

**OUT OF COMMISSION?**

**Georgia's Charter Schools after *Gwinnett County School District v. Cox***

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**I. INTRODUCTION**

In May 2011, a sharply divided Georgia Supreme Court, after months of consideration, issued its decision in a highly publicized case in which the Gwinnett County School District, joined by six other school systems, challenged the constitutionality of the Georgia Charter Commission Act (O.C.G.A. § 20-2-2080 *et seq.*). Both before and after the Court's decision striking down the Act (*Gwinnett County School District, et al. v Cox, et al.*, \_\_ Ga. \_\_; Case No. S10A1773, May 16, 2011), much was written and said about the importance and potential impact of the case on the future of charter schools in Georgia and elsewhere. The decision itself, and even the four Justices who joined in the majority opinion, have been subject to severe criticism from charter advocates, some members of the General Assembly, and from the dissenting Supreme Court Justices.<sup>1</sup>

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<sup>1</sup> Almost immediately after the decision was published, charter school supporters held a rally at the State Capital to protest the decision (<http://www.ajc.com/news/hundreds-protest-overturning-of-948977.html>, May 17, 2011). Calls came forth quickly to amend the Georgia Constitution to reverse the outcome of the Court's decision and Governor Nathan Deal announced that he would support such an amendment. (<http://savannahnow.com/news/2011-06-17/deal-vows-help-save-state-approved-charter-schools#.TrV6B RRzKs>, June 16, 2011). Senator Fran Millar, Chairman of the Senate Education and Youth Committee, warned the majority Justices that "[t]he voters may also reconsider whom they elect to our highest court when given a future opportunity." (<http://norcross.patch.com/articles/ivy-preparatory-academys-future-still-undecided-2>, June 14, 2011.)

Within the context of the Supreme Court's decision in the *Gwinnett County School District* case, this paper will (1) summarize the existing Georgia laws relating to charter schools (including descriptions of the different types of charter schools); (2) provide some information about the number and locations of the various types of charter schools in the state; and (3) identify some of the likely short-term and long-term legal, political and educational implications of the Supreme Court's decision.

## **II. CHARTER SCHOOLS: A WORKING DEFINITION**

The typical characteristics of a charter school are that (a) it is created and operates under the terms of a "charter," which is basically a contract between the school organizers and an authorizing governmental entity; (b) it is funded in whole or in part with public money; (c) it is exempt from certain statutory and regulatory requirements that apply to regular public schools; and (d) students attend such a school as a matter of parental choice.

Some characteristics that are often generally ascribed to charter schools are not universal among them. For example, charter schools may or may not have unique missions or curricula, employ innovative teaching methodologies or offer extended school hours. They may or may not target specific groups of students in terms of socio-economic factors, areas of academic or extracurricular interest, gender, or disability. Teachers in charter schools may or may not have tenure rights or collectively bargained contracts or be subject to a particular state's teacher certification requirements. In short, charter schools can be as different as the governing statutes and the terms of the applicable charter may allow. A charter school may incorporate a unique and radically innovative educational services delivery model or its methods and operations may be indistinguishable from the most traditional neighborhood school. The unifying factor is that all charter schools have been granted, and have agreed to be bound, by charters issued by an authorized governmental entity.

### **III. VARIETIES OF CHARTER SCHOOLS IN GEORGIA**

The Georgia statutory law recognizes four distinct categories of charter schools: local charter schools (which includes both "start-up" charters and "conversion" charters), charter system schools, state chartered special schools and Commission charter schools. The latter of these (Commission charter schools) were held to be unconstitutional in *Gwinnett County School District v. Cox*. At least until such time as the Georgia Constitution might be amended, commission charter schools have therefore ceased to operate in the state. The constitutionality of the large majority of the state's charter schools (including all local start-up and conversion charter schools, charter system schools, and state chartered special schools) was neither challenged nor directly ruled upon in the *Gwinnett County School District* case.

#### **a. Local Start-up Charter Schools**

The majority of charter schools in Georgia are established through charters initially approved and granted by local boards of education. "Start-up" charter schools include all charter schools that did not exist as regular local public schools prior to being granted their receiving charters. Charter schools that previously operated as local public schools are known as "conversion" charter schools and will be discussed in the following section. In Georgia, a start-up charter must have successfully petitioned for the issuance of a charter by the local board of education in which the school is located. The local board must vote to approve or deny the charter petition within 60 days of its submission. O.C.G.A. § 20-2-2064 (a). The charter must also be approved by the State Board of Education after that Board has received and considered recommendations from the Charter Advisory Committee established by O.C.G.A. § 20-2-2063.1.

According to the Georgia Department of Education's most recent Annual Report on Georgia's Charter Schools, in 2010, a total of 121 charter schools operated in the state. Of those, approximately 54 percent were start-up charter schools (local or state);

25 percent were conversion charters; and 21 percent were schools in charter systems (discussed below).<sup>2</sup>

A local board's statutory authority to grant (and revoke) local charters is codified by the Charter Schools Act of 1998 (O.C.G.A. § 20-2-2060, *et seq.*). The Charter Schools Act gives local boards the responsibility of considering and voting to approve or deny petitions by individuals or non-profit organizations to operate schools pursuant to charters, which are defined as "performance based contracts" between the local boards and the charter petitioners. The Georgia Department of Education has published guidelines governing the charter petition process, including petition requirements.<sup>3</sup>

The Charter Schools Act prescribes a minimum level of local board funding to be provided to any locally approved charter. Local boards are not statutorily prohibited from providing funding amounts higher than what the statute requires. O.C.G.A. § 20-2-2068.1 (c). Local start-ups must be treated "no less favorably than other local schools" in the system with respect to the provision of funding for "instruction, school administration, transportation, food services, and, *where feasible, building programs.*" O.C.G.A. § 20-2-2068.1 (a) (Emphasis added). Charter advocates have criticized Georgia's statute for not mandating parity in funding local start-up charters for facilities building and maintenance costs. Some charter skeptics have noted that many charter schools receive private foundation grants that, when coupled with allocated government funding, considerably exceeds the per-student funding available for the regular public schools.<sup>4</sup> Local charter schools and their

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<sup>2</sup> The 2009-2010 Annual Report may be found at the DOE's website at [http://public.doe.k12.ga.us/pea\\_charter.aspx](http://public.doe.k12.ga.us/pea_charter.aspx)

<sup>3</sup> *Id.*

<sup>4</sup> Some charter schools that have been most widely recognized for their achievements have benefitted from private funding significantly exceeding the funding available to regular public schools. For example, a study published in 2011 by researchers at Western Michigan University looked at funding received in the 2007 school year by charter schools in the Knowledge is Power Program (or "KIPP"), the largest and most successful charter network in the country. The study found that 25 KIPP schools in the twelve school districts studied received \$771 more per student in *government* funding than regular public schools, plus an additional \$5,760 per student in *private donations*, thus resulting in the

students are included in calculation of a school system's QBE formula earnings. A charter school's receipt of outside private funding does not reduce the local school system's statutory obligation to provide local public funding to the school.

A local school board "shall" grant a charter petition if it meets all legal and regulatory requirements and "is in the public interest," a standard which grants broad discretion to the local board. If the local board denies a petition, it must within 60 days give written notice to the charter petitioners and the State Board of Education of the reasons for the denial of the petition. O.C.G.A. § 20-2-2064 (d).

The initial term of a local charter shall be for not greater than ten years or less than five years, unless the petitioner requests a shorter period. Prior to the end of the initial term, the charter school may petition for renewal of its charter for another period not to exceed ten years. Although the statute does not state so explicitly, the local board should have the same discretion to grant or deny a renewal petition that it had in considering the original petition. O.C.G.A. § 20-2-2067.1 (b). The statute gives the State Board of Education the power to revoke a charter prior to the end of the original term. Before the State Board may terminate a charter, it must hold a hearing and must find that the charter school has violated federal or state law, has materially breached its charter, has been fiscally mismanaged or that its continued operation is not in the best interests of the students or the community. O.C.G.A. § 20-2-2068 (a)(2). Alternatively, the State Board may terminate a charter at the request of a local board that has itself conducted such a hearing and determined that one of those grounds for termination exists. The statute, however, gives the State Board discretion to accept or

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overall funding for KIPP schools exceeding by more than 50 percent the total public funding provided to support the regular schools. (Miron, Urschel, and Saxon, *What Makes KIPP Work? A Study of Student Characteristics, Attrition and School Finance*, at <http://www.edweek.org/media/kippstudy.pdf>, March 2011.) Similarly, the widely acclaimed Harlem Children's Zone charter school program pioneered by Dr. Benjamin Canada includes as a critical component an extensive array of "wrap-around" social services to low income students and families. It is reported that more than two-thirds of the operating budget for the Harlem Children's Zone is derived from philanthropic grants. (<http://millermeps.wordpress.com/2010/10/24/more-on-harlem-childrens-zone-and-geoffrey-canada/>).

reject the local board's request that a charter be terminated. O.C.G.A. § 20-2-2068 (a)(3).

A petitioner for a local start-up charter has no statutory right to appeal a local board's denial of its charter petition to the State Board of Education. The Georgia statute does permit an unsuccessful charter applicant to petition to become a state chartered special school (discussed below), but provides that the granting of a *local charter* cannot occur without the approval of a local board of education.

Depending on the specific terms of the charters granted to petitioners, local start-up charter schools are exempt from many, but not all, legal requirements applicable to regular public schools. The governing statute (O.C.G.A. § 20-2-2065 (b)) includes a list of legal requirements that apply equally to charter schools and regular public schools, including laws related to civil rights; the protection of health and safety of students, employees and visitors; conflicts of interest; and unlawful conduct in or near a public school. Charter schools must operate under the same accountability and student assessment requirements, and many of the state reporting requirements, applicable to other public schools. Charter schools are not exempt from requirements imposed on other public schools by federal law (including, for example, laws relating to education of students with disabilities, the No Child Left Behind Act or the Family Educational Rights and Privacy Act (FERPA)).<sup>5</sup>

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<sup>5</sup> Potentially complex and problematic issues for local school boards are presented when charter schools and charter schools staff fail to meet requirements of federal or state law, as the local school district may face responsibility or liability for acts or omissions of schools which are chartered by, and thus are deemed part of, the local school district. This potential legal responsibility may apply, even though the local board has limited ability to control the actions of, or to sanction legal non-compliance by, charter schools or their staffs. For example, a local school district may be held liable under IDEA for a local charter school's denial of a free appropriate public education to a student with a disability attending the charter school, even if the charter school has the clear obligation under its charter to provide needed special education services. In such a circumstance, a local school district's only recourse might be to institute the charter termination process with the State Board of Education under O.C.G.A. § 20-2-2068, based on the charter school's failure to comply with federal law. The Charter Schools Act, however, gives the local board no unilateral authority to terminate a charter prior to the end of its term, as this can occur only with State Board approval.

Examples of some of the more significant exemptions from state laws that may be available to charter schools include: (1) a charter school may be exempt from teacher certification and Fair Dismissal Act requirements of Georgia law and thus may hire and retain non-certified teachers and need not recognize any statutory "tenure" rights of certified teachers; (2) a charter school is not subject to class size regulations or State rules regarding mandatory school hours or days, curriculum requirements, etc.; and (3) a charter school may develop and implement disciplinary rules, procedures and sanctions that exceed or differ from those applicable under the Georgia Code and need not employ statutory student disciplinary tribunals (although students do maintain their constitutional rights to due process of law).

A local start-up charter school must establish an attendance zone from which resident students will be eligible to attend. All eligible applicants from the attendance zone will be admitted into the school unless the number of applications exceeds the school's designated capacity. In that case, admission shall be through a random process, except that priority may be given to siblings of students already enrolled in the charter school, children of members of the school's governing board, and children of school employees. O.C.G.A. § 0-2-2066 (a).

### **Local Conversion Charter Schools**

A second type of locally chartered school is the local conversion charter. A conversion charter differs from a start-up charter in that, prior to the grant of its charter, the conversion charter had operated as a regular local public school. As with start-up charters, conversion charter schools may enjoy waivers from most requirements of the Georgia school law.

Before a local board may approve a petition for a conversion charter, two public meetings, with at least two weeks advance public notice, must be held -- one for faculty and instructional staff and one for parents/guardians of students of the local school. At both meetings, secret ballot votes are held and a majority of faculty and instructional staff (at one meeting) and a majority of parents (at the other meeting) must approve

proceeding with the charter petition. After these school-level approval votes are completed, the local board then considers and votes whether to approve the conversion charter's petition. As with a start-up charter, final approval by the State Board of Education is required before a conversion charter is granted, and unsuccessful local petitioners have no statutory right to appeal the local board's denial of a petition.

One potentially significant difference exists between the funding of conversion charters and that of start-ups. Possibly because conversion charter schools' buildings and property continue to be owned by local school systems and their operations funded through school district budgets, the building and maintenance exclusion from the requirement of "no less favorable treatment" applicable to start-up charters does not apply to conversion charter schools. O.C.G.A. § 20-2 2068.1 (a).

At the time of its conversion to a charter school, a school attendance zone is established which may, but need not necessarily, be consistent with the prior regular public school's attendance zone. A student residing in the school district who previously attended the pre-conversion public school, but does not reside in the new attendance zone, shall have priority in admission to the conversion charter, in the event that all available spaces in the school are not filled from applicants residing in the attendance zone. O.C.G.A. § 20-2-2066 (a). Students living in the charter's attendance zone are under no obligation to attend the conversion charter school, so it is incumbent on the local school system to devise and arrange a system for school assignments for students who elect to attend a regular public school after the conversion.

Local conversion charter schools constitute the second largest number (behind local start-up charters) of all charter schools in Georgia. According to the State Department of Education's Annual Report on Georgia's Charter Schools (*supra*, at p. v), 25 percent of all charter schools in the State were local conversion charters during the 2010-2011 school year.

## **b. Charter Systems**

In 2007, the General Assembly added another wrinkle to the charter school law by authorizing the conversion of an entire local school system to charter status, upon application by the system and approval of the State Board. Under O.C.G.A. § 20-2-2063.2, a local board seeking to convert the system to charter status must approve and submit a petition to the State Board, which then shall receive recommendations on the petition from the State Charter Advisory Committee. The State Board "shall" approve the petition if it determines that it complies with legal requirements, is "in the public interest" and "promotes school level governance."

Each school within a charter system must have a governing council, which shall include parents, teachers, administrators and "others." The governing council shall be involved in "school level governance," which includes decision-making on personnel, finances, curriculum, operations, student achievement and resource allocation. Although the local board of education still retains responsibility for the management and control of the school system, the Charter Schools Act is virtually silent on the respective roles and authority of the local board viz-a-viz the local governing councils. The statute is likewise silent regarding the allocation and use of QBE funds or locally levied tax revenues for charter system schools; it can only be surmised that the Act was not intended to impact either the amount of funds flowing to the system or the local board's authority over decisions regarding budgeting for the system.

The concept of a "system charter" is peculiar and presents some issues not faced by individual charter schools, whether locally or state chartered.<sup>6</sup> First, what happens

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<sup>6</sup> It is not clear that "charter system" schools even fit within the generally accepted definition of charter schools. The existence of governing councils notwithstanding, charter system schools continue to operate under the control of a locally elected board of education. Moreover, the parent residents of the school district that becomes a charter system do not have the choice, offered in the case of other charter schools, of sending their children to regular public schools, as the only public schools within the district are themselves system charter schools. What the General Assembly really did with this 2007 statute was merely to give local boards a vehicle to opt out of many state regulatory and statutory requirements applicable to all other non-chartered public schools. These "system charter schools" might thus more accurately be called "contract system" or "waiver system" schools.

to any start-up or conversion charter schools already operating within the system that seeks system charter status? The statute gives any such individual charter school the option of continuing to operate in that capacity under its existing charter.

Alternatively, the existing charter may, with approval by the local and state boards, agree to a termination of its charter and then become a system charter school subject to the system's charter. An existing school within a charter system is not prevented from petitioning to become a conversion charter school, governed by its own separate charter and not subject to the system charter, although any such conversion must be approved by both the local and state boards. O.C.G.A. § 20-2-2063.2.

One key difference between charter systems and individually chartered schools is that resident students in those systems do not have the same option of attending any "regular" public schools, as no such schools exist in the charter systems. The charter system concept thus offers none of the purported benefits of choice or competition between schools for student enrollment. As with start-up and conversion charters, charter system schools may be exempted (depending again on the terms of the particular charters) from state requirements regarding, for example, teacher certification, Fair Dismissal Act rights, student disciplinary tribunals, curriculum and class size mandates. The system's charter may, however, include or adopt these or any other state law requirements as its own. Charter systems are subject to the same state student testing and accountability requirements as other public schools in Georgia.

As of the end of 2010, eight local school systems had been approved and were operating as Charter systems. These included four county systems (Floyd, Putnam, Warren and White) and four city systems (Decatur, Gainesville, Marietta and Cartersville). A total of 60 schools, now "charter system schools," operate in those eight systems.<sup>7</sup>

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<sup>7</sup> See "Georgia Charter Systems" at Georgia Department of Education website: [http://public.doe.k12.ga.us/pea\\_charter.aspx](http://public.doe.k12.ga.us/pea_charter.aspx)

### c. State Chartered Special Schools

The 1998 Charter Schools Act anticipated, and set up a mechanism to approve, the granting by the State Board of a charter to an unsuccessful local start-up petitioner that the State Board (contrary to the local board) determines to be worthy of receiving a charter. The Act allows for the granting of such a state charter if the petition is determined to meet all legal requirements and "is in the public interest." The Act provides no other requirements for obtaining a state charter as a "special school" nor does it suggest any limitations on what could be considered a special school, even though the provision of the Georgia Constitution authorizing special schools provides that the General Assembly may create a special school only "in such areas as may require them." Ga. Const. Art. 8, Sec. 5, Par. 7.<sup>8</sup>

In practice, the Act's authorization of state chartered special schools had limited application for the first ten years of the statute's existence and then appeared to have become virtually irrelevant with the passage of the Georgia Charter Commission Act in 2008. The General Assembly had not approved or appropriated funding for state chartered special schools at the same level as it required local school systems to fund their own charter schools. Thus, any charter petitioner unsuccessful at the local level faced the realization that obtaining a state charter as a special school would force the school to operate with significantly lower revenues than local charter schools and regular public schools in the same district.

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<sup>8</sup> Ga. Const. Art. VIII, § 5, ¶ 7, the interpretation of which was critical to the Supreme Court's decision in *Gwinnett County School District v. Cox*, provides as follows (emphasis added):

"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; but *no bonded indebtedness may be incurred nor a school tax levied for the support of special schools* without the approval of a majority of the qualified voters voting thereon in each of the systems affected. Any special schools shall be operated in conformity with regulations of the State Board of Education pursuant to provisions of law. The state is authorized to expend funds for the support and maintenance of special schools in such amount and manner as may be provided by law."

With the passage of the Charter Commission Act, the *raison d'etre* for most of the then-existing state chartered special schools ceased to exist, as the Charter Commission Act created a new and creative mechanism by which the new state Commission charter schools could be funded at even higher levels than locally chartered schools -- and without costing the State an additional penny. Perhaps not surprisingly, the way the General Assembly accomplished this financial wizardry was to take the money to fund these "state schools" out of the local tax revenues that were levied by local boards to fund the operations of the local public schools.

As will be discussed below, the Supreme Court's decision in *Gwinnett County School District v. Cox*, by declaring the Charter Commission Act unconstitutional while not *directly* addressing the status of state chartered special schools, created an opening, and perhaps an incentive, for the state to revive the state chartered special schools mechanism as a vehicle for creation of charter schools that could be authorized at the state level and thus override decisions of local boards. For reasons discussed in the final section of this paper, however, both the Supreme Court's holding and the lengthy dissenting opinion by Justice Nahmias effectively establish that the Supreme Court's opinion leaves no justifiable rationale to support the constitutionality, or continued existence, of state chartered special schools. The decision by the Governor and the State Board of Education to continue -- and even to expand -- creation and operation of those schools in response to the Supreme Court's decision may be politically expedient, but it cannot be legally justified.

#### **d. Commission Charter Schools**

In 2008, the General Assembly enacted the Charter Commission Act. O.C.G.A. § 20-2-2080 *et seq.* The Act created a state-level politically appointed Charter Commission and authorized it to create a new type of "state" charter school that would be funded primarily by local rather than state revenues. The General Assembly vested the Charter Commission with powers traditionally reserved for local boards of education, including the authority to grant, deny, and renew charters; to monitor,

review and evaluate the academic and financial performance of those schools, and to hold the schools accountable for their performance pursuant to the charter and state law. *See* O.C.G.A. § 20-2-2083.

The Charter Commission Act permitted unsuccessful local charter petitioners (or even petitioners who had not sought local charters, as long as they stated an intention of serving students in more than four local school systems) to obtain Commission charters to operate state special schools. O.C.G.A. § 20-2-2085. The Act also established a funding system whereby the total allotment of state and federal funds to a local school system, including state QBE funding, was reduced by an amount “equal to a proportional share of local revenue from the local school system in which the student attending the commission charter school resides[.]” This per-student proportional funding scheme resulted in Commission charter schools having access to locally levied tax revenues that the local system would have otherwise received to educate its students, and did not require the General Assembly to appropriate a single additional dollar to fund these supposed “state” special schools.<sup>9</sup> During the two fiscal years during which Commission charter schools were approved and operating, sixteen such schools had either begun operations or had been approved by the Charter Commission to open in the following school year.

#### **IV. THE SUPREME COURT'S DECISION**

In September 2009, the Gwinnett County School District, joined shortly thereafter by the school systems of Atlanta City, Dekalb County, Bulloch County,

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<sup>9</sup> The Georgia Constitution gives the General Assembly the authority and responsibility to fund special schools and prohibits bonded indebtedness or levying of a school tax for the support of special schools without a local referendum in each of the systems affected. Ga. Const. Art. VIII, § 5, ¶ 7. The plaintiff school systems in *Gwinnett County School District v. Cox* disputed the constitutionality of the Charter Commission Act's funding mechanism under this section of the Constitution. Because the Supreme Court's decision struck down the statute on broader grounds (i.e., that Commission charter schools did not meet the constitutional definition of “special schools”), the Court did not find it necessary to address whether the funding mechanism violated Article VIII's prohibition on use of locally levied taxes to support special schools.

Candler County, Griffin-Spalding County and Henry County, filed suit in Fulton County Superior Court seeking a declaratory judgment that two then-operating Charter commission schools (one in Gwinnett County and one in Bulloch County), as well as schools that had been approved to operate the following year, were not authorized by the special schools provision of the Georgia Constitution and that they had been created by an unconstitutional entity, the Charter Commission. After Superior Court Judge Wendy Shoob ruled in favor of the State defendants that the Charter Commission Act did not violate the Constitution, the school systems appealed to the Georgia Supreme Court. On May 16, 2011, in a 4-to-3 decision, the Supreme Court held in favor of the school systems and declared the Charter Commission Act unconstitutional. *Gwinnett County School District, et al. v Cox, supra.*

The Court's majority opinion, authored by Chief Justice Hunstein, concluded that the Charter Commission Act ran afoul of the Georgia Constitution for two primary reasons. First, the Court held that the schools authorized by the Act were not in fact "special schools" as contemplated by the relevant provision of the Georgia Constitution. After examining the history, including comments by committee members and drafters of the relevant sections of the 1983 Constitution, the Court concluded that "special schools" were intended to mean schools that enrolled only students with certain special needs (including, for example, the Georgia School for the Deaf and School for the Blind and vocational trade schools). The term was not intended, according to the Court, to create "a carte blanche authorization for the General Assembly to create its own general K-12 schools so as to duplicate the efforts of or compete with locally controlled schools for the same pool of students educated with the same limited pool of tax funds." Second, the Court held that the purported authorization of state-created, but locally operating, charter schools, which are not approved by the local boards of education, infringed on the "fundamental principle of exclusive local control" of public education embodied in the Georgia Constitution. Noting that Article VIII, Sec. 5, Par. 1 of the Constitution provides that "Authority is

granted to county and area boards of education to establish and maintain public schools within their limits. . . .," the Court stated that "[n]o other constitutional provision authorizes any other governmental entity to compete with or duplicate the efforts of local boards of education in establishing and maintaining general K-12 schools." Opinion, at 2-3.

In what had to be one of the lengthiest dissenting opinions in the history of the Court, Justice Nahmias blasted his colleagues in the majority, accusing them of "illogical" and "terribly wrong" reasoning and suggesting that the decision "portends dire consequences" for public education law in Georgia. Justice Nahmias asserts at least twice in his opinion that, even though the 1998 law establishing state chartered special schools was not directly challenged by the plaintiff systems, the majority's opinion "will unfortunately have the effect of rendering [those state chartered special schools] unconstitutional." (Nahmias dissent, at 23).

## V. IMPLICATIONS OF SUPREME COURT'S DECISION

Although addressing the validity of only a small fraction of charter schools within the state, the Georgia Supreme Court's decision in *Gwinnett County School District v. Cox* does clarify several important points, including the following:

- a. The Georgia Constitution prohibits the creation by the State of separate charter schools or a separate system of charter schools, or any other type of locally operating public schools, in competition with local public school systems under the authority of elected local boards of education.
- b. The primary responsibility for control and management of public schools in the State rests with the local boards of education.
- c. Although the Constitution authorizes the State to create and fund "special schools" in certain circumstances, such schools are permissible only when they are required to meet the special needs of particular and identifiable categories of students (e.g., deaf, blind, or vocational students).

Although Justice Nahmias's dissenting opinion in *Gwinnett County School District v. Cox*, like some of the public criticism from charter school advocates that followed the decision, tends toward hyperbole, it is difficult to contest his assertion that the Court's opinion leaves no defensible constitutional basis for the continued existence, much less the expansion of, state chartered special schools. As with most appellate decisions, it can be tempting to interpret the effect of a case far beyond what the particular facts and law involved require, and the majority in *Gwinnett County School District v. Cox* expressly noted that state chartered special schools under the Charter Schools Act of 1998 "are not at issue in this appeal and we intimate no opinion as to their [constitutional] status." Nevertheless, the express rationale of the Court's opinion leaves open no plausible convincing argument for the continued constitutional viability of state chartered special schools. If a Commission charter school is not a "special school" because it operates as a separate public school in competition with the local school system and not under the authority of the local board, and because it does not serve the special needs of a particular category of students, then those constitutional defects are not, and cannot be, remedied by the State's granting that same school a charter as a state chartered special school. Yet that is precisely what the State Board of Education did almost immediately after the Supreme Court's decision became final.<sup>10</sup> As of the date of this paper, no school system (or anyone else, to the writer's knowledge) has initiated any legal challenge to the constitutionality of the state chartered special schools. Given the current statutory funding mechanism for those schools, the lack of any legal challenge is understandable, as these schools truly are state funded and local school boards do not suffer the same loss of locally levied tax revenues that was imposed by the Charter Commission Act. As long as the State

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<sup>10</sup> In fact, almost immediately after the State lost its motion asking the Supreme Court to reconsider its May 16th ruling, the State offered Commission charter schools were the option of receiving charters as state chartered special schools and Governor Deal promised \$10 million in additional state funding for these schools, even though no such additional funding had been authorized or appropriated by the General Assembly. ("Eight Charter Schools Get Money from Governor," <http://www.ajc.com/news/eight-charter-schools-get-1016886.html>, July 14, 2011.)

Board of Education insists on continuing to recognize -- and even to extend new charters and additional funding -- to these state chartered special schools, however, the failure of local school systems to challenge this statute is not without risks. It is conceivable that the General Assembly would decide to amend the current statutory funding scheme for state chartered special schools and replace it with one similar to that of the Charter Commission Act, and to resume withholding local revenue amounts from QBE distributions.

## **VI. WHAT'S AHEAD FOR CHARTER SCHOOLS IN GEORGIA**

*Gwinnett County School District v. Cox* marked neither the death knell, nor even a serious injury, to the growth and expansion of charter schools in Georgia. Not only were the impacted schools only a small percentage of all charter schools in the state, but there is no reason to believe that the number of Georgia's local charter schools will not continue to grow as it has over the past ten years. Moreover, most of the Commission charter schools have not closed their doors at all, but have now obtained approval to continue operating either as local charter schools or as state chartered special schools. It also appears extremely likely that a strong push will be made in the upcoming session of the General Assembly to move forward with a proposed constitutional amendment to authorize the very type of charter schools declared unconstitutional by the Supreme Court.

The national charter school movement also appears to be alive and well, and receiving bi-partisan political support from important persons and constituencies. As recently as early as 2010, the charter school movement appeared to be losing some momentum, as significant research began to suggest that charter schools were producing no better results in terms of student achievement than the regular public schools, and in a surprisingly high percentage of cases, were doing worse.<sup>11</sup> It had

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<sup>11</sup> Foremost among the studies showing disappointing results for charter schools was the CREDO Report out of Stanford University in 2009. That report, which included an analysis of charter school

also become apparent that some of the more successful charter schools employed approaches, had additional funding sources, imposed student and parental requirements, or otherwise engaged in practices that could not be "scaled up" so as to be implemented to benefit broader populations or be translated into the regular public school arena.<sup>12</sup>

What appears to have provided a shot in the arm to the charter school movement in the past two years includes what might be described as a media blitz, including two commercially successful and positively reviewed documentary movies (*Waiting for Superman* and *The Lottery*) and several books (including, most recently, *Class Warfare* by Steven Brill) that not only extol the virtues of charter schools, but heap considerable scorn on the public schools and public school teachers in general and teachers' unions in large urban school systems in particular. Coupled with the emphasis on charter initiatives emanating from the federal Department of Education and its "Race to the Top" program, the charter movement remains in its ascendancy.

The charter school movement may also have benefitted from the current "conventional wisdom" that America's students are falling behind the rest of the developed and developing world in terms of educational attainment and that the American public has grown increasingly disenchanted with the public education system. Annual Gallup poll results show, however, that the public's satisfaction levels with the results of the American K-12 educational system in general, and especially of their own children's education within that system, have remained virtually unchanged since at least 2000. For example, 78 percent of parents are "completely" or "somewhat" satisfied with the education their own children are receiving -- the identical percentage that responded positively in the August 2000 poll. In addition,

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results from sixteen states, compared student achievement results of charter school students to demographically similar cohorts of public school students. The CREDO Report concluded that 17 percent of charter schools outperformed their public school peer group, yet 37 percent delivered learning results that were "significantly worse than their students would have realized had they remained in traditional public schools." The remaining 46 percent showed results that were no different from the regular schools. See *CREDO Report* at [www.credo.stanford.edu](http://www.credo.stanford.edu), Executive Summary, p. 1.

<sup>12</sup> See discussion at Footnote 4, *supra*.

Americans have not abandoned the public schools in any significant numbers. The percentage of parents polled whose children attend public schools has declined only two percent (from 86 percent to 84 percent) since 2000; while the percentage attending private schools (9 percent) has not increased at all during that same period. The only significant change has been a growth in the number of respondents who report home-schooling their children.<sup>13</sup>

The success or failure of the forthcoming effort to amend the Georgia Constitution to permit the state to create its own charter schools, with access to locally levied tax revenues, will likely determine whether, going forward, the front lines in the battles over charter schools will be established at the local or state levels. If the Georgia Constitution is amended as proposed by some in the General Assembly, then the State will become the ultimate authority in approving or denying charter schools and in mandating the direction of local tax revenues to fund those schools. Should that occur, the principle of local school board control over local public education, as recognized and affirmed by the Georgia Supreme Court in *Gwinnett County School District v. Cox*, will have been dealt a serious blow.

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<sup>13</sup> See, *Gallup Poll* results at <http://www.gallup.com/poll/1612/education.aspx>.