FINAL

IN THE SUPREME COURT OF GEORGIA

GWINNETT COUNTY SCHOOL DISTRICT, ET AL.,

Appellants,

v.

KATHY COX, ET AL.,

Appellees.

CASE NO. S10A1773

MOTION OF THE CHARTER SCHOOL PARTIES FOR RECONSIDERATION OF THIS COURT'S MAY 16, 2011 DECISION

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IN THE SUPREME COURT OF GEORGIA

Gwinnett County School District, et al., Appellants, v. Kathy Cox, et al., Appellees.	**Case No. S10A1773**

Appellees Ivy Preparatory Academy, Inc., Charter Conservatory for Liberal Arts & Technology, Inc., and Heron Bay Academy, Inc. ("the Charter School Parties") hereby move the Court to reconsider its May 16, 2011 decision in this case, to vacate that decision, and to affirm the judgment of the Superior Court.

I. INTRODUCTION

The Majority holds that because local districts have "exclusive constitutional authority" over "general K-12 public education," the State has no authority under the "special school" section of the 1983 Constitution to create charter schools offering general K-12 public education. This analysis marks a significant departure from the arguments advanced by the Appellant School Districts and addressed by the parties in their briefs and argument to this Court. The School Districts' "special school" argument

was a moving target,[1] but never included the contention that local districts had exclusive authority over public education. As a result, the Charter School Parties have not had the opportunity to address what has become the dispositive issue in the case, and this brief can only begin to assess the staggering ramifications of the Majority's opinion.

II. SUMMARY

This motion should be granted, the Majority's opinion set aside, and the judgment of the Superior Court affirmed for the following reasons:

A. The Majority misreads 134 years of Georgia history. Local districts have never been granted exclusive control over public education. The 1877 Constitution, which anchors the Majority's analysis, mandated separate schools "for the white and colored races." After the local districts failed to provide adequate education for generation after generation of African-American children, the State exercised its ultimate constitutional authority

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[1] The School Districts first argued that "special schools" could not include charter schools because "neither charter schools, nor even the concept of charter schools, existed when the current Constitution was adopted." (Gwinnett Br. at 14) The School Districts also argued that the term "special schools" in the 1983 Constitution really means "special needs schools" or, alternatively, "schools for students with special educational needs." (Gwinnett Br. at 16 - 17). After oral argument, however, the School Districts reversed course, contending that "special schools" "are *not* exclusively for special education students," but might include schools for "the immigrant population." (First Supplemental Br., at 9) (emphasis in original).

over public education and provided direct assistance to African-American schools with programs like the State Department of Education's Division of Negro Education. The real Georgia history shows that power over public education has always been a shared obligation between the local districts and the State.

B. The Majority's radical holding that local districts have the "exclusive authority" to provide an "adequate public education" under Article VIII, Section I, Paragraph 1 of the 1983 Constitution is contrary to crystal clear language of the constitution and would overrule this Court's unanimous decision in the seminal "adequacy of education" case, *McDaniel v. Thomas,* 248 Ga. 632 (1981). The potential impact of this holding upon the State and local districts is staggering. It will turn the regulation of public education in Georgia upside down and render unconstitutional any number of state laws and thwart desperately needed state-led educational reforms. The Majority's opinion will also impose upon local districts an awesome – but unfunded – obligation to provide an adequate public education to all of their citizens, a multi-billion dollar undertaking.

The Charter School Parties agree with the dissenting opinions authored by Justice Melton and Justice Nahmias, with this exception. Justice Nahmias predicts that the Majority Opinion "will not infect this

Court's law in the future" because the opinion "'is not likely to enjoy either a long life or the capacity to generate offspring.'" (Nahmias, J., dissenting, at 75) (quoting Walter V. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV, 3, 11 (1966)). The Charter School Parties fear that the Majority Opinion will be a continuing burden, entangling courts and administrators with litigation and uncertainty over the role of the General Assembly, if any, in setting education policy, and over whether local districts have discharged their new, exclusive, constitutional obligation to provide Georgians with an adequate public education.

C. The Majority's holding that local districts have "exclusive authority" over public education is contrary to the plain language of the 1983 Constitution, which simply states "authority is granted" to the local districts. In stark contrast, the Constitution uses the word "exclusive" to describe the Board of Regents' authority to create colleges and universities. Particularly given the presumption of constitutionality that attaches to acts of the General Assembly, adding the word "exclusive" to the constitution to strike down the Commission Charter Schools Act is as a matter of law not correct, and is most unfair to the thousands of students and parents who have relied upon the action of General Assembly – validated by decisions of the Attorneys General – to find, finally, an adequate public education.

D. The Majority's holding that "special schools" should be defined as schools that do not duplicate the offerings of "general K-12 public schools," in addition to resting upon a flawed understanding of Georgia history and an incorrect reading of Georgia's constitution, is fatally flawed in any number of other respects. There is no school that is a "special school" as that term is defined by the Majority: all district schools must enroll all students, and there are no course offerings that do not actually or potentially resemble the offerings of "general K-12 public schools." Further, the Majority's definition conflicts with the language of the special school section of the Constitution, which clearly anticipates special schools providing the same kind of education as offered in "general K-12 schools."

E. There is a middle ground that can be reached in this case that will not compromise the role of the local districts in providing public education in Georgia. Stepping back, if one were inclined to protect the role of the local districts in providing public education in Georgia, the Majority's opinion itself should raise substantial new fears. The Majority's opinion burdens the districts with the enormous responsibility of having the "exclusive authority" to provide their citizens with "adequate public education." This is a huge, multi-billion dollar a year responsibility of government, heretofore discharged by the State. Though the Majority's

decision may result in a handful of districts having several fewer charter schools for several years, every district in Georgia will bear the burden and uncertainty of having these massive new responsibilities thrust upon them by this Court. The Majority's opinion does very little for the seven districts who are parties to this case, and is very bad for the other 172.

Setting aside the Majority's opinion, on the other hand, carries none of these risks and avoids the other problematic features of the opinion. An opinion affirming the Superior Court can be crafted in such a way so as to preserve existing law with respect to the roles of the State and local districts in providing education, but also not give the General Assembly carte blanche. This is a facial challenge, a case which is exceptionally broad if it is successful, but exceptionally narrow if it is defeated. The issue in this case is not whether *any* school that the Commission may decide to charter is necessarily constitutional, but whether *every* Commission charter school, present and future, is necessarily *unconstitutional,* without respect to whether the creation and funding of the school has any actual impact upon the local district. This Court may affirm the Superior Court and make it clear that it is not deciding cases or claims that are not before the Court. For example, the Court would not be deciding whether, with a proper factual record, a local district could establish that local taxes or bonded

debt were supporting a Commission charter school in violation of the constitution. In this case, however, the Local Districts have failed to establish the facial invalidity of the Act, and have conceded that they have neither raised taxes nor incurred bonded debt to support any Commission charter school. The Superior Court's order should be affirmed on these narrow grounds.

As Justice Goldberg wrote in *Abington School District v. Schempp,* 374 U.S. 203, 308 (1963) (concurring opinion), "the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." These fine charter schools do not pose a real threat to local school districts, and this case may be resolved on narrow grounds that preserve the proper balance between the roles of local and state governments.

III. ARGUMENT

A. Local Boards Have Never Had "Exclusive Control Over General K-12 Public Education"

The Majority states that the Constitution of 1983 "continues the line of constitutional authority, unbroken since it was originally memorialized in the 1877 Constitution of Georgia, granting local boards of education the exclusive right to establish and maintain, i.e. the exclusive control over, general K-12 public education." (Op. at 2). Local boards have been given

this exclusive authority, the Majority reasons, because they are more responsive to "the taxpayers and parents of the children being educated." (Op. at 3). Granting the state the power to create charter schools as special schools, the Majority concludes, is contrary to this "134-year-old status quo in regard to exclusive local control over general K-12 public education." (Op. at 4). This reasoning – which the School Districts themselves did not advance in this case[2] – is entirely incorrect.

The Majority's "unbroken" line of constitutional authority begins with this passage from the 1877 Constitution:

> There shall be a thorough system of common schools for the education of children in the elementary branches of an English education only, as nearly uniform as practicable, the expenses of which shall be provided for by taxation, or otherwise. *The schools shall be free to all children of the State, but separate schools shall be provided for the white and colored races.*

(Emphasis added). The 1877 Constitution did not merely authorize racial segregation like *Plessy v. Ferguson,* 163 U.S. 537 (1896). It went further to require racial segregation as a matter of constitutional law. Worse, the 1877 Constitution did not even require that the races be separate "but equal," as empty a promise as that might have been. More to the point: the 1877 Constitution did not anchor 134 years of unbroken constitutional history.

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[2] *See supra* note 1.

Whatever shameful "constitutional line of authority" it "memorialized" ended with the United States Supreme Court's unanimous decision in *Brown v. Board of Education*, 347 U.S. 483 (1954).

The Majority's citation to the 1877 Constitution is troublesome at another level: the 1877 Constitution simply does not support the proposition that the Majority repeatedly cites it for. There is absolutely no provision in the 1877 Constitution giving local districts the exclusive authority over public education. The 1877 Constitution established free public education generally, and permitted counties to raise funds for education, but does not suggest that counties exercised authority over public education to the exclusion of the state. Further, in the provision quoted above providing for a segregated "system of common schools" throughout the state, the constitution provided that such schools should be as "nearly uniform as practicable," a directive that would be utterly defeated if scores of counties had been given the autonomy that would have accompanied exclusive control.

Moreover, the Majority's romanticized account of the 134 years of public education in Georgia following the ratification of the 1877 Constitution – particularly the fiction that local schools boards were relied upon because they were the most responsive to the needs of local parents --

bears absolutely no resemblance to the actual cruel history of segregated education in Georgia, a history in which the local districts deliberately and systematically denied adequate education to one half of their constituency because of race. *See generally* D. ORR, HISTORY OF EDUCATION IN GEORGIA (1950), CHAPTER XII, ELEMENTARY AND SECONDARY EDUCATION FOR NEGROES (hereafter "Orr").[3] Under statutes enacted pursuant to the 1877 Constitution, the state apportioned funds to the counties on a per capita basis, regardless of the racial makeup of the district, and the local districts were responsible for allocating funds among the various schools. "The appropriations for Negro schools were, therefore, almost entirely dependent upon the local sentiment of the white school board." Orr, p. 315-316. As a result, almost all of the meager public funds available went to white schools, even though African Americans composed about half of the student population.

The inequalities between the funding for white and African-American schools were greatest in those districts with the largest African-American population; there, more state funds (distributed on a per capita basis without regard to race) were available to be diverted to the all white

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[3] This Court quoted extensively from Orr's book in *McDaniel v. Thomas*, 248 Ga. 632, 650 (1981).

schools. Orr, p. 316 (Table, "Per Capita Expenditure for Counties According to Percentage of Negro Population, 1910"). In counties with 75% or greater African-American population, for example, the local districts spent $1.61 per African-American child compared to $19.23 per white child. *Id.* The local districts were simply stealing the money from the African-American schools. For another example: seventy-eight high schools for whites were built by local district schools between 1902 and 1914, but by 1916, there was still only one public high school in the entire state for African-American children. Orr, p. 319. By 1923, there were 275 accredited public high schools in the state for white students, but only two accredited public high schools for African Americans. Orr, 329.

This actual history of how local districts systematically deprived basic educational opportunities to generation after generation of African Americans stands in vivid contrast to the Majority's romanticized account. The Majority contends that "our constitutions, past and present, have limited governmental authority over the public education of Georgia's children to that level of government closest and most responsive to the taxpayers and parents of the children being educated." (Op. at 3). The Majority does not cite to any constitutional authority, past or present, supporting this proposition. Further, the tragic history is that local districts

were not "responsive to the taxpayers and parents" of African-American children who made up one-half of the student age population. Local districts may have been responsive to local political forces, but they were not responsive to the educational needs of the children.

Moreover, if local districts have always had "exclusive" control over public education, as the Majority repeatedly states, then state government in the era of segregated schools would have been constitutionally prohibited from taking any action to mitigate the injustice that the local districts were perpetrating upon African-American students. But this wasn't the case. Instead, there were a series of initiatives *by the state government* in the early 20th Century to assist and develop African-American schools. In 1911, to "help provide more adequate education opportunity for the Negro Children in Georgia," the State Department of Education established the "Division of Negro Education."

> The division worked with the other divisions of the department in promoting their objectives in the Negro schools in the state. Upon it, in time, fell the responsibility for supervising and co-ordinating all agencies of Negro education. Its activities came to include: (1) stimulating local interest and the construction of standard school buildings; (2) encouraging the organization and improvement of county training schools for Negroes; (3) improvement of instruction in elementary schools through Jeanes supervisors; (4) experimentation in improvement of the one-teacher school; (5) improvement of the curricula for Negro normal schools.

Orr, p. 323. By 1932, the state's Division of Education supervised education of 177,000 African-American students taught by 5,000 African- American teachers. Orr, p. 336.

In 1920, the State Department of Education adopted a plan to assist African-American schools by coordinating and leveraging the substantial assistance that was being provided by philanthropies. This "marked a new era in the history of education for Negroes in Georgia." Orr, p. 342. In the 1930's reform, again, came from the state. Prior to the 1930's, each county set up its own salary scale and length of school year. Orr, p. 327. As a result, teachers at the African-American schools were horribly underpaid and school years in African-American schools were as short as three months. That changed in 1937:

> The real turning point in the [pre-*Brown*] history of Negro education came in 1937-1938 with the reorganization of the public school system. Provision was made for a state system of free textbooks,[4] a minimum term of seven months, and a minimum state salary schedule for all teachers.

Orr, p. 343 [5]

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[4] "Prior to 1936 the inability of Negro children to secure textbooks was a tremendous problem. One superintendent reported that in a one-teacher school the only book available was a catalog from a mail order house." Meadows, MODERN GEORGIA 147 (1954).

[5] The reforms mandated by the State in the 1930's remain in place today. *See* O.C.G.A § 20-2-212(a) (requiring State Board of Education to establish

Even with state assistance, public education for African Americans was woefully inadequate at least until public schools were integrated following *Brown*.[6] But public education of African Americans would have been much worse if the local districts had exercised "exclusive control" over public education.

The real Georgia history speaks with tragic eloquence of the dangers of vesting exclusive power over public education in the hands of any single level of government. Some local districts might have been responsive to all of their citizens in the age of segregated schools; many today may be the most responsive. But the Georgia Constitution wisely recognizes that public education is too critical a function of government to be entrusted exclusively to any single board, committee, assembly or branch. Thus, responsibility over public education is a partnership between the local districts, which are responsible for the day to day operation of their schools,

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the minimum salary schedule for public school teachers); GA. COMP. R. & REGS. 160-5-1-.02 (2)(a)(1) (requiring local board of education "schedule the school year for students as a minimum of 180 school days"); GA. COMP. R. & REGS. 160-5-1-.12(1)(a) (requiring school systems to "provide instructional materials required to complete each state funded course").

[6] "[A] full year after the *Brown* decision, ninety-eight percent of black students in Southern states still attended fully segregated schools." Epperson, *Resisting Retreat: The Struggle for Equity in Educational Opportunity in the Post-Brown Era,* 66 UNIV. OF PITTSBURGH L. REV. 131, 134-135 (2004).

and the State, which has always retained the ultimate constitutional duty to provide its citizens with adequate public education. Art. VIII, Sec. I, Para. 1. Commission charter schools are directly in line with this tradition.

B. The Majority's Holding that Local Districts Have the Exclusive Obligation to Provide An Adequate Public Education is Contrary to the 1983 Constitution, Overrules *McDaniel v. Thomas*, and Renders Much of Title 20 Unconstitutional.

The Majority's holding that local districts have the "exclusive" authority to provide adequate education is directly contrary to the crystal clear language of Article VIII, Section I, Paragraph 1 of the 1983 Constitution and overrules this Court's unanimous "adequacy of education" case, *McDaniel v. Thomas,* 248 Ga. 632 (1981). The impact of this holding is staggering: it will turn the regulation of public education in Georgia on its head.

Article VIII, Section I, Paragraph 1 of the 1983 Constitution states: "The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia." In the seminal "adequacy of education" case, *McDaniel v. Thomas,* 248 Ga. 632 (1981), this Court interpreted the identical provision in the 1976 Constitution:

> The Georgia constitution thus contains very specific provision relating to the obligation of localities to impose a tax for the maintenance of the public schools and general provisions

> imposing a duty on the state and General Assembly to provide its citizens an "adequate education."

258 Ga. at 164. In sharp contrast to the Majority's decision in this case on a number of levels, the *McDaniel* court held that since the term "adequate education" was not defined in the constitution, it was up to the General Assembly to give meaning to the term:

> However, this court has recently noted the inherent difficulty in establishing a "judicially manageable standard for determining whether or not pupils are being provided 'an adequate education.'" *Deriso v. Cooper,* 246 Ga. 540, 543, 272 S.E.2d 274 (1980). We deal in an area where courts have "traditionally deferred to state legislatures." *San Antonio School District v. Rodriguez,* supra, 411 U.S. at 40, 93 S.Ct. at 1300. Thus, while an "adequate" education must be designed to produce individuals who can function in society, it is primarily the legislative branch of government which must give content to the term 'adequate.'"

248 Ga. at 644.

The Majority's decision in this case would overrule *McDaniel.* In a crucial step of its "special school" analysis, the Majority reasons as follows:

> The constitutional history of Georgia could not be more clear that, as to general K-12 public education, local boards of education have the exclusive authority to fulfill one of the "primary obligation[s] of the State of Georgia," namely, '[t]he provision of any adequate public education for its citizens.' Art. VIII, Sec. 1, Par. I."

(Op. 3). This holding directly overrules *McDaniel.* Either the constitution imposes a "duty on the state and General Assembly to provide its citizens an 'adequate education,'" as this Court unanimously held in *McDaniel,* or

"local boards of education have the exclusive authority to fulfill one of the 'primary obligation[s] of the State of Georgia,' namely, '[t]he provision of any adequate public education for its citizens,'" as the Majority would hold in this case.

Even if *McDaniel* had never been decided, the Majority's holding could not be reconciled with the language of the Constitution. The first sentence of the education article of the 1983 Constitution states: "The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia." Art. VIII, Sec. I, Par. I. The Majority would turn what is clearly an obligation of the State of Georgia into an "exclusive" obligation of the local districts. This Court cannot allow a plain misreading of the Constitution to cause a radical redistribution of authority over public education.

The implications of the Majority's ruling are indeed staggering, for both the State and for the local districts:

1. Impact on State Government. Before the Majority's ruling, the State -- pursuant to plain language of the 1983 Constitution and unanimous decisions of this Court -- had the constitutional duty to provide its citizens with an adequate public education. *See* M. Hill, THE GEORGIA STATE CONSTITUTION 172 (1994) (In the drafting of the 1983 Constitution, the

"education article committee decided to maintain the state's obligation to provide an 'adequate public education' for the citizens"). Pursuant to this authority, the General Assembly has enacted far-reaching statutes regulating public education in Georgia, including the Quality Basic Education ("QBE") Act, O.C.G.A. § 20-2-161. In the QBE Act, the General Assembly recognized the need to implement a "quality basic education in public schools state wide," and set forth a comprehensive regulatory scheme governing every aspect of public education, including the detailed QBE Formula for allocating billions in state tax dollars to local districts, and the delegation to the State Board of Education the responsibility of establishing "uniformly sequenced core curriculum." *Id.* at §20-2-140. If local districts have the "exclusive authority to fulfill one of the 'primary obligation[s] of the State of Georgia,' namely, '[t]he provision of any adequate public education for its citizens,'" as the Majority holds, then the General Assembly had no business enacting the far-reaching QBE Act or taking any of the other desperately needed reforms that it is considering today. The State might still decide – notwithstanding crushing budgetary pressures – to continue to fund local districts with billions and billions of dollars in aid each year, but it would not have any constitutional obligation to do so.

Further, it is not only the major pieces of legislation that would be undermined by the Majority's decision, but any number of laws and regulations that together form the entire state-wide regulatory regime. For example, state law, not local law, establishes the minimum salary schedule for public school teachers (O.C.G.A § 20-2-212(a)); requires annual reviews for all school personnel (O.C.G.A. § 20-2-210(a)); prescribes minimum qualifications for employment of all personnel (O.C.G.A. § 20-2-211(a)); limits a local board of education's authority to demote or "non-renew" a teacher (O.C.G.A. § 20-2-942(b)); and specifies maximum teacher to student ratios. O.C.G.A. § 20-2-161(b). If local districts have the "exclusive authority," then the state had no constitutional authority to enact any of these laws or regulations.

2. *Impact upon Local Districts.* Giving the local districts the exclusive authority and obligation to provide adequate education is not doing the local districts any favors -- and this may explain why the Local Districts in this case did not advance this argument in support of their "special school" argument. Local districts rely heavily upon the state regulatory regime, which the Majority's ruling would throw into utter disarray. Further, will every local district in the state now be exposed to a

tsunami of litigation over whether they have discharged their newly minted constitutional duty to provide an "adequate public education"?

C. The Majority Misreads Article VIII, Section V, Paragraph 1 of the 1983 Constitution.

The Majority repeatedly states that the 1983 Constitution grants "exclusive authority" to local districts over public education. There is no such grant, whatsoever, in the Constitution. Article VIII, Section V, Paragraph 1 states, in the passive voice, that "authority is granted" to the local districts to create schools, but the phrase conspicuously omits words like "sole" or "exclusive" that would have been added had the Framers intended local districts to hold the kind of exclusive authority that the Majority describes.

Any lingering doubt that the Framers of the 1983 Constitution intended the phrase "authority is granted" to mean "authority is granted," and not "*exclusive* authority is granted," is dispelled by comparing the grant of authority to local districts in Section V of Article VIII to a parallel grant of authority to the board of regents in the immediately preceding section:

1983 Constitution Grant of Authority to Local Districts *Public Schools*	1983 Constitution Grant of Authority to Board of Regents *Colleges and Universities*
"Authority is granted to county	"The board of regents *shall*

and area boards of education to establish and maintain public schools within their limits." Article VIII, Section V, Paragraph I.	*have the exclusive authority to create* new public colleges, junior colleges, and universities in the State of Georgia, subject to approval by majority vote in the House of Representatives and the Senate." Article VIII, Section IV, Paragraph I.

Upon reviewing these two provisions side-by-side, the only reasonable interpretation is that the Framers did *not* intend to grant exclusive authority to the local districts. The Framers knew how to say "exclusive" when they meant "exclusive," and they did not use that word or any word like it to describe the local districts' authority over public schools.

If the presumption of constitutionality means anything at all, the Commission Charter School Act should not be invalidated by reading the word "exclusive" into Article VIII, Section V, Paragraph 1.

D. Fatal Flaws in the Majority's Definition of Special Schools.

The Majority's definition of "special schools" is fatally flawed:

1. All agree that "special school" has to mean something, but there is no school that the General Assembly could create that would qualify as a "special school" under the Majority's definition. The Majority states that "special schools" "are not schools that enroll the same types of K-12

students who attend general K-12 public schools." (Op. at 13). The Majority does not explain what it means by "same types of K-12 students," but presumably the Majority means students that could not attend "general K-12 public schools." But there are no such students: local district schools must enroll every student residing in the area, and must do so regardless of race, gender, socioeconomic status, disability, national origin, or any other classification that might be devised to define a special school population.

Even if a category of special students could be found, to be special the school could not "teach the same subject that may be taught at general K-12 public school." (Op. at 13). This too would be impossible, for there is no course that a local district school might not teach. Local district schools today teach every subject under the sun, from English for Speakers of Other Languages, to AP Latin (Virgil's *Aeneid*), JROTC, Nursing, Constitutional Theory, Chinese, Forensics, Ceramics, AP Studio Art, Genetics, and History in Film.[7] All district schools also must have special programs for the hearing and visually impaired. And even if a local district school did not teach a particular course when a special school was created, nothing would stop the local district school from developing such a course or just suggesting that it might be able to do so in the future. What possible

[7] Grady High School's course catalogue, available online, is 45 pages long.

purpose would be served by a special school that taught none of the courses that might be taught by local district schools? A "school" that teaches no language, no math, no science, no physical education, no social studies, no literature, and no history would be freakishly "special," but it would not be a "school."

2. Even if there is some hypothetical school that would fit the Majority's definition, is it reasonable and fair for the Majority to conclude that the Framers went to the trouble of drafting a special section of the *Constitution* just to give the General Assembly the trivial authority to create educational institutions to teach an unknown group of students unknown subjects of study?

3. The Majority describes special schools as those that are totally outside the domain, experience, and expertise of the local school districts. (*Id.*, at 13-14). This definition of special school conflicts with two clauses in the same special schools section of the Constitution. The next clause states as follows (italicized below):

> 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* . . . .

If "special schools" described a class of schools totally foreign to the "exclusive" domain of the local boards of education, why would the Framers have bothered to give the General Assembly the option of providing for the participation of the local boards in the establishment of such schools? Clearly, the Framers, by allowing the General Assembly to provide for the cooperation of the local district boards in the establishment of special schools, contemplated special schools with respect to which the local district boards had experience and expertise.

Next, the special school provision of the Constitution states: "Any special schools shall be operated in conformity with regulations of the State Board of Education pursuant to provisions of law." *Id.* Local district schools must also be operated in conformity with Board regulations. The Framers therefore anticipated that special schools and local district schools would be operated in conformity with a common set of basic educational requirements established by the State Board of Education. The Majority's holding that a special school is one that does not "teach the same subject that may be taught at general K-12 public school," Op. at 13, cannot be reconciled with this sentence of the Constitution.

E. Middle Ground

There is a middle ground, a holding that affirms the judgment of the Superior Court but does not give the General Assembly carte blanche. The Appellant School Districts concede that the establishment and funding of the Commission charter schools in this particular case has not forced them to raise local taxes or incur bonded debt, a concession that requires the affirmance on the issue of whether the Act violates the financing piece of the "special schools" provision. But affirming the judgment of the Superior Court does not foreclose the possibility that in a future case a local district might be able to make a showing that it has been required to raise local taxes or incur bonded debt to support a Commission charter school. The Court need not suggest what kind of factual showing in a particular case would be required to prove that local taxes were being used in support of Commission charter schools; it need only note that no such showing has been made in this case. To maintain the proper balance between local and state authority over public education, such a holding could also send a signal to the Commission not to overstep its mandate, and to the General Assembly to take the impact of charter school creation into account when making its annual allocation of QBE funding to each of the districts. Since the Superior Court properly rejected this facial challenge to the Act,

however, its decision may be affirmed without addressing the precise factual record that will need to be developed in a particular case.

This motion should be granted.

Respectfully submitted this 26th day of May, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I served a true and correct copy of the foregoing **Motion for Reconsideration** has been served on counsel for the parties by U.S. Mail, postage-prepaid addressed as follows:

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