

7349 Liberty



The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON  
ATTORNEY GENERAL

May 24, 2002

The Honorable Mike Fair  
Member, South Carolina Senate  
P.O. Box 142  
211 Gressette Senate Office Building  
Columbia, SC 29202

The Honorable Thomas G. Keegan  
Member, South Carolina House of Representatives  
434-B Blatt Building  
Columbia, SC 29211

The Honorable William C. Mescher  
Chairman, Senate General Committee  
P.O. Box 142  
303 Gressette Senate Office Building  
Columbia, SC 29202

Gentlemen:

Each of you have requested the Opinion of this Office as to whether the Education 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) (Supp. 2001) of the Education Accountability Act. 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.” (emphasis added).

This 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

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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).

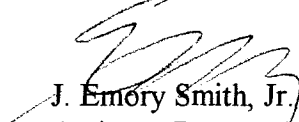
Section 59-18-320(D) indicates no intention to deviate from this practice of the advice and consent following the Governor's choice of the individual to be appointed, or in the instant case, the adoption of standards. Accordingly, the prior consent of the Oversight Committee did not have to be obtained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

This letter is an informal opinion. It has been written by the designated Assistant Deputy Attorney General and represents the opinion of the undersigned attorney as to the specific questions asked. It has not, however, been personally reviewed by the Attorney General nor officially published in the manner of a formal opinion.

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If you have further questions, please let me know.

Yours very truly,

  
J. Emory Smith, Jr.  
Assistant Deputy Attorney General