

**THE CONSTITUTIONALITY OF THE GEORGIA
CHARTER SCHOOLS COMMISSION LAW**

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I.	INTRODUCTION	287
II.	THE EFFECT OF THE COMMISSION STATUTE ON CHARTER SCHOOL APPROVAL AND FUNDING	291
III.	THE CURRENT CONTROVERSY	293
IV.	AN ANALYSIS OF POSSIBLE STATE CONSTITUTIONAL CHALLENGES TO THE COMMISSION.....	295
	<i>A. The Charter Schools Versus Special Schools Challenge</i>	296
	<i>B. The Management and Control and Independent School System Challenges</i>	300
	<i>C. The Sufficient Guidelines Challenge</i>	307
	<i>D. The Funding Challenge.....</i>	312
V.	CONCLUSION.....	320

I. INTRODUCTION

The education landscape in Georgia has changed dramatically over the past several decades. In 1985, the General Assembly passed the Quality Basic Education Act (“QBE”) which, in part, set the stage for school systems across the state to be on a more equal footing relative to education funding.¹ In 1993, the

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General Assembly enacted legislation creating charter schools in Georgia for the first time.² Since the early days of expanding educational opportunities in Georgia, the General Assembly has amended and expanded the state charter school laws more than a half dozen times³ and has, in recent years, continued to expand opportunities for K-12 students by creating additional tax-funded scholarship programs (such as the Special Needs Scholarship in 2007⁴ and the Tuition Tax Credit Scholarship in 2008⁵).

The reform that is the subject of this article and has recently drawn significant criticism is the legislation creating the Georgia Charter Schools Commission (“Commission”) under the auspices of the State Board of Education.⁶ The Commission

shared by Georgia Family Council.

1. O.C.G.A. § 20-2-130 (2009). At the time QBE was created, education spending varied dramatically among districts and schools based on the relative wealth of the citizens in each area comprising the tax base. The Quality Basic Education Act created, for the first time in Georgia, a funding mechanism designed to insure that each student in a public school received a base level of education dollars regardless of where they lived. It also attempted to equalize funding between schools and districts with the goal that students with similar needs would receive funding for their education that was approximately equal.

2. O.C.G.A. § 20-2-2060 (2009). Charter schools are tax funded public schools that operate based on a charter agreement between the charter school, local districts, and the state Department of Education (or between the charter school and Department of Education in the case of *state*-chartered schools). Other than the restrictions within the charter agreement, charter schools are free of most regulations applied to traditional public schools.

3. The law was amended in 1995, 1998, 2000, 2002, 2004, 2007, 2008, and 2009. See a partial listing at GA. DEP’T OF EDUC., GEORGIA CHARTER SCHOOLS FACTS AT A GLANCE, (2004), available at http://www.doe.k12.ga.us/_documents/schools/charterschools/charter_stats.pdf.

4. O.C.G.A. § 20-2-2110 (2009) (providing students with an Individualized Educational Plan (IEP) with a scholarship to attend the public or private school of their choice).

5. O.C.G.A. § 20-2A-1 (2009) (allowing corporations and individuals to donate to private nonprofit organizations which, in turn, give scholarships to students to attend the private school of their choice).

6. H.B. 881, 149th Gen. Assem., 2d Reg. Sess. (Ga. 2008) (as passed), available at http://www.legis.ga.gov/legis/2007_08/versions/hb881_HB_881_AP_11.htm (last visited Mar. 22, 2010). The legislation, known as House Bill 881 (or

was created by the General Assembly, under the constitutional authority granted to it to create special schools,⁷ for the purpose of developing and supporting new state-chartered special schools.⁸ To that end, the powers of the Commission include the ability to approve, renew, or deny charter school petitions;⁹ authorize cosponsors of commission charter schools;¹⁰ and conduct facility and curriculum reviews.¹¹ In addition to these powers, the statute imposes a long list of responsibilities upon the Commission including duties to review charter school petitions, assist in establishing new Commission charter schools, create and promote best practices,¹² create and implement accountability systems, monitor and review academic achievement, and audit the financial records of Commission charter schools.¹³ To those ends, the Commission

H.B. 881) was signed by Governor Sonny Perdue in May of 2008 (and subsequently became law on July 1, 2008). It is codified as O.C.G.A. § 20-2-2080 (2009). *See* Ga. Gen. Assem., 149th Gen. Assem., 2d Reg. Sess., (Mar. 20, 2010) (Ga. 2008), *available at* http://www.legis.ga.gov/legis/2009_10/sum/hb881.htm.

7. GA. CONST. art. VIII, § V, para. VII.

8. O.C.G.A. § 20-2-2080(b)(1) (2009) (stating in pertinent part that the Commission’s “primary focus is the development and support of charter schools in order to better meet the growing and diverse needs of some of the increasing number and array of charter schools in this state . . .”).

9. O.C.G.A. § 20-2-2086 (2009). The Commission is also given authority to accept petitions from currently existing charter schools, whether created by a charter agreement with a local board of education or as a state charter school only. *Id.* The Commission is limited to entering into a charter agreement with an existing charter school at the expiration of the school’s current charter or upon the local system or State Board of Education rescinding or waiving the obligations of the current charter agreement. *Id.*

10. O.C.G.A. § 20-2-2081(3) (2009). A “cosponsor” is defined to mean “a municipality, county, consolidated government, university or college of the board of regents, technical institution of the Technical College System of Georgia, or regional educational service agency which has been authorized by the commission pursuant to Code Section 20-2-2083.” *Id.* Together with the petitioner, the cosponsor works to create and implement the programs offered by the charter school. *Id.*

11. O.C.G.A. § 20-2-2083(a) (2009).

12. O.C.G.A. § 20-2-2083(b)(2) (2009) (stating in part, “[a]t a minimum, the best practices shall encourage the development and replication of academically and financially proven charter school programs”).

13. O.C.G.A. § 20-2-2083(b) (2009).

was given authority to both authorize the creation of charter schools without local school board approval¹⁴ and to provide funding essentially on par¹⁵ with locally-approved charter schools created under the Georgia Charter Schools Act of 1998.¹⁶ The Commission law provides that, in addition to Commission charter schools receiving state and federal funding like locally approved charter schools,¹⁷ Commission charter schools are entitled to receive, pursuant to O.C.G.A. § 20-2-2090(a)(3)(A), a *proportional share* of the money the local system would have spent if the child attending a Commission charter school were still attending a local traditional public school.¹⁸ The law also instructs the Department of Education to deduct the funding allocated to a student attending a Commission charter school from the state funding to the local district.¹⁹ The result of this funding mechanism is that, while

14. Compare O.C.G.A. § 20-2-2083(a)(1) (2009) (allowing for approval of charter school petitions, generally), with O.C.G.A. § 20-2-2085 (2009) (requiring new charter petitions to be submitted to local school boards and the Commission but authorizing the Commission to approve the charter petition even if the local system denies it).

15. O.C.G.A. § 20-2-2090 (2009). The funding mechanism in the Commission statute is considerably different than the one created by the Georgia Charter Schools Act of 1998. See discussion *infra* Part IV.D.

16. O.C.G.A. § 20-2-2060 (2009). The Georgia Charter Schools Act of 1998, as amended, is the most recent iteration of the 1993 charter school law. *Id.* The Georgia Charter Schools Act of 1998 and the statute creating the Georgia Charter Schools Commission are both currently in effect, giving charter petitions multiple avenues for potentially establishing new charter schools. *Id.*; O.C.G.A. § 20-2-2083 (2009).

17. O.C.G.A. § 20-2-2090 (2009). Notably, charter systems, as opposed to individual charter schools, may be provided with additional funding. O.C.G.A. § 20-2-165.1 (2009).

18. O.C.G.A. § 20-2-2090(a)(3)(A) (2009) (emphasis added). This section says, in pertinent part, that the Department of Education shall allocate “[a]n amount determined by the commission for each student enrolled in such school equal to a proportional share of local revenue from the local school system in which the student attending the commission charter school resides; provided, however, that the commission may reduce the amount calculated pursuant to this paragraph based on factors that affect the cost of providing instruction.” *Id.*

19. O.C.G.A. § 20-2-2090(c) (2009). This amount is roughly equivalent to the amount the district would have received for that student under the QBE funding formula. *Id.*

local public school tax dollars are not being paid directly by the local system to the Commission charter school, the financial impact to the local system is substantially similar.²⁰

In the pages that follow, the Georgia Charter Schools Commission law and the controversy that has developed as a result of the approval of the first charter schools under the law will be explored in much more detail. Section II of this article will focus on the effect of the law on how charter schools are approved and funded in Georgia. Section III will focus on describing the controversy that has arisen in the wake of the first charter schools being approved under the new law. Finally, Section IV is devoted to exploring the merits of the state constitutional challenges that have been raised by opponents to the law and showing why each, in turn, should fail. The author concludes that, while the law does dramatically change how charter schools may be approved in Georgia, it should withstand the challenges brought against it under the Georgia Constitution.

II. THE EFFECT OF THE COMMISSION STATUTE ON CHARTER SCHOOL APPROVAL AND FUNDING

The Commission statute's departure from the funding mechanism created by the previous charter school law, the Georgia Charter Schools Act of 1998 (hereafter, "the Act"), is evident when viewed in light of how charter schools are currently approved and funded.²¹ Under the Act, a petitioner wishing to start a charter school is required to first apply to the local board of education in the district where the charter school proposes to operate.²² If the charter application is approved by

20. Under this funding mechanism, local school systems experience a loss in state funding that must be "made up" by local tax dollars.

21. O.C.G.A. § 20-2-2060 (2009). Prior to the creation of the Charter Schools Commission, the Charter Schools Act of 1998 provided the only mechanism through which a charter school could be created absent local school board approval. O.C.G.A. § 20-2-2064.1 (2009). It is important to note that the Charter Schools Act of 1998 is still good law, and a charter school petitioner may use its provisions in seeking to establish charter schools. *Id.*

22. O.C.G.A. § 20-2-2064(b) (2009). The law makes a distinction between "conversion" charter schools (and "conversion" systems) and "start-up" charter schools. O.C.G.A. § 20-2-2064 (2009). "Conversion" charter

the local system and subsequently approved by the State Board of Education, then the charter school receives federal, state, and local funding.²³ Upon denial of the petition by the local board of education, the petitioner is authorized to apply to the State Board of Education to receive a state charter as a “special school.”²⁴ If the State Board of Education approves the charter but the local board does not, then the new state chartered school receives state and federal funding but no local public school tax dollars, unless the voters of that local system approve the use of local funds via a referendum.²⁵ While the State Board of Education is empowered to require a local referendum under the Act,²⁶ should voters fail to approve local funding of a state chartered school, there is no other mechanism in the Act to provide for a proportional share of local funding like that found in the Commission statute. The Commission statute, in contrast, allows state approved charter schools to receive approximately the same amount of funding as locally approved charter schools but without the approval of the local system. As will be discussed below, this perceived departure from local control of funding has led to the constitutional challenges currently before the Georgia courts.²⁷

schools are schools that were operated as a traditional public school but have petitioned to become a charter school governed by a charter agreement. O.C.G.A. § 20-2-2064(a) (2009). “Start-up” charters schools are new schools started as charter schools (i.e., they were never traditional public schools). O.C.G.A. § 20-2-2064(b) (2009). Throughout this article, a reference to “charter school(s)” is a reference to “start-up” charter schools only.

23. O.C.G.A. § 20-2-2068.1 (2009). These three sources provide the vast majority of education funding in Georgia (roughly 97 percent). See discussion *infra* Part IV.D.

24. O.C.G.A. § 20-2-2064.1(b) (2009). Currently, there are four charter schools operating as state-chartered special schools. See GA. CONST. art. VIII, § V, para. VII (allowing the General Assembly to create “special schools” that are not under the control of local boards of education); GA. DEP’T OF EDUC., LIST OF GA. CHARTER SCHS., <http://www.doe.k12.ga.us/DMGetDocument.aspx/Charter.list.external.websit e.xls?p=6CC6799F8C1371F6C8D4AE5CA86AD179F0BD50EFA22BAB49C06445ABC4CE4EA8&Type=D> (last visited Mar. 22, 2010); see also discussion *infra* Part IV.A.

25. O.C.G.A. § 20-2-2068.1(d) (2009).

26. O.C.G.A. § 20-2-2068.1(e) (2009).

27. See discussion *infra* Part IV.

III. THE CURRENT CONTROVERSY

As a result of this conflict, in 2009, three Georgia counties filed two lawsuits in Fulton County Superior Court in response to the activities of the Commission.²⁸ The lawsuits directly challenge the constitutionality of the Commission, the law creating it, and the schools approved under its authority.²⁹ At the heart of the challenge is the Commission's approval of two schools, Ivy Preparatory Academy ("Ivy Prep") in Gwinnett County and the Charter Conservatory for Liberal Arts and Technology ("CCAT") in Bulloch County, the first Commission chartered schools in Georgia.³⁰ Ivy Prep is an all-girls school that opened in 2008 after being granted a state charter. The school's charter petition to the Gwinnett County Board of Education was previously denied in 2007.³¹ Currently, there are 310 students attending Ivy Prep,³² with minorities representing nearly ninety percent of the student population and one-third of the population coming from families with incomes low enough

28. Complaint, Gwinnett County Sch. Dist. v. Cox, No. 2009CV174907 (Sept. 11, 2009), *available at* <http://www.cpoga.org/PDF/complaint.pdf> [hereinafter Gwinnett Complaint]; Complaint, Bulloch County Sch. Dist. v. Ga. Dep't of Educ., No. 2009CV175703 (Sept. 28, 2009) [hereinafter Bulloch & Candler Complaint].

29. Gwinnett Complaint, *supra* note 28; Bulloch & Candler Complaint, *supra* note 28.

30. GA. CHARTER SCH. COMM'N, MEETING MINUTES, (June 18, 2009), *available at* http://public.doe.k12.ga.us/pea_charter.aspx?PageReq=PEACSMetingMinutes (follow "August 9 Commission Minutes" for hyperlink) (last visited March 22, 2010) [hereinafter MEETING MINUTES]. The Defendant charter schools attract students from several school districts. Gwinnett Complaint, *supra* note 28; Bulloch & Candler Complaint, *supra* note 28. Any school district with one student or more attending one of these charter schools has standing to bring suit. For example, CCAT has students from both the Bulloch and Candler school districts, so both have joined in the suit. *See* Bulloch & Candler Complaint, *supra* note 28.

31. Brandee A. Thomas, *Concerns Rise About Charter School Funding*, GAINESVILLE TIMES, Oct. 25, 2009, *available at* <http://www.gainesvilletimes.com/news/archive/25207/>.

32. Ivy Prep-About, <http://www.ivypreacademy.org/about> (last visited Mar. 23, 2010).

to qualify for the free and reduced price lunch program.³³ CCAT was also granted a state charter in 2001 after being denied a charter by the Bulloch County Board of Education.³⁴ Currently, there are 132 students enrolled at CCAT,³⁵ and, historically, CCAT students have mirrored the local system in racial diversity and poverty, with nearly forty-five percent of its students eligible for the free and reduced price lunch program.³⁶

In addition to approving the charter petitions for the schools, the Commission also approved funding for the schools in accordance with the Commission statute's funding mechanism,³⁷ including providing the schools with the proportional local share of funding authorized by the statute.³⁸ Because Ivy Prep and CCAT were already state chartered schools³⁹ when they petitioned to become Commission chartered schools, which also meant that they were not eligible for any share of local funding, the allegation is that they applied to become a Commission chartered school primarily, if not solely, for the purpose of obtaining the additional funding represented by the proportional local share.⁴⁰

33. Benita M. Dodd, *Lawsuit Targets a School with Class*, GA. PUB. POLICY FOUND., Sept. 18, 2009, available at <http://www.gppf.org/article.asp?RT=&p=pub/Education/edulawsuit090918.htm>.

34. James Healy, *Bulloch School System Plans to File CCAT Lawsuit Next Week*, STATESBORO HERALD, Sept. 19, 2009, available at <http://www.statesboroherald.com/news/archive/19250>.

35. *Id.*

36. GA. DEP'T OF EDUC., 2008-2009 REPORT CARD FOR CCAT, available at <http://gadoe.org/ReportingFW.aspx?PageReq=102&CountyId=795&PID=62&PTID=213&T=1&FY=2009> (last visited Mar. 22, 2010).

37. See discussion *supra* Part I.

38. MEETING MINUTES, *supra* note 30.

39. Meaning that both schools' charter petitions had been originally denied by their local county boards of education and subsequently approved by the State Department of Education under the Charter Schools Act of 1998.

40. While the motivation behind the schools' decision to seek Commission charter status is immaterial to the constitutional challenges considered in this paper, the question of funding is at the heart of this case and is motivating both sides. The state has exercised authority to create charter schools without local approval for over a decade and a challenge to that authority comes only in the wake of local funding being affected.

The conflict between local control and the power of the new Commission (through the Georgia Department of Education) to allocate a proportional local share of tax dollars without local taxpayer approval represents the backbone of the constitutional challenges discussed below.

IV. AN ANALYSIS OF POSSIBLE STATE CONSTITUTIONAL CHALLENGES TO THE COMMISSION⁴¹

The two lawsuits filed in response to Commission activities raise five specific constitutional challenges under the Constitution of the State of Georgia.⁴² The first challenge alleges that charter schools are not within the meaning of “special schools” as authorized by the constitution in article VIII, section V, paragraph VII.⁴³ The second challenge asserts that in creating the Commission, the General Assembly violated the constitutional prohibition against the creation of an independent school system found in Article VIII, Section V, Paragraph I.⁴⁴ The third challenge claims that the ability of the Commission to grant charters to schools that are not under the management and control of an elected board of education violates the constitutional provision in Article VIII, Section V, Paragraph II, which states that “[e]ach school system shall be under the management and control of a board of education”⁴⁵ Because of the integral nature of the two topics, the independent system and management and control challenges

41. Since the current suits against the Commission do not raise any challenges under the U.S. Constitution, this article does not address any such potential challenges.

42. Where this article refers to the “Constitution” or a “constitutional challenge,” such references are to the Constitution of the State of Georgia of 1983. The constitutional challenges discussed in this article mirror those challenges brought in the lawsuits mentioned in *supra* note 28. For the sake of brevity and relevance, only those challenges will be considered. However, other constitutional challenges are certainly possible.

43. GA. CONST. art. VIII, § V, para. VII (2009). The language of the paragraph authorizes the General Assembly to create “‘special schools’ in such areas as may require them” but gives few other details as to what defines a “special school.” *Id.*

44. GA. CONST. art. VIII, § V, para. I (2009) (stating, in part, that “[n]o independent school system shall hereafter be established”).

45. GA. CONST. art. VIII, § V, para. II (2009).

will be considered together. The fourth challenge alleges that the delegation of authority to create special schools from the General Assembly to the Commission is unconstitutional because the delegation was allegedly done without prescribing sufficient guidelines for the Commission to follow in creating the schools. If true, the delegation of authority would violate article III, section I, paragraph I of the state constitution, which vests legislative power exclusively in the state General Assembly.⁴⁶ The fifth and final challenge alleges that the portion of the law authorizing the Department of Education to fund Commission charter schools with a proportional local share of QBE earnings violates article VIII, section V, paragraph VII of the state constitution because the funding is not approved by local voters.⁴⁷ Ultimately this article concludes, as detailed below, that each of these challenges is most likely to fail.

A. *The Charter Schools Versus Special Schools Challenge*

According to the first challenge, Commission-approved charter schools are not “special schools” within the meaning of article VIII, section V, paragraph VII, of the Georgia Constitution.⁴⁸ The argument here is that, while the constitution does empower the General Assembly to create special schools, the term “special schools” is said to mean state-funded “special needs schools” catering to students with some form of disability

46. GA. CONST. art. III, § I, para. I (2009) (stating that “[t]he legislative power of the state shall be vested in a General Assembly which shall consist of a Senate and a House of Representatives”).

47. GA. CONST. art. VIII, § V, para. VII (2009) (stating, in part, that “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.”).

48. The question in this section assumes that, provided that the Constitution gives the General Assembly power to create special schools, it also gives the General Assembly power to delegate that authority to the Commission. The delegation issue is not addressed specifically in this section; this will be addressed below, along with the question of whether the delegation of authority to the Commission was done properly. *See infra* Part C. The question in this section is narrowly focused on the meaning of “special schools” in the Constitution.

and not just any school the legislature deems necessary.⁴⁹ As evidence of this definition for “special schools,” proponents point to O.C.G.A. § 20-2-152(c)(1)(E) where the General Assembly authorized special education funding to be used for the operation of special schools, including “the Georgia School for the Deaf, The Georgia Academy for the Blind, and the Atlanta Area School for the Deaf and other special schools as approved by the General Assembly.”⁵⁰ That this language

49. See Gwinnett Complaint, *supra* note 28, at para. 45; Bulloch & Candler Complaint, *supra* note 28, at paras. 52-53.

50. O.C.G.A. § 20-2-152(c)(1)(E) (2009). In context the language is as follows:

(c)(1) The State Board of Education shall provide for the funding which has been approved by the General Assembly for this purpose for special education programs for students with disabling conditions which are either of such low incidence or of such severity that it is unfeasible or impractical to provide needed educational services through programs offered by local school systems. The state board may provide such educational services with funds specifically approved by the General Assembly for this purpose by:

(A) Providing grants directly to regional educational service agencies for provision of services;

(B) Either directly contracting with or making grants to or authorizing local units of administration to contract with or make grants to suitable private or public institutions, inside or outside this state, for the provision of such services; provided, however, that the educational and related services of the child must be provided by professionals, such as teachers, school psychologists, speech therapists, physical and occupational therapists, and audiologists who meet the certification or licensing standards of their profession in the state in which the institution is located;

(C) Authorizing local units of administration to contract with suitable public agencies and departments, including institutions in which eligible children are confined and out-patient centers serving eligible children, inside and outside this state, for the provision of such services;

(D) Entering into reciprocal agreements with other states or political subdivisions thereof for the provision of such services; or

(E) *Operating the Georgia School for the Deaf, the Georgia Academy for the Blind, the Atlanta Area School for the Deaf, and other special schools as approved by the General Assembly. Id.* (emphasis added).

includes provisions authorizing funding of General Assembly-created special schools is said to make clear the legislatures' intention that its power to create special schools be limited to the creation of schools for special needs students. Although the case law interpreting the power conferred upon the legislature by the "special schools" provision in the constitution is sparse, the question raised by this challenge is really one regarding what type of limitations exist on the legislature's power to enact laws where it does so pursuant to a constitutional grant of authority.

In *Bryan v. Georgia Public Service Commission*,⁵¹ a unanimous Georgia Supreme Court found the following regarding limits on the power of the General Assembly to legislate:

The inherent powers of the Georgia General Assembly are plenary. Unlike the United States Congress, which has only delegated powers, the Georgia legislature is given full lawmaking powers. . . . "The legislature is absolutely unrestricted in its power to legislate, so long as it does not undertake to enact measures prohibited by the State or Federal Constitution."⁵²

In *Bryan*, the Court found that the plenary power⁵³ of the legislature leads to a strong presumption in favor of the constitutionality of a statute⁵⁴ and that acts of the General Assembly will not be declared unconstitutional except in clear and urgent cases.⁵⁵

Here, in light of *Bryan* and *Sears*, it must be asked whether the language of O.C.G.A. § 20-2-152(c)(1)(E) limits the General Assembly's constitutionally-conferred power to create special schools to the creation of special *needs* schools only. The language of article VIII, section V, paragraph VII is the only provision in the state constitution dealing with the scope of the General Assembly's power to create special schools and, as such, is dispositive in determining whether the General

51. *Bryan v. Ga. Pub. Serv. Comm'n*, 234 S.E.2d 784 (Ga. 1977).

52. *Id.* at 785 (citing *Sears v. State*, 208 S.E.2d 93 (Ga. 1974)).

53. "Plenary" is defined as "[f]ull; complete; entire." BLACK'S LAW DICTIONARY 1175 (7th ed. 1999).

54. *See also* *Park v. Candler*, 40 S.E. 523, 523 (Ga. 1901).

55. *Bryan*, 234 S.E.2d at 785; *see also* *Serv. Employees Int'l Union v. Perdue*, 628 S.E.2d 589, 591 (Ga. 2006).

Assembly has the power to establish charter schools as a type of special school.⁵⁶ A reading of the provision's plain language indicates that the grant of authority to the legislature to create special schools is very broad and does not limit the types or numbers of special schools that may be created, nor does it limit the purposes for which special schools may be established.⁵⁷ The only limitation placed upon the legislature by the provision relates to how special schools may be funded.⁵⁸

Even if it were to be assumed, *arguendo*, that the special schools provision of the constitution provides sufficient authority to the legislature so that it, by statute, could limit its own authority to create special schools, the argument that O.C.G.A. § 20-2-152 (related to funding of special needs education) expresses such a limitation is unpersuasive. A reading of the statute shows that the legislature was merely exercising its authority to create a legal structure governing special education services provided by the state, including those administered by the three special schools in existence at the time the law was enacted.⁵⁹ Nowhere in the plain language of this statute, or any other, has the legislature limited its own authority to create special schools to those only serving students identified as having special needs. The instant statute merely sets forth certain rules governing the funding and operation of three specific special schools previously created by the legislature.

56. GA. CONST. art. VIII, § V, para. VII.

57. *Id.* The language appears in the state Constitution as follows:

Special schools. (a) 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." *Id.*

58. See discussion *infra* Part IV.D.

59. See *supra* note 50 and accompanying text.

Finally, as is discussed further below,⁶⁰ when faced with this and related questions relative to the creation and operation of charter schools, the state Attorney General has concluded repeatedly that the constitution empowers the General Assembly to create charter schools as a type of special school citing to the very broad and unrestrictive nature of the language in the special schools constitutional provision.⁶¹

Given the presumption that acts of the legislature are constitutional, the General Assembly's plenary power to legislate, the existence of a specific constitutional grant of authority to the legislature to create special schools, the absence from the constitution of a limitation upon the legislature's ability to create various types of special schools, and the absence of any language in the constitution or statute proscribing that "special schools" must only be special *needs* schools, it is evident that the General Assembly's power to create "special schools" includes the ability to create a type of special schools known as charter schools.⁶²

B. The Management and Control and Independent School System Challenges

The question raised by the second and third challenges to the Commission law is whether the creation of the Commission constitutes the creation of an independent school system existing outside the management and control of local school

60. *See infra* Part IV.B.

61. *See* 2001 Op. Ga. Att'y Gen. No. 9, 2001 Ga. AG Lexis 11, *available at* http://law.ga.gov/00/opinion/detail/0,2668,87670814_90679019_109917158,00.html [hereinafter 2001 Opinion] (interpreting the Charter Schools Act amendment relating to state charter schools); 1998-1999 Op. Ga. Att'y Gen. No. U98-2, 1998 Ga. AG Lexis 1, *available at* http://law.ga.gov/00/opinion/detail/0,2668,87670814_90686057_109457855,00.html [hereinafter 1998 Opinion]; 1997 Op. Ga. Att'y Gen. No. U97-8, 1997 Ga. AG Lexis 13, *available at* http://law.ga.gov/00/opinion/detail/0,2668,87670814_90686057_109478012,00.html [hereinafter 1997 Opinion].

62. It is not insignificant that, under the Georgia Charter Schools Act of 1998, the state is empowered to create state-chartered special schools, several of which have been created and gone unchallenged as to violating the state Constitution. O.C.G.A. § 20-2-161 (2009).

systems in violation of two of Georgia's constitutional provisions."⁶³ The contention is that because the General Assembly granted the Commission and the state Board of Education the power to authorize and exercise oversight of Commission charter schools without the involvement of local school systems, it has effectively created a statewide independent school system that has no accountability to any local boards of education. In fact, this is exactly what the creation of the Commission has done. However, the relevant question in this context is not whether the Commission statute creates a system of schools that are independent of local control but whether the prohibition against the creation of independent school systems applies only to local school systems or to the General Assembly as well. The resolution of this question will also address the related issue of whether management and control of a school system can be vested in a body other than a local system. After all, to be "independent" means that the system is not under local management and control. If the legislature has the power to create an "independent" system,

63. GA. CONST. art. VIII, § V, para. I. In context, the language prohibiting independent school districts reads as follows:

School systems continued; consolidation of school systems authorized; new independent school systems prohibited. Authority is granted to county and area boards of education to establish and maintain public schools within their limits. Existing county and independent school systems shall be continued, except that the General Assembly may provide by law for the consolidation of two or more county school systems, independent school systems, portions thereof, or any combination thereof into a single county or area school system under the control and management of a county or area board of education, under such terms and conditions as the General Assembly may prescribe; but no such consolidation shall become effective until approved by a majority of the qualified voters voting thereon in each separate school system proposed to be consolidated. *No independent school system shall hereafter be established.* *Id.* (emphasis added);

GA. CONST. art. VIII, § V, para. II (providing, in relevant part, that "[e]ach school system shall be under the management and control of a board of education, the members of which shall be elected as provided by law") Importantly, this sentence sets residency within the "territory embraced by the school system" (thus local control over each system) as a condition of board membership. *Id.*

then it also has, by definition, the power to vest management and control of that system outside the local system.

The long history of local control of schools in the United States and Georgia highlights why this issue is of such importance in the current controversy. Since public schools were first authorized in Georgia in 1777, they have been under the control of the communities in which they were located for at least a couple of reasons.⁶⁴ First, local control allows for education to be tailored to the needs and goals of local citizens, whose children attend the schools.⁶⁵ Second, so much of public education is funded with local tax dollars that local control is expected.⁶⁶ Indeed, as will be explored later,⁶⁷ the Georgia constitution has a very strong bias in favor of local control of locally assessed tax dollars, and this is particularly true relative to local tax dollars raised for education.⁶⁸

And while the history of education in Georgia reveals a bias in favor of local control, the history of consolidation of local districts reveals the limits the constitution and the General Assembly have placed on their deference to local control. Under the constitutional provisions related to consolidation, authority is granted to county governments and area boards of education to maintain public schools within their districts while giving the General Assembly specific authority to consolidate local school systems “under such terms and conditions as the General Assembly may prescribe” and by specifically prohibiting the creation of any new independent school systems thereafter.⁶⁹ It is important to know that the move to

64. COMM’N FOR SCH. BD. EXCELLENCE, GA. SCH. BD. ASS’N., FINAL REPORT (2008), available at http://www.gsba.com/downloads/newsroom/press_releases/final_commission_rpt-091008.pdf.

65. *Id.*

66. *See, e.g.*, GWINNETT COUNTY BD. OF EDUC., MEETING REGARDING LEGAL ACTION CONTESTING THE CONSTITUTIONALITY OF THE GEORGIA CHARTER SCHOOLS COMMISSION (Oct. 8, 2009), available at [http://www.gwinnett.k12.ga.us/gcps-mainweb01.nsf/105ED38853B3C2D1852576490080F11D/\\$file/BdCommentsforBoardMtgonCharterSchComm.pdf](http://www.gwinnett.k12.ga.us/gcps-mainweb01.nsf/105ED38853B3C2D1852576490080F11D/$file/BdCommentsforBoardMtgonCharterSchComm.pdf).

67. *See* discussion *infra* Part IV.D.

68. *See* GA. CONST. art. VIII, § VI, para. II; GA. CONST. art. VIII, § VI, para. IV.

69. GA. CONST. art. VIII, § V, para. I.

consolidate schools was, in large part, driven by the belief that small, independent local schools were inadequately funded to educate effectively.⁷⁰ Consolidation was believed to be part of the solution for improving the quality of education and raising achievement levels among the poor (and the research seems to justify the belief) by eliminating waste and capitalizing on economies of scale.⁷¹ By closing small schools with inadequate resources and encouraging consolidation, local schools could then pool their resources, eliminate duplicate costs, increase efficiency, and, it was expected, be able to deliver a higher quality education to students.⁷² Whatever the merits of consolidation, under the constitution, the General Assembly has been given an express grant of authority to exercise control over local education systems.

The outright prohibition against the creation of new independent school systems has resulted in the virtual elimination of local independent school systems.⁷³ Since consolidation, the quality of education generally available in the state has also improved, lending some credibility to the claim that consolidation may have worked, if only in part.⁷⁴ Given that the language prohibiting the creation of new independent school systems is intimately tied to consolidation of local school systems (historically speaking and in context), the prohibition is best understood as forbidding *local districts*, and not the General Assembly, from creating independent school systems and thereby returning to the days when schools were very small, had limited resources, and were inadequate to the task of educating children. However, while helpful, this argument from

70. NREA CONSOLIDATION TASK FORCE, NAT'L RURAL EDUC. ASS'N, RURAL SCHOOL CONSOLIDATION REPORT (2005), *available at* http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/29/90/32.pdf [hereinafter NREA REPORT].

71. *Id.*

72. *Id.*

73. *See* ROSS RUBENSTEIN & DAVID L. SJOQUIST, GA. STATE UNIV., REPORT NO. 87, FINANCING GEORGIA'S SCHOOLS: A PRIMER 1 (Andrew Young School of Public Policy 2003), *available at* <http://aysps.gsu.edu/frcreport87.pdf>. Since the ratification of the 1945 Georgia Constitution, which consolidated systems and prohibited new independent school systems, the number of school systems has gone from 1,257 to 180, of which only 21 are independent. *Id.*

74. NREA REPORT, *supra* note 70.

history, legislative intent, and context is not necessarily dispositive when deciding, finally, whether the prohibition on the creation of independent districts applies to acts of the legislature.

Yet, there is a constitutional provision that appears to resolve this question definitively, especially given the history, legislative intent, and contextual arguments. The provision also resolves the question of local management and control of special schools. Article VIII, section V, paragraph VII of the Georgia Constitution says that the legislature “*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”⁷⁵

Despite this express grant of authority to the General Assembly to create special schools, some would argue that there is some conflict between this grant of authority and the prohibition against the creation of independent school systems. This argument essentially asserts that while the General Assembly may be able to create some limited types of special schools, it is unconstitutional for it to exercise management and control over those schools in the same manner and to the same extent as local boards of education exercise authority over local school systems. For the General Assembly to do so would mean, this argument contends, that it operates a *de facto* independent school district that happens to be statewide in scope.⁷⁶

Although the apparent conflict between these two constitutional provisions has not been specifically addressed by the Georgia Supreme Court, the court has set forth rules of construction that are instructive here. First, the court has concluded that apparently conflicting constitutional provisions should be harmonized to effectuate the purposes of each where possible, “so as to ascertain the legislative intent and give effect thereto” because “it is not presumed that the legislature intended that any part would be without meaning.”⁷⁷ The

75. GA. CONST. art. VIII, § V, para. VII (emphasis added).

76. See Gwinnett Complaint, *supra* note 28, at para. 40; Bulloch & Candler Complaint, *supra* note 28, at para. 47.

77. Goldberg v. State, 651 S.E.2d 667, 670 (Ga. 2007) (citing City of Buchanan v. Pope, 476 S.E.2d 53, 55 (Ga. App. 1996)).

Court's assumption is that the legislature knows the current state of the law when legislating and intends any new provision to work in harmony with previous ones, unless expressly stated otherwise. In attempting to harmonize the provisions as required by the rules of construction, it is not difficult to interpret the prohibition against creating new independent school districts as a prohibition against local school systems creating independent districts, as was discussed above. By recognizing the grant of authority to the General Assembly to create special schools as an exception to the rule against creating independent school systems, the General Assembly reserves the power to do what the local school systems cannot.⁷⁸

78. As points of comparison, it is instructive to look to two cases decided by other state courts relative to similar state level Commissions authorized to approve charter schools that would be outside of local control. The first, a Florida case, *Duval County School Board v. State Board of Education*, 998 So. 2d 641 (Fla. Dist. Ct. App. 2008), concerned a constitutional challenge to the Florida Schools of Excellence Commission law. Ultimately, the local control mandated by the Florida Constitution resulted in the Commission law being struck down as unconstitutional. There, as in Georgia, the Commission was established to create charter schools at the state level. Unlike in Georgia, where our General Assembly retains constitutional authority to create special schools, the Florida Constitution vests complete control over "all free public schools within the school district" in the local school board, without exception (*see* FLA. CONST. art. IX, § IV(b)). The fact that the Florida Constitution failed to reserve any authority in the legislature to create any schools outside the control of local school systems meant that their state charter school commission was successfully challenged. The Georgia Constitution, in contrast, does not suffer from a similar defect. The second case, *Boulder Valley School District Re-2 v. Colorado State Board of Education*, 217 P.3d 918 (Colo. Ct. App. 2009), involved a challenge to Colorado's Charter School Institute Board law. There, the law was upheld because Colorado's Constitution specifically vests "[t]he general supervision of the public schools of the state" in the State Board of Education, "whose powers and duties" are prescribed by law (*see* COLO. CONST. art. IX, § II). At the same time, the Colorado Constitution only vests "control of instruction" in the local board of education. The court in that case found, in essence, that the State Board was vested with broad authority to create schools not under the control of local districts, including charter schools. In fact, the same court had upheld a law that allowed the State Board of Education to *force* local districts to approve a charter school application where it had been previously denied by the district. Relative to Georgia, the constitutional authority vested in the State Board of Education in Colorado (and, by extension, the legislature) is much more extensive. In Georgia, the

The Attorney General concluded similarly on this point when he found that the General Assembly is authorized to create special schools (including state charter schools) without the permission, approval or participation of local boards of education and that doing so does not violate the constitutional provision outlawing the creation of independent school systems.⁷⁹ He concluded that, in fact, the authority given to the General Assembly to create “special schools” is an exception to the general prohibition against independent school districts and provides the General Assembly wide latitude in regard to virtually all aspects of schools created pursuant to this constitutional authority. That power includes the ability of the General Assembly to “invade the constitutional province of the local school board under the aegis of a coordinate constitutional provision.”⁸⁰ As has been said, this reading of the special schools provision and the prohibition of independent school systems provision harmonizes them and gives each full effect while avoiding diminishing the nearly unqualified authority of the General Assembly to create special schools.

Further, the Attorney General, citing to *Berman v. Berman*,⁸¹ concluded that the issue of management and control of special schools hinged on the use of the term “may” in the special schools provision giving the General Assembly the power to involve local school systems.⁸² Applying the Supreme Court’s reasoning in *Berman*, the Attorney General concluded that the use of the term “may” was permissive, providing the legislature authority to involve local boards of education to the extent it chose to do so.⁸³ Given this rationale, the General Assembly’s decision not to provide local school systems oversight of

Constitution provides local districts much more control over virtually all aspects of public education, with the exception of public schools created by virtue of the special schools provision of the Constitution.

79. 2001 Opinion, *supra* note 61 (citing favorably to 1998 Opinion, *supra* note 61 and 1997 Opinion, *supra* note 61).

80. *Id.*

81. *Berman v. Berman*, 319 S.E.2d 846, 848 (Ga. 1984) (holding that the use of the term “may” in a statute governing when a judge or jury can modify and revise a previous judgment left the discretion of whether or not to modify or revise to the trier of fact “and should not be taken away from it”).

82. 1997 Opinion, *supra* note 61.

83. *Id.*

Commission chartered special schools does not violate the constitution and is consistent with its express language.

Finally, the Supreme Court has found that even were it not reasonable to harmonize the special schools provision with some previous provision, “the amendment, being the last expression of the sovereign will of the people, will prevail as an implied modification *pro tanto* of the former provision.”⁸⁴ Following this analysis, the prohibition against creating independent school districts outside the management and control of local school systems does not apply to the actions of the General Assembly exercising its authority under the special schools provision because the special schools provision, coming last in context, represents the express will of the people that the legislature retain the power to create independent schools in the form of special schools. Given the weight of the arguments, the special schools created by the General Assembly do not violate the prohibition against creating independent school systems and, therefore, are not required to be under the management and control of local school systems. Any challenge to the contrary should fail.

C. The Sufficient Guidelines Challenge

The fourth challenge to the charter commission statute claims that the delegation of authority from the General Assembly to the Commission to authorize and manage charters is an unconstitutional delegation of authority because the General Assembly has not provided the Commission with *sufficient guidelines* for its operation. The contention is that the lack of guidelines violates article III, section I, paragraph I of the Georgia Constitution which specifically vests legislative authority in the General Assembly.⁸⁵ The assertion here is that the power provided to the Commission is so broad and unlimited that in exercising authority, the Commission is in

84. *Cason v. State*, 122 S.E.2d 232, 233 (Ga. 1961).

85. GA. CONST. art. III, § I, para. I. The question raised here necessarily implies a violation of article I, section II, paragraph III of the Georgia Constitution regarding the separation of powers provision. In addressing whether delegation of authority is proper in this case, the issue of the potential separation of powers issue will also be resolved. If the delegation was proper, then a separation of powers violation has not occurred.

effect legislating instead of merely carrying out and enforcing the law as made by the legislature. As will be shown below, however, the authority conferred upon the Commission is bound by sufficient restrictions so that the legislation creating the Commission does not amount to an unconstitutional delegation of legislative authority.

The question presented by this argument is not whether the General Assembly may delegate authority to the Commission. It is instead a question of whether in delegating authority, the legislature essentially went too far.⁸⁶ The case law on this point is clear: the legislature, in enacting laws, may “delegate to administrative officers or agencies the authority to make rules and regulations necessary to effectuate such laws”⁸⁷ so long as it has supplied sufficient direction or guidelines to the agency so that it is not, in effect, exercising the functions of the legislature when it acts.⁸⁸ On this point, the Supreme Court of Georgia has held that where there are sufficient guidelines, the agency is only acting administratively pursuant to the direction of the legislature.⁸⁹

86. Given the division of government in our system into three, co-equal branches each tasked with different roles (law giving, interpretation of the law, and enforcement of the law), delegation of authority is necessary in order for any law to be enforced.

87. *Dep’t of Transp. v. Del-Cook Timber Co.*, 285 S.E.2d 913, 916 (Ga. 1982).

88. *Scoggins v. Whitfield Fin. Co.*, 249 S.E.2d 222, 223 (Ga. 1978).

89. *Dep’t of Transp. v. City of Atlanta*, 398 S.E.2d 567, 571-72 (Ga. 1990). Here, the Court found that the Act creating the State Commission on the Condemnation of Public Property, found at O.C.G.A. § 50-16-183, provided sufficient guidelines for the Commission to exercise eminent domain in taking certain public property, even though the power of eminent domain is constitutionally vested in the General Assembly. The Court reasoned that the complexity of our governmental system makes it impossible for legislatures to make all findings of fact and apply all legislative policy directly, necessitating the delegation of power. The Court found that since the Act granted specific authority to the Commission to exercise eminent domain and provided sufficient guidelines (including a Commission made up of the Governor, the Lieutenant Governor, the Secretary of State, the State Auditor, and the Commissioners of Agriculture, Insurance and Labor charged with determining whether the condemnation is reasonable, necessary, and in the public interest), the Commission’s exercise of authority was constitutional.

In determining what constitutes “sufficient” guidelines, the Supreme Court has stated that the statute must not grant *unlimited* authority to the delegatee to promulgate rules.⁹⁰ It has also said that a statute must not give to a ministerial officer the power to define the thing to which the statute is to be applied.⁹¹ However, the Court has also made it clear that determining a bright line rule regarding when the proper delegation of power becomes improper is impossible because of the inherent overlap of duties among the branches of government.⁹² What is more, the Court has said that unless the violation of the separation of powers is manifest, the constitutionality of the delegation will be presumed.⁹³ In the absence of a bright line rule, it is necessary to explore what constitutes a manifest violation of the separation of powers. In better defining the limits on delegated authority, the constitutionality of the Commission’s authority should become clearer.

In *HCA Health Services, Inc. v. Roach*, an administrative rule that exempted certain healthcare facilities from obtaining the approval of the state Health Planning Agency (“HPA”) before they were allowed to relocate was ruled unconstitutional because the rule, in effect, allowed the HPA to determine for itself which facilities were *subject* to the law.⁹⁴ The court

90. *Scoggins*, 249 S.E.2d at 223 (upholding authority delegated to the Georgia Industrial Loan Commissioner by the Industrial Loan Act, found at O.C.G.A. § 7-3-1, because the power granted was not unlimited and was confined to the promulgation of rules and regulations that are “necessary and appropriate, and not inconsistent with the terms of the chapter or any other applicable statutes”).

91. *HCA Health Servs., Inc. v. Roach*, 458 S.E.2d 118, 120-21 (Ga. 1995) (citing to *Sundberg v. State*, 216 S.E.2d 332, 333 (Ga. 1975)).

92. *S. Ry. Co. v. Melton*, 65 S.E. 665, 668 (Ga. 1909) (stating that “it is not easy to draw an exact line at which this power of conferring authority on the commission as to details must stop . . .”); *see also* *City of Americus v. Perry*, 40 S.E. 1004, 1007 (Ga. 1902) (holding that “[w]hile the constitution declares that the three departments of government shall be separate and distinct, this separation is not, and cannot, from the nature of things, be total”).

93. *Id.*

94. *HCA Health Servs.*, 458 S.E.2d at 120-21. While the Court determined that the law itself was subject to a constitutional, as well as an unconstitutional, interpretation (meaning, it could be read as giving too much authority to the HPA), it was bound to read the law as constitutional, if possible. *Id.* Nevertheless, the Court struck down the rule promulgated by

reasoned that the function of determining to whom a law applies is inherently legislative in nature and cannot be delegated to the executive branch.⁹⁵

In *Sundberg v. State*, the court found that a statute empowering the state Board of Pharmacy to define what constitutes a “depressant or stimulant drug” for purposes of a criminal statute was an unconstitutional delegation of authority because, in essence, the law gave power to an executive agency to determine what acts would constitute a crime.⁹⁶ Again, the court found defining the *actions* that constitute a crime to be inherently legislative in nature and not subject to delegation.⁹⁷

In contrast, the court in *Scoggins v. Whitfields Finance Company* found the provisions of the Industrial Loan Act, which empower the Georgia Industrial Loan Commissioner to make rules and regulations to accomplish the purpose and objectives of the Act, to be a constitutional delegation of authority.⁹⁸ The court reasoned that, since the Commissioner was not granted unlimited authority to promulgate rules and such rules had to be necessary and appropriate and consistent with the terms of the Act, the delegation of authority was constitutional.⁹⁹

Here, while the authority to create special schools is a legislative one, the power granted to the Commission is limited

the HPA as unconstitutional, finding that the HPA had acted outside the authority given to it by statute. *Id.* A constitutional reading of the statute did not give the HPA authority to *exempt* any facility; the statute gave only the power to “establish procedure[s] for expediting or waiving reviews” of facility relocation plans under O.C.G.A. § 31-6-47. *Id.*

95. *Id.* at 120-21 (“SHPA’s [State Health Planning Agency] construction of its authority under [the Act] would permit it to do far more than merely administer and effectuate an existing enactment of the General Assembly. SHPA would have complete and unbridled authority to determine what health care facilities are subject to the Act, since it would have the power to exempt from the mandate of the Act any facility which the General Assembly had left unexempted This construction of [the Act] would render that statutory provision an unconstitutional delegation to the SHPA of the legislative power ‘to define the thing to which the statute is to be applied’”) (citing *Sundberg*, 216 S.E.2d at 333).

96. *Sundberg v. State*, 216 S.E.2d 332, 333 (Ga. 1975).

97. *Id.*

98. *Scoggins v. Whitfield Fin. Co.*, 249 S.E.2d 222, 223 (Ga. 1978).

99. *Id.*

in that it does not permit the Commission to do anything more than carry out the legislature's stated purpose for the Commission: the "development and support of charter schools."¹⁰⁰ To the degree that the Commission acts upon the power granted to it, it is acting only in an administrative and ministerial capacity to approve and exercise oversight of Commission charter schools and generally carry out the will of the legislature as expressed in the Commission statute. In addition to procedural limitations on its authority, the Commission is also made up of appointees by the State Board of Education, which are drawn from a pool of nominees designated by the Governor, the President of the Senate and the Speaker of the House.¹⁰¹ The statute also does not grant to the Commission the authority to determine, for itself, what classes of organizations are subject to its authority but, instead, sets out explicitly that charter school petitioners and approved schools are its only concerns.¹⁰² The statute also limits the authority of the Commission to determine what constitutes an acceptable charter petition by delineating the ends to which charter schools are to be approved¹⁰³ and by empowering the State Board of Education to promulgate rules governing the required content of charter petitions and to exercise oversight of the Commission's work.¹⁰⁴ Given that the provisions of the Commission statute

100. O.C.G.A. § 20-2-2080(b)(1) (2009).

101. O.C.G.A. § 20-2-2082 (2009). The structure of the Commission is very similar to that of the State Commission on the Condemnation of Public Property in *Dep't of Transp. v. City of Atlanta*, 398 S.E.2d 567 (Ga. 1990) which was cited favorably by the Court and ultimately upheld as a permissible delegation of authority. *Id.* at 571-72.

102. In contrast to the HPA in *HCA Health Services, Inc. v. Roach*, the law here limits the Commission's authority to those organizations seeking to create charter schools by virtue of a charter petition, as opposed to allowing the Charter Commission independently to determine who may become a charter (either by allowing the Commission to define for itself the class of possible charter school applicants or by giving it authority to simply create charter schools by fiat, rather than requiring third party applicants to seek charter status). Compare O.C.G.A. § 20-2-2083(a)(1) (2009), with *HCA Health Servs., Inc. v. Roach*, 458 S.E.2d 118, 120-21 (Ga. 1995).

103. O.C.G.A. § 20-2-2083 (2009) (assigning the Commission the job of meeting state education goals and replicating those charter schools with proven academic and financial success).

104. O.C.G.A. § 20-2-2083(a)(1) (2009). Unlike the HPA in *HCA Health Services, Inc.*, the Commission is also not empowered to expand the scope of

subject the Commission's authority to much greater limitations than the authority granted in either *HCA Health Services, Inc.* or *Sundberg* and are more closely aligned with the authority granted in *Scoggins*, the guidelines appear to be more than sufficient to withstand a constitutional challenge.

D. *The Funding Challenge*

The fifth and final challenge asserts that the funding mechanism used by the Commission violates the Georgia Constitution by, in effect, using local tax dollars to fund Commission charter schools.¹⁰⁵ As mentioned earlier, local control has been a hallmark of education in Georgia since the earliest days of its history. In addition to controlling the manner of delivery of education, the concept of local control is inseparable from the control of local tax dollars raised to pay for education. That history of local control over local tax revenues is a concept found repeatedly in the state constitution in the form of deference to the decisions of local school systems relative to the use of local revenues. However, despite this history of local control, the challenge to the Commission's funding mechanism is likely to fail.

Before analyzing the current Commission charter school funding mechanism, it is important to understand how traditional public schools are currently funded in Georgia, how state-chartered schools are funded under the Charter Schools Act of 1998, and how Commission charter schools differ. Under the current funding structure, traditional public schools receive funding from essentially four sources. Local districts

its own authority. Compare O.C.G.A. § 20-2-2083 (2009) (limiting the scope of the Commission's authority, including vesting authority to promulgate rules and regulations with State Board of Education and not the Commission), with *HCA Health Servs., Inc.*, 458 S.E.2d at 120-21 (noting the SHPA's constitutional rule-making authority as prescribed by legislature). Such expansion of authority would require legislative action.

105. Gwinnett Complaint, *supra* note 28; Bulloch & Chandler Complaint, *supra* note 28. The claim is that the Commission violates GA. CONST. art. VIII, § V, para. VII(a), which states, in relevant part, that "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." Gwinnett Complaint, *supra* note 28; Bulloch & Chandler Complaint, *supra* note 28.

provide approximately 43.4% of per pupil funding.¹⁰⁶ The state of Georgia provides funding to districts amounting to roughly 44.4% of per pupil funding through the state's QBE funding formula.¹⁰⁷ The federal government provides roughly 9.2% of funding per pupil.¹⁰⁸ The remainder of the funding (approximately 3.1%) consists of private funding in the form of gifts, tuition, and fees from patrons.¹⁰⁹ Prior to the creation of the Commission, state-chartered special schools (meaning those charter schools approved by the state but *not* by the local school board¹¹⁰) were only entitled to receive education funding from state and federal sources unless and until a local referendum allowing for the use of local funds was approved by voters in the county where the school was located.¹¹¹

In contrast, the statute creating the Commission and authorizing it to approve charter applications not only provides state and federal education funds for Commission-chartered schools, but also empowers the Georgia Department of Education to pay Commission-chartered schools “[a]n amount equal to a proportional share of local revenue from the local school system in which the student attending the commission charter school resides”¹¹² And the Commission is authorized to provide the proportional share of local revenue even if the charter school has not been approved by the local system. The statute then directs the Department to deduct all state and federal dollars (including state dollars spent to provide for the “proportional share of local revenue”) allocated to the Commission-chartered school from the amount of state and federal funds that the local district would have otherwise

106. See RUBENSTEIN & SJOQUIST, *supra* note 73. Funding in local districts is generated primarily through local property tax, but some school funding is generated by local sales taxes. *Id.* See also INST. OF EDUC. SCI., NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., REVENUES FOR PUBLIC ELEMENTARY AND SECONDARY SCHOOLS, BY SOURCE AND STATE OR JURISDICTION: 2005-06, *in* DIGEST OF EDUC. STATISTICS tbl. 172 (2008), available at http://nces.ed.gov/programs/digest/d08/tables/dt08_172.asp.

107. *Id.*

108. *Id.*

109. *Id.*

110. O.C.G.A. § 20-2-2068.1 (2009).

111. *Id.* at (d).

112. O.C.G.A. § 20-2-2090(a)(3)(A) (2009).

received.¹¹³ In effect, this has meant that Commission-chartered schools receive an amount of money equal to what they would have received from the local school board if locally approved but the money is paid directly by the state using QBE funding.¹¹⁴ The Department is then offsetting the additional “local share” it pays to Commission-chartered schools by reducing state QBE funding to the local districts by the same amount. The net result has been that local school systems have seen a reduction in funding roughly equivalent to what the district would have spent for the children attending the Commission-charter school if the same had been approved by voters to receive local funding.

Opponents to this funding mechanism assert that it essentially allows local tax dollars to be used for Commission-chartered special schools without the local approval seemingly required by the constitution.¹¹⁵ The resolution of this purported conflict turns on an understanding of what the constitution means when it prohibits a school tax levy to support special schools without local approval.¹¹⁶ Unless the funding mechanism violates this provision, “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.”¹¹⁷

113. See O.C.G.A. § 20-2-2090(c) (2009) (“The total allotment of state and federal funds to the local school system in which a student attending a commission charter school resides shall be calculated as otherwise provided in Article 6 of this chapter with an ensuing reduction equivalent to the amount of state and federal funds appropriated to the commission charter schools pursuant to subsection (a) of this Code section.”).

114. See Gwinnett Complaint, *supra* note 28, at paras. 36-37; Bulloch and Candler Complaint, *supra* note 28, at para. 41 (claiming that the amount of the reduction by the Department in QBE funding per pupil is actually more than each student would have received in local revenue if educated in the traditional public school).

115. See Gwinnett Complaint, *supra* note 28, at para. 47; Bulloch and Candler Complaint, *supra* note 28, at para. 57; see also GA. CONST. art. III, § I, para. I (2009).

116. GA. CONST. art. III, § I, para. I (2009) (stating that “[t]he legislative power of the state shall be vested in a General Assembly which shall consist of a Senate and a House of Representatives”). While the provision also prohibits bonded indebtedness, there is no claim that the funding mechanism creates any bond debt, so this article will not address the merits of that claim.

117. GA. CONST. art. VIII, § V, para. VII(a) (stating, in part, that “no bonded indebtedness may be incurred nor a school tax levied for the support

Due to the lack of interpretation of this provision by any court of record in the state, the following is an exercise in divining how a court would resolve this issue without any guidance specifically on point. However, there are rules of construction that are useful aids in assessing how a court would approach the subject. First, in the interpretation of a constitutional provision, “the ordinary signification shall be applied to words.”¹¹⁸ Second, the meaning of a provision is dependent upon the context in which it is used and the subject matter involved.¹¹⁹

Given the cited rules of construction, opponents of the Commission funding mechanism will likely argue that, in proper context, the language of Article VIII, Section V, Paragraph VII, should lead the court to rule that the funding mechanism is unconstitutional for at least a couple of reasons. First, the requirement that a majority of qualified voters in “systems affected” approve the levying of a tax to support a special school is a requirement that voters consent to being financially impacted by the funding of a special school using local tax dollars.¹²⁰ Under the Commission’s funding mechanism, local school systems are necessarily required to reallocate local education tax revenues to make up for the shortfall in QBE funding deducted to support Commission charter schools. The result is that local school systems feel the full effect of funding Commission charter schools as if the use of local funds had been approved through a referendum but without, in fact, a vote ever having taken place.¹²¹

Second, the context of the special schools provision is telling. The provision is located in Article VIII of the Georgia Constitution which is dedicated to the subject of education,

of special schools without the approval of a majority of the qualified voters voting thereon in each of the systems affected.”).

118. *Blum v. Schrader*, 637 S.E.2d 396, 397 (Ga. 2006) (quoting *Thomas v. MacNeill*, 37 S.E.2d 705, 708 (Ga. 1946)).

119. *Thomas*, 37 S.E.2d at 708 (citing *Stanley v. Sims*, 195 S.E. 439, 442 (Ga. 1938)).

120. See discussion *supra* note 47 and accompanying text.

121. An additional argument, but certainly not a decisive one, is that the drafters of this provision of the Constitution (last amended in 1983), drafted it prior to the creation of the QBE funding scheme, so they would not have been aware of the state’s ability to manipulate QBE funding to local school systems in the way described here.

generally.¹²² Within Article VIII, the concepts of local control over public education and local education tax revenues are consistent themes.¹²³ Section V of Article VIII is dedicated to empowering *counties and local boards* of education to “establish and maintain public schools within their limits.”¹²⁴ In addition to empowering counties and local boards of education to create local public schools, Paragraph I of Section V allows the General Assembly to provide by law for the consolidation of two or more county school systems. However, it makes clear that “no such consolidation shall become effective *until approved by a majority of the qualified voters voting thereon in each separate school system proposed to be consolidated.*”¹²⁵

This section not only places management of local schools in the hands of local counties or boards of education but it also puts the final decision to consolidate local schools into the hands of local voters. In this regard, the deference to local control is so strong that, even though it was the goal of *state* policy to consolidate independent schools, local school systems were given veto authority over any plan to consolidate currently existing independent schools within their districts.¹²⁶ Reinforcing this theme of local control, Paragraph II of Section V places actual control of local school systems in the hands of residents of that system by mandating that “[s]chool board

122. GA. CONST. art. VIII (entitled, “Education”).

123. *Id.*

124. GA. CONST. art. VIII, § V (entitled, “Local School Systems”).

125. GA. CONST. art. VIII, § V, para. I (emphasis added). The Paragraph, in its entirety, reads as follows:

Authority is granted to county and area boards of education to establish and maintain public schools within their limits. Existing county and independent school systems shall be continued, except that the General Assembly may provide by law for the consolidation of two or more county school systems, independent school systems, portions thereof, or any combination thereof into a single county or area school system under the control and management of a county or area board of education, under such terms and conditions as the General Assembly may prescribe; but no such consolidation shall become effective until approved by a majority of the qualified voters voting thereon in each separate school system proposed to be consolidated. No independent school system shall hereafter be established. *Id.*

126. *Id.*

members shall reside *within the territory embraced by the school system . . .*”¹²⁷ The importance of local control is such that even if citizens wanted to vest oversight of their school system in a board of education made up of nonresidents, they would be unable to do so, constitutionally.

Likewise, local voter approval is required to make changes in local education tax policy. In addition to vesting approval of local funding of special schools in the hands of local voters, each time local boards of education are empowered to change a tax rate or levy a new tax by Section VI of Article VIII (regarding local taxation for education), that power is conditioned upon local voter approval of the change in tax policy.¹²⁸ In fact, local control is so important in these sections of the constitution that the decisions of how to tax for education are not conferred on local boards of education, which they theoretically could be, but are placed ultimately in the hands of voters directly.¹²⁹

Proponents of the Commission’s funding mechanism also have several arguments available that support the funding mechanism as it currently exists. First, a literal reading of the plain language of the provision suggests that a referendum would only be required where the intent is to use *actual* local tax dollars to fund a state-chartered special school. Under the current structure, the money funding Commission charter schools comes directly from state QBE funds (including the proportional local share) and not directly from local tax revenues.¹³⁰ While it is true that local tax revenues are being

127. GA. CONST. art. VIII, § V, para. II (emphasis added).

128. *See* GA. CONST. art. VIII, § VI, para. II; GA. CONST. art. VIII, § VI, para. IV.

129. GA. CONST. art. VIII, § V, para. VII (stating, in part, that “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”). Local voter control over education tax issues is unique in the taxation powers granted by the Constitution. The powers to tax granted to the state (in Article VII, Section III) and to county and municipal governments (in Article IX, Section IV) do not contain a similar requirement of direct voter approval of new tax measures.

130. O.C.G.A. § 20-2-2090(3)(A) (2009). Because the schools are funded in this way, it means that local school systems are never required to pay any money directly to the state or to the state-chartered special schools.

used to offset the reduction in QBE dollars available to the local system, no actual local tax revenue is being used to directly support a Commission charter school.¹³¹ All local tax dollars stay in the local system under the current funding mechanism.

A second reading of the language that also appears to support the current funding mechanism is one that would require a local referendum only where a *new* local tax levy is required to offset the loss of QBE funds to the local system.¹³² If read in this way, any funding mechanism that simply reallocated funding already in the system (whether state or local funds) but did not also create the need for or actually *require* a new tax levy (or bond debt) would not trigger the referendum required by the constitution. Even if the deduction of the “proportional local share” from QBE funding and the corresponding additional burden it places on the local system is seen as equivalent to the direct use of local funds for the support of special schools, without a new local tax being required by the statute, such a use of local funds should theoretically survive scrutiny under the constitution as complying with the express language of the provision.

Finally, recognizing what the statute creating QBE funding is and what it is not is also instructive. QBE is, in part, a funding mechanism designed to distribute state tax revenues for public education in a manner that treats similar public school students

131. See RUBENSTEIN & SJOQUIST, *supra* note 73; see also *supra* text accompanying note 106. In fact, because the local and state contributions to educating a student are roughly the same (each contributes about 43 percent of per pupil spending), the loss of a proportional local share in addition to the normal state QBE contribution results in an overall funding reduction that equates to the loss of a full time student. See *supra* text accompanying note 106. Without the deduction of the proportional local share, the local system would experience a net gain in per pupil funding because it would no longer be educating the student attending a Commission charter school but would still be collecting education tax dollars as if the student were still in the system. After all, the parents of the child will still be paying the local school tax whether or not their child attends a local public school.

132. After all, the drafters of the provision could have just as easily drafted the language to say that “no local funds shall be *used* to support special schools without a local referendum with a majority approval by eligible voters.” The drafters either overlooked the need to be so explicit or, at the time, there was no need.

equally, or approximately so.¹³³ The tax dollars distributed by virtue of QBE come from revenues collected from taxes levied at the *state* level and QBE authorizes the state, not local school systems, to control how those revenues are allocated.¹³⁴ Since both QBE and the Commission are statutory creations and concern the same subject matter, their provisions are of equal weight¹³⁵ except that the Commission statute explicitly modifies how QBE funds are to be allocated by including provisions for Commission charter schools.¹³⁶

Taken together, these facts mean that in reallocating QBE funds to include Commission charter schools, the Commission statute is fulfilling one of the purposes of QBE by treating similar public school students equally.¹³⁷ And, while it is true that the reallocation of QBE funding impacts local school systems, the reallocation of QBE funds is not, in any sense, the taking of local funding and is certainly not the imposition of a school tax.¹³⁸ All local education tax revenues stay in the local system. In fact, as has been discussed, while the Commission funding mechanism may result in a loss of funding to a local district when a student attends a Commission charter school, the loss of funding is roughly equivalent to the amount of federal, state and local money that would have been spent on that child

133. *See*, RUBENSTEIN & SJOQUIST, *supra* note 73.

134. *Id.*

135. *Goldberg v. State*, 651 S.E.2d 667, 670 (Ga. 2007).

136. O.C.G.A. § 20-2-2090 (2009).

137. Specifically, this purpose is fulfilled by ensuring that students attending a Commission charter school (a type of public school) are treated no less favorably than students attending traditional public schools.

138. In fact, it would not go too far to say that, since QBE is a statutory creation, is a state level program, and uses only state tax dollars, the General Assembly could have mandated that Commission charter schools receive much more than a “proportional” share of local funding and still not violate the Constitution. Doing so may have violated the intent and spirit of the QBE Act (and given rise to legitimate claims under QBE) but would not have risen to the level of a constitutional violation. If a court rules that the Commission funding mechanism is unconstitutional, essentially requiring local approval *before* the state can reallocate QBE funds, the result would be absurd. In essence, it would mean that the state would have to seek the approval of each affected local district before QBE funds could be reallocated in any way, basically ensuring absolute gridlock and control over one of the largest expenditures in the state budget by local school districts rather than the General Assembly.

in the local system. So when a student leaves the local system, the money to fund the student's education goes with him or her; yet the local system remains fully funded for the students who remain.¹³⁹ Based on the weight of these arguments, the Commission funding mechanism is likely to be upheld as constitutional.

V. CONCLUSION

While the Georgia Charter Schools Commission law faces serious challenges under our state constitution, based on the analysis provided in this article, it appears that each of those challenges is likely to fail. While opponents of the legislation argue that the General Assembly is only empowered to create special schools that cater to students with special needs (i.e. learning or physical disabilities), a reading of the plain language of the constitution's provision on special schools indicates no such limitation. To the contrary, on its face the constitutional language gives very broad authority to the legislature to create special schools where it deems they are needed.

Also likely to fail is the claim that Commission-chartered schools violate the constitutional provisions prohibiting the creation of independent school systems and requiring each school system to be under the management and control of a local board of education. This assertion is likely to fail for two reasons. First, the history of consolidation (and the constitutional language empowering the General Assembly to require consolidation) shows that the concern about independent school systems was that, after consolidation, local school systems would return to creating smaller schools with insufficient resources to properly educate their students. The concern was *not* that the state government would create and inadequately fund independent school systems. Second, the General Assembly is given express authority to create special schools that are outside the control of (or independent of) local

139. Understanding that the complaints in the referenced lawsuits claim that Commission charter schools are actually receiving more than a "proportional local share" (i.e., more than would have been spent on the student in the local public school), the argument that the allocation is constitutional still stands since the control of QBE funding rests in the legislature.

school systems. The General Assembly, therefore, is able to create independent schools (arguably, a “system” of schools) and, by definition, deny local school systems management and control of those schools.

Opponents of the law are also likely to be unsuccessful in their claim that the General Assembly neglected to provide sufficient guidelines to the Commission, which they assert allows the Commission to exercise, essentially, too much legislative power. As has been pointed out, while there is no bright line rule as to what constitutes “sufficient” guidelines, the Commission statute meets the limitations required by the Georgia Supreme Court in the cases addressing the subject: the legislation neither gives unlimited authority to the Commission to promulgate rules nor does it allow the Commission to define *to whom* the law applies. The Commission is acting, in all ways, as merely an administrative arm of the General Assembly in authorizing and regulating charter schools.

Lastly, the assertion that the statute’s funding mechanism violates the constitution because it impacts local education funding without local voter approval is also likely to be unsuccessful. While this article concedes the point that local school systems are impacted by the Commission’s funding mechanism to the extent that they must reallocate local tax dollars to replace lost state QBE tax dollars, merely being impacted is not enough to require voter approval under the constitution. Instead, the constitution says that voter approval is required only when bonded indebtedness is going to be incurred or a school tax levied for the support of a special school. The Commission’s funding mechanism deals solely with the allocation of state QBE tax dollars. It does not require any bond debt to be incurred by, nor any tax levied on, local school systems for the support of Commission-chartered schools. It also does not purport to control how any local tax dollars are to be spent. Furthermore, a reading of the constitution’s language on this point that would deny the state the ability to reallocate QBE funds if the reallocation simply “impacts” local school systems would, in essence, permanently tie the hands of the General Assembly, relative to QBE funding, until local voters in each system affected approved any proposed changes. This result would not only be contrary to the plain language of the constitution but would be absurd from a public policy

perspective by denying our elected legislature control over a large portion of the state budget.

Based on the arguments presented in this article, it appears likely that the Georgia Charter Schools Commission law will be upheld on each of the constitutional challenges brought against it. Should that indeed be the case, the real winners will be Georgia's public school students who will be assured that, no matter what public education option they may choose – traditional public or public charter – the lack of equal funding will not prevent them from receiving a quality education.