

ATTORNEY GENERAL

November 24, 1980

EDWIN H. ALBANO, M.D.

President

N.J. State Board of Medical Examiners

28 West State Street

Trenton, New Jersey 08608

FORMAL OPINION NO. 24—1980

Dear Dr. Albano:

You have requested our opinion regarding the constitutionality of that portion of the act regulating podiatry, which authorizes licensure of podiatrists through endorsement of licenses issued in other jurisdictions, but only if the podiatrist then establishes legal residence in New Jersey and practices only in this State. You are advised that that provision is unconstitutional.

The podiatry statute contains two sections bearing upon the licensing of podiatrists. Under N.J.S.A. 45:5-3 an applicant may obtain a license through examination after first having submitted to the Board various documentation concerning his background; not mentioned are any requirements that the applicant, either before or after being licensed, must reside or work in New Jersey. The alternate route for licensure is N.J.S.A. 45:5-7, which authorizes the Board to issue a license through endorsement of a license to practice podiatry previously issued in another jurisdiction. Under this alternative, by contrast, the applicant does face residency and practice requirements, for the applicant "shall, within six months after the issuance of his license hereunder, remove to this State, establish his permanent and only legal residence and cease to operate his practice in the State from which he applies and not use such license for part-time practice in this State."* The statute thus differentiates between two types of podiatry licensees—those licensed by examination and those licensed through endorsement of a sister state license—and imposes upon the latter class regulatory requirements not imposed upon the former.

As a general matter, a legislatively-chosen system of regulation will stand "[i]f the need [for governmental control] is not wholly illusory and the regulation imposed is reasonably calculated to satisfy the need . . .," for "[i]f the subject is within the police power of the State, even debatable questions as to reasonableness of the means employed are not for the courts but for the Legislature." *N.J. Chapter, American Institute of Planners v. N.J. State Bd. of Professional Planners*, 48 N.J. 581, 600 (1967). Nevertheless, a genuine public need upon which the regulatory constraints are to operate must exist, for a statute "may not transcend public need and must bear a real and substantial relationship to the objectives of the [legislation]." *Hudson Circle Servicecenter, Inc. v. Kearny*, 70 N.J. 289, 301 (1976).

Moreover, "[w]hile the due process and equal protection guarantees are not coterminous in their spheres of protection, equality of right is fundamental in both." *Washington National Ins. Co. v. Bd. of Review*, 1 N.J. 545, 553 (1949). As the Supreme Court of New Jersey has said:

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Each forbids class legislation arbitrarily discriminatory against some and favoring others in like circumstances. It is essential that the classification itself be reasonable and not arbitrary, and be based upon material and substantial distinctions and differences reasonably related to the subject matter of the legislation or considerations of policy and that there be uniformity within the class. [*Id.*]

Equal protection "requires more of a state law than nondiscriminatory application within the class it establishes. . . . It also imposes a requirement of some rationality in the nature of the class singled out." *Rinaldi v. Yeager*, 384 U.S. 305, 308-309, 86 S. Ct. 1497, 16 L. Ed. 2d 577 (1966). Stated another way, "[a]lthough the Legislature has broad discretion in selecting those who shall be affected by its enactments, such selection must be reasonable and include all those who naturally fall within the class." *DeMonaco v. Renton*, 18 N.J. 352, 358 (1955).

Upon reviewing the podiatry statute, there does not appear to be any rational basis for imposing upon podiatrists licensed through endorsement obligations of residency and practice not imposed upon podiatrists licensed through examination. To be sure, the State does have an interest in assuring that a professional licensee maintain adequate contacts with it as the

* The pertinent portion of the provision reads:

"Any applicant for a license to practice podiatry upon proving that he has been examined and licensed by the examining and licensing board of another State, territory of the United States, or the District of Columbia, may in the discretion of the board be granted a license to practice podiatry without further examination upon payment to the board of a licensee fee of \$100.00; provided, such applicant shall furnish proof that he can fulfill the requirements demanded in the other sections of this chapter relating to applicants for admission by examinations; provided further, that the laws of such State, territory or the District of Columbia accords equal reciprocal rights to a licensed podiatrist of this State, who desires to practice his profession in such State, territory or the District of Columbia; provided further, that said applicant has been in lawful and ethical practice of podiatry in the State, territory or District of Columbia from which he applies for 5 full consecutive years next prior to filling his application; *and provided further, that said applicant shall, within 6 months after the issuance of his license hereunder, remove to this State, establish his permanent and only legal residence and cease to operate his practice in the State from which he applies and not use such license for part-time practice in this State. An affidavit setting forth his intention to comply with the requirements of this proviso must be filed with the application for license.* In any such application for a license without examination, all reciprocal questions of academic requirements of other states, territories or the District of Columbia shall be determined by the board. The board shall consider each application for such license on its individual merits and may, in its discretion and without establishing a precedent, waive the requirements for internship in lieu of 10 or more years of active and continuous ethical practice outside of this State.

"The board may issue to any licensed podiatrist of this State, known to it to be of good moral character and who has conducted an ethical practice in this State, and who desires to remove his residence and practice to another state, a certificate or certification authenticated with its seal, which shall attest such information as may be necessary for competent boards of other states to determine reciprocity qualifications, upon payment of a fee of \$10.00."

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licensing jurisdiction. *See e.g.* R. 1:21-1(a), requiring a New Jersey-licensed attorney either to be domiciled and maintain a bona fide office for the practice of law in New Jersey or, if not domiciled in New Jersey, maintain within the State his principal office for the practice of law; *Wilson v. Wilson*, 416 F. Supp. 984, 986-988 (D. Ore. 1976) (3 judge court), *aff'd mem.* 430 U.S. 925, 97 S. Ct. 1540, 51 L. Ed. 2d 768 (1977), holding that an applicant to the bar may be required to state his intent to be a resident at the time of admission; *Lipman v. Van Zant*, 329 F. Supp. 391, 401-404 (N.D. Miss. 1971) (3 judge court), holding that a state may require residency at the time of the bar examination for character investigation. Consequently, were the sort of residency and practice requirements set forth in N.J.S.A. 45:5-7 imposed upon *all* podiatry licensees, whether licensed by endorsement or examination, there would be no constitutional infirmity. As the matter stands, however, one category of licensees—those licensed through endorsement of sister state licenses—has been singled out, and therefore some characteristic which is unique to podiatry licensees by endorsement and which engenders a particular kind of regulatory difficulty must be identified in order to justify the classification. Having been unable to identify any reasonable basis for this classification, we conclude that the statutory scheme denies endorsement licensees due process and equal protection of the law, *U.S. Const.*, Amend. XIV.

You are advised therefore that that portion of N.J.S.A. 45:5-7 which conditions the licensure of podiatrists through endorsement of licenses issued in other jurisdictions upon the podiatrist's establishing legal residence in New Jersey and practicing only in the State is unconstitutional and should not be enforced.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: BERTRAM P. GOLTZ, JR.
Deputy Attorney General

December 5, 1980

T. EDWARD HOLLANDER, *Chancellor*
Department of Higher Education
225 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 25—1980

Dear Chancellor Hollander:

You have asked whether the Board of Higher Education has the statutory authority to regulate foreign medical schools operating in New Jersey. The reason for your inquiry is that a number of foreign medical schools have contracted with New Jersey hospitals to permit their matriculating students to observe and conduct clinical procedures in those hospi-