



ALAN WILSON
ATTORNEY GENERAL

November 9, 2015

Mr. Tim M. Hofferth, Chair
South Carolina Commission of Higher Education
1122 Lady Street, Suite 300
Columbia, South Carolina 29201

Dear Mr. Hofferth:

You have requested the opinion of this Office as to whether the South Carolina Commission of Higher Education (“the Commission”) has the legal authority to participate in the State Authorization Reciprocity Agreement (“SARA”). If the Commission becomes the principal SARA contact agency, *i.e.*, the portal agency, you also question whether the Commission has the authority to collect fees for administering SARA. Our analysis follows.

Background

As you provide in your letter:

SARA is a voluntary initiative among member states, districts, and territories, administered by regional compacts, which establishes uniform national standards for interstate offerings of postsecondary education courses and programs. SARA’s intent is to make it easier for students to take online courses offered by post-secondary institutions based in another state; seek placement in on-site clinical, internship, and practicum experiences in other states; and facilitate more effective and efficient oversight and monitoring process nationwide.

The establishment of SARA came about after federal regulation required higher education institutions that offer distance or online learning courses to obtain prior authorization from each state where the institution offering the course was physically located. This rule was implemented as part of the United States Department of Education’s “Program Integrity” Rules, promulgated under the Higher Education Act. *See* Program Integrity Issues, 75 Fed. Reg. 66, 832 (Oct. 29, 2010) (codified in various sections of 34 C.F.R.). Specifically, Regulation 34 C.F.R. § 600.9(c), provides that:

[i]f an institution is offering postsecondary education through distance or correspondence education to students in a State in which it is not physically located or in which it is otherwise subject to State jurisdiction as determined by the State, the institution must meet any State requirements for it to be legally offering postsecondary distance or correspondence education in that State. An

institution must be able to document to the Secretary the State's approval upon request.

While this regulation was subsequently vacated after being challenged for not giving interested parties sufficient notice and time to comment prior to its enactment,¹ the United States Department of Education has reminded postsecondary institutions that they "continue to be responsible for complying with all State laws as they relate to distance education." Office of Postsecondary Educ., U.S. Dep't of Educ., GEN-12-13, Guidance on Program Integrity Regulations Relating to Legal Authorization by a State 3 (July 27, 2012). It is also believed that the rule will soon be reintroduced.

Regulation 34 C.F.R. § 600.9(c) brought to light the vastly different state laws, rules, and regulations regarding out-of-state distance learning, leading to SARA's reciprocity initiative to standardize the differing processes around the country. At the state level, the basic eligibility for consideration to participate in SARA are that the state be a member of one of the four interstate higher education regional compacts that administer SARA² and that the "portal agency," that acts as the lead state agency for purposes of SARA, must have the legal authority under state law to enter into an interstate agreement on behalf of the state. See generally National Council for State Authorization Reciprocity Agreements, Bringing SARA from Design to Implementation: A Guide for State Policymakers (May 2014). Of the thirty four states that have joined SARA, some portal agencies had existing legal authority to join, while it was necessary for others to pass new legislation providing the portal agency authority to enter into a reciprocity agreement. See National Council for State Authorization Reciprocity Agreements, State Actions Regarding SARA, <http://nc-sara.org/content/sara-state-status> (last visited Nov. 5, 2015). You have provided that "[i]t is the Commission's position that it has the authority under existing statutory law to enter into SARA," relying on S.C. Code Ann. § 59-103-20 (2004), 59-103-45(5) (2004), and 59-104-610 (2004) in support.

Law / Analysis

It is a well-established that an administrative agency has only such powers as have been conferred by law and must act within the authority granted for that purpose. Bazzle v. Huff, 319 S.C. 443, 445, 462 S.E.2d 273, 274 (1995) (citing Triska v. Dep't of Health and Env'tl. Control, 292 S.C. 190, 355 S.E.2d 531 (1987)). Our Office has acknowledged this limitation in numerous prior opinions. See, e.g., Op. S.C. Att'y Gen., 2014 WL 2619140 (May 30, 2014); Op. S.C. Att'y Gen., 2005 WL 292232 (Jan. 27, 2005); Op. S.C. Att'y Gen., 2004 WL 2745671 (Nov. 10, 2004). As such, we have consistently concluded that "administrative agencies, as creatures of statutes, possess only those powers expressly conferred or necessarily implied for them to effectively fulfill the duties with which they are charged." Op. S.C. Att'y Gen., 2005 WL 292232 (Jan. 27, 2005); Op. S.C. Att'y Gen., 1993 WL 720073 (Feb. 11, 1993) (citing Captain's

¹ See Career College Ass'n v. Duncan, 796 F.Supp.2d 108 (Dist. D.C. 2011), rev'd in part on other grounds by 681 F.3d 427 (D.C. Cir. 2012).

² The four regional higher education compacts include the Midwestern Higher Education Compact, the New England Board of Higher Education, the Southern Regional Education Board, and the Western Interstate Commission for Higher Education.

Quarters Motor Inn, Inc. v. South Carolina Coastal Council, 306 S.C. 488, 413 S.E.2d 13 (1991)).

An agency or board, as a general rule, may not materially alter or add to statutory requirements. Op. S.C. Att’y Gen., 2004 WL 2745671 (Nov. 10, 2004) (citing Brooks v. S.C. State Bd. of Funeral Service, 271 S.C. 457, 247 S.E.2d 820 (1978)). Furthermore, it is beyond the power of an administrative body to change a statute by administrative interpretation. 73 C.J.S. Public Administrative Law and Procedure § 83 (2015). Thus, an administrative officer may apply only the policy declared in the statutes with respect to matter at hand and may not set different standards or change the policy. Id. Also, it has been determined that an agency may not exercise what is effectively a new power on the theory that such power is expedient for administrative purposes. 73 C.J.S. Public Administrative Law and Procedure § 150 (2015).

This Office has also specifically commented as to a state agency’s authority to enter into a reciprocity agreement. In particular, we were asked whether the Director of the Fund or the Crime Victim’s Advisory Board was authorized to enter into reciprocity agreements with other states which have similar programs as the Fund to allow residents of other states and this State to receive benefits if they become victims of crime in a state other than their residence. Op. S.C. Att’y Gen., 1983 WL 182023 (Oct. 10, 1983). In response, we provided that: “[w]e would advise that absent statutory authority for such power, neither the Director of the Fund or the Crime Victim’s Advisory Board is authorized to enter into such agreements. Administrative agencies such as this one have only that authority granted to, or conferred on, them by law. Id. at *1. We also commented as to our belief that the provision granting the authority to enter into a reciprocal agreement must be specific in nature. Id.

In regards to the general powers of the Commission, established pursuant to S.C. Code Ann. § 59-103-10 *et seq.*, we have opined that “[t]he statutory scheme, read as a whole, envisions an independent commission charged with responsibility of coordinating the overall efforts of the State’s institutions of higher learning in serving the educational needs to the State.” Op. S.C. Att’y Gen., 1978 WL 22502 (Jan. 27, 1978). We noted that the “Commission on Higher Education is also charged with the responsibility of coordinating all budgetary requests made by the State-supported institutions of higher learning.” Id. at *1.

The Commission has cited S.C. Code Ann. § 59-103-20 (2004), 59-103-45(5) (2004), and 59-104-610 (2004) as enabling authority to enter into a reciprocity agreement on behalf of the State of South Carolina. S.C Code Ann. § 59-103-20 provides, in relevant part, that the Commission:

is charged with examining the state’s institutions of higher learning relative to both short and long-rang programs and missions which include:

...

(d) areas of state-level coordination and cooperation with the objective of reducing duplication, increasing effectiveness, and achieving economies and eliminating sources of friction and misunderstanding;

(e) efforts to promote clearer understanding and greater unity and good will among all institutions of higher learning, both public and private, in the interest of serving the educational needs of the people of South Carolina on a statewide level.

S.C. Code Ann. § 59-103-20(d)-(e) (2004). You provide that it is the Commission's belief that:

[j]oining SARA would, in the opinion of the Commission, be consistent with and in furtherance of the Commission's duties to coordinate and increase effectiveness of institutions of higher learning, to promote unity and good will among institutions of higher learning, and to serve the educational needs of the people of South Carolina.

Next, S.C. Code Ann. § 59-103-45(5) is also cited in support of the proposition that the Commission has authority to enter into a reciprocity agreement. Section 59-103-45(5) provides the Commission with the authority to:

reduce, *expand*, or consolidate any institution of higher learning including those which do not meet standards of achievement in regard to the performance indicators for quality academic success enumerated in Section 59-103-30. . . . The process to be followed for the closure, reduction, expansion, or consolidation of an institution under this item (5) shall be as promulgated in regulations of the commission which shall be submitted to and approved by the General Assembly.

S.C. Code Ann. § 59-103-45(5) (2004) (emphasis added). The Commission reasons that the institutions of higher education would "expand," as authorized by the statute, because "SARA would make it easier for South Carolina students to take online courses offered by post-secondary institutions based in another state, seek placement in clinical and internship experiences, and provide an easy accessible method for South Carolina institutions of higher learning to expand their consumer base."

Finally, the Commission relies on S.C. Code Ann. § 59-104-610, providing that:

[t]he State Commission on Higher Education shall maintain a statewide planning system to address strategic issues in public and private higher education. The system must focus upon the following goals to:

- (1) identify future directions for higher education in South Carolina and recommend appropriate methods for meeting the resultant challenges;
- (2) review major goals identified by the public and private institutions of higher learning in this State and ascertain their relationship to higher education in South Carolina;
- (3) assure the maintenance and continued development of the quality of higher education in South Carolina;
- (4) assure the maintenance and continued provision of access to and equality of educational opportunity in higher education in South Carolina;

- (5) measure and monitor an institution's standard of achievement in regard to the performance indicators for quality academic success as contained in Section 59-103-30.

You note the Commission's belief that "aiding South Carolina institutions of higher education with securing a method by which they can easily participate in online learning opportunities is a part of fulfilling this directive."

While we are in agreement that the Commission is correct in raising the challenges facing distance learning, noting the advantages for our State of the Commission joining SARA as the portal agency, and taking steps to begin the application process, none of cited statutes, or any other provisions we have discovered, explicitly grants the Commission the authority to enter into a reciprocity agreement. Without this specific grant of authority, we are of the opinion that the Commission lacks the power to do so. Again, as an administrative agency and a creature of statute, the Commission only has those powers expressly conferred upon it. Although when conferring a power upon an agency, the Legislature also impliedly intends that the agency have whatever powers are reasonably necessary to fulfill its express functions and duties, it is our opinion that entering into an interstate reciprocity agreement on behalf of the State would not be considered an extension of any of the Commission's current powers.

The conclusion that the Commission currently does not have the authority to enter into an interstate reciprocity agreement is further supported by looking at examples of SARA states that have found the enactment of legislation to be necessary for its portal agency to enter into a reciprocity agreement as well as states that determined existing legislation already afforded the portal agency with such authority. In either instance, the power is specific and expressly defined by the legislature. Of the thirty four states that have joined SARA at the time this opinion was written, twenty eight state legislatures passed legislation authorizing its portal agency authority to enter into an interstate reciprocity agreement, some legislation referencing SARA or the applicable regional compact specifically. *See, e.g.*, Tenn. Code Ann. § 49-7-3304(1) (2015) ("The commission is authorized to: [e]nter into the interstate reciprocity agreement known as SARA, or any successor organization, which serves the purpose of approving institutions in Tennessee to participate in SARA"); Wyo. Stat. Ann. § 21-18-226(a) (2015) ("The commission shall enter into an agreement with the Western Interstate Commission for Higher Education to participate, on behalf of the state of Wyoming, with all other states legally joining in the state authorization reciprocity agreement"); Alaska Stat. § 14.48.050(5) (2014) ("The commission [on Postsecondary Education] shall enter into interstate reciprocity agreements, if in the judgment of the commission, the agreements will be helpful in carrying out the purposes of this chapter"); Colo. Rev. Stat. § 23-2-103.1(4) (2012) ("The Commission [of Postsecondary Education] may negotiate and enter into interstate reciprocity agreements with other states. . .").

Six states that have joined SARA – including Arkansas, Georgia, Idaho, Montana, Oklahoma, and West Virginia – determined that new legislation was not needed to permit participation. *See* National Council for State Authorization Reciprocity Agreements, State Actions Regarding SARA, <http://nc-sara.org/content/sara-state-status> (last visited Nov. 5, 2015). Our office has been in contact with representatives of the portal agencies from two of the six

states deeming new legislation was not required for its portal agency to enter into an interstate agreement on behalf of the state. Both states, Arkansas and Georgia, are members of the Southern Regional Education Board.

In Arkansas, it was determined that additional legislation was not necessary to grant the Arkansas Department of Higher Education and the Arkansas Higher Education Coordinating Board the authority to enter into a reciprocity agreement as the General Assembly has already done so through Ark. Code Ann. §§ 6-4-104 and 6-4-105. Specifically, Section 6-4-104 of the Arkansas Code provides that:

(a) [t]he Arkansas Higher Education Coordinating Board is designated as agent for the State of Arkansas for the purpose of entering into a program of out-of-state training and education for residents of Arkansas through the cooperation of the Board of Control for Southern Regional Education, which was created by interstate compact with Arkansas, a signatory pursuant to House Concurrent Resolution 13, approved March 2, 1949.

(b) The Department of Higher Education is hereby authorized to administer the program.

Ark. Code Ann. § 6-4-104. Furthermore, Section 6-4-105 provides that:

(a) As agent for the state, the Arkansas Higher Education Coordinating Board shall contract with the Board of Control for Southern Regional Education in order that the latter may act to secure admission of Arkansas residents as students in institutions of higher learning operated by other states who are signatories of the compact.

(b) Contract authority shall include the placing of students for study in the fields for which the Board of Control for Southern Regional Education may maintain programs, including, but not limited to, veterinary medicine and dentistry.

(c)(1) The Arkansas Higher Education Coordinating Board shall contract to pay the Board of Control for Southern Regional Education for Arkansas students accepted under this program.

(2) Provided, in no case will the contract price exceed the amount approved by the Board of Control for Southern Regional Education.

Sections 6-4-104 and 6-4-105 provide an example that existing legislation that supports the portal agency joining SARA would necessarily have to provide express authority to do so.

Likewise, in Georgia, it was determined that legislation existed to support the Georgia Nonpublic Education Commission's ("GNEC") authority to enter into a reciprocity agreement on behalf of the State. Pursuant to Ga. Code Ann. § 20-3-250.5(b)(3) the GNEC shall have the power and duty to: "negotiate and enter into interstate reciprocity agreements with similar agencies in other states and with the United States Department of Education if, in the judgment of the commission, such agreements are or will be helpful in effectuating the purposes of this [Act]" Additionally, Ga. Code Ann. § 20-3-250.5(b)(9) grants the GNEC the authority "[t]o

contract with other state, federal, or local public or private schools and other entities, individuals, and other legal entities for the provision of services or activities the commission deems necessary.” Again, the existing Georgia authority relied on by the Commission in its application for participation in SARA provides another example that the authority to enter into a reciprocity agreement was expressly devolved from the legislature.

Conclusion

As we have consistently advised, an administrative agency, such as the South Carolina Commission on Higher Education, only has such powers as have been conferred by law and must act within the authority granted for that purpose. In review of the Commission’s enabling legislation, it is our opinion that the powers and duties conferred upon it do not include entering into an interstate reciprocity agreement on behalf of the State of South Carolina. As the above authorities reflect, it is our belief that legislation expressly granting such power to the Commission would be necessary. In light of this conclusion, it is also our opinion that the Commission lacks the authority to collect fees for administering SARA at this time.

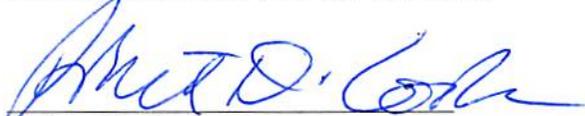
We wish to emphasize that we are in no way discouraging South Carolina’s participation in SARA, nor the Commission acting as the portal agency. Rather, it is merely our opinion that legislation authorizing the Commission to enter into an interstate reciprocity agreement is a necessary step prior to consideration for participation in SARA.

Very truly yours,



Anne Marie Crosswell
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General