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May 22, 2006

Opinion No. 06-096

Constitutionality of Senate Bill 2512 as Amended by House Amendments Nos. 1 and 3

QUESTION

Does Senate Bill 2512, as amended by House Amendment No. 1 and House Amendment No. 3, violate Article XI, Section 8 of the Tennessee Constitution?

OPINION

Unless there exists a rational basis for the classification created by the amendments, it is the opinion of this office that the above amendments to Senate Bill 2512, if enacted, would be unconstitutional as violative of Article XI, Section 8 of the Tennessee Constitution. Further, if such classification were to be challenged, in our view any claimed rational basis for such classification might be impugned by the health and safety issues that are implicated by the amendments concerning the ability of the Tennessee Board of Nursing to effectively regulate such online nursing diploma program before 2008. Therefore, we think it likely that a court could find such classification to be capricious, unreasonable, or arbitrary.

ANALYSIS

Article XI, Section 8 of the Tennessee Constitution provides in pertinent part:

> **General laws only to be passed. ----** The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie, [immunities] or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law.

As we explained in detail in Op. Tenn. Att'y. Gen. No. 01-133 (August 28, 2001), Article XI, Section 8 is implicated only when a statute contravenes a general law that has mandatory statewide application. Further, the legislature may make distinctions based on classification, and Article XI, Section 8 is not violated unless it creates classifications that are capricious, unreasonable,

or arbitrary, *Civil Service Merit Board v. Burson*, 816 S.W.2d 725, 730 (Tenn. 1991)(citing *Martin v. Martin*, 213 Tenn. 345, 373 S.W.2d 609 (1963), whether or not the basis for the classification is apparent on the face of the statute. *Burson, supra* (citing *Stalcup v. City of Gatlinburg*, 577 S.W.2d 439, 442 (Tenn. 1978)). Generally, all classifications that do not affect a fundamental right or discriminate as to a suspect class are subject to the rational basis test. *Harrison v. Schrader*, 569 S.W.2d 822, 825,826 (Tenn. 1978). The rational basis test addresses the question of whether such classifications bear a reasonable relationship to a legitimate state interest. *Doe v. Norris*, 751 S.W.2d 834, 841 (Tenn. 1988). The classification will be upheld if any state of facts can reasonably be conceived to justify the classification, or if the reasonableness of the class is fairly debatable. *Harrison, supra* at 826.

First, the two amendments to Senate Bill 2512 each would operate to contravene the general law that has mandatory statewide application, Tenn. Code Ann. § 63-1-117. That section, which took effect July 1, 2005, provides as follows:

> **Application for school accreditation. ----** An institution desiring to conduct a school of professional nursing, or a school of practical nursing, on ground, distance, online or via other electronic means, must apply to the board for approval, and submit evidence that it is prepared to:
> (1) Carry out the basic prescribed professional nursing curriculum, or the prescribed curriculum for practical nursing, as the case may be; and
> (2) Meet other standards established by this chapter, or by the board.

Senate Bill 2512, popularly referred to as a "Sunset Bill," seeks only to extend the existence of the Tennessee Board of Nursing until June 30, 2010 by amending Tenn. Code Ann. §§ 4-29-226(a) and 4-29-231(a). Proposed House Amendment 1 to Senate Bill 2512, on the other hand, seeks to amend Tenn. Code Ann. § 63-7-117 by designating the existing language as subsection (a) and by adding the following new subsection:

> (b) The provisions of this section shall not apply to any online nursing diploma program in existence before January 1, 2005, and approved by an out-of-state board of nursing and accredited by the National League for Nursing Accrediting Committee; provided, however, such program is subject to the review of the state board of nursing for reapproval beginning with any class to be admitted during 2008. Any such program shall provide all information requested by the board and required of other nurses training programs in the state. In addition, such program shall be subject to the same site visits required of other nurses training programs in the state. Such program shall be subject to the reapproval requirements of the state board of nursing as uniformly applied to all professional nursing education programs beginning with any class to be admitted during 2008.

Amendment 3 to Senate Bill 2512 seeks further to amend the above language by inserting the phrase "whose licensed nurses have reciprocal licensure approval by Tennessee's board of nursing" between the language "out-of-state board of nursing" and "and accredited."

Read together, the proposed House Amendments would exempt from the requirements of Tenn. Code Ann. § 63-7-117 any online nursing diploma program in existence before January 1, 2005 that is approved by an out-of-state board of nursing whose licensed nurses have reciprocal licensure approval by Tennessee's board of nursing, and accredited by the National League for Nursing Accrediting Committee.

Under these amendments, it appears that the Tennessee Board of Nursing would not be permitted to effectively regulate such an online nursing diploma program until 2008, because Amendment 1 includes language that gives authority back to the Board of Nursing to review and reapprove such exempted nursing diploma program only in that year. Amendment 1 is incongruent because on the one hand, it requires that such online nursing diploma program provide all information requested by the board, and be subject to the same site visits, as are required of other nurses training programs in the state. However, on the other hand, it provides that "such program is subject to review of the state board of nursing for reapproval beginning with any class to be admitted during 2008," and that "[s]uch program shall be subject to the reapproval requirements of the state board of nursing as uniformly applied to all professional nursing education programs beginning with any class to be admitted during 2008." Thus, it is unclear what the Board of Nursing could do about any insufficient information submitted to it, or any unsatisfactory site visit results, before such program comes up for review and reapproval before the Board of Nursing in 2008.

The Board of Nursing, like the other Tennessee health related boards, is vested with the important public function and duty of protecting patients against dangerous and incompetent practitioners. *See Davis v. Beeler*, 207 S.W.2d 343, 346 (Tenn. 1948) (citing *Commonwealth v. Zimmerman*, 221 Mass. 184, 108 N.E. 893, 895: "The protection of the public health is an object of such vital importance to the welfare of the state that any rational means to that end must be upheld;") *Janeway v. State Bd. of Chiropractic Exam'rs*., 33 Tenn. App. 280, 288, 231 S.W.2d 584, 588 (1950)("The public has come to rely upon public regulation and supervision of practitioners of the healing arts and it is a natural assumption that one who assumes to act has been found qualified by competent authority.") We would point out, simply, that if these amendments are enacted, any health and safety issues that might arise out of any such exempt online nursing diploma program may, in a practical sense, remain essentially unregulated for a period of months or years.

Second, it appears that the classification that is contained in the two amendments to Senate Bill 2512, and which contravenes a general law of mandatory statewide application, likely would operate to the benefit of only one entity. Our research reveals that nursing diploma programs (as opposed to nursing degree programs) now are rather rare in most states. Further, we are aware of the existence of only one online nursing diploma program in this country. It is our understanding that this lone online nursing diploma program currently has provisional approval from an out-of-

state board of nursing, and that the program currently has only seventeen students in that state.[1] However, it is not known whether this program has received the accreditation that is required by Amendment 1 to Senate Bill 2512.[2] In August, 2005, this institution (f.1) applied for a letter of intent and initial approval from the Tennessee Board of Nursing to begin an online nursing diploma program in Tennessee. After reviewing and considering such request, the Board denied the institution's request to grant initial approval to begin an online nursing diploma program in Tennessee at two sites.[3]

Thus, based on the information that is available to us at this time, the amendments in question do create a classification that contravenes a general law of mandatory statewide application, apparently for the benefit of one particular program. Any other online nursing diploma program (if, indeed, any other online nursing diploma program were to exist) which was not in existence prior to January 1, 2005, would not now be able to bring itself within the provisions of the amendments.

In *Tennessee School Systems v. McWherter*, 851 S.W.2d 139, 153 (Tenn. 1993), the Tennessee Supreme Court explained the standard to be applied under Article XI, Section 8:

> [I]f the classification is made under Article XI, Section 8, every one who is in, or may come into, the situation and circumstances which constitute the reasons for and basis of the classification, must be entitled to the rights, privileges, immunities, and exemptions conferred by the statute, or it will be partial and void.

Further, because the classification in this case does not affect a fundamental right, or discriminate as to a suspect class, the rational basis test must be applied, and the question to be addressed is "whether the classifications have a reasonable relationship to a legitimate state interest." *Doe, supra*, at 841. In Op. Tenn. Att'y. Gen. No. 96-107 (August 20, 1996) we opined that although Article XI, Section 8 has been construed broadly to reach many situations, the barber license exemption statute, Tenn. Code Ann. § 62-3-132, appeared to violate the direct and clear language of Article XI, Section 8. One of several concerns we raised in that opinion was what rational basis could exist for exempting such individual from annual inspections that monitor compliance with

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[1]Our research suggests that the same institution that conducts this online nursing diploma program also conducts a "bricks and mortar" diploma nursing education program that has been in existence for many years, which is approved by the same out-of-state board of nursing. It is our understanding that the out-of-state board of nursing wrote to the "bricks and mortar" diploma nursing education program and expressed its concern about that program's low NCLEX-RN (National Council Licensure Examination) passing rates, and further requested that such program submit a written report identifying factors that may have contributed to the unsatisfactory performance of graduates taking that examination, as well as strategies that the program plans to institute to improve the testing performance of its first-time candidates.

[2]It is not clear whether the National League of Nursing Accrediting Committee has accredited this online nursing diploma program, and we are unsure whether such accrediting organization accredits any online nursing diploma program.

[3]It is our information that a contested case hearing is scheduled to take place concerning this matter.

sanitary and health requirements, for which other barber shops are inspected. This concern, raised in the context of the barber license exemption statute, also may apply to the amendments to Senate Bill 2512, particularly in light of the effect of the amendments discussed above.

If we were able to conceive of a possible rational basis undergirding these amendments, it might arise out of the generally reported shortage of trained nurses. Having said that, however, it remains unclear to us how exempting one online nursing diploma program (which may have questionable or unknown credentials as well as relatively few students) until 2008 from the established licensure and regulatory process that is carried out by the Tennessee Board of Nursing for the purpose of protecting the health, safety and welfare of the citizens of Tennessee, can represent a rational basis for such classification. In light of this, we think it likely that if such a classification were to be challenged, a court could find it to be "capricious, unreasonable, or arbitrary." *Civil Service Merit Board v. Burson, supra*.

Therefore, it is the opinion of this office that unless there exists a rational basis for the classification created by House Amendment 1 and House Amendment 3 to Senate Bill 2512, the above amendments to Senate Bill 2512, if enacted, would be unconstitutional as violative of Article XI, Section 8 of the Tennessee Constitution.

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