IN THE SUPREME COURT OF GEORGIA

CASE NO. S13Q0981

DEKALB COUNTY SCHOOL DISTRICT
and DR. EUGENE WALKER,

APPELLANTS,

v.

GEORGIA STATE BOARD OF EDUCATION*, et al.,*

APPELLEES.

AMICUS CURIAE BRIEF ON BEHALF OF GEORGIA SCHOOL BOARDS ASSOCIATION

Phillip L. Hartley
Georgia Bar No. 333987

HARBEN, HARTLEY & HAWKINS, LLP
Wells Fargo Center, Suite 750
340 Jesse Jewell Parkway
Gainesville, Georgia 30501
Telephone: (770) 534-7341

ATTORNEY FOR AMICUS CURIAE
GEORGIA SCHOOL BOARDS
ASSOCIATION

IN THE SUPREME COURT OF GEORGIA

DEKALB COUNTY SCHOOL DISTRICT and DR. EUGENE WALKER, Individually and in his Official Capacity as a Member and Chairman of the DEKALB COUNTY BOARD OF EDUCATION,	)	
Appellants,	)	
v.	)	CASE NO. S13Q0981
GEORGIA STATE BOARD OF EDUCATION, and NATHAN DEAL, in his Official Capacity as Governor of the State of Georgia,	)	
Appellees.	)	

AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS

I. STATEMENT OF INTEREST

This brief is filed on behalf of the Georgia School Boards Association (GSBA). GSBA is a voluntary organization composed of all of the local boards of education in the State of Georgia. The mission of the Association is to ensure excellence in the governance of local school systems by providing leadership, advocacy and services and by representing the collective resolve of Georgia's 180 elected boards of education.

II. INTRODUCTION

In an Order dated March 15, 2013, the United States District Court for the Northern District of Georgia certified to this Court the basic question of whether the state statute, codified at O.C.G.A. § 20-2-73, granting to the Governor the power to remove from office an elected local board of education violates the state Constitution. In an earlier order, explaining why certification was appropriate, the court noted that the "decision on these issues could have a significant impact on the public education system in Georgia." (Order of March 4, 2013, page 13.)

During both the 2009 and 2010 sessions of the General Assembly while various versions of the legislation that ultimately included the removal provision were being debated and ultimately passed, the Georgia School Boards Association and many members of local boards of education testified before committees and otherwise expressed their belief that the statute was unconstitutional. Not only did it remove from the voters the right to elect the board members who would "control and manage" the local school district, but it granted to the State, through the office of the Governor, the ultimate authority to take over the governance of a local school district, dramatically overturning the respective roles of the local board and the State mandated by the Constitution.

Since it was passed in 2010, the statute has been implemented six times. First, in 2011, against the Coffee County Board of Education, Atlanta City Board

of Education and the Montgomery County Board of Education, all of which ultimately entered into consent orders with the State Board of Education and were not recommended by the State Board for removal by the Governor. In November 2012, the Sumter County Board of Education obtained an injunction from the Fulton County Superior Court staying any proceedings under this statute and that case, Pless, et al. v. The Georgia State Board of Education, et al., Case No. 2012CV223573, remains pending in Fulton County Superior Court.[1] On March 20, 2012, the State Board of Education recommended that all members of the Miller County Board of Education be removed from office and, ultimately, by September, the Governor had accepted that recommendation and appointed five replacement board members.[2] This Court is aware from briefs filed by the parties of the facts leading to the Governor's action removing the DeKalb County Board of Education from office on February 25, 2013 and ultimately naming six new members to hold office but not removing three members elected in November, 2012.[3]

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[1] According to the court docket, a motion to dismiss has been filed by the State and various other motions regarding discovery have been filed by the Board of Education, but no order has been issued as of this time by the court on any of those pending motions.

[2] No court challenge was filed to the process or challenging the statute by any of these board members.

[3] It is important to note that the statute itself requires the removal of "all eligible members without providing any definition of what makes a member "eligible." While the 2013 General Assembly amended the statute to define the term as "a

The Georgia School Boards Association files this brief consistent with its mission to reflect the collective resolve of the 180 locally elected school boards in the state of Georgia and in support of the constitutional principle that education should be governed by local officials elected in each community. Art. VIII, Sect. V, Para. I. The same Constitution of our state provides a mechanism whereby those elected officials, including locally elected school board members, may be recalled by the same voters who put them in office. Art. II, Sect. II, Para. III.

III. HISTORY OF ELECTED BOARDS OF EDUCATION

In 1992, the people of Georgia chose to amend the Constitution to require that all members of local boards of education be elected, Art. VIII, Sect. V, Para. II, and that this elected board of education appoint a superintendent to serve as the chief executive officer of the school district. Art. VIII, Sect. V, Para. III. So as not to shorten the terms of superintendents elected in 1992 under the old constitutional provision, that portion of the amendment did not go into complete effect until 1996, but appointed boards were totally eliminated as of December 31, 1993. Prior to this dramatic change in the structure of local governance for public school districts, the state Constitution had provided that local boards of education were to be appointed by the grand jury on a rotating system with five board members

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board member who was serving on the local board at the time the accrediting agency placed the local school system or school on the level of accreditation immediately preceding loss of accreditation," there was no such distinction existing in the statute at the time of the State Board hearing in this case.

appointed, each to serve a five year term. 1976 Constitution, Art. VIII, Sec. V, Para. II; 1945 Constitution, Art. VII, Sect. V, Para. I. The voters in a school district had no role in choosing the board of education, but instead elected the superintendent who had no accountability to the appointed board of education.[4] 1976 Constitution, Art. VIII, Sec. V, Para. V; 1945 Constitution, Art. VII, Sect. VI, Para. I. This basic structure of a grand jury appointed board and an elected superintendent was first introduced in the 1945 Constitution, continued in 1976, and in 1983, until the time of the 1992 amendment. Thus, at the time the General Assembly passed the removal statute at issue in this case, our State had only been electing local boards of education statewide for 17 years, four election cycles.

Of course, once members of local boards of education were to be elected pursuant to the new constitutional amendment, those elected officials became subject to the voters' right to recall them pursuant to Article II, Section II, Paragraph V of the Constitution. The recall authorization recognizes that public officials who are elected by the voters should be subject to removal by the same

[4] Prior to 1996, many communities had changed their local school governance structure through local acts and local constitutional amendments. Thus, the large majority of county school boards in the state were elected through such local legislation, but the large majority of superintendents continued to be elected as well, a system rife with potential political infighting and lacking any accountability between the board of education and the chief executive officer.

process.[5] Constitutional elected board members also became subject to disqualifying provisions of Art. II, Sect. II, Para. III: not being a registered voter, being convicted of a felony involving moral turpitude, defaulting on taxes, and illegally holding public funds.[6]

IV. PASSAGE OF SB 84

In disregard of all of these constitutional provisions and without seeking the approval of the voters to amend the Constitutional restructuring just passed in 1992, the General Assembly enacted O.C.G.A. § 20-2-73 as part of Senate Bill 84. The legislation was touted as an effort to improve the governance of school districts. The preamble and statement of findings for Senate Bill 84, codified at O.C.G.A. § 20-2-49, is critical in evaluating the legislature's actions. It reads, in relevant part,

> Given the specialized nature and unique role of membership on a local board of education, **this elected office should be characterized and treated differently from other elected offices where the primary duty is independently to represent constituent views….** And although there are many **measures of the success of a local board of education, one is**

[5] When local boards were appointed by grand juries, state law provided a process whereby grand juries could remove them for "inefficiency, incapacity, general neglect of duty, or malfeasance or corruption in office, after opportunity to answer charges." O.C.G.A. § 20-2-53(pre-1992).

[6] Thus, the provisions of O.C.G.A. § 45-5-6 address the implementation of a constitutional disqualification for elected board members.

clearly essential: maintaining accreditation and the opportunities it allows the school system's students.

(Emphasis added.) Two things are prominent in this preamble. First, the General Assembly specifically declared its intention to treat elected local school board members differently from all other elected officers. Just as importantly, the legislature declared to the voters (who less than twenty years earlier had given themselves the right to elect these officers) that these elected local board members should not concern themselves with representing their constituency. Second, and amazingly given the emphasis on accountability, adequate yearly progress, graduation rates and student achievement, the General Assembly decreed that the most "essential" criteria for determining the success of these locally elected boards was whether the school district remained "accredited."

V. HISTORY OF ACCREDITATION

As the preamble above indicates, accreditation is the crux of this statute. Therefore, a review of the history and evolution of the accreditation process is necessary. First, accreditation is a voluntary action. Despite statements in the State's brief to the contrary (see pages 6 ad 7), there exists no statute or other requirement that Georgia schools, much less school districts, must be accredited.[7]

[7] The only statutory reference provided by the State is to the qualifications for a student's eligibility for the HOPE Scholarship found in O.C.G.A. § 20-2-519.2. It is of note that the General Assembly specifically amended the statute in its 2013

As noted in the State's brief, accreditation is not a standardized, uniform, defined system or set of standards; but depends upon the private, volunteer entity that is doing the "accrediting." For public schools in Georgia, there are currently two such options: the Georgia Accrediting Commission and the Southern Association of Colleges and Schools Council on Accreditation and School Improvement/AdvanceED (herafter SACS CASI or AdvancED).[8]

Historically, accreditation was a voluntary, peer review, process tracing its roots back to the very early 1900's.[9] Individual schools, especially high schools, compared themselves to a set of voluntary standards, and thus to each other. Long before the days of state and federal accountability standards, standardized testing and removal statutes, the accrediting process provided an opportunity for schools, and significantly post-secondary institutions, to compare the credentials of a

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session to include: an exception for any high school "accredited within the previous two years" at least for the period from July 1, 2013 to June 30, 2015. O.C.G.A. §20-3-519(6).

[8] Although the State references the HOPE Scholarship statute and its list of various accrediting agencies; on its face, it is clear that a public school would not participate in the Georgia Association of Christian Schools or the Georgia Private School Accreditation Council.

[9] See http://www.coe.uga.edu/gac/about/history.html for a history of the Georgia Accrediting Commission and a discussion of the history and purpose of accreditation at http://www.advanc-ed.org/what-accreditation. For an overview of AdvancED, see http://www.advanc-ed.org/company-overview and for an explanation of the relationship between SACS CASI and AdvancED, as well as the corporate status, see http://www.advanc-ed.org/webfm_send/269. Educators in Georgia typically refer to SACS accreditation rather than AdvancED and, therefore, the organization is often referred to as SACS throughout this brief.

student from one high school with another. A review and comparison of the standards of SACS/CASI/AdvanceEd and the Georgia Accrediting Commission demonstrates that the criteria and the process used can be dramatically different.[10]

Most significantly, the accreditation process historically was based upon a review and analysis of the school and its ability and capacity to provide a standard education for its students. The concept of "accreditation" including an evaluation of the governance provided by the board of education is less than a decade old.

As there is no statute that mandates that a school district be a member of any accrediting association, there is certainly no statute or administrative rule that dictates whether a school district joins SACS CASI or the Georgia Accrediting Commission. Some schools in the state are members of both, while others choose to be members of just one.

Of great significance to the issues before this Court are the changes that have taken place just in the last five or six years with the merger in 2007-2008 of SACS CASI with AdvancED , a not for profit private corporation. In 2005, before the merger, SACS CASI had ten standards for schools and school systems, which included very specific detailed requirements for areas such as required instructional time, number of personnel based on school size, professional qualifications, facilities, media resources, extracurricular activities, and other

[10] See http://www.coe.uga.edu/gac/standards.html and http://www.advanc-ed.org/webfm_send/289.

specific areas. These were similar, although certainly not identical, to those of the Georgia Accrediting Commission noted above. Effective with the 2007-2008 school year, schools and school systems began to earn accreditation through the seven standards shared by SACS CASI and AdvancED, which were broader and vaguer. In fact, even the "indicators" designed to define the standards have become more vague. The current (2011) edition of the standards contains five standards with standard 2 addressing governance and leadership.

As an example, indicator 2.2 on governance and leadership from 2007 to 2010 stated that the governing body "recognizes and preserves the executive, administrative, and leadership authority of the administrative head of the system." As of 2011, that indicator has been reworded: "The governing body operates responsibly and functions effectively." This is the type of standard that boards of education are held accountable for during the private, peer review process conducted by AdvancED.[11]

VI. ACCREDITATION AND THE REMOVAL STATUTE

The suggestion in the State's brief that the removal statute simply provides an additional "qualification of members of local boards of education" becomes ludicrous when the accreditation process and the standards governing it are

[11]Other indicators require boards to "establish policies… that ensure effective administration," "foster a culture consistent with the system's purpose and direction," and "engage stakeholders effectively,"

reviewed. Accreditation is about schools, and more recently, school districts or systems. It is not intended as a code of conduct or code of ethics for individual elected officials or a quote "qualification for membership on the board."

It is perfectly conceivable that an individual board member could be acting in the most outlandish of ways as an individual, attempting to micromanage the entire system, but because of the strength of the system, the remainder of the Board and its relationship with the Superintendent, that individual's conduct would not affect accreditation. On the other hand, as noted in Appellants' brief, an individual board member could be acting totally consistent with the standards of the accreditation process, but yet be subject to removal under the statute because AdvancED determines that the relationship between the board **as a body** and the superintendent is dysfunctional or that the system in some other way is not in compliance with its vague governance standards and indicators.

To suggest that the statute simply imposes additional qualifications for service on a board of education is totally belied by the statutory requirement that the Governor must remove the entire board without any individualized assessment. Even when individual board members have the opportunity to petition to be reinstated, the standard is not whether they are qualified as board members pursuant to some objective, defined criteria, but whether the individual board

member's return to the board makes it more likely that AdvancED will maintain or reinstate the school district's accreditation.[12]

When the State Board of Education must determine what recommendation to make to the Governor, when an administrative law judge must hold a hearing on petition for reinstatement from an individual board member, and when the Governor makes his decisions to accept or reject the State Board's recommendation, to accept or reject the decision of the administrative law judge, and to appoint a new board of education, there is only one criteria: will those actions please and satisfy the accrediting body. A true hearing on these issues requires only one witness, the decision maker at the accrediting body. A decision based on any other evidence is no more than pure speculation. Contending that this process adds a "qualification" to the requirements for an individual board member to serve is no more than an attempt to force this statute into the Constitutional provision found in Art. VIII, Sect. V, Para. II, and the dicta of this Court in Roberts v. Deal, 290 Ga. 705 (2012). This case does not require this Court to determine whether the General Assembly can set up a statutory process for removal of local board members by adding qualifications and providing due process to determine if the individual board member is no longer "qualified." The

[12] This argument is made by Appellant at some length at pages 5-10 of his reply brief.

Court is not presented with that question because this statute makes no attempt to do either.

VII. REMOVAL STATUTE UNDERMINES LOCAL CONTROL AND CONSTITUTES A DEPRIVATION OF DUE PROCESS

In essence, O.C.G.A. § 20-2-73 is a State-takeover statute. It is designed to allow the State, acting through the Governor, to take over the control and management of a local school district by removing from office the individuals selected pursuant to the Constitution by the "taxpayers and parents of the children being educated," Gwinnett County School District v. Cox, 289 Ga. 265, 266 (2011), and replacing them with a board appointed by the executive officer of the State. As this Court held in its recent decision on the constitutional division of authority between the local board and the State, "our Constitutions, past and present, have limited governmental authority over the public education of Georgia's children to that level of government closest and most responsive to the taxpayers and parents of the children being educated." Id. That Constitutional authority has been "unbroken since it was originally memorialized in the 1877 Constitution of Georgia, granting local boards of education the exclusive right to establish and maintain, i.e., the exclusive control over, general K-12 public education." Id.

The Georgia Constitution and state statutes maintain this local control even under circumstances where individual board members may be removed from office because they are no longer qualified. This would include circumstances where board members move from the school district or the election district from which they were elected, become employed by the board of education so as to create a conflict, or even simply resign from the board. The selection of a new board member is not made by the State but by the remaining members elected by the people in the school district. O.C.G.A. § 20-2-54.1. If the current statute was intended only to add a qualification for individual board members, this replacement process could be maintained and individual board members, rather than the entire board, would be subject to removal to be replaced by the remaining elected members of the local board. Instead, under the removal statute at issue here, the entire governance structure for the local school district is subject to the appointment of a state official who, even with the best of intentions, is clearly not the "level of government closest and most responsive to the taxpayers and parents of the children being educated." Id.

The State does not dispute that individual elected officials, including local board members, have a property interest in the office to which they are elected and are entitled to due process before they can be removed from that office. As emphasized in the reply brief filed by Appellant, the due process deficiency for

individual board members in this case is less the procedures that ultimately may be provided through a hearing before an administrative law judge, than the total lack of notice or of any substantive, objective standard to identify what conduct might subject the board member to a deprivation of that property right. In fact, as noted repeatedly in Appellant's briefs, there is no requirement that the individual board member be guilty of any specific misconduct. Instead, a decision by a non-governmental, private, voluntary, peer-review entity triggers the entire process and the potential decision of that same entity determines the outcome. In no other due process analysis, whether involving the criminal law and a deprivation of liberty rights or the civil law and the deprivation of employment or other property rights, would such a standard be upheld.

Whether or not the board of education, as the elected governing entity of the local school district, actually has a constitutional property right, the Georgia Constitution clearly vests in that body the power to control and manage the school district. Art. VIII, Sect. V, Para. I. The removal statute at issue here is triggered by the decision of the accrediting agency designed to warn the governing body and the school district of the potential loss of accreditation. The appropriate body to respond to that warning is the body that chose to join the agency and that is charged with identifying and implementing whatever changes may be suggested by the accrediting agency.

CONCLUSION

The Georgia School Boards Association strongly urges this Court to closely review the statute at issue and its history and to weigh it against the Constitutional principles most recently highlighted by this Court in the Gwinnett County case. The Association strongly supports the development and implementation of good governing practices and the implementation of a code of ethics to govern the conduct of individual board members. It has worked closely with the State Board of Education to implement those provisions of SB 84.

The concerns of the Association are broader than and not directly related to the individual specific facts alleged in any of the six reports by the AdvancED monitoring teams that eventually led to proceedings before the State Board of Education under O.C.G.A. § 20-2-73. Instead, the framework of the statute, the lack of an objective, definable standard of conduct, the lack of any definition of additional qualifications, and the enforcement process that involves the State removing the local governing body elected by the people under the provisions of the Constitution make clear that the statute is inconsistent with that very Constitution. Not only does it violate the peoples' right to select the board members who control and manage education at the local level, and the rights of those individual board members once they are elected, but it undermines and

subverts the constitutional structure of the governance of public education in our state that has been in place for many years through many Constitutions.

If the General Assembly questions the ability of the voters to exercise the right placed into the Constitution twenty years ago and seeks to have education controlled at the state level or boards of education appointed by the Governor or anyone else, our Constitution provides a process to go to the voters and make that change. Recently, the voters made such a change to give the State certain authority over certain charter schools in light of a decision of this Court. If such a dramatic change is to be made in the governance of public education in our State as imposed by O.C.G.A. § 20-2-73, the people should be the ones to choose to amend the Constitution once again.

Respectfully submitted, this 31st day of May, 2013.

HARBEN, HARTLEY, & HAWKINS, LLP

s/Phillip L. Hartley
Phillip L. Hartley
Georgia Bar No. 333987

ATTORNEY FOR AMICUS CURIAE
GEORGIA SCHOOL BOARDS
ASSOCIATION

Suite 750, Wells Fargo Center
340 Jesse Jewell Parkway
Gainesville, Georgia 30501
Telephone: 770-534-7341
Fax: 770-532-0399

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the *Amicus Curiae Brief in Support of Appellants* upon all counsel of record by depositing the same in the United States Mail in a properly addressed envelope with adequate postage thereon to:

Thomas A. Cox
Marquetta J. Bryan
Michael J. Walker
Carlock, Copeland & Stair, LLP
191 Peachtree Street, Ste. 3600
Atlanta, GA 30303

Stefan Ritter
Jennifer Colangelo
Office of State Attorney General
40 Capitol Square, S.W.
Atlanta, GA 30334-1300

Robert E. Wilson
Stephen G. Quinn
Wilson, Morton & Downs, LLC
Two Decatur Town Center, Suite 420
Decatur, GA 30030

This 31st day of May, 2013.

HARBEN, HARTLEY, & HAWKINS, LLP

s/Phillip L. Hartley
Phillip L. Hartley
Georgia Bar No. 333987

ATTORNEY FOR AMICUS CURIAE
GEORGIA SCHOOL BOARDS
ASSOCIATION

Suite 750, Wells Fargo Center
340 Jesse Jewell Parkway
Gainesville, Georgia 30501
Telephone: 770-534-7341
Fax: 770-532-0399