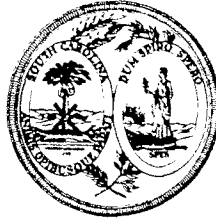


6591 Library



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

November 24, 1998

The Honorable Mike Fair
Senator, District No. 6
P. O. Box 14632
Greenville, South Carolina 29610

Re: Informal Opinion

Dear Senator Fair:

You have asked about "the constitutionality of the General Assembly placing an appointed board in the position to have authority over the State Board of Education, the State Superintendent of Education, and/or the State Department of Education. You note that the "General Assembly passed an accountability act that appears to have given the Education Oversight Committee the authority to direct the State Superintendent of Education and the State Board of Education to do certain things." Your question is whether this violates the Constitution of South Carolina.

Law / Analysis

The issue you have presented concerns the "South Carolina Education Accountability Act of 1998", enacted by Act No. 400 of 1998 and codified as part of Chapter 18 of Title 59 of the South Carolina Code (1976 as amended). The Act took effect on June 10, 1998. The General Assembly found, in enacting the Accountability Act, 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

Request Letter

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.

Section 59-18-100. Section 59-18-20 defines the Oversight Committee as the Education Oversight Committee established in § 59-6-10 of the Code. Act No. 400 amends § 59-6-10 to compose the Education Oversight Committee of the following persons:

- (1) Speaker of the House of Representatives or his designee;
- (2) President Pro Tempore of the Senate or his designee;
- (3) Chairman of the Education and Public Works Committee of the House of Representatives or his designee;
- (4) Chairman of the Education Committee of the Senate or his designee;
- (5) Governor or his designee;
- (6) Chairman of the Ways and Means Committee of the House of Representatives or his designee;
- (7) Chairman of the Finance Committee of the Senate or his designee;
- (8) Five members representing business and industry who must have experience in business, management, or policy to be appointed as follows: one by the Governor, one by the President Pro Tempore of the Senate, one by the Speaker of the House, one by the Chairman of the Senate Education Committee, and one by the Chairman

of the House Education and Public Works Committee;
and

- (9) Five members representing public education teachers and principals to be appointed as follows: one by the Governor, one by the President Pro Tempore of the Senate, one by the Speaker of the House, one by the Chairman of the Senate Education Committee, and one by the Chairman of the House Education and Public Works Committee.

General duties of the Education Oversight Committee are entailed in § 59-6-10, as amended, to include the responsibility to

- (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 the programs;
- (4) recommend Education Accountability Act and EIA program changes to state agencies and other entities as it considers necessary.

In addition, the Act makes the Committee a centerpiece for accountability reform by delegating a number of duties and responsibilities to the Committee throughout the Act. Among these is the review of the statewide assessment program to measure student performance on state standards established by the State Board of Education through the Department of Education pursuant to §59-18-310. Section 59-18-320 requires the Committee to "review the state assessment program and the course assessments for alignment with state standards, level of difficulty and validity, and for the ability to differentiate levels of achievement and [to] make recommendations for needed changes, if any." Following "review and approval by the Education Oversight Committee," the

"standards based assessment of mathematics, English/language arts, social studies and science will be administered to all school students. . . ." Moreover, Subsection (D) of § 59-18-310 mandates that "[a]ny new standards and assessments required to be developed and adopted by the State Board of Education must be developed and adopted upon the advice and consent of the Education Oversight Committee."

The Oversight Committee also reviews and approves the "end of course assessments of benchmark courses" prior to their being administered to all public school students. . . . § 59-18-320 (B).

Throughout the Act, the State Board of Education, as well as the Department of Education, is directed to consult with or work with the Education Oversight Committee with respect to a variety of matters. See, e.g., §§ 59-18-360; 59-18-500 (F); 59-18-710; 59-18-900 (A); 59-18-530 (D); 59-18-1540. In addition the Oversight Committee must approve the guidelines established by the State Board of Education (working with the Department of Education) "outlining eligibility for the grant programs and methods of distributing funds which will be in effect until such time as the school ratings in Section 59-18-900 (B) are implemented."

Moreover, the Act bestows a number of duties upon the Accountability Division of the Education Oversight Committee, pursuant to § 59-6-100. Section 59-6-100 provides as follows:

[w]ithin the Education Oversight Committee, an Accountability Division must be established to report on the monitoring, development, and implementation of the performance based accountability system and reviewing and evaluating all aspects of the Education Accountability Act and the Education Improvement Act.

Section 59-6-110 authorizes the Division to "examine the public education system to ensure that the system and its components and the EIA programs are functioning for the enhancement of student learning." Furthermore, the Division is empowered to

. . . recommend the repeal or modification of statutes, policies, and rules that deter school improvement. The division must provide annually its findings and recommendations in a report to the Education Oversight Committee no later than February

first. The division is to conduct in-depth studies on implementation, efficiency, and the effectiveness of academic improvement efforts and:

- (1) monitor and evaluate the implementation of the state standards and assessment;
- (2) oversee the development, establishment, implementation, and maintenance of the accountability system;
- (3) monitor and evaluate the functioning of the public education system and its components, programs, policies, and practices and report annually its findings and recommendations in a report to the commission no later than February first of each year; and
- (4) perform other studies and reviews as required by law.

The responsibilities of the division do not include fiscal audit functions or funding recommendations except as they relate to accountability. It is not a function of this division to draft legislation and neither the director nor any other employee of the division shall urge or oppose any legislation. In the performance of its duties and responsibilities, the division and staff members are subject to the statutory provisions and penalties regarding confidentiality of records as they apply to students, schools, school districts, the Department of Education, and the Board of Education.

Section 59-6-120 requires the State Department of Education, the State Board of Education, and the schools to "work collaboratively with the Division of Accountability to provide information needed to carry out the responsibilities and duties of its office." Finally, Section 10 of the Act requires the Education Oversight Committee to appoint a task force to review current state programs and policies for parent participation in their children's education.

The gist of your question is whether the delegation of these various duties and functions in the Act (as well as others not enumerated herein) to the appointed Education Oversight Committee and to the Accountability Division of the Committee violates the state

Constitution. Your concern is whether the General Assembly can, by statute, place authority in the Committee to review and 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, the South Carolina General Assembly possesses full power to enact any law not inconsistent with the Constitution. Riley v. Martin, 274 S.C. 106, 262 S.E.2d 404 (1980). It bears repetition that any Act of the General Assembly must be presumed valid and constitutional. No statute will be deemed to infringe the Constitution unless its constitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). Every doubt regarding the constitutionality of an Act of the General Assembly must be resolved favorably to the statute's constitutional validity. More than anything else, only a court, and not this Office may declare an Act to be void for unconstitutionality. A statute "must continue to be followed until a court declares otherwise." Op. Att'y. Gen., June 11, 1997 (Informal Opinion).

Art. XI, § 3 of the South Carolina Constitution (1985 as amended) provides that

[t]he General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State and shall establish, organize and support such other public institutions of learning, as may be desirable.

In Richland County v. Campbell, 294 S.C. 346, 364 S.E.2d 470 (1987), our Supreme Court, in construing Art. XI, § 3, stated that such provision

. . . is similar to a section contained in the South Carolina Constitution in 1946 which required the General Assembly "... to provide for a liberal system of free public schools. . . ." See, Article XI, Section 5, Constitution of South Carolina, repealed by Act 653, Acts and Joint Resolutions of South Carolina, 1954. The trial court noted that in 1946, the South Carolina Supreme Court made the following comments about the provision which are applicable to Article XI, Section 3:

[t]he Constitution . . . places very few restrictions

on the powers of the General Assembly in the general field of public education. It is required to 'provide for a liberal system of free public schools,' but the details are left to its discretion ... Hildebrand, et al., v. High School District No. 32, et al., 138 S.C. 445, 136 S.E. 757 [(1927)].

....

The development of our school system in South Carolina has demonstrated the wisdom of the framers of the Constitution in leaving the General Assembly free to meet changing conditions.

Moseley v. Welch, 209 S.C. 19, 33-34, 39 S.E.2d 133, 140 (1946). Similarly, under Article XI, Section 3, the framers of the Constitution have left the legislature free to choose the means of funding the schools of this state to meet modern needs. In the EFA and related laws, the General Assembly has chosen a valid means of providing for education in this State through the use of the shared funding plan.

364 S.E.2d at 472.

Applying this standard, it is my opinion that Act No. 400 would pass constitutional muster. Nothing in the State Constitution appears to preclude placing certain supervisory and approval responsibility in the Education Oversight Committee, even where such involved the elected Superintendent of Education. While Art. XI, § 2 of the Constitution designates the Superintendent of Education as the "chief administrative officer of the public education system of the State", and Art XI, § 1 creates the State Board of Education, the latter provision also states that the State Board "shall have such powers and duties as the General Assembly shall specify by law." Moreover, Art. XII, § 1 provides that

[t]he health, welfare, and safety of the lives and property of the people of this State and the conservation of its natural resources are matters of public concern. The General Assembly shall

provide appropriate agencies to function in these areas of public concern and determine the activities, powers, and duties of such agencies.

As well, it should be noted that educational boards and administrative officers have no inherent powers – only those powers granted them by the Constitution and Legislature. State Bd. of Ed. v. Honig, 16 Cal. Repr. 272, 13 Cal. App. 4th 720 (1993). Moreover, I am unaware of any common law powers of the State Superintendent of Education. Thus, the General Assembly possesses very broad constitutional authority and extremely wide latitude to implement Art. XI, § 3 and to place authority in whatever board or committee it sees fit to fulfill the Legislature's constitutional obligations thereunder.

In addition, I cannot see where the Legislature has unlawfully delegated any powers to the Education Oversight Committee. See, Op. Atty. Gen., Op. No. 85-81 (August 8, 1985); Op. Atty. Gen., Jan. 24, 1984. In the latter Opinion, we commented as follows in this regard:

[i]t is well-settled that, pursuant to Art. I, § 8, the Legislature may not delegate its power to make laws. Bauer v. S.C. State Housing Authority, 271 S.C. 219, 246 S.E.2d 869 (1978). However, it is equally axiomatic that . . . in enacting a law complete in itself [the Legislature] . . . may authorize an administrative agency or board 'to fill up the details' by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose. . . 'However, it is necessary that the statute declare a legislative policy, establish primary standards for carrying out, or lay down an intelligible principle to which the administrative officer or body must conform, with a proper regard for the protection of the public interests and with such degree of certainty as the nature of the case permits, and enjoin a procedure under which, by appeal or otherwise, both public interests and private rights shall have due consideration' . . . 271 S.C., supra at 232, quoting S.C. Highway Dept. v. Harbin, 266 S.C. 585, 594, 86 S.E.2d 466 (1955). See also, Davis v. Query, 209 S.C. 41, 39 S.E.2d 117 (1946); State v. Taylor, 223 S.C. 526, 77 S.E.2d 195 (1953); Cole v. Manning, 240 S.C. 260, 125 S.E.2d 621 (1962). The Supreme Court of South Carolina has further noted

that

The degree to which a legislative body must specify its policies and standards in order that the administrative authority granted may not be an unconstitutional delegation of its own legislative power is not capable of precise definition. There are many instances where it is impossible or impracticable to lay down criteria or standards without destroying the flexibility necessary to enable the administrative offices to carry out the legislative will . . . where S. C. State Hwy. Dept. v. Harbin, 226 S.C., supra at 595. Especially is great leeway essential discretion ' . . . is necessary to protect the public . . . health, safety and general welfare.' Cole v. Manning, 240 S.C., supra at 265. Accordingly, the Court has fashioned the following guideline: a statute ' . . . which in effect reposes an absolute, unregulated and undefined discretion in an administrative body bestows arbitrary powers and is an unlawful delegation of legislative powers.' Bauer v. S.C. State Housing Authority, 271 S.C., supra at 233 quoting, S.C. State Hwy. Dept. v. Harbin, 86 S.E.2d at 471.

See also, State ex rel. McLeod v. McInnis, 278 S.C. 307, 295 S.E.2d 633 (1982) [legislators cannot perform executive functions]. In contrast to McInnis, with respect to the Education Oversight Committee, the majority of members of the Education Oversight Committee are not necessarily composed of members of the General Assembly. See, State ex rel. McLeod v. Edwards, 269 S.C. 75, 236 S.E.2d 406 (1977).

Based, therefore, upon the foregoing authorities, it is my Opinion that Act No. 400 of 1998 would pass constitutional muster and is constitutionally valid.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney

Senator Fair
Page 10
November 24, 1998

General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to be 'RDC', with a long horizontal stroke extending to the right.

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph