



# TEXAS HIGHER EDUCATION COORDINATING BOARD

**RECEIVED**

P.O. Box 12788 Austin, Texas 78711

MAY 22 2012

**OPINION COMMITTEE**

FILE # ML-47055-12  
I.D. # 47055

Fred W. Heldenfels IV  
CHAIR

Harold W. Hahn  
VICE CHAIR

Dennis D. Golden, O.D.  
SECRETARY OF THE BOARD

Amir H. Barzin  
STUDENT REPRESENTATIVE

Durga D. Agrawal, Ph.D.  
Robert W. Jenkins  
Munir Abdul Lalani  
James H. Lee  
Janelle Shepard  
David D. Teuscher, M.D.

Raymund A. Paredes  
COMMISSIONER  
OF HIGHER EDUCATION

512/ 427-6101  
Fax 512/ 427-6127

Web site:  
<http://www.thecb.state.tx.us>

May 21, 2012

The Honorable Greg Abbott  
Attorney General  
State of Texas  
Office of the Attorney General  
P.O. Box 12548  
Austin, TX 78711-2548

*Via Certified Mail, Return Receipt Requested*

**RQ-1062-GA**

Re: Request for legal opinion regarding the Texas Higher Education Coordinating Board's authority to grant a certificate of authority to a foreign school, including a foreign medical school, under Texas Education Code § 61.306

Dear General Abbott:

The Texas Higher Education Coordinating Board ("THECB" or "Coordinating Board") seeks your assistance in interpreting Subchapter G of Chapter 61 of the Texas Education Code, and, more specifically, Section 61.306 of that subchapter. The question that we seek to resolve is whether THECB has authority to grant a certificate of authority to a foreign school, including a foreign medical school, under Section 61.306. That section provides:

ISSUANCE OF CERTIFICATE. (a) The board may issue a certificate of authority to grant a degree or degrees and to enroll students for courses which may be applicable toward a degree if it finds that the applicant meets the standards established by the board for certification.

(b) A certificate of authority to grant a degree or degrees is valid for a period of two years from the date of issuance.

## Background

Subchapter G ("Regulation of Private Postsecondary Educational Institutions") of Chapter 61 of the Texas Education Code requires, *inter alia*, that every "private postsecondary educational institution" apply for and be granted a certificate of authority from THECB in order to offer courses or award degrees. Tex. Educ. Code §§ 61.304-.306. "Private postsecondary educational institution" means an educational institution which: is not an institution of higher education as defined by Section 61.003 of the Education Code; is incorporated under the laws of Texas, maintains a place of business in Texas, has a representative present in Texas, or solicits business in Texas; and

furnishes or offers to furnish courses of instruction in person, by electronic media, or by correspondence leading to a degree or providing credits alleged to be applicable to a degree. Tex. Educ. Code § 61.302(2).

Institutions which are fully accredited by a recognized accrediting agency or which have received approval by a state agency authorizing the institution's graduates to take a professional or vocational state licensing examination administered by that agency are exempt from Subchapter G. Tex. Educ. Code § 61.303(a).

A certificate of authority granted under Subchapter G is valid for a 2-year period; an institution must apply to renew its certificate in order to continue offering courses and awarding degrees after that period. Tex. Educ. Code § 61.306(b), § 61.308. The THECB rule discussing certificates of authority is located at 19 T.A.C. § 7.8 ("Institutions Not Accredited by a Board Recognized Accreditor").

The American University of the Caribbean ("AUC"), a for-profit medical school located in St. Maarten, Netherlands Antilles, is currently seeking approval from THECB for a certificate of authority to offer courses leading to a first professional degree in medicine. AUC seeks to offer clerkships, which are required during years three and four of the medical program, to AUC students at Texas hospitals under affiliation agreements it proposes to attempt to negotiate. AUC has followed the procedures required by Tex. Educ. Code § 61.305 and 19 T.A.C. § 7.8 for application for a certificate of authority. In November 2011, following an on-site evaluation of AUC by external consultants, THECB's Certification Advisory Council<sup>1</sup> recommended that AUC be approved for a certificate of authority.

On April 25, 2012, THECB held its quarterly board meeting, and Agenda Item VIII-J concerned the consideration of AUC's request for a certificate of authority to offer courses in Texas leading to a medical degree. Exhibit A, Supplemental Material for Agenda Item VIII-J from April 2012 THECB Board Meeting. Due to concerns raised at the Board meeting regarding whether THECB has statutory authority to grant a certificate of authority to any foreign school, including a foreign medical school such as AUC, the Board members passed, in pertinent part, the following motion:

Given the uncertainty regarding whether the Coordinating Board has sufficient statutory authority to grant a Certificate of Authority to any foreign school, including a foreign medical school, and given certain of the other issues raised by this application from AUC, I move that we seek

---

<sup>1</sup> See Tex. Educ. Code § 61.314 ("Advisory Council on Private Postsecondary Educational Institutions").  
AN EQUAL OPPORTUNITY EMPLOYER

an opinion from the Attorney General as to the extent of our authority as a Board in this area of the law.

As a result, THECB now seeks an opinion from the Attorney General regarding THECB's authority to grant a certificate of authority to a foreign school, including a foreign medical school.

### **Discussion**

From a review of the purpose underpinning the creation of THECB and the legislative history of Subchapter G of Chapter 61 of the Texas Education Code, THECB appears to have authority to grant certificates of authority to both medical schools and foreign schools, including foreign medical schools.

The purpose of Chapter 61 ("Texas Higher Education Coordinating Board") of the Texas Education Code, which created THECB in 1965, is as follows:

- (a) The purpose of this chapter is to establish in the field of public higher education in the State of Texas an agency to provide leadership and coordination for the Texas higher education system, institutions, and governing boards, to the end that the State of Texas may achieve excellence for college education of its youth through the efficient and effective utilization and concentration of all available resources and the elimination of costly duplication in program offerings, faculties, and physical plants.
- (b) In the exercise of its leadership role, the Texas Higher Education Coordinating Board established by this chapter shall be an advocate for the provision of adequate resources and sufficient authority to institutions of higher education so that such institutions may realize, within their prescribed role and scope, their full potential to the benefit of the students who attend such institutions and to the benefit of the citizens of the state in terms of the realization of the benefits of an educated populace.

Tex. Educ. Code § 61.002.

Ten years later, the Texas Legislature significantly expanded the duties and authority of THECB. Subchapter G of Chapter 61 was added by H.B. 1538 in 1975 (64<sup>th</sup> Leg., R.S.). Exhibit B, Enrolled Version of H.B. 1538. This 1975 legislation, in relevant part, required every "private institution of higher education" to receive a certificate of authority from THECB in order to enroll students, offer courses, or award degrees. "Private institution of higher education" was defined as an educational institution which:

- (A) is not an institution of higher education as defined by Section 61.003(7) of [the Education] code;
- (B) is incorporated under the laws of this state, or maintains a place of business in this state, or solicits business in this state; and
- (C) furnishes or offers to furnish courses of instruction in person or by correspondence leading to a degree or providing credits alleged to be applicable to a degree.

Exhibit B at p. 2. “Degree” was (and still is) defined as:

[A]ny title or designation, mark, abbreviation, appellation, or series of letters or words, including associate, bachelor’s, master’s, **doctor’s**, and their equivalents, which signifies, purports to, or is generally taken to signify satisfactory completion of the requirements of all or part of a program of study leading to an associate, bachelor’s, master’s, or **doctor’s** degree or its equivalent.

*Id.* (emphasis added); Tex. Educ. Code § 61.302(1). Included in the “exemptions” from Subchapter G were institutions “whose graduates are subject to licensure by an agency of the State of Texas prior to their engaging in professions directly related to their course of study.” Exhibit B at p. 3.

The legislative history behind H.B. 1538 makes clear that all private postsecondary educational institutions – including those offering post-baccalaureate degrees – were meant to be encompassed by the certificate of authority process. For example, the 1975 House Committee on Higher Education’s Bill Analysis noted as follows:

Background Information:

Accompanying the increasing use of off-campus instruction, credit by examination, college-without-walls arrangements, etc. has come the proliferation of operations which are often called degree mills or diploma mills. It has been estimated that the number of diploma mill institutions has increased by three times over the last eight years. The term “degree mill” refers to operations which confer degrees without substance in return for the payment of a fee and few, if any, other requirements.

Two situations have happened lately in Texas regarding diploma mills, one in Dallas and the other in San Antonio. **In 1974 the Texas Attorney General brought action against Dallas State College for selling degrees in more than 50 subject areas at a cost of from \$75 for a high**

**school diploma to \$180 for a doctorate.**<sup>2</sup> All calls to the institution were taken by an answering service.

**The San Antonio based Southwestern Institute of Management contracted with Indiana Northern University of Gas City, Indiana to offer a graduate degree in management to students until it was learned that the Indiana based school was not accredited.**

In 1970, 30 states had no regulations governing the establishment of colleges. In the last five years, 14 states have adopted some type of legislation to control the offering of courses of degrees within their state.

**What the Bill Proposes to Do:**

**Establish rules, regulations, and penalties for degree granting institutions offering courses in Texas.**

Exhibit C, Bill Analysis for H.B. 1538, at p. 1 (emphasis added). Thus, H.B. 1538 clearly contemplated that Subchapter G would regulate all private “degree granting institutions offering courses in Texas,” including those institutions offering post-baccalaureate degrees such as graduate degrees and doctorates, which are specifically mentioned in the Bill Analysis. However, as noted above, professional schools such as law schools and medical schools whose graduates must be state-licensed prior to engaging in professions directly related to their course of study were exempted from Subchapter G in the 1975 legislation.

In 1985 (69<sup>th</sup> Leg., R.S.), Subchapter G was amended by H.B. 934,<sup>3</sup> in part to eliminate the exemption for professional institutions whose graduates must be state-licensed prior to engaging in professions directly related to their course of study and subject these institutions to the certificate of authority process. The Bill Analysis by the House Committee on Higher Education noted as follows:

**Existing law allows unaccredited medical and law schools, among others, to operate legally in Texas without being subject to consumer protection laws to prevent degree-mill operations in the state. The proposed bill is intended to provide that schools now exempted from the law would become subject to some type of educational quality controls. The legislation would amend Coordinating Board statutes to eliminate exceptions from state purview which now apply to schools whose graduates are subject to state licensure. Because of this provision,**

---

<sup>2</sup> At the time that H.B. 1538 was being considered by the Senate Education Committee, there was an injunction against Dallas State College in connection with these activities. *Hearing on H.B. 1538 Before the Sen. Educ. Comm.*, 64th Leg., Reg. Sess. (Tex. May 23, 1975) (statement of Dr. Norma Foreman, Coordinating Board employee). The Senate audio tapes for the 64th Leg., R.S., are located at <https://www.tsl.state.tx.us/ref/senatetapes/64/index.html>.

<sup>3</sup> Exhibit D, Enrolled Version of H.B. 934.

the state has been unable to question the operation of possible substandard professional schools.

Exhibit E, House Committee on Higher Education Bill Analysis for H.B. 934 (emphasis added). The motivation to eliminate this exemption was driven in large part by the operation in El Paso of a branch facility of a Caribbean medical school, St. Lucia. As the Senate's Bill Analysis noted:

**Certain unaccredited professional schools (e.g. private medical or law schools) currently are not subject to any type of quality standards because of provisions in the law which exempt from state regulation any schools whose graduates are subject to state licensure. Concerns have been raised by the attorney general's office and the Coordinating Board over the operation in El Paso of a Caribbean medical school branch facility.**

\*\*\*

Senate Bill 691<sup>4</sup> prohibits any private unaccredited institution from operating in the state without Coordinating Board certification unless the state licensing agency for that profession has approved the school; gives the Coordinating Board authority to regulate any private institution broadcasting courses in the state, if a representative of the school is present in the state....

Exhibit F, Senate Bill Analysis for H.B. 934 (emphasis added). The Senate Committee on Education's Fiscal Note for S.B. 691 noted that "[t]he bill would clarify the authority of the Coordinating Board to regulate private institutions from out-of-state or in-state that offers courses or programs with credit toward a degree or is named 'college' or 'university'." Exhibit G, Senate Fiscal Note for S.B. 691.

In introducing H.B. 934 and outlining its purposes for the House Committee on Higher Education, the bill's sponsor, Representative Wilhelmina Delco, discussed closing the loophole in Subchapter G for professional schools and giving the Coordinating Board review authority over those institutions, including foreign institutions:

House Bill 934 is a bill that has been filed in an effort to recognize and deal with what has become a problem in our state.

Existing law currently allows unaccredited medical and law schools among others to operate legally in Texas without being subject to consumer protection laws to prevent degree-mill operations.

The proposed bill is intended to provide that schools now exempted from the law would become subject to some type of educational quality

---

<sup>4</sup> S.B. 691 was the companion (identical) to H.B. 934, and H.B. 934 was considered in lieu of S.B. 691.

controls. The legislation would amend Coordinating Board statutes to eliminate exceptions from state purview which now apply to schools whose graduates are subject to state licensure. Because of this provision, the state has been unable to question the operation of possible sub-standard professional schools.

It is particularly important for us to recognize that this is a consumer protection bill. A lot of you have been aware recently of articles in the paper where some operations that are not under the authority of the Coordinating Board have been able to mislead our citizens into believing that the programs offered and, in some instances, accredited in other states or foreign countries, are available and operative in Texas.

We feel that that is perfectly legitimate as long as there is some ability of our state and our Coordinating Board to make sure that these programs are accurately represented to our citizens. And that's what this bill does. It extends the review authority to all private institutions and to those entities that say to Texas citizens that if you come to us, you're getting bona fide, legal, and acceptable education.

*Hearing on H.B. 934 Before the House Comm. on Higher Educ., 69th Leg., Reg. Sess. (Tex. Mar. 18, 1985) (statement of Rep. Wilhelmina Delco, H.B. 934 Sponsor and Chair, House Comm. on Higher Educ.).*<sup>5</sup> Representative Delco also mentioned St. Lucia Medical School in her discussion of H.B. 934 on the House floor:

House Bill 934 is an effort to close another loophole in the law that has permitted degree mills to operate in Texas. It does a number of things. First of all, it would say that those private institutions that currently are exempt from the law simply because the person who graduates must take some kind of licensure exam would not be able to perpetuate the fraud that would allow students to attend the schools and then not be able to pass the exams. **We have as an example of this, an institution in the state that is supposed to be a medical school, that doesn't even have laboratories.** So we're concerned about it. ...

*Second Reading of H.B. 934 on House Floor, 69th Leg., Reg. Sess. (Tex. Mar. 27, 1985) (statement of Rep. Wilhelmina Delco) (emphasis added).*

Similarly, an exchange during a hearing before the House Committee on Higher Education between a committee member and the Chair of THECB (Hon. Larry Temple) makes clear that the intent of H.B. 934 was to subject foreign schools, including foreign medical schools such as St. Lucia, to THECB authority under Subchapter G:

---

<sup>5</sup> House audio tapes are located at the John H. Reagan Building, 105 W. 15<sup>th</sup> St., Room 330, Austin, Texas 78701.

Rep. Saunders: Mr. Temple, these so-called "outlaw schools," or, I guess we could call them schools, are they mostly out-of-state?

Mr. Larry Temple: **The one that we primarily have been concerned about and tried to get a handle on and couldn't is a medical school based in the Caribbean, St. Lucia, in El Paso, and we worked with the Attorney General to try to come up with a way to get them under the purview so that they could really have somebody give scrutiny to them. And under the present law we can't do that.** And the one that, as I say, we primarily have looked at, is an offshore-based institution.

*Hearing on H.B. 934 Before the House Comm. on Higher Educ., 69th Leg., Reg. Sess. (Tex. Mar. 18, 1985) (statements of Rep. Robert Saunders, Member, House Comm. on Higher Educ., and Mr. Larry Temple, Chair, THECB) (emphasis added).*

The Executive Director of the Texas State Board of Medical Examiners also described H.B. 934 as subjecting foreign medical schools to THECB authority:

Those of us that are interested in health affairs in Texas are primarily concerned with the quality of health that is provided to our citizens. **We've been very concerned about the quality of some schools, particularly in the Caribbean, and particularly in that one out in El Paso.** I have been talking to Ken[neth Ashworth, Commissioner of Higher Education] a long time about this. We've been to a number of legislators about this. **We think this is very important legislation. And the effect of it would help us provide assurance that those men and women that are practicing in Texas are well-qualified and will deliver good medicine to our citizens.**

*Hearing on H.B. 934 Before the House Comm. on Higher Educ., 69th Leg., Reg. Sess. (Tex. Mar. 18, 1985) (statement of Dr. J.D. Brindley, Exec. Dir. of the Tex. State Bd. of Med. Examiners) (emphasis added).*

Likewise, in H.B. 934's introduction before the Senate Education Committee, Senator Chet Edwards made clear that the bill was designed to make professional institutions, such as St. Lucia, subject to Subchapter G:

**[T]he primary idea of House Bill 934 is to do away with a loophole we presently have in the law. If you are a private professional school and your profession might be licensed by the state, the Coordinating Board has absolutely no authority over that private professional school. As a consequence, we've had St. Lucia Medical School established in El Paso. This is a branch of a Caribbean, West Indies medical school. It's in El Paso, they operate out of the top floor of a former elementary school, they have no laboratories, and just three small classrooms where 60 students study. These students cannot even begin to**



pass a medical examination in Texas to be certified as a physician, what they have done is go to other states such as Montana where no certification test is required and they put themselves out to be doctors. I think it's a discredit to this state when we have people graduating from such a school.

**We need some legislative and Coordinating Board oversight of these kinds of schools, and so our bill would basically close that loophole to give the Coordinating Board authority over private professional schools where those professions might later be licensed. ...**

*Hearing on H.B. 934 Before the Sen. Educ. Comm., 69th Leg., Reg. Sess. (Tex. Apr. 3, 1985) (statement of Sen. Chet Edwards, Member, Sen. Educ. Comm.) (emphasis added).*<sup>6</sup> Senator Edwards later discussed H.B. 934 on the Senate floor as follows:

[HB 934] is designed to close a loophole under present law through which universities established by other nations can be created in Texas with no licensing, no approval procedures. The harm of the present policy is that there is a particular Caribbean nation that has set up a sham medical school in the West Texas/El Paso area and as a result of that we are trying to pass this legislation to keep those types of sham operations from operating in Texas....

*Second Reading of H.B. 934 on Senate Floor, 69th Leg., Reg. Sess. (Tex. Apr. 22, 1985) (statement of Sen. Chet Edwards).*

Due to the concerns regarding unregulated professional schools, H.B. 934 removed the exemption regarding institutions whose graduates were subject to licensure by a state agency prior to engaging in professions directly related to their course of study. The new exemption instead exempted from the requirement of receiving a certificate of authority:

**[A]n institution or degree program that has received approval by a state agency authorizing the institution's graduates to take a professional or vocational state licensing examination administered by that agency. The granting of permission by a state agency to a graduate of an institution to take a licensing examination does not by itself constitute approval of the institution or degree program required for an exemption under this subsection.**

Exhibit D at p. 2 (emphasis added). The exemption continues to read this way. Tex. Educ. Code § 61.303(a).

---

<sup>6</sup> Senate audio tapes are located in the reference section of the Lorenzo de Zavala State Archives and Library Building, 1201 Brazos St., Austin, Texas 78701.

Possibly due to the concerns regarding the operation in El Paso of a Caribbean medical school branch facility, H.B. 934 amended Subchapter G to add "has a representative present in this state" to the definition of "private institution of higher education," resulting in its definition (in part) as an institution that "is incorporated under the laws of this state, maintains a place of business in this state, has a representative present in this state, or solicits business in this state." The definition continues to read this way (with the exception of "private institution of higher education" being changed to "private postsecondary educational institution"). Tex. Educ. Code § 61.302(2)(B).

Accordingly, in view of the legislative history surrounding H.B. 934, it appears clear that THECB's authority to grant certificates of authority extends to medical schools as well as foreign schools, including foreign medical schools.

Finally, in 1997 (75<sup>th</sup> Leg., R.S.), Section 61.313 of Subchapter G was amended by S.B. 1826 to add "seminary,"<sup>7</sup> "school of medicine," "medical school," "health science center," "school of law," "law school," and "law center" to "college" and "university" as terms that cannot be used in the official name of a nonexempt private postsecondary educational institution unless it has been issued a certificate of authority under Subchapter G. Exhibit H, Enrolled Version of S.B. 1826, at p. 4. Section 61.313 continues to read this way. Tex. Educ. Code § 61.313(a). If THECB did not have authority to issue a certificate of authority to a medical school, the addition of "school of medicine," "medical school," and "health science center" to the list of protected terms would not have been necessary.

Based upon the above analysis, THECB clearly appears to have authority to grant a certificate of authority to a foreign medical school under Texas Education Code Section 61.306.

THECB hereby requests, pursuant to Section 402.042 of the Government Code, that you issue an opinion on this question.

Thank you very much for your assistance in this matter.

Very truly yours,



Raymund A. Paredes

---

<sup>7</sup> As noted, the 1997 legislation added "seminary" to the list of protected terms in Section 61.313(a). However, in 2007, the Texas Supreme Court held that sections 61.304 and 61.313(a) of the Texas Education Code violated the Establishment Clause of the First Amendment to the U.S. Constitution as applied to a religious institution's programs of religious instruction. *HEB Ministries, Inc. v. Tex. Higher Educ. Coordinating Bd.*, 235 S.W.3d 627, 649 (Tex. 2007).