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The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER  
ATTORNEY GENERAL

January 20, 2006

The Honorable Dwight A. Loftis  
Member, House of Representatives  
530A Blatt Bldg  
Columbia, South Carolina 29211

Dear Representative Loftis:

You have requested an opinion regarding recent "action by the State Board of Education concerning their repeal of the South Carolina Biology Standards and along with the reinstatement of the 2000 Biology Standards." By way of background, you provide the following information :

... the EOC (Education Oversight Committee) revised and sent recommendations for all science standards to the State Board for action in October of this year as required by law, that all school curriculum standards be reviewed for the purpose of revision every five years. The State Board heard and passed these revised standards for the second and final reading in November. On Monday, December 12, the EOC voted in an 8-7 vote to "pull" four indicators of the seven in biology standards B-5 and review their revisions and resubmit to the State Board of Education their changes after the EOC's February meeting.

The request from the EOC to the State Board was to "pull" the four indicators from their "approved list of all science standards until these indicators could be represented in March for approval. The State Department of Education's legal counsel, Dale Stuckey, recommended to the Board that they "pull" the entire revised biology standard B-5 rather than the four of seven indicators in question by the EOC.

You have requested an opinion, which you describe as follows:

1. I believe the State Board of Education overstepped its authority to "pull" the ENTIRE standard when both entities had approved three of the seven biology indicators. Does the State Board have the authority to "pull" off the entire approved standard B-5, when a component of the standard has ALREADY had the consensus and been voted on by both the EOC and the State Board? ....

*Request Letter*

Secondly, I have concerns regarding the unilateral reinstatement of the 2000 biology standards by the State Board on Wednesday. .... Does the State Board have the authority to reinstate a new set of standards (the 2000 standards) when the EOC and State Board are in the process of revision of new (the 2005) biology standards?

**Law / Analysis**

The questions you raise involve interpretation and application of the Education Accountability Act of 1998. See, S.C. Code Ann. 59-18-100 *et seq.* The Act took effect on June 10, 1998. In enacting the Accountability Act, the General Assembly found that

... South Carolinians have a commitment to public education and a conviction that high expectations for all students are vital components for improving academic achievement. It is the purpose of the General Assembly in this chapter to establish a performance based accountability system for public education which focuses on improving teaching and learning so that students are equipped with a strong academic foundation. Accountability, as defined by this chapter, means acceptance of the responsibility for improving student performance and taking actions to improve classroom practice and school performance by the Governor, the General Assembly, the State Department of Education, colleges and universities, local school boards, administrators, teachers, parents, students, and the community.

The Education Oversight Committee was created and designated by the General Assembly to play an integral role in the implementation of the Education Accountability Act of 1998. Creation of the Oversight Committee is authorized pursuant to § 59-6-10 and the Committee's powers and duties are enumerated in that same provision. Indeed, we have recognized previously that the Committee "possesses a great deal of influence over both policy and financial decisions made in reference to South Carolina's public education system." *Op. S.C. Atty. Gen.*, January 23, 2002. Pursuant to §59-6-10, the Oversight Committee's powers and duties are as follows:

- (A) In order to assist in, recommend, and supervise implementation of programs and expenditure of funds for the Education Accountability Act and the Education Improvement Act of 1984, the Education Oversight Committee is to serve as the oversight committee of these acts. The Education Oversight Committee shall:
- (1) review and monitor the implementation and evaluation of the Education Accountability Act and Education Improvement Act Programs and funding.
  - (2) make programmatic and funding recommendations to the General Assembly;

- (3) report annually to the General Assembly, State Board of Education, and the public on the progress of these programs;
- (4) recommend Education Accountability Act and EIA program changes to state agencies and other entities as it considers necessary.

In addition to the duties prescribed in Section 59-6-10, Article 3 of Chapter 18 of Title 59 bestows other important responsibilities upon the Committee in the area of approval of standards required in the core courses to be taught in South Carolina's public schools. We first note that Section 59-18-30 requires the State Board of Education to

... adopt grade specific performance-oriented educational standards in the core academic areas of mathematics, English/language arts, social studies (history, government, economics, and geography), and science for kindergarten through twelfth grade and for grades nine through twelve adopt specific academic standards for benchmark courses in mathematics, English/language arts, social studies and science. The standards are to promote the goals of providing every student with the competencies to:

- (1) read, view, and listen to complex information in the English language;
- (2) write and speak effectively in the English language;
- (3) solve problems by applying mathematics;
- (4) conduct research and communicate findings;
- (5) understand and apply scientific concepts;
- (6) obtain a working knowledge of world, United States, and South Carolina history, government, economics and geography; and use information to make decisions.

Moreover, pursuant to §59-18-310, the State Board of Education, through the Department of Education, is required "to develop or adopt a statewide assessment program to measure student performance on state standards ...." Such assessment program relates to the four "benchmark" academic areas enumerated above.

In the area of assessment, the powers and duties of the Education Oversight Committee are set forth in §§ 59-18-320 and -360. The Committee is mandated, pursuant to § 59-18-320(A), to "review the state assessment program and the course assessments for alignment with the state standards, level of difficulty and validity, and for the ability to differentiate levels of achievement, and will make recommendations for needed changes , if any." Such recommendations are sent to

a number of agencies and officials, including the Governor and the State Board and Department of Education. The Department of Education is then required to report to the Oversight Committee “no later than one month after receiving the reports on the changes made to the assessments to comply with the recommendations.” Following “review and approval” by the Oversight Committee, the standards based assessment in the four benchmark courses “will be administered to all public school students ....”

Section 59-18-320(D) speaks to the creation of *new* standards and assessments – the situation involved here. Such provision states that “[a]ny new standards and assessments required to be developed and adopted by the State Board of Education, through the Department of Education, must be developed and adopted *upon the advice and consent of the Education Oversight Committee.*” (emphasis added).

Section 59-18-360 further provides for a cyclical review of state standards and assessments by academic area. Such Section provides in pertinent part as follows:

[t]he State Board of Education, in consultation with the Education Oversight Committee, shall provide for a cyclical review by academic area of the state standards and assessments to ensure that the standards and assessments are maintaining high expectations for learning and teaching. All academic areas must be initially reviewed by the year 2005. At a minimum, each academic area should be reviewed and updated every four years. After each academic area is reviewed a report on the recommended revisions must be presented to the Education Oversight Committee *for its consideration.* After *approval* by the Education Oversight Committee, the recommendations may be implemented.

(emphasis added).

With that background in mind, we turn to your specific questions. Pursuant to § 59-18-360, proposed revised South Carolina Science Academic Standards, including Biology, were developed and submitted to the State Board of Education in 2005 as part of the required cyclical review of benchmark course standards. It is our understanding that, following first reading of the proposed revised Standards by the State Board of Education, the EOC, in October, 2005, deferred action on these revised Standards. In the meantime, the State Board proceeded ahead, giving second reading to the proposed Standards in November. This was, we understand, somewhat of a departure from the usual procedure because, typically, the process is for the State Board to give first reading to proposed revised standards, then to send the proposed standards to the EOC, which then takes action, and sends the proposed standards back to the State Board for final action. However, in this instance, since the EOC delayed taking action in October, the State Board proceeded with second reading, on November 9, 2005, while awaiting action by the EOC.

As we understand it, the EOC in its consideration of the proposed revised Standards, invoked a parliamentary procedure, authorized by *Roberts Rules of Order*, to consider the proposed Standards

on a paragraph-by-paragraph basis. Section 28 of *Roberts*, which formed the basis of the EOC's action, provides as follows:

[a] report or long motion consisting of a series of resolutions, paragraphs, articles, or sections that are not totally separate questions can be considered by opening the different parts to debate and amendment separately, without a division of the questions. If the chair does not follow such a course of his own accord and the assembly wishes to do so, the procedure can be ordered by adopting a motion to *Consider by Paragraph (or to Consider Seriatim)*. Several distinct main motions on *different subjects* cannot be considered seriatim if a single member objects ....

Employing the above-referenced parliamentary procedure, the EOC took action on the proposed Standards at its December 12, 2005 meeting. A December 15, 2005 statement of the EOC explained the Committee's action as follows:

[a]t its meeting on December 12, South Carolina Education Oversight Committee (EOC) members voted to recommend adoption of the South Carolina Science Academic Standards, with the exception of four indicators included within a biology content standard. These four indicators were deferred for decision.

The four indicators deferred for decision are included within Standard B-5, which demonstrate students' ability to "demonstrate an understanding of biological evolution and the diversity of life" and include:

- B-5.2 Explain how genetic processes result in the continuity of life-forms over time.
- B-5.4 Explain how genetic variability and environmental factors lead to biological evolution.
- B-5.5 Exemplify scientific evidence in the fields of anatomy, embryology, biochemistry, and paleontology that underlies the theory of biological evolution.
- B-5.7 Use a phylogenetic tree to identify the evolutionary relationships among different groups of organisms.

The committee directed EOC staff to organize a balanced panel of scientists and science educators to advise the Academic Standards and Assessment Subcommittee, a standing subcommittee of the EOC. Staff is consulting with individuals within the state and national science community and plans to have panelists identified as soon as possible. Although a date has not yet been determined the panel discussion will be open.

A recommendation will emerge from the subcommittee level, and will be presented to the EOC at its February 13, 2006 meeting.

The EOC has authority (Section 59-18-360) to *approve* or *disapprove* recommended revisions arising from the cyclical review process. The EOC does *not* have the authority, nor has the committee suggested in Monday's decision, to rewrite or revise any content standard or indicator.

*See*, EOC Statement Regarding Science Content Standards, dated December 15, 2005.

The State Board of Education met on December 14, 2005 to consider the EOC's action of December 12. An issue arose with respect to the Biology portion of the revised Biology Standards. Rather than accepting these Biology Standards approved by the EOC, the State Board of Education instead voted 11-5 to keep in place the 2000 Biology Standards, pending EOC action concerning the four indicators under the B-5 standard, consideration of which had been deferred by the EOC. By way of explanation, the proposed Biology course contains six Standards with a set of 6-9 indicators which are a part of each Standard. Thus, EOC, according to its Statement, had approved all parts of the Biology Standards with the exception of the four indicators contained within the B-5 Standard. In essence, therefore, the State Board determined that, since the four indicators had not been approved by the EOC, the Biology Standards had not yet been fully ratified or confined by the Oversight Committee. Thus, the State Board of Education reinstated the 2000 Biology Standards, pending action by EOC on the four indicators in question. According to one report, the State Board had, for all practical purposes, determined that "[t]he EOC didn't give us a complete set of (biology) standards and until we get them, we'll continue to use the (current) standards." *Charleston City Paper*, December 21, 2005.

As will be discussed more fully below, we conclude that the SBE's action in this regard was in excess of its authority.

As a general matter, it is well recognized that if another body or officer possesses the power of approval or consent and such approval is given, the matter becomes final and cannot be withdrawn or revoked. *See*, 78 C.J.S. *Schools and School Districts* § 41 [where the approval or assent of the district trustees or board is required to a petition seeking the creation or alteration of a district, a material change in the petition after its approval renders the proceedings void]; 100 C.J.S. *Workers' Compensation* § 766 [a workers' compensation agreement, once approved, is, in effect, the equivalent of a final order, decree or adjudicated award by the approving body, and has been described as a "virtual judgment."]; *Waring v. Bertram*, 75 S.W. 222 (Ky. 1903) [alteration in the petition, after approval, was fatal to the validity of the proceedings]; *Tice v. Guggisberg*, 160 P.2d 938 (Kan. 1945) [where boundaries are approved by proper authorities, the action on the proposal is final, and thereafter the board is without authority to rescind its previous action and withdraw its approval]; *McBride v. Osborn*, 59 Ariz. 321, 127 P.2d 134 (1942) [Governor may withdraw appointment at any time prior to Senate approval].

Moreover, we have previously addressed the role of the EOC with respect to the Standards approval process and whether the Oversight Committee "must give prior consent to standards and assessments adopted by the State Board of Education under S.C. Code Ann. § 59-18-320(D)." See *Op. S.C. Atty. Gen.*, May 24, 2002. As noted above, this provision states that

[a]ny new standards and assessments required to be developed and adopted by the State Board of Education, through the Department of Education, must be developed and adopted upon the advice and consent of the ... Committee.

In the May 24, 2002 Opinion, our analysis of this provision was as follows:

[t]his provision is similar to a number of statutes that provide for appointments by the Governor upon the advice and consent of the Senate. See, eg. §8-13-310(B)(Supp. 2001) (Ethics Commission) and §13-1-30 (Supp. 2001) (Secretary of Commerce). I believe that customary practice is that the Governor chooses the individual to be appointed and then the Senate gives its advice and consent. This construction was recognized in a prior Opinion of this Office, as follows:

... As a general rule, "an appointment to office is made and is complete when the last act required of the person or body vested with the appointing power has been performed." *Op. Atty. Gen.*, February 19, 1980, quoting 63 Am.Jur.2d, *Public Officers and Employees*, § 99. See also, *Op. Atty. Gen.*, December 7, 1987. The rule is equally applicable to the situation where an appointment is made upon the advice and consent of the Senate. In that specific context, it has been written:

Where an appointment is made as the result of a nomination by one authority and confirmation by another, the appointment is not valid and complete until the action of all bodies concerned has been taken.

67 C.J.S., *Officers*, § 42. . . .

And in *Harrington v. Pardee*, 1 Cal.App. 278, 82 P. 83, the Court was of the view:

As to the trustees of this home, the Governor cannot appoint, when the Senate is in session, without the 'advice and consent' of that body. In all such appointments the first step to be taken is the suggestion by the Governor to the Senate of the name of a person for the office, and to ask the advice of the Senate, and for its consent for him to appoint

such person; the second step is the advice and consent of the Senate which is manifested by a resolution certified to the Governor and to the Secretary of State, . . . .

Op. No. 89-72, *Ops. Atty. Gen.* (July 17, 1989). See also, Op. No. 4542, *Ops. Atty. Gen.* (December 13, 1976)(appointments to fill vacancies in terms of probate judges with advise and consent).

Section 59-18-320(D) indicates no intention to deviate from this practice of the advice and consent following the Governor's choice of the individual to be appointed, or in the instant case, the adoption of standards. Accordingly, the prior consent of the Oversight Committee did not have to be obtained by the State Board.

Thus, in the May 24, 2002 Opinion, we likened the role of the EOC to that of the Senate in an "advice and consent" context. We noted that the appointment was "complete" upon the advice and consent of the Senate, as manifested by a resolution certified to the Governor and Secretary of State. This being the case, once EOC approved everything but four of the seven indicators under Standard B-5, following two favorable readings by the State Board of Education, we deem the EOC's action final on these matters (except the four indicators). Accordingly, in our view, the State Board of Education had no authority to "reinstate" the 2000 Biology Standards.

We recognize that the State Board of Education considered all of the Biology Standards as one and that these Standards should not be considered paragraph-by-paragraph or in "seriatim" fashion. While we certainly respect the State Board's position in this regard, the Board is not authorized to make this determination. Moreover, we have stated above, the Education Oversight Committee has been delegated broad authority to perform an "oversight" role pursuant to the Education Accountability Act. As we concluded in *Op. S.C. Atty. Gen.*, November 24, 1998, the General Assembly has constitutionally delegated considerable discretion to the Legislative Oversight Committee even if such powers "place authority in the Committee to review or approve decisions or recommendations made by the State Board of Education and/or the Department of Education, the latter, of course, which is under the auspices and direction of the Superintendent of Education, a constitutional officer elected by the people."

Of course, as a general matter, it is well recognized that administrative agencies possess discretion in the area of effectuating the policy established by the Legislature in the agency's governing law. As our Supreme Court has recognized, "construction of a statute by the agency charged with executing it is entitled to the most respectful consideration [by the courts] and should not be overruled absent cogent reasons." *Op. S.C. Atty. Gen.*, October 20, 1997, quoting *Logan v. Leatherman*, 290 S.C. 400, 351 S.E.2d 146, 148 (1986). The Courts have stated that it is not necessary that the administrative agency's construction be the only reasonable one or even one the court would have reached if the question had initially arisen in a judicial proceeding. *Ill. Commerce Comm. v. Interstate Commerce Comm.*, 749 F.2d 825 (D.C.Cir. 1984). Typically, so long as an

administrative agency's interpretation of a statutory provision is reasonable, we defer to that agency's construction.

Here, we have no reason to question the EOC's decision to consider the Biology Standards on a *seriatim* basis. Section 59-18-360 simply states that "[a]fter each academic area is reviewed, a report on the recommended revisions must be presented to the Education Oversight Committee for its *consideration*. After approval by the Education Oversight Committee, the recommendations may be implemented." (emphasis added). The term "consider" or "consideration" means "to fix the mind on, with a view to careful examination." *Black's Law Dictionary* ("Consider") (4<sup>th</sup> ed.). Clearly, "careful examination" could include a *seriatim* analysis of the Biology Standards, an approach which is clearly an authorized parliamentary option. Finally, given the function of the EOC as an "oversight" body, the Committee has, in our view, been designated by the Legislature as the body which is in the best position to make such a determination. Neither the State Board, nor this Office, may "second guess" that determination.

Of course, it is not uncommon to delete certain parts or portions of a curriculum or course of study as part of the authorization or approval of such course or curriculum. It is well recognized that school authorities possess broad discretion in approving a curriculum or course of study. *See, Parsippany-Troy Hills Ed. Assn. v. Bd. of Ed. of the Township of Parsippany-Troy Hills*, 188 N.J. Super. 161, 457 A.2d 15 (1983). [determination of curriculum is discretionary decision]. Such discretion includes the ability to delete or defer approval to certain portions of the curriculum. Without this broad discretion, EOC's role in the approval process would constitute little more than a rubber stamp approval, on the one hand, or a complete disapproval resulting from the most minor deletion, on the other.

This reasoning is further confirmed by the use of the word "approved" in § 59-18-360. The power to "approve," of course, includes the power to disapprove. *Powers v. Isley*, 183 P.2d 880, 884, 885, 886 (Ariz. 1947). Statutes which vest "approval" authority normally imply discretion and judgment to be exercised to sanction or reject the matter submitted; the very act of "approval," unless limited by the context of the statute in question, imports the act of passing judgment and the use of discretion, and a determination as a deduction therefrom, and does not contemplate a ministerial act. *Oahe Conservancy Subdistrict v. Janklow*, 308 N.W.2d 559 (S.D. 1981). The word "approval" implies the exercise of sound judgment, practical sagacity, wise discretion, and *final direct affirmative sanction*. *Leroy v. Worcester St. Ry. Co.*, 287 Mass. 1, 191 N.E. 39 (1934) (emphasis added). The question of whether or not there has been approval or disapproval of a matter is a question of fact. *See, State v. Sherman*, 63 N.D. 9, 245 N.W. 877 (1932).

In this instance, the EOC's Statement of December 15, 2005 indicates that the EOC approved ("voted to recommend adoption") the proposed revised Biology standards with the exception of only four indicators contained within one Standard (B-5). The EOC must be deemed to have broad leeway because, otherwise, even the deletion of a single word could be deemed as a "non-approval," thereby frustrating a true "approval" process. Absent a showing of abuse of discretion, a court would defer to the EOC's conclusion. So do we. By such approval, the EOC presumably has exercised

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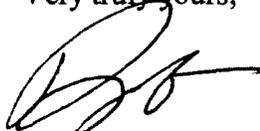
wise and prudent discretion, and its action thereupon is final with certain very limited exceptions. This being the case, the State Board of Education possesses no authority to impose the 2000 standards unilaterally.

### Conclusion

Pursuant to the Education Accountability Act, the State Board of Education is required to conduct a cyclical review by academic area of state standards and assessments to insure that such standards and assessments are maintaining high expectations for learning and teaching. § 59-18-360. The Oversight Review Committee is charged with the responsibility of giving its approval to such proposed standards and assessments and, upon approval, the revised standards and assessments are to be implemented. It is our opinion that the EOC's action of December 12, 2005 relating to the proposed revised Biology standards constituted an approval of those standards with certain limited exceptions. Both the EOC, in its Statement, as well as the State Board of Education's Synopsis Agenda/Executive Summary agree that the EOC "approved" the South Carolina Science Academic Standards, with the exception of the four standard indicators relating to the B-5 Biology standard.

Accordingly, in our view, the State Board of Education did not possess the authority unilaterally to reinstate the 2000 Biology standards. In other words, the State Board does not possess the authority to make its own determination that the EOC's action does not constitute a complete approval of the proposed revised standards, and thus unilaterally impose the 2000 standards in their place. Such action circumvents the EOC's role of "approval" of revised standards because, otherwise, even if the EOC deleted a word or sentence, such action could be deemed to constitute a "non-approval" or "disapproval." Only a court finding that EOC has abused its discretion in requiring further study as to certain indicators may conclude that the EOC's action is invalid. Otherwise, the EOC's action is final.

Very truly yours,



Robert D. Cook  
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