

STATE OF TENNESSEE

OFFICE OF THE
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Opinion No. 12-35

Authority of Tennessee Higher Education Commission (THEC) to Regulate Flight Training Schools

QUESTIONS

1. Must a flight training school that provides training primarily to avocational students and whose programs are regulated by the Federal Aviation Administration be authorized to operate as a postsecondary education institution under the Postsecondary Education Authorization Act of 1974?

2. Would regulation of a flight training school under the Act by the Tennessee Higher Education Commission (THEC) be preempted by any of the following:

- a. 20 U.S.C. § 1098 of the Higher Education Act;
- b. 34 C.F.R. 668.8 – Eligible Programs;
- c. Federal Aviation Administration Statutes and Regulations; or
- d. Title 38 of the United States Code, specifically Section 203 of Public Law 111-377 of the Post-9/11 Veterans Education Assistance Improvement Act of 2010?

OPINIONS

1. If such a flight training school operates in Tennessee it must be authorized to operate by THEC under the Act.

2. Regulation of the content and instruction of the flight training courses would likely be preempted by federal law and regulations. However, THEC's regulation of other aspects of the flight school pursuant to the Act, such as the school's marketing, business practices, and fiscal soundness, would not be preempted.

ANALYSIS

1. The purpose of the Tennessee "Postsecondary Education Authorization Act of 1974" (the Act), codified at Tenn. Code Ann. §§ 49-7-2001 to -2020, is

to provide for the protection, education and welfare of the citizens of this state, its postsecondary educational institutions and its students, by:

- (1) Establishing minimum standards concerning quality of education, ethical and business practices, health and safety and fiscal responsibility, to protect against substandard, transient, unethical, deceptive or fraudulent institutions and practices;
- (2) Authorizing the granting of degrees, diplomas, certificates or other educational credentials by postsecondary educational institutions and prohibiting the granting of false or misleading educational credentials;
- (3) Regulating the use of terminology in naming or otherwise designating educational institutions;
- (4) Prohibiting misleading literature, advertising, solicitation or representation by educational institutions or their agents; and
- (5) Providing certain rights and remedies to the consuming public and the commission necessary to effectuate the purposes of this part.

Tenn. Code Ann. § 49-7-2002. To accomplish this goal, the Tennessee Higher Education Commission (THEC) is empowered to:

- (1) Establish minimum criteria . . . including quality of education, ethical and business practices, health and safety and fiscal responsibility, that applicants for authorization to operate, or for an agent's permit, shall meet before the authorization or permit may be issued, and to continue the authorization or permit in effect. The criteria to be developed shall effectuate the purposes of this part, but not unreasonably hinder legitimate educational innovation;
- (2) Receive, investigate as it may deem necessary and act upon applications for authorization to operate postsecondary educational institutions and applications for agent's permits;
- (3) Maintain a list of postsecondary educational institutions and agents authorized to operate in this state under this part. This list shall be available for the information of the public;
- (4) Negotiate and enter into interstate reciprocity agreements with similar agencies in other states, if, in the judgment of the commission, the agreements are or will be helpful in effectuating the purposes of this part . . . ;
- (5) Receive and cause to be maintained as a permanent file, copies of academic records in conformity with § 49-7-2016;
- (6) Promulgate rules, regulations, performance standards and procedures necessary or appropriate for the conduct of its work and the implementation of this part, which rules and regulations shall have the force of law, and to hold

hearings as it deems advisable or as required by law in developing the rules, regulations and procedures or in aid of any investigation or inquiry;

(7) Investigate as it deems necessary, on its own initiative or in response to any complaint lodged with it, any person, group or entity subject to, or reasonably believed by the commission to be subject to, the jurisdiction of this part; and in connection with the investigation, to subpoena any persons, books, records or documents pertaining to the investigation, which subpoenas shall be enforceable by any court of this state, to require answers in writing under oath to questions propounded by the commission, and to administer an oath or affirmation to any person in connection with any investigation;

(8) Exercise other powers and duties implied but not enumerated in this subsection (a), but in conformity with this part that, in the judgment of the commission, are determined necessary in order to carry out this part; and

(9) May require as part of the application for initial authorization of a postsecondary educational institution a full set of fingerprints of all owners and directors of the institution to enable a criminal background investigation to be conducted. The commission shall submit the completed fingerprint card to the Tennessee bureau of investigation, which is authorized to submit the fingerprints to the federal bureau of investigation for a national criminal history record check. Dissemination of information provided to the commission as a result of this process shall be governed by Public Law 92-544.

Tenn. Code Ann. § 49-7-2005(a). Broad regulatory and enforcement powers are thus conferred upon THEC by the Act, which is directed at the regulation of postsecondary educational institutions within the State of Tennessee. Tenn. Code Ann. § 49-7-2003(11). As a review of the above-quoted statutes indicates, many of the regulatory functions applicable to postsecondary educational institutions are designed to protect consumers from fraudulent or unethical business practices and misleading representations and to insure that schools are fiscally sound.

A private or proprietary flight training school would fall within the Act's definition of "postsecondary educational institution" and would not fall within one of the exemptions set forth in the Act. *See* Tenn. Code Ann, § 49-7-2004(a). A "postsecondary educational institution" is broadly defined under the Act as follows:

"Postsecondary educational institution" includes, but is not limited to, an academic, vocational, technical, online/distance learning, business, professional or other school, college or university, or other organization or person, offering educational credentials, or offering instruction or educational services, primarily to persons who have completed or terminated their secondary education or who are beyond the age of compulsory high school attendance, for attainment of educational, professional or vocational objectives."

Tenn. Code Ann. § 49-7-2003(11).

Accordingly, a flight school would qualify as a “school” or “other organization” offering “instruction or educational services” for “attainment of educational objectives,” namely the objective of learning to fly an airplane.

2. Public Law 111-377 (the Bill), also known as the “Post-9/11 Veteran’s Educational Assistance Improvements Act of 2010,” was enacted by Congress on January 4, 2011. The Bill amended the “Post-9/11 Veteran’s Educational Assistance Act of 2008,” commonly called the “Post-9/11 GI Bill,” as well as a number of other veterans’ educational assistance programs. The Bill, as it relates to this opinion request, amended the definition of courses of education eligible to be covered and paid for by the Veteran’s Educational Assistance Act. The Post-9/11 GI Bill currently defines approved courses in pertinent part as follows:

An eligible person or veteran shall receive the benefits of this chapter and chapters 34 and 35 of this title while enrolled in a course of education offered by an educational institution only if (1) such course is approved as provided in this chapter and chapters 34 and 35 of this title by the State approving agency for the State where such educational institution is located or by the Secretary, or (2) such course is approved (A) for the enrollment of the particular individual under the provisions of section 3536 of this title or (B) for special restorative training under subchapter V of chapter 35 of this title. Approval of courses by State approving agencies shall be in accordance with the provisions of this chapter and chapters 34 and 35 of this title and such other regulations and policies as the State approving agency may adopt. Each State approving agency shall furnish the Secretary with a current list of educational institutions specifying courses which it has approved, and, in addition to such list, it shall furnish such other information to the Secretary as it and the Secretary may determine to be necessary to carry out the purposes of this chapter and chapters 34 and 35 of this title. Each State approving agency shall notify the Secretary of the disapproval of any course previously approved and shall set forth the reasons for such disapproval.

38 U.S.C. § 3672(a).

The Bill added language that would deem approved a flight training course approved by the Federal Aviation Administration, stating as follows:

Subject to sections 3675(b)(1) and (b)(2), 3680A, 3684, and 3696 of this title, the following programs are deemed to be approved for purposes of this chapter.

.....

A flight training course approved by the Federal Aviation Administration that is offered by a certified pilot school that possesses a valid Federal Aviation Administration pilot school certificate.

Public Law 111-377, Sec. 203(a)(2)(A)(ii) (codified at 38 U.S.C. § 3672(b)(2)(A)(ii)). Generally most remaining courses covered by veteran’s benefits must be approved by the “State approving agency,” which in Tennessee is THEC. *See* 11 U.S.C. §§ 3671 & 3672. *See generally Auburn*

University v. Southern Ass'n of Colleges and Schools, Inc., 489 F. Supp. 2d 1362, 1367-68 (N.D. Ga. 2002) (discussing history of federal government's involvement in the accreditation process).

As noted above, however, the role of THEC to regulate and license postsecondary schools such as flight training schools extends well beyond approval of the content and instruction of the flight training course. Automatic approval of FAA – approved flight training courses under the terms of the Bill therefore does not obviate the functions and authority of THEC under State law to regulate and license proprietary postsecondary schools such as flight training schools with regard to matters such as their business practices or fiscal soundness. Consequently, the issues of whether a flight school will be authorized to operate under State law, and whether federal law automatically approves a flight training course for veterans' assistance, are separate and distinct.

Under current federal law, FAA-approved flight training course are automatically approved for federal veterans' assistance. In light of the Bill, a court would likely conclude that regulation of the actual course content and instruction of the flight training offered at the school are preempted by federal law. Regardless of the automatic approval of flight training course for federal veterans' assistance, however, proprietary flight schools within the State of Tennessee must still meet all other regulatory requirements imposed upon such schools by the Act. This is because there appear to be no federal laws or regulations specifically aimed at regulating matters such as the business practices and fiscal soundness of flight schools.

Congressional power to preempt state law arises from the Supremacy Clause, which provides that “the Laws of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. 6, cl. 2. Congressional intent determines whether a federal statute preempts state law. *Wadlington v. Miles, Inc.* 922 S.W.2d 520, 522 (Tenn. Ct. App. 1996). The Supremacy Clause results in federal preemption of state law when: (1) Congress expressly preempts state law; (2) Congress has completely supplanted state law in that field; (3) adherence to federal and state law is impossible; or (4) the state law impedes the achievements of the objectives of Congress. *Wadlington*, 922 S.W.2d at 522.

Numerous courts have held that state regulation of matters involving aviation safety is preempted by the extensive federal laws and regulations that “occupy the field” in that area. *See e.g., Air Transport Ass'n of America v. Cuomo*, 520 F.3d 218, 225 (2d Cir. 2008); *Greene v. B.F. Goodrich Avionics*, 409 F.3d 784, 794-795 (6th Cir. 2005), *cert. denied*, 547 U.S. 1003 (2006); *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 369–371 (3rd Cir. 1999); *Air Evac EMS v. Robinson*, 486 F.Supp. 2d 713, 724 (M.D.Tenn. 2007).

Nevertheless, the United States Supreme Court has held that although state law is preempted to the extent it actually conflicts with federal law, it is preempted to that extent and no further. *Dalton v. Little Rock Family Planning Services*, 516 U.S. 474, 475-477 (1996) (*per curiam*) (citing *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502, (1985)). In this instance, while federal law and regulations provide authority for the proposition that Congress intended to occupy the field of oversight and regulation of the instruction and content of flight training courses, there is no similar authority for federal preemption of the regulatory oversight of flight schools' business practices and fiscal soundness.

The same reasoning applies to the other federal laws and regulations identified in the opinion request. 20 U.S.C. § 1098 of the Higher Education Act establishes within the federal Department of Education “an Independent Advisory Committee on Student Financial Assistance which shall provide advice and counsel to the authorizing committees and to the Secretary on student financial aid matters.” 20 U.S.C. § 1098. While the provisions under 20 U.S.C. § 1098 address the financial practices of banks and other financial and educational institutions involved in the various federal student loan programs, this Office finds nothing in these provisions that conflicts with the regulation of postsecondary educational institutions under the Act.

34 C.F.R. §668.8 is the section of the Code of Federal Regulations that defines the federal Department of Education’s requirements for an educational program to qualify as an “eligible program” for purposes of federal student assistance. After setting forth general requirements for educational programs that are eligible for federal student assistance, 34 C.F.R. §668.8(i) states:

- (i) Flight Training. *In addition to satisfying other relevant provisions of this section*, for a program of flight training to be an eligible program, it must have a current valid certification from the Federal Aviation Administration.

34 C.F.R. § 668.8(i) (2012) (emphasis added).

Subsequently in paragraph (l)(2) of the same section, this regulation sets forth the method of computing the number of credit hours in an educational program. The following language provides:

- (2) The institution’s conversions to establish a minimum number of clock hours of instruction per credit may be less than those specified in paragraph (l)(1) of this section, *if the institution’s designated accrediting agency, or recognized State agency for the approval of public postsecondary educational vocational institutions, for participation of title IV, HEA programs has not identified any deficiencies with the institution’s policies and procedures*, or their implementation, for determining the credit hours, as defined in 34 CFR 600.2, that the institution awards for programs and courses, in accordance with 34 CFR 602.24(f), or, if applicable, 34 CFR 603.24(c) . . .

34 C.F.R. §668.8(l)(2) (2012) (emphasis added). Accordingly, not only is THEC regulation of such educational institutions consistent with this federal regulatory scheme, but the federal regulations expressly rely upon state regulation of such postsecondary educational institutions in determining eligibility for federal loan programs.

These federal statutes and regulations do not conflict with state requirements for licensing of proprietary postsecondary schools. Rather, they are primarily directed at a different goal – that of assuring that federal student assistance be directed toward educational programs that meet federal educational standards. Nor does an examination of the Federal Aviation Administration statutes¹ and regulations² reveal a basis for finding that the State regulatory statutes are preempted by federal law or regulations.

¹ See, e.g., 49 U.S.C. §§ 40101 to 40129 (general provisions), 41101 to 41113 (air carrier certificates), 41301 to 41313 (foreign air transportation), 41501 to 41511 (pricing), 41701 to 41723 (operations of carriers – requirements),

Consequently, this Office concludes that, aside from the actual course content and instruction of flight training courses that are likely preempted by federal law as discussed above, the remaining regulatory functions of THEC pursuant to the Act – those concerned with proper business practices and fiscal soundness – are not preempted and thus are applicable to private or proprietary flight instruction schools operating in the State of Tennessee.

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41731 to 41748 (small community air service), 44101 to 44113 (safety – registration and recordation of aircraft), 44301 to 44310 (insurance), 44501 to 44517 (facilities, personnel and research), 44701 to 44729 (safety regulation).

² See 14 C.F.R. §§ 21.1 to 21.225 (special federal aviation regulations), 60.1 to 60.37 (initial and continuing qualification and use of flight simulation training devices), 61.1 to 61.431 (certification of pilots, flight instructors and ground instructors), 63.1 to 63.61 (certification of crewmembers other than pilots), 141.1 to 141.101 (pilot schools), 142.1 to 142.81 (training centers).