IN THE SUPREME COURT
STATE OF GEORGIA

GWINNETT COUNTY SCHOOL DISTRICT, et al.	*	
Appellants,	*	
v.	*	CASE NO. S10A1773
GEORGIA DEPARTMENT OF EDUCATION, et al,	*	
Appellees.	*	

MOTION FOR RECONSIDERATION
BY STATE APPELLEES

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COME NOW the STATE SUPERINTENDANT OF EDUCATION, the GEORGIA DEPARTMENT OF EDUCATION, the GEORGIA CHARTER SCHOOLS COMMISSION, and the individual members of that Commission (all such Appellees appearing in his or her respective official capacity and all collectively referred to herein as the "State Defendants"),[1] and, by and through their counsel, the Attorney General of Georgia, move this Court to reconsider and reverse its ruling of May 16, 2011.

The Court's ruling fundamentally undermines the longstanding role of the State in education. In holding that there is "***exclusive*** local control of general

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[1] The identities of the individually named official capacity Appellees have changed several times since the original actions under appeal, and are referred to herein simply by title. *Cf.* O.C.G.A. § 9-11-25(d). While the Court's order refers to the former office holders by name, the suits are against their offices, not against the individuals. *Cf. Kentucky v. Graham*, 473 U.S. 159, 165-68 (1985).

primary and secondary ('K-12') public education in this State" (Order at p. 2, emphasis added), the Court calls into question the billions of States dollars spent every year on education and the significant role the State has in policy and supervision over systems and teachers. The State has never claimed it has the exclusive authority in education; rather, education law has always been a partnership between the State and local governments.[2]

The State's view, as reflected in statute, regulation, and practice, is that the State, through its actors and officials, provides an overall State-wide role in setting policy and supervising the performance of school districts and teachers (for example, the Professional Standards Commission regularly disciplines teachers who violate state standards for behavior by educators). The day-to-day task of education and the supervision over the performance and conduct of students is the responsibility of individual schools districts and individual schools. There is an extensive statutory and regulatory system built up around this premise, *see, e.g.*,

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[2] As the Court is aware, the State has been sued several times for alleged "inadequacy" in education and has either prevailed or those actions have been dismissed. *See, e.g., McDaniel v. Thomas*, 248 Ga. 632 (1981). The State, in fact, spends billions on education -- by far the largest portion of the State budget (and far more, in real dollars, than was spent at the time of *McDaniel*) -- and devotes extraordinary resources to the effort. Day-to-day educational services are not provided by the State and it monitors (both professionally and through testing) and sanctions their conduct. The State cannot guarantee their proper performance; it can penalize wrong performance or acts below certain standards. The holding of the Court undercuts this fundamental authority of the State.

O.C.G.A. § 20-2-1 *et seq.*, and it is the subject of billions of dollars in annual State funding. All of this is potentially undermined by the Court's ruling.

The commission charter school laws -- O.C.G.A. § 20-2-2080 *et seq.* -- changed nothing about the nature of the responsibility for education shared between the State and local governments. While the State Defendants, as with all other schools, assess performance of schools and teachers, they do not operate the schools.[3] Commission charter schools are "special" within the meaning of the Constitution's "special schools" provision since each charter school has a unique methodology and curriculum in educating its students. *See* O.C.G.A. § 20-2-2080(a). They represent experimental approaches to education that are unlikely to be followed (unless and until proven) statewide or in individual county school systems. *Id.* Indeed, it is the Commission's duty to assess their proposed

[3] This is critical, as Appellants recognized when they filed their actions. Their complaints did not lead with their "special schools" contention but began with the mistaken (indeed, untenable, based on the statutes) claim that in approving charter schools the State was somehow operating a new school system. This is not addressed in the Court's May 16 opinion. But in approving these special schools the State is not operating special schools. And, if the alleged reduction in funding to the Appellants is constitutional – and it is likewise not addressed by the opinion at all – then the Appellants have no standing to challenge the approval of other schools since this does not injure them any more than Gwinnett County could claim that it is injured by actions regarding Bulloch County. Appellants' lack of standing was asserted in the trial court. (*See, e.g.,* R-0191, 0255, 1071 to 1076.) Despite the State Defendants' arguments, standing is just assumed *ipso facto* without comment by the Court's opinion (which also fails to address the State Defendants' other defenses such as those going to the capacity of some of the Defendants to be sued). (*See* R-0191 to 0193, 0254 to 0257, 1071 to 1076.)

charters on a case-by-case basis to see that they meet this calling. O.C.G.A. §§ 20-2-2083(a)(1), 20-2-2085(b).

The State's Constitution does not explicitly prohibit any of this. To the contrary, as the Court well knows, our Constitution ***expressly*** gives the State the power to create special schools. Ga. Const. Art. VIII, Sec. V, Para. VII. To find that the State exceeded its authority in this case, the Court was required to infer for the first time unwritten limitations on otherwise plenary State authority -- despite an unbroken history of the Court interpreting the Constitution in exactly the opposite manner -- as well as to adopt such a limited reading of the "special schools" provision that it might as well be a scrivener's error.

If the Court is concerned that an alternative reading grants the State too much authority, its concern is misplaced; the authority to create special schools does not give the State *carte blanche* to create any school it wants. Nor, in fact, does it limit the power of local school districts. Local school districts are free to operate their schools systems as before, without any change due to the existence of Commission charter schools. The Commission's authority, on the other hand, to approve charter schools is constrained by both statute and regulation. *See, e.g.,* O.C.G.A. § 20-2-2083, 20-2-2085; Ga. Comp. R. & Regs. 160-4-9-.04(5). And, as the State Defendants have stressed, the State -- not just the State Defendants but also the General Assembly -- is also constrained by the obligation that it not act

irrationally in relation to the power it exercises. This, in the context of special schools, means that the State cannot create schools that have no rational relationship or claim on being special schools. (Thus, in the context of a question posed by Justice Hines at oral argument, the State (or the Commission as the State actor) could not approve a "school for linebackers" because such a "school" would have no rational basis or connection to education.)

There is no evidence or law in this case that the school appellants do not serve special purposes. The fact that "any student" might be accepted (even though Ivy Prep indisputably accepts only girls) is a fundamental tenet of equal protection, one of non-discrimination, one that does not undermine the special purpose ***of the school***. Indeed, the ruling focused on the State's refusal to allow commission charter schools to discriminate[4] to find them not "special", which disregards the special and unique educational approach each school may provide, the very point that makes them special to begin with. (*See* opinion at pp. 5-7, 8, 9-13, 18, 20.) "Special" now evidently means a "special student," while our Constitution refers to "special schools." "Special" apparently no longer means a school that offers an experimental and different approach to education than that found in a local school system. (*Id.* at p. 8.)

[4] It is unpleasant but important to note that our State has spent over one hundred years since the Civil War concluded trying to eliminate discrimination by local school districts. A significant part of that process was overcoming opposition by some local school systems to State and federally mandated equality.

Charter schools teach the same subjects as all other school systems but each ***in a different manner***. They are experimental. That is what makes them special. Students in a school district have a choice to go to their ordinary public schools, each which teach in a uniform manner not only throughout that system but in accordance with State policy (until now, at least, since State establishment of policy now may be questioned), or attend instead the special and experimental charter school. Yes, charter schools do compete in a sense with local school systems; charter schools also compete with each other. That is neither bad nor unconstitutional.

Indeed, it is unprecedented that "special schools" are now defined as only schools that teach students and subjects that local school systems do not teach. (*Id.*) Every "special needs" student now can be taught and every vocational subject now can be offered in local schools. Indeed, an enormous amount of effort has been expended in the educational system, as dictated by both federal and state law and policy, to make sure "special needs" students are treated fairly and taught as much as possible in ordinary public schools in as ordinary setting as possible. *See, e.g.*, 20 U.S.C. § 1400 *et seq.* (the "Individuals with Disabilities Act"). There is no subject and no student that falls into the newly-announced definition of "special" as the Court now interprets it. To say that "the 1983 Constitution reflect[s] that 'special schools' were those that enrolled only students with certain

special needs, e.g., adults, deaf or blind children, and those that taught only certain special subjects, e.g., vocational trade schools with jobs-oriented curricula," (*Opinion* at p. 8) leaves the State with no power under the special schools provision at all, because even those special students and special subjects are now taught in local school systems. The Constitution, however, does not refer to "special students" or "special subjects." In fact, reference to special subjects was eliminated in the 1983 Constitution. *Compare* Ga. Const. Art. VIII, Sec. V, Para. VII (1983) *with* Ga. Const. Art. Art. VIII, Sec. V, Par. VII (a) (1976). Our Constitution refers only to "special schools", and nothing in the text or structure of the Constitution precludes a school from being special because of its educational approach. Simple disagreement over policy is an insufficient reason to read in such a limited definition.

Even beyond the consequences of the ruling on Appellee schools and the students that attend them, judicial approaches to analyzing the General Assembly's authority also have been significantly changed. Until this case it was clear in Georgia that the General Assembly was entitled to deference in its determinations and legislative action unless acting contrary to an express constitutional statement. *See Development Auth. of DeKalb County v. State*, 286 Ga. 36, 38 (2009); *Hanson v. State*, 275 Ga. 470, 473 (2002) (opinion by Thompson, J.). Under the Court's order the General Assembly's power has been transformed from one of broad

power unless expressly limited, to one of limited powers that do not exist unless expressly stated in the Constitution. *See, e.g.,* Opinion at p. 2. Such a principle is directly contrary to prior Georgia law. *See, e.g.,* Ga. Const. Art. III, Sec. VI, Para. I (broad power of the General Assembly to legislate); *Fullwood v. Sivley*, 271 Ga. 248, 254 (1999).

Nor is such a limitation historically accurate, as pointed out at length by Justice Nahmias. To the contrary, whatever gloss one may provide on the Constitution's historical purpose, one historical fact is beyond dispute: the Constitution was amended in 1983 removing previously express limitations on the State's special school's power. The established rules of construction require that this change be given force and effect. *Cox v. Fowler*, 279 Ga. 501, 502 (2005); *cf. MCG Health, Inc. v. Owners Ins. Co.*, 288 Ga. 782, 784-85 (2011) (rejecting Court of Appeals imposing requirements in statute that did not exist in statutory text, applying doctrines of *expressio unius est exclusio alterius* and *expressum facit cessare tacitum*). Indeed, that is how "intent" is determined under Georgia law; Georgia (unlike the federal courts) does not plumb "intent" by cherry picking quotes of a few select legislators and claim that speaks for everyone. Indeed, such evidence is not even admissible. *Cf. Jackson v. Delk*, 257 Ga. 541, 543 (1987); *Fulton County v. Dangerfield*, 260 Ga. 665, 667 (1990). "Intent" rather comes from the terms of the law and, when in doubt, from the changes made to the law.

Judicial Council v. Brown & Gallo, LLC, 288 Ga. 294, 296-97 (2011). That law shows an express power to create schools by the State, and it shows an overt *elimination* in the 1983 Constitution of those limitations.

In addition, the Court upholds a facial challenge to a statute the implementation of which would, in many cases, likely survive even an as-applied challenge. As discussed by Justice Melton and Justice Nahmias, the ruling does not find that the Commission is incapable of approving a school that satisfies even the majority's definition of "special". To strike down the entire law anyway – even sections not challenged by Appellants – is implicitly to strike down with it a long line of cases requiring successful facial challenges to demonstrate that the challenged law is incapable of operating constitutionally, and by doing so, to threaten any number of other laws within and without the education context.

The order of the Court is an unprecedented step towards eliminating the State's role in educating Georgia's children, and represents a dramatic departure from long-standing principles of constitutional interpretation. The Court should reconsider its order and affirm the trial court.

ARGUMENT AND CITATION OF AUTHORITY

I. THE STATE'S RESPONSIBILITY AND AUTHORITY IN EDUCATION IS CRIPPLED BY THE COURT'S RULING.

Near the beginning of its opinion the Court states its core legal conclusion: "our constitution embodies the fundamental principle of ***exclusive local control*** of

general primary and secondary ('K-12') public education in this State" (Order at pp. 1-2, emphasis added). The Court elaborates throughout the opinion: "[a portion of the constitution constituting the local role] continues the line of constitutional authority, unbroken since it was originally memorialized in the 1877 Constitution of Georgia, granting local boards of education the ***exclusive*** right to establish and maintain, i.e., the ***exclusive control over***, general K-12 public education" (*id.* at p. 2, emphasis added); "[b]y providing for local boards of education to have ***exclusive control*** over general K-12 schools, our constitutions, past and present, have limited governmental authority over the public education of Georgia's children to that level of government closest and most responsive to the taxpayers and parents of the children being educated" (*id.* at p. 3, emphasis added); "local boards of education have the ***exclusive*** authority to fulfill one of the 'primary obligation[s] of the State of Georgia,' namely, '[t]he provision of an adequate public education for the citizens'" (*id.*, emphasis added); and "Art. VIII, Sec. V, Par. VII (a) cannot be interpreted either as a relinquishment of the historical ***exclusivity*** of control vested in local boards of education over general K-12 schools" (*id.* at p. 8, emphasis added).

The unprecedented finding of exclusive local control over education is at odds not only with the Georgia Constitution but with numerous statutes and regulations and with the overall practice in public education in Georgia. As an

initial matter, the word "exclusive" does not appear in any form in any of the relevant provisions of the Constitution.[5] While it appears once in *McDaniel*, it is used regarding ***the authority of the General Assembly***: the Court recited the ruling of the district court (left undisturbed by this Court) that "the quantum of [public] education provided would be almost ***exclusively*** for the General Assembly to determine...." *McDaniel*, 248 Ga. at 640 (emphasis added).

As for what the Constitution **does** say, it expressly provides that "[t]here shall be a State Board of Education" with "such powers and duties as provided by law." Ga. Const. Art. VIII, Sec. II, Para. I(a), (b). It further provides for a separate State Superintendent of Education (whose powers and duties the Constitution does not specify except as executive officer of the State Board of Education). Ga. Const. Art. VIII, Sec. III, Para. I. And, of course, the Constitution also provides that the General Assembly may provide for special schools, which it expressly may provide for "by law." Ga. Const. Art. VIII, Sec. V, Para. VII. The latter provision is in the section of the Constitution's education article entitled "Local School Systems." Ga. Const. Art. VIII, Sec. V. The existence of the State Board,

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[5] For that matter, the General Assembly did know how to use the word "exclusive" and did so elsewhere in Article 8, despite declining its use relative to local school systems. See Ga. Const. Art. VIII, § IV, Para. I(b) ("The board of regents shall have the exclusive authority to create new public colleges...."). Of course, "the venerable principle, '*Expressio unius est exclusio alterius*'" means "the express mention of one thing implies the exclusion of another." *MCG Health, Inc. v. Owners Ins. Co.*, 288 Ga. at 784-85.

Superintendent, and special schools power within local schools systems makes it plain on the face of the Constitution that local school systems do not have exclusive power or authority over K-12 public education.

The State, of course, spends many billions of dollars each year supporting K-12 public education. In addition to providing by law the powers and duties of the State Board and the Superintendent, O.C.G.A. §§ 20-2-1 to 20-2-38, it regulates the election and conduct of local boards of education and school superintendents, O.C.G.A. §§ 20-2-50 to 20-2-71, 20-2-100 to 20-2-113, licenses teachers and regulates their conduct, O.C.G.A. §§ 20-2-880 to 20-2-989.20, sets policy regarding and regulates the pedagogical practices of local public schools, O.C.G.A. §§ 20-2-130 to 20-2-324, regulates school financial practices, O.C.G.A. § 20-2-390 to 20-2-491, regulates school contracts, facilities, and property. O.C.G.A. §§ 20-2-500 to 20-2-660, and provides uniform laws for school attendance and conduct by students, 20-2-670 to 20-2-780. Within the confines of this authority the State also provides detailed testing regimens and advancement and graduation requirements, and monitors the performance of school systems to determine their compliance and success. It is not a secret that a number of school systems have recently failed to satisfy the State's or non-State accreditation bodies' exacting standards, and the State through its various offices seeks compliance.

The bottom line, though, is that both in law and in practice local school systems do not have exclusive authority over K-12 public education. To hold otherwise, as the Court now does expressly, is a sea change in Georgia's education law of proportions so great that they render overstatement impossible.

The provision of education in Georgia until now has been a partnership between local schools and the State. Local schools and school systems are responsible for the day-to-day provision of education. They hire and fire teachers. They determine the hours and days their schools are in session as long as they meet state-wide minimums. They determine what classes are offered and to which students are assigned, who teaches them, and ultimately they are responsible for what their students learn. The State does not have day-to day contact with students; it cannot take responsibility for a school system's failure to provide its students an adequate education, for in those instances where an individual school system fails it has differentiated itself from the many other successful school systems in Georgia.

The State's responsibility is to set overall school policies and regulate schools, school systems, and their teachers. It determines performance on state wide tests and assesses not only student performance, but the performance of teachers, schools, and school systems. It does so not only in compliance with State law and regulation, but in compliance with federal law.

The unprecedented notion that "local school systems have exclusive authority over K-12 public education" is the lynchpin of the Court's holding. It is the grounds on which the General Assembly's power to create "special schools" is supposedly limited, for to create such schools would supposedly trod on local authority. But the mere fact that the Constitution expressly allows for the creation of "special schools" removes any claim for exclusivity in local authority (even without everything else just recited above).

The Charter Schools Commission is not a new, completely independent educational body created by law. It answers, rather, to the State Board of Education, a constitutionally established body, by the express requirement of statute. O.C.G.A. §§ 20-2-2082(b), 20-2-2088. It works in conjunction with the State's Department of Education.[6] O.C.G.A. §§ 20-2-2082(a), 20-2-2090. It is not a "school system" any more than the Department or Board are a "school system." It is, rather, a chartering body to assesses and monitor the creation of independent schools, each which have their own, unique approaches and criteria. It does not operate any school day-to-day. Its relation *vis-a-vis* individual schools is no different than the State's other educational functions.

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[6] The Department of Education itself is not a separate legal entity with the power to sue or be sued under Georgia law. *See* O.C.G.A. § 20-2-1 *passim* (no provision establishing the Department). It is, rather, the administrative arm of the State Superintendent and Board of Education.

Charter schools provide unique, special educational opportunities for the students who choose to attend them. As the General Assembly found:

> Charter schools provide valuable educational options and learning opportunities while expanding the capacity of this state's system of public education and empowering parents with the ability to make choices that best fit the individual needs of their children ...

O.C.G.A. § 20-2-2080(a)(2).

It is the nature of the unique educational approach offered by each charter school that makes it a "special school." "Special schools" are, in fact, exactly what they are. Their existence does not change how any local school system must practice. Some local school systems may be offended by competition, but there is no law prohibiting such competition. There is not a word in the Constitution that says local school systems have some sort of unquestionable monopoly on education. Until this Court ruled May 16, no provision of the Constitution, no statute, and no ruling of this or any other Georgia court granted local systems exclusive authority over K-12 public education. The Supreme Court should reconsider its May 16 opinion and affirm the trial court.

II. THE COURT'S RULING ABANDONS WELL ESTABLISHED CANONS OF CONSTITUTIONAL INTERPRETATION IN GEORGIA

The Georgia Constitution provides

> The General Assembly shall have the power to make all laws not inconsistent with this Constitution, and not repugnant to the Constitution of the United States, which it shall deem necessary and proper for the welfare of the state.

Ga. Const. Art. III, Sec. VI, Para. I.

The General Assembly has authority to act unless it contravenes an express provision of the State or federal constitution. There is no provision offended in this case. Instead, the Court creates from whole cloth "exclusive" local control and strikes down a lawful exercise of authority by the General Assembly.

But the language of the Constitution itself should have resolved this case. In critical relevance to this case it does provide express authority:

> The General Assembly may provide ***by law*** for the creation of special schools ***in such areas as may require them*** and may provide for the participation of local boards of education in the establishment of such schools ***under such terms and conditions as it may provide*** ...

Ga. Const. Art. VIII, Sec. V, Para. VII (emphasis added).

The Court's May 16 opinion does not address most of the terms of this constitutional provision. Yet this portion of the Constitution expressly provides that special schools may be created "by law" and, therefore, by statute; that is, as the General Assembly determines they are needed. It expressly says they may be created "in such areas as may require them," again a grant of discretion to the General Assembly to determine whether an ***area*** requires them. And it provides that they may be created, and, specifically, local school boards allowed (or disallowed) from participating "under such terms and conditions as it [the General