ALAN WILSON
ATTORNEY GENERAL

May 30, 2014

The Honorable John Richard C. King
House District No. 49
309-A Blatt Building
Columbia, SC 29211

Dear Representative King:

By your letter dated May 23, 2014 you have asked for the opinion of this Office regarding various questions arising under the Administrative Procedures Act ("APA") as well as statutes and regulations relating to the Commission on Higher Education ("CHE"). In your letter, you ask the following questions:

1. When evaluating an application for a license to operate a nonpublic educational institution, does the [CHE] have authority to consider licensing criteria that are not specifically articulated in the South Carolina Code of Laws or the Code of Regulations, such as a criterion that inquires whether issuance of a license is in the best interests of the State?

2. Regulation 62-6(j) provides that in order to receive a license, an applicant's owners and directors must be "of good reputation and character." The regulation then provides that if an applicant satisfies six factors enumerated in Regulation 62-6(j), the applicant will be "considered to be of good reputation." Does the [CHE] have authority to consider factors other than or in addition to the six factors identified in Regulation 62-6(j) when evaluating whether an applicant is "of good reputation and character?"

3. Regulation 62-6(j)(4) states that a licensing applicant may not be considered to be "of good reputation and character" if it is "a plaintiff or defendant in litigation that carries a significant risk to the ability of the institution to continue operation." Does Regulation 62-6(j)(4) apply to litigation against a wholly separate corporate entity that is affiliated with the applicant by

common ownership, when the applicant itself is not a party to the litigation and the applicant itself has no exposure in the litigation?

4. When licensing an organization as a nonpublic educational institution, does the [CHE] have the authority to attach conditions regarding admissions policies to the agency's licensure determination?

5. Does an administrative agency have authority to reserve to itself the ability to apply unwritten *ad hoc* criteria when evaluating a license application?

6. If an applicant for a license satisfies written criteria that are contained in a statute, promulgated as regulations, or both, does an administrative agency have discretion to deny the application?

Our responses follow.

Law/Analysis

Initially we note that this Office, unlike a court, which can subpoena witnesses and take testimony under oath, is ill-equipped to investigate and determine factual questions. See Op. S.C. Atty. Gen., 2013 WL 3479877 (June 26, 2013) ("[T]his Office does not have the authority of a court or other fact-finding body, and therefore, it is unable to adjudicate or investigate factual questions."); Op. S.C. Atty. Gen., 2013 WL 3479876 (June 26, 2013) (explaining this Office does not investigate facts, but instead only issues legal opinions); Op. S.C. Atty. Gen., 2013 WL 861299 (February 26, 2013) ("We have repeatedly stated that, because this Office does not have the authority of a court or other fact-finding body, we are not able, in a legal opinion, to adjudicate or investigate factual questions."). Moreover, this Office does not make recommendations to administrative agencies regarding policy decisions that are within their respective jurisdictions. See Op. S.C. Atty. Gen., 2013 WL 3362038 (June 25, 2013), n.8 (declining to issue an opinion concerning the policy decisions of an administrative agency); Op. S.C. Atty. Gen., 2011 WL 2214062 (May 11, 2011) ("[T]his Office may not give a view regarding policy decisions made by various state institutions."). Instead, when issuing an advisory opinion on a matter such as this, we are confined to a discussion of the law controlling the legal questions contained within your letter.

1. Whether the CHE may Consider Licensing Criteria not Articulated in the South Carolina Code of Laws or Code of State Regulations

Understanding the limitations of this Office when issuing an advisory opinion, we will now address your first question—whether the CHE has authority to consider licensing criteria outside of those specifically articulated in the South Carolina Code of Laws and the South Carolina Code of State Regulations, particularly the criterion of whether granting a license is in the best interest of the State. We believe it may not.

Due process and concerns of fundamental fairness require that individuals receive notice of the law the government will apply in a given situation. See Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (stating the Due Process Clause demands "notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"). This concept is embodied within the context of administrative law in Article I, Section 22 of the South Carolina Constitution, which states, *inter alia*, that "[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on notice and opportunity to be heard[.]" S.C. Const. Art. I, § 22. Consistent with state and federal concepts of fair notice, the APA provides that agencies may only enforce statutes and regulations against individuals where they have been properly promulgated pursuant to the procedures delineated within the APA.[1] See Sloan v. South Carolina Bd. of Physical Therapy Examiners, 370 S.C. 452, 475, 636 S.E.2d 598, 609-10 (2006) ("In order to promulgate a regulation, the APA generally requires a state agency to give notice of a drafting period during which public comments are accepted on a proposed regulation; conduct a public hearing on the proposed regulation overseen by an administrative law judge or an agency's governing board; possibly prepare reports about the regulation's impact on the economy, environment, and public health; and submit the regulation to the Legislature for review, modification, and approval or rejection."); S.C. Code Ann. § 1-23-110 to-160 (2013 Supp.).

As touched on above, the Legislature, via the APA, has provided a detailed process for promulgating state regulations. S.C. Code Ann. § 1-23-110 to -160. This includes a fiscal impact statement, agency reports, a public comment period, potential hearings, and submission to the Legislative Council for review by the Legislature. S.C. Code Ann. § 1-23-110 to -125. Furthermore, to prevent agencies from bypassing the extensive regulatory process set forth in the APA, the Legislature has explained, "policy or guidance issued by an agency other than in a regulation does not have the force or effect of law." S.C. Code Ann. § 1-23-10(4). In other words, the extensive regulatory framework put in place by the Legislature, in addition to the safeguards against circumventing the process, mandate that agencies must only evaluate an applicant for a license based upon licensing criteria that have been promulgated pursuant to the procedures set forth in the APA.

With respect to the CHE's criteria for licensing non-public educational institutions, there are numerous criteria contained within Section 62-6 of the South Carolina Code of Regulations which we believe, are consistent with the agency's authority to promulgate licensing standards as detailed in Section 59-58-40 of the Code. That said, our review of Section 59-58-40 and Regulation 62-6 shows "the best interests of the State" is simply not among them. Indeed, the phrase "best interests" appear throughout the South Carolina Code, including some concerning education, but are noticeably absent in the aforementioned provisions. E.g. S.C. Code Ann. §

[1] The APA defines the term "regulation" as "each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency" including "general licensing criteria." S.C. Code Ann. § 1-23-10(4) (2013 Supp.).

59-151-140(B) (permitting the board of directors of South Carolina's LightRail Consortium the ability to ensure that the Consortium acts "in the best interest of the State."). Thus, because the canons of statutory construction explain that where, as here, a regulation provides multiple factors to evaluate within its text, the omission of others is considered intentional. See Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) ("The cannon of construction '*expressio unius est exclusion alterius*' or '*inclusion unius est exclusion alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative."). As a result, it is the opinion of this Office that the absence of a "best interest" factor in either the CHE's enabling statute or Regulation 62-6 was intentional and therefore, the CHE, when evaluating an applicant for a license, is limited to factors expressly contained within the applicable state statutes or regulations. Accordingly, we believe that if the CHE were to evaluate an applicant's license on criteria not contained within either the South Carolina Code of Laws or South Carolina Code of Regulations, doing so would appear to be at odds with not only federal and state constitutional notice requirements, but the extensive framework placed on state agencies by the APA.

2. The CHE's Ability to Consider Factors Regarding "Good Reputation and Character" Outside of Those Listed in Regulation 62-6(J)

We now move to your second question, whether the CHE has "authority to consider factors other than or in addition to the six factors identified in Regulation 62-6(J) (sic) when evaluating whether an applicant is 'of good reputation and character'?" As stated above in response to question one, because evaluating an applicant on a factor not contained within the regulation is at odds with federal and state constitutional notice requirements, in addition to the extensive framework placed on state agencies by the APA, we believe the CHE cannot evaluate applicants on factors which are not specifically identified within Regulation 62-6(J).

Regulation 62-6(J) of the South Carolina Code of Regulations requires, *inter alia*, that an applicant be "of good reputation and character." S.C. Code of Regs. § 62-6(J) (2008). Regulation 62-6(J) explains applicants are considered to be of "good reputation" if:

(1) The person has no felony convictions related to the operation of a school, and the person has been rehabilitated from any other felony convictions;

(2) The person has no convictions involving crimes of moral turpitude;

(3) Within the last ten years, the person has never been successfully sued for fraud or deceptive trade practice;

(4) The person is not a plaintiff or defendant in litigation that carries a significant risk to the ability of the institution to continue operation;

(5) The person does not own a school currently violating legal requirements; has never owned a school with habitual violations; or has never owned a school that closed with violations including, but not limited to, unpaid refunds; or

(6) The person has not knowingly falsified or withheld information from representatives of the Commission.

S.C. Code of Regs. § 62-6(J)(1)-(6). In interpreting this regulation, this Office has previously opined that the CHE can deny a license to an applicant who fails to satisfy any of Regulation 62-6(J)'s six factors. Op. S.C. Atty. Gen., 2010 WL 3505057 (August 5, 2010). Based on the way the regulation was promulgated, an applicant who does not violate any of the six factors must be "considered to be of good reputation" as a matter of law for purposes of licensure. As a result, we believe, consistent with our answer in question one, that consideration of anything outside of the six enumerated factors, including unwritten factors, rumors, speculation, or generalized opinions regarding an applicant's reputation would, as noted above, appear to violate federal and state due process requirements as well as the terms of the APA. Accordingly, it is the opinion of this Office that the CHE does not have authority to consider licensing factors outside of those identified in the governing statutes or regulations.

3. Whether Regulation 62-6(J)(4) Applies to Wholly Separate Corporate Entities

In your third question you ask if Regulation 62-6(J)(4), one of the six factors regarding "good reputation and character," applies "to litigation against a wholly separate corporate entity that is affiliated with the applicant by common ownership, when the applicant itself is not a party to the litigation and the applicant itself has no exposure in the litigation?" Because applying Regulation 62-6(J)(4) against a wholly separate corporate entity is at odds with the terms of the regulation, ignores the existence of the corporate form and essentially pierces the corporate veil without meeting the legal requirements in order to do so, we believe Regulation 62-6(J)(4) cannot be read to impute litigation against a separate corporate entity where, as stated in your letter, "the applicant itself is not a party to the litigation."

Regulation 62-6(J)(4), one of the six factors regarding "good reputation" provides that, for purposes of Regulation 62-6(J)(4), "[a] person is considered to be of good reputation if: [t]he person is not a plaintiff or defendant in litigation that carries a significant risk to the ability of the institution to continue operation." S.C. Code of Regs. § 62-6(J)(4). Notably, Regulation 62-2, the definitions section regarding the CHE, explains the Regulations related to the CHE, "are defined by Section 59-58-20, South Carolina Code of Laws, 1976, as amended." S.C. Code of Regs. § 62-2. According to Section 59-58-20(15) the word "person" means "any individual, firm, partnership, association, organization, corporation, trust, or other *legal entity* or combination of the above." S.C. Code Ann. § 59-58-20(15) (2013 Supp.) (emphasis added). Thus, we believe Regulation 62-6(J)(4)'s use of the word "person" as defined in Section 59-58-20(15), clearly recognizes "person" as including different types of legal entities and therefore,

when interpreting Regulation 62-6(J)(4)'s usage of the word "person," must be understood as being limited to the legal entity or "person" applying for a license. E.g. Hodges v. Rainey, 341 S.C. at 86, 533 S.E.2d at 582 ("The cannon of construction '*expressio unius est exclusion alterius*' or '*inclusion unius est exclusion alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.").

Moreover, South Carolina's appellate courts have recognized that corporate entities are separate from their shareholders, and courts are highly reluctant to set aside this long-established distinction. Mid-South Mgmt. Co. v. Sherwood Dev. Corp., 374 S.C. 588, 597, 649 S.E.2d 135, 140 (Ct. App. 2007). In Mid-South, the Court of Appeals explained, "[i]t is generally recognized that a corporation is an entity that is separate and distinct from, and its debts are not the individual debts of, its officers and stockholders." Id. In fact, courts disregard this fundamental principle only in the very limited circumstances in which a claimant successfully carries his or her burden of proving that the corporate veil should be pierced. Drury Dev. Corp. v. Found. Ins. Co., 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008).

Here, we believe Regulation 62-6(J)(4) cannot be read as applying to wholly separate corporate entities who have not applied for a license. Indeed, were we to interpret Regulation 62-6(J)(4) as applying not only to an applicant, but to other legal entities owned by an applicant, doing so would disregard the statutory definition of "person" utilized by the Legislature in Section 59-58-20(15), and would completely ignore that corporate entities are distinct jural persons separate from their shareholders as a matter of law. See Mid-South Mgmt. Co. v. Sherwood Dev. Corp., 374 S.C. at 597, 649 S.E.2d at 140 ("It is generally recognized that a corporation is an entity that is separate and distinct from, and its debts are not the individual debts of, its officers and stockholders."). Additionally, interpreting Regulation 62-6(J)(4) as permitting the CHE to treat litigation against a wholly separate corporate entity as litigation against an applicant, despite the existence of the corporate form, amounts to a *de facto* piercing of the corporate veil without any sort of legal showing whatsoever, which, in the opinion of this Office, is entirely at odds with established South Carolina law on this subject. See Drury Dev. Corp. v. Found. Ins. Co., 380 S.C. at 101, 668 S.E.2d at 800 (explaining that South Carolina's courts may only disregard the corporate form and pierce the corporate veil where an individual has carried his burden and demonstrated that a balancing of the equities requires a court to do so). In light of these well-settled principles, we do not believe litigation against a wholly separate legal entity that is not seeking a license from the CHE, triggers Regulation 62-6(J)(4)'s factor for evaluating an applicant's reputation and character.

4. The CHE's Authority to Attach Conditions Relating to Admissions Policies where an Organization is Licensed as a Non-Public Educational Institution

In your fourth question you ask whether the CHE has authority to "attach conditions regarding admissions policies to the agency's licensure determination" when licensing an organization as a non-public educational institution. In response, we believe that, while not free from doubt, the CHE, despite the absence of enabling legislation specifically addressing this question, may, as a means of ensuring an applicant institution's admissions policies are

consistent with Equal Protection, place conditions on admissions policies of a non-public educational institution's licensure determination.

Administrative agencies are created by the Legislature and, therefore, can only perform those functions and activities authorized by statute. See 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."). Understanding this, we must look to the CHE's enabling legislation to determine if the CHE can attach conditions relating to admission policies. Section 59-103-45 of the Code, titled "[a]dditional duties and functions of commission regarding *public institutions* of higher learning" states, in subsection three, that the CHE is authorized to, "review minimum undergraduate admissions standards for in-state and out-of-state students." S.C. Code Ann. § 59-103-45(3) (2004) (emphasis added). Section 59-103-45(7) of the Code, which also concerns the CHE's duties relating to *public institutions*, further mandates that the CHE, "ensure access and equity [of] opportunities" for all South Carolinians "regardless of race, gender, color, creed, or national origin." S.C. Code Ann. § 59-103-45(7) (2004). Thus, the relevant enabling legislation, as it relates to your question, can be summarized as authorizing the CHE to review a *public institution's* undergraduate admissions standards to, among other things, ensure access and equity of opportunity for all South Carolinians, but it is however silent as to the CHE's authority to review admissions policies for *nonpublic* institutions. Indeed, it appears the CHE's enabling legislation simply does not address whether it may "attach conditions regarding admissions policies to the agency's licensure determination" when licensing an organization as a non-public educational institution.

Nevertheless, despite the Legislature's silence regarding the CHE's authority to review a non-public institution's admissions policies and attach conditions on its licensure determination, we acknowledge that an agency's licensing authority must not be exercised in a way that sanctions discrimination based on classifications protected by the Equal Protection Clause. E.g. Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (explaining an ordinance giving local officials unfettered discretion in issuing licenses to laundries, while facially neutral, violated Equal Protection as applied because local officials denied licenses based on alienage). As a result, it is possible a court could conclude the CHE may place conditions consistent with the requirements of the Equal Protection Clause on a non-public institution's admissions policies as a condition of licensure. Accordingly, though not free from doubt, we believe the CHE may be able to use its licensing authority to monitor a nonpublic institution's admissions policies for the purpose of ensuring that such policies do not violate the mandates of the Equal Protection Clause. However, because there is no express authority on this point in the CHE's enabling legislation, at least with respect to *non-public institutions*, this issue is not clear, and only a court can answer this question conclusively.

5. Whether the CHE can Apply Unwritten or *Ad Hoc* Criteria when Evaluating a License Application

Your fifth question asks if "an administrative agency [has] authority to reserve to itself the ability to apply unwritten *ad hoc* criteria when evaluating a license application." As we

explained above in response to your first and second questions, because evaluating an applicant on a factor not contained within a regulation would be at odds with federal and state constitutional notice requirements in addition to the extensive framework placed on state agencies by the APA, we believe the CHE cannot apply "unwritten" criteria to a license application. Similarly, because *ad hoc*, unannounced laws or policies are void for vagueness, we believe the CHE is also restricted from applying *ad hoc* criteria when evaluating a license application. See Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (holding that laws which are unconstitutionally vague impermissibly delegate policy matters to authorities for resolution on an *ad hoc* and subjective basis).

As we have previously explained, a regulation is defined as a "statement of *general public applicability* that implements or prescribes law or policy or practice requirements of any agency." S.C. Code Ann. § 1-23-10(4) (emphasis added). Moreover, South Carolina law explains that agencies can only enforce regulations against private parties when the regulations have been promulgated pursuant to the procedures provided for within the APA. S.C. Const. Art. I, § 22 ("No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on notice and opportunity to be heard[.]"); S.C. Code Ann. § 1-23-110 to -125 (providing various procedures for the promulgation of regulations including drafting, public comment, agency summaries, public hearings and reports). These requirements are in addition to federal concepts of procedural due process which require notice and the opportunity to be heard. See Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. at 314 (stating the Due Process Clause demands "notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

Furthermore, it is a fundamental rule of due process that *ad hoc*, unannounced laws or policies are void for vagueness. Grayned v. City of Rockford, 408 U.S. at 108-09. In particular, such laws infringe on an individual's ability to act in accordance with the law, by failing to provide "fair warning" of prohibitive conduct. Id. They also allow for "arbitrary and discriminatory enforcement" of such standards, because of their inability to provide "explicit standards for those who apply them." Id. As the Grayned Court said, "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Id.

Here, in reviewing the CHE's licensing regulations, it appears Regulation 62-6(S) attempts to reserve the authority to create "additional criteria" when reviewing a license application. S.C. Code of Regs. § 62-6(S) (2008). Specifically, Section 62-6(S) provides that "[t]he institution shall comply with such additional criteria as may be required by [the CHE]." S.C. Code of Regs. § 62-6(S). To the extent this regulation can be interpreted as intending to signal that the CHE may add additional licensing criteria in the future by following the APA's process for promulgating additional regulations, we believe this regulation may be construed as a valid exercise of the CHE's rulemaking power. However, we do not believe that the CHE can

lawfully use Regulation 62-6(S) as a "catch all" that justifies consideration of licensing criteria different from, or in addition to, those already listed in the Code of Laws and Code of Regulations. To do so would be contrary to the APA provision that only promulgated "regulations"—which, by definition, includes "general licensing criteria," S.C. Code Ann. § 1-23-10(4)—are enforceable and would further violate both state and federal constitutional law as discussed above. Accordingly, it is the position of this Office that the CHE cannot apply unwritten or *ad hoc* criteria when evaluating a license application.

6. Whether the CHE Possesses Discretion to Deny an Applicant a License if the Applicant has Satisfied Written Criteria Contained in the Applicable Statutes and Regulations

In your sixth and final question you ask, "if an applicant for a license satisfies written criteria that are contained in a statute, promulgated as regulations, or both, does an administrative agency have discretion to deny the application." In response, we believe that because South Carolina law generally states that the granting of a license is a "ministerial function," in a situation where an applicant has satisfied applicable statutory and properly promulgated regulations, an agency such as the CHE lacks discretion to deny a properly qualified applicant a license.

We reemphasize that agencies such as the CHE, which are creatures of statute, may only engage in activities authorized by the Legislature. Captain's Quarters Motor Inn v. S.C. Coastal Council, 306 S.C. at 490, 413 S.E.2d at 14. In accordance with this limitation on agency authority, the Supreme Court of South Carolina has explained, as a general matter, that the "granting of a license to engage in a trade, business or profession is a ministerial function." Bd. of Bank Control v. Thomason, 236 S.C. 158, 165, 113 S.E.2d 544, 547 (1960). Thus, while it is true agencies are charged with investigating facts to assess whether an applicant meets criteria for obtaining a license, "the right to a license is fixed" by law. Id. (quoting State Bd. of Medical Registration & Examination v. Scherer, 46 N.E.2d 602, 603 (Ind. 1943)). A ministerial function involves "no exercise of official judgment or discretion." Blalock v. Johnston, 180 S.C. 40, 49, 185 S.E. 51, 55 (1936).

Based on this well-established principle, this Office previously opined that an agency must issue a license to an applicant who meets statutory licensing criteria. See Op. S.C. Atty. Gen., 1964 WL 8375 (Nov. 23, 1964) ("Where a foreign insurance company has fully satisfied the standards for admission contained in Sections 37-101, *et seq.*, of the Code, the Commissioner has no authority to refuse a certificate of authority, as the statutory provisions are mandatory and allow no discretion to the insurance commissioner to impose any other requirement as a condition precedent to qualification to do business in this state."). Indeed, this principle applies even if the agency's licensing authority contains statutory language that is generally thought to be permissive, such as "may" or "can," rather than "shall" or "must." Kennedy v. S.C. Retirement System, 345 S.C. 339, 353, 549 S.E.2d 243, 250 (2001). This is because the Supreme Court has explained that permissive statutory terms must be construed to require a mandatory action when a contrary interpretation would vest an administrative agency with

"unfettered discretion" to treat "similarly situated" parties differently. Id. This rule of construction is consistent with black-letter law regarding licenses which states that "courts will generally strike down license legislation that vests in public officials the discretion to grant or refuse a license to carry on an ordinarily lawful business, profession, or activity without prescribing definite rules and conditions for the guidance of the officials in the execution of their power." 51 Am. Jur. 2d Licenses and Permits § 36. Accordingly, we do not believe that an agency has authority to deny an applicant a license if the applicant meets the criteria set forth in statutes and properly-promulgated regulations.

Conclusion

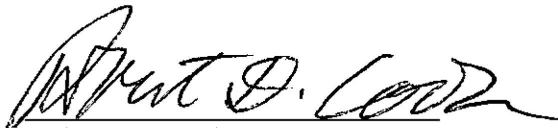
In conclusion, it is the opinion of this Office that the CHE lacks authority to consider licensing criteria outside of those specifically articulated in the South Carolina Code of Laws and the South Carolina Code of State Regulations, particularly the criterion of whether granting a license is in the best interest of the State. We further believe, with respect to your second question that because evaluating an applicant on a factor not contained within the regulation is at odds with federal and state constitutional notice requirements, in addition to the extensive framework placed on state agencies by the APA, the CHE cannot evaluate applicants on factors which are not specifically identified within Regulation 62-6(J). As to your third question, because applying Regulation 62-6(J)(4) against a wholly separate corporate entity is at odds with the terms of the regulation, ignores the existence of the corporate form and essentially pierces the corporate veil without meeting the legal requirements in order to do so, Regulation 62-6(J)(4) cannot be read to impute litigation against a separate corporate entity that is not a party to litigation. Moving to your fourth question, we believe that, while not free from doubt, the CHE, despite the absence of enabling legislation specifically addressing this question, may, as a means of ensuring an applicant institution's admissions policies are consistent with Equal Protection, place conditions on admissions policies of a non-public educational institution's licensure determination. As to your fifth question, since evaluating an applicant on a factor not contained within a regulation would be at odds with federal and state constitutional notice requirements in addition to the extensive framework placed on state agencies by the APA, we believe the CHE cannot apply "unwritten" criteria to a license application, nor can it evaluate a license application utilizing *ad hoc* criteria. Finally, with respect to your sixth question it is the opinion of this Office that because South Carolina law generally states that the granting of a license is a "ministerial function," in a situation where an applicant has satisfied applicable statutory and properly promulgated regulations, an agency such as the CHE lacks discretion to deny a properly qualified applicant a license.

To sum up, as we have consistently advised, it is fundamental that the authority of a state agency or governmental entity created by statute, as is the CHE, "has only such powers as have been conferred by law and must act within the authority granted for that purpose." Op. S.C. Atty. Gen., 2004 WL 245147 (October 22, 2004) (quoting Bazzle v. Huff, 319 S.C. 443, 445, 462 S.E.2d 273, 274 (1995)). The CHE is a creature of statute and may exercise only those powers provided by law. When exercising its authority in the licensing process, it is especially

important that CHE make its decision to license only upon criteria authorized by law because fundamental due process rights of the applicant are at stake. Any licensing decision based upon criteria outside the law would, of course, be subject to judicial review and possible reversal.

Sincerely,

Brendan McDonald
Assistant Attorney General



Robert D. Cook
Solicitor General