IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

FILED IN OPEN COURT, THIS THE 24 DAY OF May 2012
JUDGE, WENDY L. SHOOB

Gwinnett County School District, et al.,

Plaintiffs,

vs.

Kathy Cox, State Superintendent of Schools, et al.,

Defendants.

The Bulloch County School District and the Candler County School District,

Plaintiffs,

vs.

Georgia Department of Education, et al.,

Defendants.

Civil Action No. 2009-CV-174907

Henry County School District, et al.,

Plaintiffs,

vs.

Kathy Cox, State Superintendent of Schools, et al.,

Defendants.

FINAL ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND MOTION TO DISMISS

On May 7, 2010, this case came before the Court for hearing on motions for summary judgment filed by defendants Ivy Preparatory Academy, Inc. ("Ivy Prep"); Charter Conservatory for Liberal Arts & Technology, Inc. ("CCAT"); Heron Bay Academy, Inc. ("Heron Bay"); and

collectively by the Georgia Department of Education ("GDOE"), the Georgia Charter Schools Commission ("Charter Commission"), Kathy Cox, Ben Scafidi, Charles Knapp, Jennifer Rippner Buck, Eric Rosen, Tom Lewis, Steven Ballowe, Gerard Robinson, and Andrew Broy (collectively the "State Defendants"), and cross motions for summary judgment filed by plaintiffs Gwinnett County School District ("Gwinnett School District"); DeKalb County School District ("DeKalb School District") and Atlanta Independent School System ("Atlanta Public Schools"); Bulloch County School District ("Bulloch School District") and Candler County School District ("Candler School District"); and Henry County School District ("Henry School District") and Griffin-Spalding County School District ("Griffin-Spalding School District") (collectively, the "School Districts"). Also before the Court is defendants' motion to dismiss Counts IV, VI and VII of the Complaint for Declaratory Judgment and Injunctive Relief filed by Henry County School District and Griffin-Spalding County School District. After reviewing the pleadings and the record in this case, and considering the arguments of counsel during the hearing held on May 7, 2010, the Court finds and holds as follows:

I. BACKGROUND

A. Charter School Laws

In this case, the School Districts contend that the Georgia Charter Schools Commission Act, O.C.G.A. § 20-2-2080, *et seq.*, (the "Act") violates the Georgia Constitution in several respects, discussed in detail below. The Act is the latest of several laws enacted by the General Assembly addressing charter schools. Two early laws, enacted in 1993 and 1998, respectively, authorize existing public schools to convert to charter schools, known as conversion charter schools, and permit the creation of "start-up" charter schools, which are schools that did not exist prior to becoming a charter school. O.C.G.A. § 20-2-2064(a),(b). These two types of schools are now collectively referred to as "local charter schools." O.C.G.A. § 20-2-2062(7). In 2000,

the General Assembly amended the Charter Schools Act to authorize the creation of state chartered special schools. State chartered special schools are charter schools that are approved by the State Board of Education and operate under the terms of a charter between the charter petitioner and the state board. O.C.G.A. §§ 20-2-2062(16); 20-2-2064.1(c).

In 2008, the General Assembly passed O.C.G.A. § 20-2-2082 establishing the Charter Commission and authorizing it to approve, if certain criteria are met, a new type of charter school known as a "commission charter school." O.C.G.A. §§ 20-2-2081 (definitions); 20-2-2083 (powers and duties of the Charter Commission); 20-2-2085 (petition requirement). When establishing the Charter Commission the General Assembly made express legislative findings that "charter schools are a critical component in this state's efforts to provide efficient and high-quality schools within this state's uniform system of public education;" that they "provide valuable educational options and learning opportunities" expanding the State's system of public education and empower parents to ultimately "best fit the individual needs of their children," and that the growth of charter schools contributes to enhanced student performance." O.C.G.A. § 20-2-2080. The General Assembly also defined commission charter schools as special schools within the meaning of Article VIII, Section V, Paragraph VII of the Georgia Constitution. O.C.G.A. § 20-2-2081(2).

Commission charter schools are expressly funded only through an appropriation of state and federal funds. O.C.G.A. § 20-2-2090(a). This appropriation is made through the Georgia Department of Education and consists of Quality Basic Education ("QBE") formula earnings, QBE grants, and federal grants earned by the commission charter school based on the school's enrollment, school profile, and school characteristics; a proportional share of state categorical grants, non-QBE state grants, state equalization grants, and all other state and federal grants; and

an amount determined by the commission for each student in the school equal to a proportional share of local revenue from the local school system in which the student would have been enrolled, subject to certain factors and possible reduction by the commission. O.C.G.A § 20-2-2090(a); *see also* O.C.G.A. § 20-2-161 (QBE formula).

B. Commission Charter School Defendants.

This litigation involves three commission charter schools approved by the Charter Commission pursuant to the Act.

1. Ivy Prep

In 2007, Ivy Prep petitioned Gwinnett School District to become a start-up charter school, and Gwinnett School District denied Ivy Prep's petition. (Gwinnett School District Complaint, ¶ 26; Exs. A, B to Complaint; DeKalb School District/Atlanta Public Schools Complaint, ¶ 26; Ivy Prep Answer, ¶ 26). Thereafter, Ivy Prep applied for and was granted a charter as a state chartered special school by the State Board of Education. (Gwinnett School District Complaint, ¶ 27; DeKalb School District/Atlanta Public Schools Complaint, ¶ 27; Ivy Prep Answer, ¶ 27). Ivy Prep operated as a state chartered special school for the 2008-2009 academic year. (*Id.*). Ivy Prep petitioned the Charter Commission to become a commission charter school, and on June 18, 2009, the Charter Commission approved Ivy Prep's petition. (Gwinnett School District Complaint, ¶¶ 27-28; Ex. C to Complaint; DeKalb School District/Atlanta Public Schools Complaint, ¶¶ 27-28; Ivy Prep Answer, ¶¶ 27-28). Ivy Prep has operated as a commission charter school for the 2009-2010 academic year. (Gwinnett School District Complaint, ¶ 29; DeKalb School District/Atlanta Public Schools Complaint, ¶ 29; Ivy Prep Answer, ¶ 29).

2. CCAT

In 2000, CCAT petitioned Bulloch School District to become a start-up charter school, and Bulloch School District denied this petition. (Bulloch School District/Candler School District Complaint, ¶¶ 23, 24; CCAT Answer, ¶¶ 23, 24). In July 2001, CCAT became the first state chartered special school in Georgia. (Bulloch School District/Candler School District Complaint, ¶ 25; CCAT Answer, ¶ 25). CCAT operated as a state chartered special school from 2003 to 2009, when it was approved as a commission charter school. (Bulloch School District/Candler School District Complaint, ¶¶ 31-34; CCAT Answer, ¶¶ 31-34). CCAT has operated as a commission charter school for the 2009-2010 academic year. (Bulloch School District/Candler School District Complaint, ¶ 39; CCAT Answer, ¶ 39).

3. Heron Bay.

In May of 2008 and 2009, Heron Bay submitted separate petitions to create a local start-up charter school to Henry School District and Griffin-Spalding School District. (Henry School District/Griffin-Spalding School District Complaint, ¶¶ 35, 38; Heron Bay Answer, ¶¶ 35, 38). Henry School District and Griffin-Spalding School District denied both petitions. (Henry School District/Griffin-Spalding School District Complaint, ¶¶ 36,37, 39,40; Exs. A-D to Complaint; Heron Bay Answer, ¶¶ 36,37, 39,40). On July 31, 2009, Heron Bay submitted a petition to the Charter Commission to become a commission charter school, which the Charter Commission approved on December 14, 2009. (Henry School District/Griffin-Spalding School District Complaint, ¶¶ 41, 44; Heron Bay Answer, ¶¶ 41, 44). Heron Bay will begin operating as a commission charter school during the 2011-2012 academic year. (Heron Bay Answer, ¶ 49).

C. This Lawsuit

Gwinnett School District filed its complaint on September 11, 2009 (the "Gwinnett Case"). On September 28, 2009, Bulloch School District and Candler School District filed their

complaint in the case styled *The Bulloch County School District, et al. v. Georgia Department of Education, et al.*, Civil Action No. 2009-CV-175703 (the "Bulloch Case"). On January 11, 2010, this Court granted the motion of the DeKalb County School District and Atlanta Public Schools to intervene in the Gwinnett case. With the consent of all the parties, the Court consolidated the Gwinnett Case and the Bulloch Case (the "Consolidated Cases") on January 21, 2010.

On February 15, 2010, Henry School District and Griffin-Spalding School District filed their complaint in the case styled *Henry County School District, et al. v. Kathy Cox, State Superintendent of Schools, et al.*, Civil Action No. 2010-CV-181426 (the "Henry Case"). On March 23, 2010, the Honorable T. Jackson Bedford ordered the Henry Case transferred to this Court as a filing related to the Consolidated Cases. On March 31, 2010, this Court ordered the Henry Case consolidated with the Consolidated Cases for all purposes.

In their respective complaints, the School Districts assert the following claims in their facial attack on the Act:

- In Count I, the School Districts contend that the Charter Commission is an independent school system prohibited by Article VIII, Section V, Paragraph I of the Georgia Constitution.

- In Count II, the School Districts contend that O.C.G.A. § 20-2-2083(a)(1) is unconstitutional pursuant to Article VIII, Section V, Paragraph II of the Georgia Constitution because it authorizes the Charter Commission to grant charters to schools that are not under the management and control of an elected board of education.

- Also in Count II, the School Districts contend that the General Assembly improperly delegated its constitutional authority to create special schools to the Charter Commission without prescribing sufficient guidelines governing approval of charter petitions.

- In Count III, the School Districts contend that commission charter schools are not "special schools" within the meaning of Article VIII, Section V, Paragraph VII of the Georgia Constitution, which grants the State the

authority to create "special schools." The School Districts argue that "special schools" should mean "state-funded special needs schools."

- In Count IV,[1] the School Districts contend that funding the commission charter schools violates Article VIII, Section V, Paragraph VII of the Georgia Constitution, which states: "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."

- In Count V,[2] the School Districts contend that the respective charters of Ivy Prep, CCAT, and Heron Bay are "null and void and of no effect" because the creation of the Charter Commission is unconstitutional, and its actions are therefore null and void.

- In Count VI,[3] the School Districts make a claim similar to that in Count IV that funding for the commission charter schools is illegal and excessive.

II. THE DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

A. Legal Standards

Summary judgment is appropriate if the pleadings and evidence "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." O.C.G.A. § 9-11-56(c); *see also Lau's Corp. v. Haskins*, 261 Ga. 491, 491 (1991).

Statutes are "presumed to be constitutional until the contrary appears," thus "the burden is on the party alleging a statute to be unconstitutional to prove it." *Development Auth. of DeKalb County v. State*, 286 Ga. 36, 38 (2009) (affirming trial court's decision upholding constitutionality of statute imposing referendum requirement on issuance of bonds by county development authority); *see also Mayes v. Daniel,* 186 Ga. 345, 350 (1938) ("All presumptions are in favor of the constitutionality of an act of the legislature."). "The General Assembly is

[1] Count V of Henry School District/Griffin-Spalding School District Complaint.

[2] Count VIII of Henry School District/Griffin-Spalding School District Complaint.

[3] Count IX of Henry School District/Griffin-Spalding School District Complaint.

presumed to enact laws with full knowledge of the condition of the law and with reference to it, and the courts will not presume that the legislature intended to enact an unconstitutional law." *Board of Public Ed. v. Hair,* 276 Ga. 575, 576 (2003). "In construing statutes, courts must look diligently for the intention of the General Assembly, and will only declare legislation unconstitutional when it manifestly infringes upon a constitutional provision or violates the rights of the people." *Brodie v. Champion*, 281 Ga. 105, 105-106 (2006) (affirming trial court's holding that statue prohibiting counting write-in ballots was constitutional). As the Supreme Court of Georgia explained 72 years ago in *Williamson v. Housing Authority of Augusta*, 186 Ga. 673, 693-94 (1938), "if, upon analysis, it appears that the only novelty in the legislation is that approved principles are applied to new conditions," a constitutional challenge "must fail."

The School Districts bring a facial challenge to the Act. A plaintiff making a facial challenge must establish that the statute cannot be applied in a constitutional manner. *Smith v. Baptiste*, No. S09A1543, 2010 WL 889557, at * 2 (Ga., March 15, 2010) (Nahmias, J., concurring) ("Outside the First Amendment overbreadth context, a plaintiff can succeed in a facial challenge only by 'establish[ing] that no set of circumstances exists under which the [statute] would be valid, i.e., that the law is unconstitutional in all of its applications,' or at least that the statute lacks a 'plainly legitimate sweep.'") (quoting *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 449 (2008)).

B. <u>The Charter Schools Commission Act is Constitutional.</u>

1. <u>The Charter Commission is Not an Independent School System.</u>

The Plaintiffs contend that the creation of the Charter Commission in O.C.G.A. § 20-2-2082 creates "an independent school system in violation of Georgia Constitution Article VIII, Section V, Paragraph I." (Gwinnett School District Complaint, ¶ 40; DeKalb School District/Atlanta Public Schools Complaint, ¶ 40; Bulloch School District/Candler School District

Complaint, ¶ 57; Henry School District/Griffin-Spalding School District Complaint, ¶ 77). This provision of the Constitution states, *inter alia*, that, "No independent school system shall hereafter be established." GA. CONST. Art. VIII, Sec. V, Para. I.

The challenged statutory subsection creating the Charter Commission provides as follows:

> (a) The Georgia Charter Schools Commission is established as a state-level charter school authorizing entity working in collaboration with the Department of Education. Startup funds necessary to establish and operate the commission may be received by the State Board of Education in addition to such other funds as may be appropriated by the General Assembly. The department shall assist in securing federal and other institutional grant funds to establish the commission.

O.C.G.A. § 20-2-2082(a).

This subsection – and the creation of the Charter Commission in general – is consistent with the General Assembly's power to establish boards and commissions. *Cf. Albany Surgical, P.C. v. Georgia Dep't of Community Health*, 278 Ga. 366, 368 (2004). Nothing in the statutory text suggests that the General Assembly is doing anything other than creating a commission – which is a routine enactment and delegation of power under Georgia law. Nothing in the statutory text suggests or states that the Charter Commission is an independent school system.

School systems in Georgia have numerous duties, powers, and responsibilities, none of which are shared by the Charter Commission. *See generally* Title 20, Chapter 2 of the Georgia Code. They are managed by elected boards; have superintendents; fund the schools in the district (using federal, state, and local funds); establish specific details of curriculum taught in the schools; contract with teachers; have administrative staffs; and in general are dedicated to providing day-to-day educational services and for student welfare, meals, transportation, and special services. *Id.* The Charter Commission has none of these day-to-day educational

responsibilities. Georgia law, rather, makes the Charter Commission simply and expressly "a state-level charter school authorizing entity working in collaboration with the Department of Education" O.C.G.A. § 20-2-2082.

Indeed, although the Constitution does not define "independent school system," Georgia law has consistently applied this term to schools created by municipalities. *See, e.g., Upson County Sch. Dist. v. City of Thomaston*, 248 Ga. 98, 105 (1981) (finding that the annexation of territory into a municipality operating an independent school system also extends the limits of the school system); O.C.G.A. § 20-2-370 (providing a method by which "the citizens of a municipality or independent school district authorized by law to establish and maintain a system of schools by local taxation" may "become a part of the county school system."). Likewise Georgia law expressly provides by regulation that "independent school system" means a "municipal school system." GA. COMP. R. & REGS. 375-6-1-.02.

Plaintiffs cite no authority or support for their claim that commission charter schools are an independent school system in violation of the Constitution. To the contrary, as discussed below, the constitution permits the General Assembly to create special schools, GA. CONST. Art. VIII, Sec. V, Para VII, and the establishment of the Charter Commission is consistent with that power.

The Defendants are entitled to summary judgment on Count I of the Plaintiffs' complaints.

2. Commission Charter Schools are Not Required To Be Under the Management and Control of an Elected School Board.

The School Districts claim that the Act is unconstitutional because it authorizes the Charter Commission "to grant charters for schools that are not under the management and control of an elected board of education." (Gwinnett School District Complaint, ¶ 42; DeKalb

School District/Atlanta Public Schools Complaint, ¶ 42; Bulloch School District/Candler School District Complaint, ¶ 49; Henry School District/Griffin-Spalding School District Complaint, ¶ 81). In response Defendants contend that commission charter schools are not required to be under the management and control of an elected board of education but, rather, are special schools expressly authorized to be created by the Georgia Constitution.

As the Court discusses below, the Georgia Constitution expressly gives the General Assembly the power to create special schools in Article VIII, Section V, Paragraph VII. That provision states that the legislature "*may* provide for the participation of local boards of education in the establishment of such schools under such terms and conditions as it may provide." GA. CONST. Art. VIII, Sec. V, Para. VII(a) (emphasis added). It does not require local boards of education to participate in the establishment of special schools. The cardinal rule of construction is that the intention of the framers is to be diligently looked for and given effect. *Forrester v. North Ga. Elec. Mem. Corp.*, 66 Ga. App. 779, 787-88 (1942). In regard to potential conflict between statute and Constitution, statutes must be construed to avoid a conclusion of unconstitutionality. *Carpenter v. Forshee*, 103 Ga. App. 758, 768 (1961); *Jones v. City of College Park*, 223 Ga. 778, 782 (1967). Where there is more than one possible interpretation, a court will choose the constitutional one. Carpenter, 103 Ga. App. at 768.

In the present case Plaintiffs' claim that the Charter Commission improperly creates charter schools not under the management and control of an elected local board of education is without merit.

3. O.C.G.A. § 20-2-2082 is Not an Unconstitutional Delegation of the Georgia General Assembly's Authority to Create Special Schools.

The School Districts claim that "the General Assembly has purported to delegate its constitutional authority to provide for the creation of special schools to the Charter Commission

without prescribing sufficient guidelines for the Charter Commission to use in the creation of such schools" and that such "delegation violates Georgia Constitution Article III, Section I, Paragraph I."[4] (Gwinnett School District Complaint, ¶ 43; DeKalb School District/Atlanta Public Schools Complaint, ¶ 43; Bulloch School District/Candler School District Complaint, ¶ 50; Henry School District/Griffin-Spalding School District Complaint, ¶ 82).

"It has long been recognized that the General Assembly is empowered to enact laws of general application and then delegate to an administrative board or agency the authority to adopt rules, bylaws, or ordinance for its government, or to carry out a particular purpose." *Pearle Optical of Monroeville, Inc. v. Georgia State Bd. of Examiners in Optometry*, 219 Ga. 364, 374 (1963); *see Albany Surgical,* 278 Ga. at 368 (power of the General Assembly to delegate to board or commission). The delegation "of legislative authority passes constitutional muster when the purpose and policy of the legislation are clearly provided, although the method, details, making of the subordinate rules, and the determination of facts to which the policy is to apply are deferred to another." *Banks v. Georgia Power Co.*, 267 Ga. 602, 603 (1997).

The power of the Charter Commission to approve or deny charter petitions is an appropriate delegation of legislative authority because the Act properly establishes the policy, general rules, and methods by which the Charter Commission exercises its functions. *Bohannon v. Duncan*, 185 Ga. 840, 843 (1938). Likewise, the purpose and policy of the Act are clearly identified and supported by express findings of legislative policy and intent. O.C.G.A. § 20-2-2080(a)-(b). The Act also specifically defines the obligations of the Charter Commission and the process by which petitions are submitted and reviewed. *See* O.C.G.A. §§ 20-2-2083; 20-2-2085.

[4] The Court notes that this contention by the Plaintiffs assumes that the General Assembly has the power to authorize commission charter schools in the first instance, an assumption the Plaintiffs later dispute in their complaints.

Because the Act properly delegates power to the Charter Commission and, indeed, articulates the process by which the Charter Commission reviews charter petitions and the stated intent and purpose of the legislation, the delegation to the Charter Commission is constitutional. The Defendants are entitled to summary judgment on Count II of the Plaintiffs' complaints.

4. The General Assembly Provided for the Creation of Commission Charter Schools as Special Schools Pursuant to its Authority under the Georgia Constitution.

In Count III, Plaintiffs allege that commission charter schools are not "special schools" authorized by the Constitution, contending that the only "special schools" the constitution allows are "special *needs* schools." (Gwinnett School District Complaint, ¶¶ 22, 45; DeKalb School District/Atlanta Public Schools Complaint, ¶¶ 22, 45; Bulloch School District/Candler School District Complaint, ¶¶ 52, 53; Henry School District/Griffin-Spalding School District Complaint, ¶¶ 87, 88) (emphasis added). There is no authority for reading the word "needs" into the constitutional provision: the provision authorizes the creation of "special schools," not merely "special needs schools."

The Georgia Constitution expressly gives the General Assembly the power to create special schools. It states, *inter alia*:

> **Paragraph VII. 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 . . .

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

The statutory scheme calling for the Charter Commission and commission charter schools is consistent with this authority. Indeed, in the only Georgia authority on this subject, the Attorney General opined nine years ago that charter schools properly qualified as "specials

schools" under this provision of the Constitution. 2001 Op. Att'y Gen. 2001-9; 1997 Op. Att'y Gen. U97-8.

There is no question that the General Assembly relied on its authority under the Constitution to create special schools in providing for commission charter schools and in giving the powers and duties it did to the Charter Commission. As stated in O.C.G.A. § 20-2-2081:

> "Commission charter school" means a charter school authorized by the commission pursuant to this article whose creation is authorized as a special school pursuant to Article VIII, Section V, Paragraph VII of the Constitution. A commission charter school shall exist as a public school within the state as a component of the delivery of public education within Georgia's K-12 education system.

O.C.G.A. § 20-2-2081(2).

The charter schools at issue in this case are "special" because they are outside the ordinary source of schools in Georgia. *See* WEBSTER'S NEW WORLD COLLEGE DICTIONARY (2009) (the word "special" means "1. of a kind different from others; distinctive, peculiar, or unique; 2. exceptional; extraordinary a special treat; ... 4. of or for a particular person, occasion, purpose, etc. by special permission, a special edition; 5. not general or regular; specific or limited special legislation."). In interpreting the law courts give words, such as "special," their ordinary meaning. *See Harris v. State*, 286 Ga. 245, 248 (2009). The General Assembly properly determined that the charter schools were "special schools" and defined them legislatively as such.

Plaintiffs next contend that since charter schools did not exist at the time of the drafting and ratification of the 1983 Constitution, that the framers of the 1983 Constitution could not have intended the words "special schools" to include charter schools. Though the intent of the framers is the appropriate reference point, *see Smith v. Baptiste,* No. S09A1543, 2010 WL 889557 (Ga., March 15, 2010), Plaintiffs have presented no authority supporting the proposition that the

framers of the 1983 Constitution intended to limit the scope of "special schools" to those then in existence, any more that the framers of the U.S. Constitution intended to limit the commerce clause to industries existing in the 18th Century or Second Amendment rights to muskets or other arms then in existence. In fact, to give the words "special schools" such a narrow reading would further appear to render the next subparagraph of the Georgia Constitution -- which "grandfathers" existing special schools created by the General Assembly or local districts[5] -- mere surplusage. *See Gilbert v. Richardson,* 264 Ga. 744, 747- 48 (1994).

Plaintiffs further contend that limiting language found in the special school provision of the 1976 Constitution demonstrates the framers' intent to narrow the range of "special schools." Article VIII, Section 9, Paragraph 1 of the 1976 Constitution provided as follows:

> The board of education of any county, area school district or independent school system, or any combination thereof, may establish, pursuant to local law enacted by the General Assembly, one or more area schools, *including special schools such as vocational trade schools, schools for exceptional children, and schools for adult education*, in one or more such political subdivisions; . . .

(emphasis added).

This case, however, concerns the current Georgia Constitution, in which the limiting language of the 1976 Constitution has been omitted:

> 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; . . .

[5] Article VIII, Section V, Paragraph VII(b) states: "Nothing contained herein shall be construed to affect the authority of local boards of education or of the state to support and maintain special schools created prior to June 30, 1983."

(GA. CONST. Art. VIII, Sec. 5, Para. 7(a)).[6]

The fact that the framers of the 1983 Constitution deleted the arguably limiting language found in the 1976 Constitution contradicts the Plaintiffs' position that the phrase "special schools" should be narrowly defined; instead, the framers' removal of the limiting language supports the contention that the framers intended to broaden the definition of special schools.

For the foregoing reasons, the Court holds that commission charter schools are "special schools" authorized by Article VIII, Section 5, Paragraph 7(a) of the Georgia Constitution, and the Plaintiffs' limited interpretation of this provision of the Constitution to "special needs schools" and insertion of the word "needs" in to the Constitution is rejected.

5. The Act's Funding of Commission Charter Schools is Constitutional.

Plaintiffs contend that the Act violates the funding section of Article VIII, Section V, Paragraph VII(a) of the Georgia Constitution, which provides that "no bonded indebtednesss may be incurred nor a school tax levied for the support of special schools without the approval a majority of the qualified voters voting thereon in each of the systems affected." The crux of their claim is that commission charter schools are, they claim, funded by local funds because their funds received from the State are proportionally reduced by the funds expended by the State for commission charter schools, and that share includes an amount of funds from the State calculated in part by the "proportional share of local revenue."

The Act, however, specifies that commission charter schools are to be funded exclusively by State and federal funds. O.C.G.A. § 20-2-2090(a) (stating that GDOE is required to "pay to each commission charter school through appropriation of state and federal funds"). Likewise,

[6] When adopting the Act, the General Assembly made the specific finding that charter "schools are a critical component in this state's efforts to provide efficient and high-quality schools within this state's uniform system of public education." O.C.G.A. § 20-2-2080(a)(1).

the proportional allotments to local school districts are based purely on State and federal funds. The challenged subsection states:

> 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.

O.C.G.A. § 20-2-2090(c) (emphasis added).

Indeed, there is absolutely no evidence whatsoever that the commission charter schools in this case have received revenue from bonded indebtedness or local school tax levies, either directly from the Plaintiffs or indirectly from any other source. *Compare Atlanta Indep. School Sys. v. Lane,* 266 Ga. 657, 659-660 (1996) (condemning school system's actual receipt of funds from "a local tax source other than ad valorem taxes raised in accordance" with the Georgia Constitution). In Paragraph 57 of their Statements of Material Fact, the Charter School Defendants asserted that the each school "receives no revenue from bonded indebtedness or local school tax levies" from any of the districts, and cited the Georgia Department of Education Funding Sheet which documented the funding of the schools. In response, the districts stated that they "disagreed" with the statement, and noted that they had *alleged* to the contrary. (*See, e.g.,* Ivy Prep Statement of Material Facts as to Which There is No Genuine Issue to be Tried, ¶ 57; Response of Gwinnett School District, ¶ 57.) Plaintiffs cannot avoid summary judgment simply by taking the position that certain facts are in dispute; instead, it is their burden to "set forth specific facts showing that there is a genuine issue to be tried." O.C.G.A § 9-11-56(e). Despite having ample opportunity to do so, Plaintiffs have not presented *any* evidence that the commission charter schools receive any revenue from bonded indebtedness or local school tax levies, from any source whatsoever. *See Tallman Pools of Georgia, Inc. v. James,* 181 Ga. App.

341, 343 (1986) (reversing denial of motion for summary judgment) ("Response by mere conclusory statements is insufficient to set forth specific facts showing a genuine issue for trial.").

Plaintiffs contend that even though no bonded indebtedness has been incurred and no school taxes have been levied in support of commission charter schools, that "effectively" such taxes have been levied because the State, to support the commission charter schools, reduces the State's funding of the districts in an amount "equal to a proportional share of local revenue from the local school system in which the student attending the commission charter school resides." O.C.G.A. § 20-2-2090(a)(3)(A). (*See* Gwinnett School District Complaint, ¶ 47; DeKalb School District/Atlanta Public Schools Complaint, ¶ 47; Bulloch School District/Candler School District Complaint, ¶ 57; Henry School District/Griffin-Spalding School District Complaint, ¶ 97.) Even if the Georgia Constitution were written to prohibit actions that had the "effect" of causing such taxation, which it is not, however, the Plaintiffs have made no showing that the law has had, or is likely to have, such an effect. (*See* Ivy Prep Statement of Material Facts as to Which There is No Genuine Issue to be Tried, ¶ 57; Response of Gwinnett School District, ¶ 57; Response of DeKalb School District/Atlanta Public Schools, ¶ 57; CCAT Statement of Material Facts as to Which There is No Genuine Issue to be Tried, ¶ 57; Response of Bulloch School District/Candler School District, ¶ 57; Heron Bay Statement of Material Facts as to Which There is No Genuine Issue to be Tried, ¶ 30; Response of Henry School District/Griffin-Spalding School District, ¶ 30.)

The Plaintiffs have not contested the showing of the Defendants that the transfer of a student from a district school to a commission charter school leaves the districts with exactly the same total funding (state, local, and federal) per remaining enrolled student. (*Id.*). The School

Districts are not entitled to a windfall from having students go to charter schools and yet have the school district receive the same funding. The funding system for commission charter schools has the rational effect of treating the funding of all students alike when they are from the same geographical area. Nothing prohibits the State from reducing State funding of the School Districts in support of commission charter schools.

Based upon the foregoing, the Court holds that the Act's funding of commission charter schools is constitutional because the schools are funded entirely by state and federal funds and do not cause the School Districts to levy sales taxes or incur bonded indebtedness.

6. The Three Commission Charter Schools' Charters Are Valid and Binding.

Plaintiffs contend that charters of Ivy Prep, CCAT, and Heron Bay are "null and void and of no effect" because the creation of the Charter Commission is unconstitutional, so it follows that the Charter Commission's actions are null and void. (Gwinnett School District Complaint, ¶ 49; DeKalb School District/Atlanta Public Schools Complaint, ¶ 49; Bulloch School District/Candler School District Complaint, ¶¶ 59-61; Henry School District/Griffin-Spalding School District Complaint, ¶¶ 107, 108). But, as discussed above, the Charter Commission was lawfully created, and it has the authority to approve petitions for commission charter schools and enter into binding charters, just as it did for Ivy Prep, CCAT, and Heron Bay. O.C.G.A. § 20-2-2083(a)(1) (stating that the Charter Commission shall approve or deny petition for commission charter schools). Therefore, the Court holds that the charters of these three schools are valid and binding.

III. MOTION TO DISMISS

The defendants filed a motion to dismiss Counts IV, VI and VII of the Complaint for Declaratory Judgment and Injunctive Relief filed by Henry County School District and Griffin-Spalding County School District.

A. Legal Standard

A motion to dismiss for failure to state a claim upon which relief can be granted should be sustained when: (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought. *Mooney v. Mooney*, 235 Ga. App. 117, 117 (1998); O.C.G.A. § 9-11-12(b)(6). If a complaint is clearly without merit, whether from an absence of law to support a claim or facts sufficient to make a good claim, then the complaint should be dismissed. *Poole v. City of Atlanta*, 117 Ga. App. 432, 434 (1968).

B. Discussion

1. Count IV: Due Process and Taking Without Just Compensation.

In Count IV, Henry County School District and Griffin-Spalding County School District challenge O.C.G.A. § 20-2-2090(b), which allows the DOE to withhold up to 3% of the funds otherwise payable to commission charter schools for use by the Charter Commission in performing administrative duties. (Complaint, ¶ 90). These school districts contend that the 3% withholding provision is unconstitutional because it deprives districts "of due process of law because the Charter Commission has a direct, personal, substantial, and pecuniary interest in approving charter petitions. See Caperton v. A.T. Massey Coal Co., Inc., 129 S.Ct. 2252 (2009)." (Complaint, ¶ 93). Henry County School District and Griffin-Spalding County School District also contend that the same provision "is unconstitutional because it is an impermissible taking of local tax funds." (Complaint, ¶ 94).

As a threshold matter, to state a due process or takings claim, Henry County School District and Griffin-Spalding County School District must allege that they have suffered a deprivation or taking of their own property without due process of law or just compensation. *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, Dep't of Bus. Regulation of Fla.*, 496 U.S. 18, 36 (1990). Henry County School District and Griffin-Spalding County School District do not (and cannot) allege any deprivation or taking because the 3% fee is withheld from the commission charter schools, not the school districts. Further, in response to the motion to dismiss, Henry County School District and Griffin-Spalding County School District still do not identify any property interest involved. Because there is no taking or deprivation of property owned by the school districts, the due process and taking clause claims must be dismissed.

Henry County School District and Griffin-Spalding County School District may be contending that the property that is being taken or that they are being deprived of is not the 3% fee itself, but the amount of State funding that would be withheld from these school districts and paid to the commission charter schools upon the approval of a commission charter petition. The State funds, however, are by definition owned by the State, not Henry County School District and Griffin-Spalding County School District, and the General Assembly's decision to direct State funds to or from a district is not a taking or deprivation of the districts' property.

Further on the due process allegation, based on the school districts' citation to *Caperton*, it appears that their contention is that the 3% withholding creates a purported pecuniary interest in the Charter Commission's approval of commission charter petitions. In *Caperton*, the Supreme Court held that due process required a West Virginia Supreme Court of Appeals justice to recuse himself from a case when the president and chief executive officer of one of the corporate parties had a "significant and disproportionate" influence in the justice's election

campaign while the case was pending. 129 S. Ct. 2252, 2257, 2263-64 (2009). *Caperton* holds that due process requires a judge to recuse himself when he has a "direct, personal, substantial, or pecuniary interest" in a case." *Caperton*, 129 S. Ct. at 2259, 2265.

The 3% withholding permitted by O.C.G.A. § 20-2-2090(b), however, is simply a cap on the amount of expenses with respect to which the Charter Commission is entitled to recoupment from the DOE. O.C.G.A. § 20-2-2090(b) provides that the DOE "may withhold up to 3 percent of the amount determined pursuant to subsection (a) of this Code section for each commission charter school for use in administering the duties required pursuant to Code Section 20-2-2083; provided, however, that any amount withheld pursuant to this subsection shall be spent solely on expenses incurred by the commission in performing" its duties. The statute authorizes the DOE, not the Charter Commission, to withhold the 3% of each commission charter school's funding for the Charter Commission's administrative expenses. The DOE has broad authority to distribute state funds for public education however it deems appropriate. O.C.G.A. § 20-2-166(b). The statute also states that the 3% withholding can *only* be spent on expenses incurred by the Charter Commission in performing its statutorily mandated duties. The Charter Commission, therefore, cannot use such funds for any personal or pecuniary gain regardless of the number of commission charter schools approved.[7] Furthermore, the Charter Commission members do not receive compensation for their service on the Commission. O.C.G.A. § 20-2-2082(e). The decision whether to approve a petition for a commission charter school therefore has no impact - much less a direct, personal, or substantial impact - upon any Charter Commission member or the Commission as a whole. *Compare Caperton*, 129 S. Ct. at 2265.

[7] Local school boards are similarly entitled to retain up to three percent of a local charter school's per pupil share of state and local funding "in order to reimburse the local school system for administrative services actually provided to the charter school." O.C.G.A. § 20-2-2068.1(c.2).

Even generously construing the allegations of Henry County School District and Griffin-Spalding County School District in Count IV, Henry County School District and Griffin-Spalding County School District have failed to state a due process or just compensation claim.

2. Count VI: Federal Voting Rights Act and Federal Desegregation Decrees.

In Count VI, Henry County School District and Griffin-Spalding County School District allege that O.C.G.A. § 20-2-2083 violates the Voting Rights Act, 42 U.S.C. § 1973, and various unspecified federal desegregation decrees and district court orders. Each claim will be addressed separately below.

a. Voting Rights Act, 42 U.S.C. 1973

Henry County School District and Griffin-Spalding County School District allege that O.C.G.A. § 20-2-2083 violates the Voting Rights Act, 42 U.S.C. 1973 *et seq.*, "because it has not been pre-cleared by the District Court and/or U.S. Attorney General." (Amended Complaint, ¶ 99). The districts further allege: "The residents of Henry and Spalding Counties no longer have a voice in the operation of HBA as elected officials have been replaced by appointed officials who are not residents of Henry or Spalding Counties." *Id.* There are several fatal defects in this claim.

First, it is not clear what cause of action Henry County School District and Griffin-Spalding County School District are asserting. The school districts claim that the Act violates the Voting Rights Act, but they seek in their Amended Complaint a declaration that the statute is unconstitutional. Henry County School District and Griffin-Spalding County School District apparently meant to seek a declaration that the Act was void as a violation of federal law, but even so they do not allege even the basics of such a claim, or explain how this Court, rather than a federal district court, has jurisdiction over such a claim.

Second, as Heron Bay explains in its motion to dismiss, generally only voters and the

Attorney General of the United States have standing to bring a claim under the Voting Rights Act. *Bone Shirt v. Hazeltine*, 444 F.Supp.2d 992, 996-997 (D.S.D. 2005) (holding that State of South Dakota lacked standing to bring claim under Section 5 of the Voting Rights Act). In their response to the motion to dismiss, Henry County School District and Griffin-Spalding County School District do not address this standing argument - they do not explain how they have standing or why standing is not required. In their Amended Complaint, Henry County School District and Griffin-Spalding County School District allege that "residents" of these counties are being deprived of their rights to vote, but do not (and cannot) allege how they are entitled to bring such an action on behalf of the "residents." Henry County School District and Griffin-Spalding County School District themselves do not vote; accordingly, they have no standing to bring a Voters Rights Act claim. *Id.* at 997 (stating that "standing to seek relief under the Voting Rights Act is limited to voters and the Attorney General").

Third, even if Henry County School District and Griffin-Spalding County School District had standing to sue under the Voting Rights Act, their challenge to O.C.G.A. § 20-2-2083 clearly fails as a matter of law. O.C.G.A. § 20-2-2083 has no impact on voting or elections; school boards are still elected in exactly the same way. Given the seriousness of a Voting Rights Act claim, even with notice pleading, it is incumbent upon Henry County School District and Griffin-Spalding County School District to explain their claim for relief. Since they have failed to do so, in either the original complaint, the amended complaint, or in their brief in response to the motion to dismiss, the Voting Rights Act claim must be dismissed.

b. Federal Desegregation Decrees and District Court Orders

In paragraph 100 of the Complaint, Henry County School District and Griffin-Spalding County School District allege that O.C.G.A. § 20-2-2083 violates unidentified "Federal desegregation decrees and District Court orders which control the racial makeup of students."

(Complaint, ¶ 100). Henry County School District and Griffin-Spalding County School District, however, fail to identify the decrees or court orders which the statute violates or allege any facts explaining why the statute violates such decrees and court orders. Even after being alerted to this clear omission in its pleadings, the school districts do not, in either their Amended Complaint or their brief in opposition to the motion to dismiss, identify the decree or order to which they refer.

Nor do Henry County School District and Griffin-Spalding County School District allege any facts establishing that they would have standing to raise a claim based on violations of federal desegregation decrees or court orders. *See School Bd. of the City of Richmond v. Baliles*, 829 F.2d 1308, 1310-1311 (4th Cir. 1987) (to have standing in a school desegregation case, plaintiff must show direct injury). Further, even if Henry County School District and Griffin-Spalding County School District had alleged the basic outlines of why the statute violates a certain federal desegregation decree or federal court order, "the proper and orderly procedure to be followed by third parties in seeking to question deficiencies in the implementation of desegregation orders" is a petition to intervene or a motion for contempt filed in the district court that entered the original decrees. *See Davis v. Bd. of School Com'rs of Mobile County*, 517 F.2d 1044, 1046 (M.D. Ala. 1975) (citing *Hines v. Rapides Parish School Bd.*, 479 F.2d 762, 765 (11th Cir. 1973)); *Belk v. Charlotte-Mecklenberg Bd. of Educ.*, 269 F.3d 305, 354 (4th Cir. 2001) (Wilkerson J., concurring). It is very well settled law that "there is no such thing as an independent cause of action for civil contempt" because "civil contempt is a device used to coerce compliance with an *in personam* order of the court which has been entered in a pending case." *Blalock v. U.S.*, 844 F.2d 1546, 1550-51 (11th Cir. 1988) (quoting *McComb v.*

Jacksonville Paper Co., 336 U.S. 187, 191 (1949)). The "desegregation" claim must also be dismissed.

3. Count VII: Proposed Management Agreement

In Count VII of the Amended Complaint, Henry County School District and Griffin-Spalding County School District allege that Heron Bay's "proposed management agreement" with Mosaica Education, Inc., is illegal in three respects, discussed below. Initially, Henry County School District and Griffin-Spalding County School District do not allege with respect to any of these contentions that they have standing to sue regarding the purported illegality of Heron Bay's "proposed" contract with Mosaica. *Haldi v. Piedmont Nephrology Assocs., P.C.*, 283 Ga. App. 321, 641 S.E.2d 298 (2007) (holding that third party, who was not a beneficiary of or party to a contract, lacked standing to challenge the contract). Henry County School District and Griffin-Spalding County School District do not (and cannot) allege that they are parties to the agreement; nor do they identify any Georgia law bestowing upon the school districts the responsibility of policing agreements between third parties to ensure compliance with Georgia law. Further, Henry County School District and Griffin-Spalding County School District allege that the agreement with Mosaica is merely "proposed." Thus, these claims are not ripe for adjudication. Even if Henry County School District and Griffin-Spalding County School District had standing and its claims were ripe, however, Count VII would still be subject to dismissal for the following reasons:

a. "Violation of Opinions Expressed" in Attorney General Opinion

Henry County School District and Griffin-Spalding County School District allege that Heron Bay Academy's proposed management agreement with the an out-of-state educational services management company, violates "opinions expressed in 1974 Op. Atty. Gen. Ga. 199 (July 30, 1974)." (Amended Complaint, ¶ 102). There is no such thing, however, as a cause of

action based on the violation of "opinions expressed" in an attorney general opinion. *Moore v. Ray,* 269 Ga. 457 (1998).

Moreover, the proposed management agreement does not violate any law described in 1974 Opinion. In the opinion, the Attorney General states: "I find no legal authorization for the county or city boards of education of Georgia to contract with out-of-state school systems with respect to the care and education of pupils residing in this state, at least in the absence of any involvement on the part of the State Board of Education." 1974 Op. Atty. Gen. 199, *1-2 (July 30, 1974).[8] Henry County School District and Griffin-Spalding County School District do not in the original or amended complaint allege Mosaica is an out-of-state school system and do not explain why it should be treated as such under the law. Instead, Mosaica is a corporation that manages public schools and provides assistance and expertise in connection with the organization and development of charter schools. (Answer, ¶ 51). Any contract between Heron Bay and Mosaica therefore does not run afoul of the Attorney General's opinion or the laws mentioned therein.

b. O.C.G.A. § 20-2-506

Henry County School District and Griffin-Spalding County School District allege that "the proposed management agreement with Mosaica allows Heron Bay, a public school, to enter a multiple year contract without certain provisions as required by O.C.G.A. § 20-2-506 that

[8] The Attorney General stated in a footnote:

> The State Board of Education, it should be noted, does have authority to enter into agreements with other states or their political subdivisions for educational and training services for severely mentally retarded children. See Ga. Laws 1958, p. 206 (Ga. Code Ann § 32-812). Additionally, should the General Assembly appropriate funds and the State Department of Education promulgate appropriate regulations, it would not be inconceivable for children in Georgia to attend school in other states with the aid of tuition payments pursuant to the 1962 tuition grant laws. See Ga. Laws 1962, p. 552 et seq (Ga. Code Ann §§ 32-813 through 32-819). However, none of these provisions confers directly upon local school systems the power about which you have inquired.

Id. at 2 n.1.

allow for a public school to terminate an agreement without a penalty at the end of a fiscal year." (Complaint, ¶ 103). Section 20-2-506 provides that "each county, independent, or area school system in this state shall be authorized to enter into multiyear lease, purchase, or lease purchase contracts of all kinds," provided that the contracts include certain delineated provisions, including, as noted by Henry County School District and Griffin-Spalding County School District, provisions that require termination of any agreement at the end of a fiscal year. O.C.G.A. § 20-2-506, however, governs the multi-year contracts executed by county, independent, or area school *systems* and therefore does not apply to Heron Bay, a commission charter school. (emphasis added). Further, Heron Bay's alleged proposed agreement with Mosaica states that it will terminate upon Heron Bay "ceasing to be a party to a valid and binding charter." *See* Exhibit A to the Answer. The contract complies with the statute because if Heron Bay lost its state funding, it follows that Heron Bay would lose its charter and the contract with Mosaica would automatically terminate.

c. Gift and Gratuities Clause

Henry County School District and Griffin-Spalding County School District also allege that Heron Bay's "petition with its proposed management agreement with Mosaica allows HBA, a public school, to indemnify an out-of-state school system" and allows HBA "to pay Mosaica, gratuity through bonus payments," in violation of the Gifts and Gratuities Clause of the Georgia Constitution, Article III, Section VI, Paragraph VI. The Gifts and Gratuities Clause states: "Except as otherwise provided in the Constitution, (1) the General Assembly shall not have the power to grant any donation or gratuity or to forgive any debt or obligation owing to the public, and (2) the General Assembly shall not grant or authorize extra compensation to any public officer, agent, or contractor after the service has been rendered or the contract entered into." Article III, Section VI, Paragraph VI(a). Henry County School District and Griffin-Spalding

County School District do not identify any action taken by the General Assembly with relation to Heron Bay or Mosaica that constitutes either a donation or gratuity to forgive a debt or the authorization of extra compensation to a public officer, agent, or contractor. The proposed contract between Heron Bay and Mosaica, itself, cannot be a gratuity because it is supported by valid consideration; Heron Bay proposes to pay Mosaica in exchange for educational management services rendered by Mosaica to Heron Bay. Similarly, any incentive or bonus payments contemplated by the management agreement are supported by the consideration of additional production under the contract by Mosaica, and Heron Bay receives substantial benefit from that increased production. *See Swanberg v. City of Tybee Island*, 271 Ga. 23, 25, 518 S.E.2d 114, 117 (1999) (stating that "no gratuity is involved" as long as contract contains "ample consideration").

For the foregoing reasons, Counts IV, VI and VII of the Complaint, as amended by the Amended Complaint, should be dismissed because they fail to state a claim against Heron Bay upon which relief can be granted. Henry County School District and Griffin-Spalding County School District, in response to the motion to dismiss, failed to provide substantial justification for the assertion of these claims. As a result, the Court finds that giving Henry County School District and Griffin-Spalding County School District another opportunity to amend their complaint to restate these claims would be futile and these claims are, therefore, dismissed with prejudice.

IV. CONCLUSION

For the reasons stated above, the motions for summary judgment of Ivy Prep, CCAT, Heron Bay, and the State Defendants are GRANTED and the cross motions for summary judgment of Gwinnett School District, DeKalb School District/Atlanta Public Schools, Bulloch School District/Candler School District, and Henry School District/Griffin-Spalding School

District are DENIED. Further, after considering the defendants' motion to dismiss, the briefs in support and in opposition thereto, and considering the arguments of counsel, this Court GRANTS the motion to dismiss.

SO ORDERED, this 21st day of May, 2010.

THE HONORABLE WENDY L. SHOOB
JUDGE, Superior Court of Fulton County

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