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## COMMENT

# The Role of the Judiciary in Charter Schools' Policies

KATE GALLEN\*

### I. INTRODUCTION

For some education leaders, the results caused them to remember Sputnik.<sup>1</sup> For United States Secretary of Education Arne Duncan, they were a “wake-up call.”<sup>2</sup> The Program for International Student Assessment (PISA) uses a standardized test to compare students’ academic aptitude from sixty-five different countries. It is, in many ways, a measuring stick for a country’s education program.<sup>3</sup> When PISA released the results of its most recent test in late 2010, the numbers indicated that the United States was behind many other countries in educational outcomes. Its test scores were merely average in reading and science, and well below average in mathematics.<sup>4</sup> By contrast, students in Shanghai not only had the highest scores of any country, but they scored as many as 104 points above average in mathematics, 74 points above average in science, and 63 points above average in reading.<sup>5</sup> In contrast, the United States only placed seventeenth in reading, twenty-third in science, and

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1. Sam Dillon, *Top Test Scores from Shanghai Stun Educators*, N.Y. TIMES, Dec. 7, 2010, at A1.

2. Nick Anderson, *International Test Score Data Show U.S. Firmly Mid-Pack*, WASH. POST, Dec. 7, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/07/AR2010120701178.html>.

3. Dillon, *supra* note 1.

4. ORG. FOR ECON. CO-OPERATION & DEV., PISA 2009 RESULTS: EXECUTIVE SUMMARY 8 (2010). The difference between the United States’ mathematics scores and the international average were statistically significant. *Id.* When the test was first given in 2000, the United States’ reading score was fifteenth of forty-three countries, but was not significantly different from the average. NAT’L CTR. FOR EDUC. STATISTICS, OUTCOMES OF LEARNING 11 (2001), available at <http://nces.ed.gov/pubs2002/2002115.pdf>. Its science score was also average, and ranked fourteenth. *Id.* at 26. The United States saw the largest shift in its mathematics scores between 2000 and 2009. In 2000, its mathematics score was still average and ranked eighteenth. *Id.*

5. ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 4, at 8.

thirty-first in mathematics.<sup>6</sup> While the United States' results were consistent with past performance on international tests,<sup>7</sup> many were surprised to see how far Shanghai students had surpassed American students.

In addition to lagging behind in the international education arena, disparities within the United State contribute to the well-documented racial and financial achievement gap. Minority students tend not to perform as well as white students on standardized achievement tests.<sup>8</sup> Although there is evidence that this gap is narrowing,<sup>9</sup> it still poses a significant barrier to many minority students. Moreover, there is evidence that the achievement gap is widening between affluent and low-income students.<sup>10</sup> As the financial gap between the wealthiest ten percent of Americans and the poorest ten percent has increased, the achievement gap between the two groups has grown by thirty to forty percent.<sup>11</sup>

As a result of the startling statistics concerning America's academic achievement both domestically and internationally, various education reform movements have taken root. Of these, the charter schools movement has gained favor because it offers "two distinct promises: to serve as an escape hatch for children in failing schools, and to be incubators of innovation[.]"<sup>12</sup> Charter schools are ideal for education reform because they are autonomous public schools, meaning each school has the ability to develop new strategies to improve educational outcomes for students outside of the framework of a traditional school district.<sup>13</sup> In turn, other schools can replicate the most ef-

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6. Dillon, *supra* note 1.

7. U.S. DEP'T OF EDUC., A NATION ACCOUNTABLE: TWENTY-FIVE YEARS AFTER A NATION AT RISK 9 (2008), available at <http://www2.ed.gov/rschstat/research/pubs/accountable/accountable.pdf>.

8. See NAT'L ASSESSMENT OF EDUC. PROGRESS, ACHIEVEMENT GAPS: HOW BLACK AND WHITE STUDENTS IN PUBLIC SCHOOLS PERFORM IN MATHEMATICS AND READING ON THE NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS 1 (2009) [hereinafter NAEP REPORT], available at <http://nces.ed.gov/nationsreportcard/pdf/studies/2009455.pdf>.

9. See *id.*

10. Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in WHITHER OPPORTUNITY? RISING INEQUALITY, SCHOOLS, AND CHILDREN'S LIFE CHANCES 91 (Greg J. Duncan & Richard Murnane eds., 2011).

11. *Id.* at 4-5.

12. Sam Dillon, *Troubled Schools Try Mimicking the Charters*, N.Y. TIMES, Sept. 6, 2011, at A16.

13. See Louann A. Bierlein & Lori A. Mulholland, *The Promise of Charter Schools*, EDUC. LEADERSHIP, Sept. 1994, at 34, available at <http://www.ascd.org/publications/educational-leadership/sept94/vol52/num01/The-Promise-of-Charter-Schools.aspx>.

fective methods in their own schools. In this manner, charter schools ideally “deliver better results in return for greater freedom.”<sup>14</sup>

Studies thus far have shown that charter schools, overall, do not perform significantly better than traditional public schools, suggesting they may not be able to deliver on the promise of improved student achievement.<sup>15</sup> However, researchers are beginning to explore avenues for scaling the most effective charter school teaching strategies into failing public schools.<sup>16</sup> Moreover, new research shows that despite differences among state charter school laws, certain legislative policy choices create better student outcomes.<sup>17</sup> Missouri, for example, affirmed its hospitable policy environment in *School District of Kansas City v. State*.<sup>18</sup> Conversely, the Supreme Court of Georgia in *Gwinnett County School District v. Cox*<sup>19</sup> stifled student achievement by weakening its state’s charter school laws. This Comment takes the position that all states can benefit from charter school policies that promote student achievement, and that the Supreme Court of Missouri can provide a model of the role the courts can play.

Part II of this Comment will provide a detailed history about the development of charter schools nationally. Part III then answers the question of whether widespread support for charter schools is a wise policy choice. Part IV outlines how Missouri has created a strong charter culture, while Part V discusses how Georgia failed to do so, and the consequences of each of those decisions. The Comment finally concludes by arguing for the continued judicial support and more purposeful legislative support of charter schools.

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14. Jennifer T. Wall, *The Establishment of Charter Schools: A Guide to Legal Issues for Legislatures*, 1998 BYU EDUC. & L.J. 69, 73-74 (1998).

15. See, e.g., CTR. FOR RESEARCH ON EDUC. OUTCOMES (CREDO), STANFORD UNIV., MULTIPLE CHOICE: CHARTER SCHOOL PERFORMANCE IN 16 STATES 1 (2009) [hereinafter CREDO], available at [http://credo.stanford.edu/reports/MULTIPLE\\_CHOICE\\_CREDO.pdf](http://credo.stanford.edu/reports/MULTIPLE_CHOICE_CREDO.pdf); NAT’L ALLIANCE FOR PUB. CHARTER SCHS., DELIVERING ON THE PROMISE: HOW MISSOURI CAN GROW EXCELLENT, ACCOUNTABLE PUBLIC CHARTER SCHOOLS 2 (2011), [http://www.kauffman.org/uploadedfiles/missouri\\_charter\\_school\\_report\\_2111.pdf](http://www.kauffman.org/uploadedfiles/missouri_charter_school_report_2111.pdf).

16. See, e.g., Roland G. Fryer, *Injecting Successful Charter School Strategies into Traditional Public Schools: Early Results from an Experiment in Houston 2-3* (Jan. 2012) (unpublished working paper), available at [http://scholar.harvard.edu/files/fryer/files/injecting\\_successful\\_charter\\_school\\_strategies.pdf](http://scholar.harvard.edu/files/fryer/files/injecting_successful_charter_school_strategies.pdf).

17. CREDO, *supra* note 15, at 45.

18. 317 S.W.3d 599 (Mo. 2010) (en banc).

19. 710 S.E.2d 773 (Ga. 2011).

## II. DEVELOPMENT AND SUPPORT OF CHARTER SCHOOLS

Currently, there are over 5,600 charter schools in forty-one states.<sup>20</sup> What began as a simple but novel idea in the early 1970s, has blossomed into a widely supported charter school movement. In order to fully understand how charter schools impact student achievement, it is first necessary to outline how charter schools came into being and why they have gained momentum in recent years. To do so, this Part will examine (1) the history of the charter school movement, (2) common characteristics and criticisms of charter schools, (3) how charter schools have become part of the federal education policy, and (4) judicial support of charter schools legislation.

### A. Evolution of Charter Schools

Education reform litigation has come in three large waves: desegregation, financial equity, and school choice.<sup>21</sup> By the early 1960s, racial inequality became the target of wide protest, and by the 1970s, the Supreme Court of the United States ordered states to take affirmative steps to integrate public schools.<sup>22</sup> However, some education reformers became dissatisfied with the slow pace of integration.<sup>23</sup> They instead turned their attention to inequality in school funding as a way of improving education.<sup>24</sup> When this movement proved largely ineffective,<sup>25</sup> the school choice movement – the umbrella under which charter schools fall – was born from its ashes.<sup>26</sup>

Many people credit Ray Budde with the invention of charter schools.<sup>27</sup> First using the term in the 1970s, his original idea included teachers working within the traditional public school structure.<sup>28</sup> Budde envisioned small groups of teachers contracting with their local school board to address spe-

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20. Laura McMillian, *Marking 20 Years of Charter Schools*, U.S. NEWS, May 9, 2012, <http://www.usnews.com/education/blogs/high-school-notes/2012/05/09/mark-ing-20-years-of-charter-schools>.

21. James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2050 (2002).

22. *Id.* at 2052.

23. *Id.* at 2058.

24. *Id.*

25. *See, e.g.*, *Comm. for Educ. Equal. v. State*, 294 S.W.3d 477, 495 (Mo. 2009) (en banc) (finding the Missouri funding formula was constitutional).

26. Ryan & Heise, *supra* note 21, at 2051.

27. Susan Saulny, *Ray Budde, 82, First to Propose Charter Schools, Dies*, N.Y. TIMES, June 21, 2005, at A19. Because the charter school movement often utilizes free-market ideas, others have credited Milton Friedman with the invention of charter schools. *See, e.g.*, Nina Gupta, *Rationality & Results: Why School Choice Efforts Endure Despite a Lack of Improvement on Student Achievement*, 3 J. MARSHALL L. REV. 199, 205-06 (2010).

28. Saulny, *supra* note 27.

cific obstacles in their schools.<sup>29</sup> For example, if a group of elementary school teachers thought it would be more beneficial to group students by ability level, as opposed to using grade level, they could seek a “charter” from their school district to do so within the school in which they worked. Over time, however, his idea morphed into a network of schools that, while publicly funded, operated outside traditional public school districts.<sup>30</sup>

In 1983, a pivotal report published by the National Commission of Excellence in Education, *A Nation At Risk*,<sup>31</sup> declared that America had essentially become so lackadaisical about its own educational system that other countries were poised to surpass its “preeminence in commerce, industry, science, and technological innovation.”<sup>32</sup> The report also stated that although the average citizen in 1983 was better educated than average citizens of previous generations, “the average graduate . . . [was] not as well-educated as the average graduate of 25 or 35 years ago, when a much smaller proportion of [the] population completed high school and college.”<sup>33</sup> While it is now well documented that the United States lags behind many countries academically,<sup>34</sup> at the time, the report was highly influential in starting education reform movements.<sup>35</sup>

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29. Ray Budde, *Education by Charter*, 70 PHI DELTA KAPPAN 518, 519 (1989).

30. For information concerning the common characteristics of charter schools, see *infra* Part II.B.

31. NAT’L COMM’N OF EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATION REFORM* (1983).

32. *Id.* at 5 (“[W]hile we can take justifiable pride in what our schools and colleges have historically accomplished . . . the educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people.”). The Commission reached this conclusion by looking at internationally given achievement tests, as well as domestic achievement indicators, such as reading ability and SAT scores, noting that for the first time, the current generation would not match or surpass the attainment of its parents. *Id.* at 8-9, 11.

33. *Id.* at 11.

34. See *supra* notes 1-7 and accompanying text. Other factors also influenced the proliferation of charter schools. During the 1980s, society at large was experiencing a shift into a post-modern culture, marked by an emphasis on local social identity. Amy Stuart Wells et al., *Charter Schools as Postmodern Paradox: Rethinking Social Stratification in an Age of Deregulated School Choice*, 69 HARV. EDUC. REV. 172, 174 (1999). Charter schools became an attractive option for the education reform movement because they offered the chance for local control of school organization and curriculum. *Id.* at 174. The charter school movement also gained impetus from those advocating for a more equitable distribution of educational resources as it grants low-income families the opportunity to choose alternatives to their local public schools. Ryan & Heise, *supra* note 21, at 2050-51.

35. Wall, *supra* note 14, at 69 n.2.

In 1991, Minnesota became the first state to enact charter school legislation.<sup>36</sup> In doing so, Minnesota outlined many of the goals of charter schools and education reform in general, including increasing student achievement, creating accountability for schools, and encouraging innovative teaching methods.<sup>37</sup> Many other states followed Minnesota's lead, and today forty-one states have some sort of charter legislation.<sup>38</sup>

### B. Common Characteristics and Criticisms of Charter Schools

Because charter school statutes are the invention of state legislatures, their structures and legislative underpinnings vary across state lines.<sup>39</sup> However, all charter schools share certain characteristics. They are created when a local school board, university, or governmental body contracts with a charter school operator to open and run a school.<sup>40</sup> The school then receives a set amount of money from the state and, in some cases, local governments to cover the costs of educating students.<sup>41</sup> Charter schools, therefore, are often considered public schools. Like traditional public schools, charter schools do not charge tuition.<sup>42</sup> Unlike traditional public schools, however, they are often free from many state and local regulations.<sup>43</sup> Thus, charter school operators can hire uncertified teachers, choose their own curriculum, and offer longer school days than traditional public schools.<sup>44</sup>

Because charter schools offer alternatives to failing traditional public schools, they are often centralized in urban areas.<sup>45</sup> While charters enroll students of all races, minority students tend to enroll in charter schools at

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36. David Groshoff, *Unchartered Territory: Market Competition's Constitutional Collision with Entrepreneurial Sex-Segregated Charter Schools*, 2010 BYU EDUC. & L.J. 307, 318 (2010); see also Act of June 4, 1991, ch. 265, art. 9 § 3, 1991 Minn. Laws 1123 (providing for "outcome-based schools," which are essentially charter schools).

37. See MINN. STAT. ANN. § 124D.10 (West, Westlaw through 2012 Reg. Sess.).

38. McMillian, *supra* note 20.

39. Benjamin Michael Superfine, *Stimulating School Reform: The American Recovery and Reinvestment Act and the Shifting Federal Role in Education*, 76 MO. L. REV. 81, 116 (2011).

40. *Id.*

41. *Id.*

42. Ryan & Heise, *supra* note 21, at 2073.

43. CHESTER E. FINN, JR., BRUNO V. MANNO & GREGG VANOUREK, CHARTER SCHOOLS IN ACTION: RENEWING PUBLIC EDUCATION 15 (2000).

44. Ryan & Heise, *supra* note 21, at 2074. A common limitation on enrollment is that students must be from the district in which the charter school is located. *Id.* at 2075.

45. *Id.* at 2076-77.

higher rates than they enroll in traditional public schools.<sup>46</sup> Additionally, charter schools tend to enroll more “high poverty” students than traditional public schools. While only 19% of traditional public schools are considered high poverty, 30% of charter schools have such a designation.<sup>47</sup>

Depending on the wording of the state statute, charter schools operate as either part of the local school district, or as their own school districts.<sup>48</sup> All charter schools are still accountable, however, to the sponsoring entity, many of which have broad authority to revoke or deny renewal of the charter if the school produces unsatisfactory results.<sup>49</sup> Because the charter functions as a contract between the school and the government, if a school fails to make progress, it has “breached” the contract, and may be shut down.<sup>50</sup> In this way, charter schools are more accountable to the public as it is easier to shut down underperforming schools without having to go through as much red tape. However, in more recent years, reformers have called for more accountability from sponsors because there is evidence that sponsors fail to close underperforming schools.<sup>51</sup>

Because charter schools challenge the structure and funding of traditional public schools, they have drawn criticism from many teachers unions and school boards. Unions often oppose charter schools because they hire non-union teachers, can terminate teachers more easily than traditional public schools, and often require teachers to work longer hours.<sup>52</sup> Because charter schools often draw money from the local school district, many school boards are also opposed to the proliferation of charter schools.<sup>53</sup> Further, those who reside in high performing school districts argue that funding charter schools is wasteful because it diverts money from academically sound schools for “unnecessarily specialized programs.”<sup>54</sup> Still others argue that charter schools

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46. *Charter Schools: Finding out the Facts*, CENTER FOR PUB. EDUC., <http://www.centerforpubliceducation.org/Main-Menu/Organizing-a-school/Charter-schools-Finding-out-the-facts-At-a-glance/Charter-schools-Finding-out-the-facts.html> (last visited Oct. 22, 2012).

47. *Fast Facts*, NAT'L CENTER FOR EDUC. STAT., <http://nces.ed.gov/fastfacts/display.asp?id=30> (last visited Oct. 22, 2012). High poverty is defined as having a over 75% of the student body qualify for free or reduced lunch. *Id.*

48. Groshoff, *supra* note 36, at 322-23 (describing how this classification affects charter school funding by state).

49. FINN, JR., MANNO & VANOUREK, *supra* note 43, at 16.

50. *See* Groshoff, *supra* note 36, at 320.

51. While accountability is beyond the scope of this Comment, it should be noted that it is a central feature of charter schools, and should be closely monitored to make sure that public money is not used to fund schools that perform worse than traditional public schools.

52. *See* Groshoff, *supra* note 36, at 322.

53. Ryan & Heise, *supra* note 21, at 2075-76.

54. *See, e.g.,* Winnie Hu, *Charter School Battle Shifts to Affluent Suburbs*, N.Y. TIMES, July 17, 2011, at A1.



“skim” the best students from the traditional public schools.<sup>55</sup> Opponents also argue that charter schools are racially isolated, essentially leading to the re-segregation of traditional public schools.<sup>56</sup> Researchers, however, have found that this is not the case.<sup>57</sup> Another chief concern about charter schools is that they do not have a significantly positive impact on student achievement, and are thus undeserving of public money.<sup>58</sup> Despite this, charters have gained widespread support from politicians and parents.<sup>59</sup>

### C. *The Federal Government’s Support for Charter Schools*

In *Brown v. Board of Education*, the Supreme Court of the United States declared, “education is perhaps the most important function of state and local governments.”<sup>60</sup> However, in the last twenty years, the federal government has taken an increasingly more active role in determining a national education policy. Subsequently, charter schools have enjoyed bipartisan political support, creating a hospitable policy environment under which charter schools have greatly increased in number.

In 1993, the Clinton administration proposed the first piece of federal charter legislation, the Public Charter School Program (PCSP).<sup>61</sup> Although the law was not enacted until 1995, it provided monetary support for research on charter schools and funding for organizations starting charter schools.<sup>62</sup> Between the time Clinton was elected and when he left office, an estimated 2,000 charter schools were created.<sup>63</sup>

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55. See RON ZIMMER, BRIAN GILL, KEVIN BOOKER, STEPHANE LAVERTU, TIM R. SASS & JOHN WITTE, RAND CORP., CHARTER SCHOOLS IN EIGHT STATES: EFFECTS ON ACHIEVEMENT, ATTAINMENT, INTEGRATION AND COMPETITION 7 (2009), [http://www.rand.org/pubs/monographs/2009/RAND\\_MG869.pdf](http://www.rand.org/pubs/monographs/2009/RAND_MG869.pdf).

56. *Id.*

57. *Id.* at 19.

58. See, e.g., Matthew Di Carlo, *Revisiting the CREDO Charter School Analysis*, SHANKER BLOG (May 2, 2011), <http://shankerblog.org/?p=2404> (noting that both positive and negative impacts on achievement are only slight, even if statistically significant).

59. See Superfine, *supra* note 39, at 117-18.

60. 347 U.S. 483, 493 (1954).

61. Joseph O. Oluwole & Preston C. Green, III, *Charter Schools: Racial-Balancing Provisions and Parents Involved*, 61 ARK. L. REV. 1, 5 (2008) [hereinafter *Charter Schools: Racial-Balancing Provisions*].

62. *Id.*

63. Press Release, Nat’l Alliance for Pub. Charter Schs., President Bill Clinton Honored with Lifetime Achievement Award at National Charter Schools Conference (June 21, 2011), available at <http://www.publiccharters.org/PressReleasePublic/?id=523>.

Likewise, George W. Bush continued to place great emphasis on education reform during his two terms in office<sup>64</sup> by proposing the No Child Left Behind Act (NCLB).<sup>65</sup> Echoing the cries of the charter school movement, NCLB sought to close the achievement gap in traditional public schools by allowing students to choose to attend other schools if their neighborhood public school was inadequate.<sup>66</sup> The original PCSP was reauthorized under NCLB,<sup>67</sup> and by 2002, approximately \$300 million of the federal budget was earmarked for the Charter School Program.<sup>68</sup> Although the implementation of NCLB was not without controversy, its continued support of charter schools was tantamount to the expansion of charter schools.<sup>69</sup> Consistent with the Clinton administration's approach to charter schools, Bush's education policy directly contributed to the growth of charter schools throughout the country.

President Barack Obama has followed a similar path in his education policy, and the furtherance of charter schools has been a lynchpin of his education policy.<sup>70</sup> As economic conditions worsened heading into 2009, Obama enacted the American Recovery and Reinvestment Act,<sup>71</sup> which covered a broad range of topics. The education provisions were "aimed at fixing existing educational policy problems and sparking future educational reform efforts."<sup>72</sup> While the Clinton and Bush administrations had supported charter schools and increased accountability, Obama's Race to the Top (RTTT) pro-

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64. See *Fact Sheet on the Major Provisions of the Conference Report to H.R. 1, the No Child Left Behind Act*, U.S. DEP'T EDUC., <http://www2.ed.gov/nclb/overview/intro/factsheet.html> (last modified Aug. 23, 2003).

65. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002). NCLB has created a significant amount of controversy and push back from state and local education policy makers. Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125, 127 (2006). While there has been much scholarly debate on the subject, that is outside the scope of this Comment and therefore will not be discussed further.

66. Joseph O. Oluwole & Preston C. Green, III, *Charter Schools Under the NCLB: Choice and Equal Educational Opportunity*, 22 ST. JOHN'S J. LEGAL COMMENT. 165, 196 (2007) [hereinafter *Charter Schools Under the NCLB*].

67. *Charter Schools: Racial-Balancing Provisions*, *supra* note 61, at 5 n.25.

68. 20 U.S.C. § 7221j (Supp. II 2002). The name of the program also changed from the Public Charter School Program to simply the Charter School Program in 2003. KARA FINNIGAN ET AL., U.S. DEP'T OF EDUC., EVALUATION OF THE PUBLIC CHARTER SCHOOLS PROGRAM ix n.2 (2004). Considering the PCSP only received \$6 million in its initial year, this signaled a significantly larger commitment to charter schools from the Clinton administration. *Id.* at xii.

69. See 20 U.S.C. § 7221(3) (2006) ("It is the purpose of this subpart to increase national understanding of the charter schools model by . . . expanding the number of high-quality charter schools available to students across the Nation").

70. Superfine, *supra* note 39, at 116.

71. Pub. L. No. 111-5, 123 Stat. 115 (2009).

72. Superfine, *supra* note 39, at 82-83.

gram pulls money from a \$4.35 billion fund to award grants to states that enact certain education reforms,<sup>73</sup> such as creating laws that are favorable to charter schools.<sup>74</sup> Further, RTTT includes the conversion of failing public schools into charter schools as a favored “school turnaround” policy<sup>75</sup> and even allows school districts to bypass state legislatures by independently applying for grants.<sup>76</sup> As thirty-five states and the District of Columbia applied for RTTT grants in the second round of applications,<sup>77</sup> it is clear that Obama’s incentives have inspired at least some movement towards certain education reforms and shows that the charter school movement continues to enjoy strong, bipartisan support from the federal government.

#### *D. Widespread Judicial Support for Charters*

Despite broad political support, charter schools have incurred numerous litigious attacks from traditional adversaries, including members of school boards and teachers unions.<sup>78</sup> In 1997, Michigan was the first state supreme court to uphold its state charter school law.<sup>79</sup> Many other state courts followed suit by giving charter schools wide constitutional support.<sup>80</sup> Looking at charter school litigation throughout the states reveals a pattern of judicial support for charter school laws despite differences among the states’ laws.

Court challenges to charter school legislation may occur in either the federal or the state court systems.<sup>81</sup> State challenges usually allege that the charter statute violates the education provision of the state constitution.<sup>82</sup> The

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73. *See id.* at 101.

74. *Id.* at 107. Georgia, for example, passed its Charter Schools Commission Act in a bid to receive a RTTT grant. *See Gwinnett Cnty. Sch. Dist. v. Cox*, 710 S.E.2d 773, 794 (Ga. 2011).

75. Superfine, *supra* note 39, at 115.

76. Richard Pérez-Peña, *District Grant Contest Unveiled*, N.Y. TIMES, May 22, 2012, <http://www.nytimes.com/2012/05/22/education/us-school-districts-can-enter-race-to-top-competition.html>.

77. *35 States and D.C. Seek Share of \$3.4 Billion in Race to the Top Fund*, U.S. DEP’T EDUC. (June 1, 2010), <http://www.ed.gov/news/press-releases/35-states-and-dc-seek-share-34-billion-race-top-fund>.

78. Robert J. Martin, *Charting the Court Challenges to Charter Schools*, 109 PENN ST. L. REV. 43, 44 n.5 (2004).

79. *See Council of Orgs. & Others for Educ. About Parochiaid, Inc. v. Governor*, 566 N.W.2d 208, 222 (Mich. 1997); Martin, *supra* note 78, at 48.

80. *See, e.g., In re Grant of Charter Sch. Application of Englewood on Palisades Charter Sch.*, 753 A.2d 687 (N.J. 2000); *State ex rel. Cong. of Parents & Teachers v. State Bd. of Educ.*, 857 N.E.2d 1148 (Ohio 2006); *Wilson v. State Bd. Of Educ.*, 89 Cal. Rptr. 2d 745 (Cal. Ct. App. 1999).

81. Martin, *supra* note 78, at 45. Since the focus of this Comment is creating hospitable state policy climates for charter schools, federal challenges are outside of its scope. For a very thorough background on state and federal litigation, see *id.*

82. *Id.* at 45.

nature of specific challenges will depend on the exact wording in the state constitution, but generally include claims that: (1) charter schools are an unlawful delegation of power,<sup>83</sup> (2) the funding mechanism was impermissible in some way,<sup>84</sup> (3) or they violate another mandatory statute.<sup>85</sup> Other less common claims include challenges to the lack of racial diversity in charter schools<sup>86</sup> or liability issues relating to charter school officers as public officers.<sup>87</sup> Regardless of the nature of the challenge, most state supreme courts have found the state charter school law valid under the various state constitutions.<sup>88</sup>

The courts' near unilateral support for charter schools is especially telling when compared with the judicial path of the school finance reform movement.<sup>89</sup> A close predecessor to the charter movement, finance reform, received mediocre support from the courts. This is because, if successful, the remedies were to give more money to poorer districts, while wealthier districts were left untouched.<sup>90</sup> Thus, there is no real remedy to unequal spending because wealthy districts are still free to spend more local money on education, making equal spending is an illusory goal.<sup>91</sup> Conversely, state courts may be more sympathetic to the charter school movement because it presents a remedy that directly relates to the problem presented – by upholding a charter school law, courts allow charter schools to operate within the state and, ideally, provide more viable education options for students.

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83. *Id.* This was the gravamen of the challenge in *Gwinnett County School District v. Cox*, 710 S.E.2d 773 (Ga. 2011).

84. Martin, *supra* note 78, at 45-46. This was at issue in *School District of Kansas City v. State*, 317 S.W.3d 599 (Mo. 2010) (en banc).

85. Martin, *supra* note 78, at 45-46.

86. See, e.g., *Villanueva v. Carere*, 85 F.3d 481, 483-84 (10th Cir. 1996); *Cleveland v. Union Parish Sch. Bd.*, No. 67-12924, 2009 WL 2476562, at \*2 (W.D. La. Aug. 12, 2009); see also Preston C. Green, *Preventing School Desegregation Decrees from Becoming Barriers to Charter School Innovation*, 144 EDUC. L. REP. 15, 20-26 (2000) (detailing various federal desegregation cases and their effects on charter schools laws). For an analysis of the role of federal and state legislation plays in charter school diversity, see generally Genevieve Siegel-Hawley & Erica Frankenberg, *Does Law Influence Charter School Diversity? An Analysis of Federal and State Legislation*, 16 MICH. J. RACE & L. 321 (2011).

87. See, e.g., *Cordray v. Int'l. Preparatory Sch.*, 941 N.E.2d 1170 (Ohio 2010).

88. Martin, *supra* note 78, at 92 (noting that charter schools' "relative freedom from traditional regulations[] is not problematic from a legal perspective").

89. See Ryan & Heise, *supra* note 21, at 2059.

90. *Id.* at 2046.

91. *Id.* at 2058.

### III. STUDIES REGARDING CHARTER SCHOOL PERFORMANCE

Having established the history of charter schools, their basic tenants, and the broad political and judicial support for charter schools, a lingering question remains – is this support wise? In other words, can charter schools deliver on their promises? As noted earlier, it can sometimes be difficult to generalize about the impact of charter schools across state lines because their structures and practices greatly vary between states.<sup>92</sup> However, two recent studies demonstrate that, in the right policy environment, charter schools can increase student performance while developing innovative strategies that traditional public schools can replicate.<sup>93</sup> Thus, it is crucial for states to create a policy environment which is favorable to charter schools as a means of increasing student achievement overall.

#### A. *The CREDO Study*

A nationwide study of charter school performance conducted by the Stanford Center for Research on Education Outcomes (CREDO) in 2009<sup>94</sup> suggested that the success or failure of charter schools in a given state depends very much on the underlying legislative policies of the state.<sup>95</sup> The study examined the academic growth in reading and math of students who had left traditional public schools for charter schools.<sup>96</sup> For each student the study tracked, researchers created a “virtual twin” for that student based on his or her gender, race, English language proficiency, special education diagnosis, income status, and similar test scores in the year prior to the commencement of the study.<sup>97</sup> The “twins” with whom charter school students were matched came from feeder schools, which are traditional public schools

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92. See *supra* Part II.B.

93. While there are many studies concerning various aspects of charter schools, those that focus on their impact on student achievement are the most compelling because they measure what really matters in education – whether students are learning. Thus, this Comment focuses only on recent studies that address achievement in public schools.

94. CREDO, *supra* note 15, at 1. This study was groundbreaking in that it was the first study of charter schools that covered a national scope. *Id.* at 10. Additionally, the availability of annual student achievement data allowed researchers to track individual student achievement growth over time. *Id.*

95. *Id.* at 3-4. CREDO took samples from fifteen states and the District of Columbia, including Arkansas, Arizona, California, Colorado, Florida, Georgia, Illinois, Louisiana, Massachusetts, Minnesota, Missouri, New Mexico, North Carolina, Ohio, and Texas. *Id.* at 9. These states accounted for 70% of all charter school student enrollment. *Id.*

96. *Id.* at 16.

97. *Id.* at 1, 16.

from which students had left to attend charter schools.<sup>98</sup> Each student's academic progress was then compared with his or her "twin's" progress to determine if a student experienced more growth in a traditional public school or in the new charter school.<sup>99</sup> Researchers then compared the student and his or her twin at the national, state, and community level.<sup>100</sup>

Nationwide, the CREDO study found that in 17% of charter schools, students were performing at academically higher rates than their counterparts in traditional public schools, and 46% were performing at the same rate.<sup>101</sup> Students in traditional public schools, however, out-performed the remaining 37%.<sup>102</sup> Moreover, African American and Hispanic students showed less academic growth in charter schools at the national level.<sup>103</sup> It should be noted, however, that both the gains and the losses were very small, as researchers noted "the absolute size of the effect [meaning gain or loss in achievement] is small."<sup>104</sup>

When researchers analyzed the nationwide data by subgroups, the results began to show more promise. Elementary and middle school students in charter schools showed higher gains in learning than their traditional public school peers.<sup>105</sup> Likewise, students in poverty and English-Language-Learners showed higher academic growth while attending charter schools.<sup>106</sup> This is promising considering that the achievement gap most negatively affects those living in poverty.<sup>107</sup> Thus, the charter school movement, in at least some respects, offers a valid option for those seeking education reform, even where it has not had a significant nationwide impact. While charter schools may not be the "magic bullet" for improving every student's scores, charter schools address the growing income-based achievement gap.

When researchers looked at the data from individual states, they were able to identify five states in which charter school students performed at higher levels on achievement tests than their "twins," including Arkansas, Colorado, Illinois, Louisiana, and Missouri.<sup>108</sup> From here, researchers were

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98. *Id.* at 16.

99. *Id.* at 21.

100. *Id.*

101. *Id.* at 3.

102. *Id.*

103. *Id.* at 45.

104. *Id.* at 22.

105. *Id.* at 23-24.

106. *Id.* at 6.

107. *See supra* notes 10-11 and accompanying text.

108. CREDO, *supra* note 15, at 45. Conversely, in six states, charter students showed less progress, including Arizona, Florida, Minnesota, New Mexico, Ohio and Texas. *Id.* The four remaining states in the study, including California, the District of Columbia, Georgia and North Carolina, showed either mixed results or gains that were relatively similar to students in traditional schools. *Id.*

able to identify three key policy features that explain, at least partially, why students performed better in their charter schools.<sup>109</sup>

First, states that did not have a cap on the total amount of charter schools had higher charter performance.<sup>110</sup> Second, states that allowed only one institution to authorize or sponsor charter schools had higher charter performance than state that allowed multiple authorizers.<sup>111</sup> The authors posit this is because allowing multiple authorizers gives charter school operators the time to “shop” for an “easy” authorizer.<sup>112</sup> However, it is also possible that these are states, like Georgia, which require that a charter school obtain approval from the local school board.<sup>113</sup> This structure functions as a de facto cap on charter schools, and is often criticized as being analogous to requiring an independent coffee shop to get Starbucks’s approval to open a store.<sup>114</sup> Lastly, states that allowed for an appeals process of decisions relating to the granting or renewal of a charter had higher charter performance.<sup>115</sup> In light of these findings, it appears that state legislatures can improve the educational outcomes of their students by mirroring their laws to reflect these proven strategies.

### B. The Apollo 20 Study

In 2012, the Apollo 20 study also boasted promising results by applying strategies from successful charter schools to failing public schools.<sup>116</sup> Led by Roland Fryer of Harvard School of Economics, the project isolated five school policies that contributed to the success of two charter school programs, including (1) extended school time, (2) small group tutoring, (3) performance incentives for teachers, (4) frequent student assessments and re-teaching when necessary, and (5) high expectations for students.<sup>117</sup> Fryer then worked with Terry Grier, the superintendent of Houston Independent School District (HISD), to implement these techniques in nine high schools and middle schools throughout Houston.<sup>118</sup> While the program is still in its infancy, the preliminary results show that, overall, the program has successfully raised achievement scores in Apollo 20 schools.

To conduct the study, Grier hired nine new principals for each of the schools and rehired only those teachers who had both a strong history of in-

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109. *Id.* at 40-41.

110. *Id.* at 40.

111. *Id.*

112. *Id.*

113. GA. CODE ANN. § 20-2-2064 (West, Westlaw through 2012 Reg. Sess.).

114. *See* Ryan & Heise, *supra* note 21, at 2075-76.

115. CREDO, *supra* note 15, at 41.

116. *See* Fryer, *supra* note 16, at 4.

117. *See id.* at 2-3.

118. *Id.*

creasing student achievement<sup>119</sup> and demonstrated a strong commitment to the “no excuses” educational philosophy of Apollo 20.<sup>120</sup> Further, the school day was extended so that students spent approximately six additional weeks in school.<sup>121</sup> In addition to receiving extra classroom instruction, each sixth and ninth grade student was tutored in math and reading in small groups.<sup>122</sup> Students frequently took benchmark assessments, and teachers had one-on-one meetings with students to set future performance goals based on the outcomes of the benchmark exams.<sup>123</sup>

The results after just one year were mixed, with a small negative effect in middle schools, but a larger positive effect in high schools.<sup>124</sup> The results for mathematics were extremely positive, with all students performing better, especially those that received small group tutoring.<sup>125</sup> In reading, high school students showed gains, but the middle school students showed negative results.<sup>126</sup> Overall, some schools showed double-digit gains on state achievement exams,<sup>127</sup> while others saw a dip in scores.<sup>128</sup>

Despite the promising results in some categories, there may still be barriers to implementing similar reforms in other states. For example, as state budgets continue to shrink, many states may not be able to spend the extra \$2,000 per student that Apollo 20 requires. Additionally, many schools do not have the ability to only retain “desirable” teachers due to a limited supply of teachers in a given area, or may not be able to locate enough talented tutors. However, on the whole, the study shows that it is at least possible for failing public schools to use techniques honed in charter schools to improve their own student achievement, which is one of the original purposes of char-

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119. *Id.* at app. A.

120. *See id.* A “no excuses” education philosophy is centered on the idea that every student can achieve academically. *Id.* at 6.

121. *See id.* at 9.

122. *Id.* at 11-12. Each tutor was paid \$20,000 plus benefits. *Id.* at 5. Tutors could also receive bonuses if their students performed well on exams. *Id.* This is perhaps the most expensive cost of implementation, and will pose an obstacle for states that would like to recreate the project given the current economic climate. *See id.* at app. D. However, the study found that investing the approximately \$1,837 per student that Apollo 20 cost would lead to a 20% return on the investment. *Id.* at 29-30. Such results are hard for policy makers to ignore.

123. *Id.* at 13.

124. *See id.* at 29.

125. *See id.* at 20.

126. *Id.* at 21.

127. Gareth Cook, Editorial, *Education’s Coconut Cake Problem*, BOS. GLOBE, Dec. 18, 2011, [http://articles.boston.com/2011-12-18/news/30532026\\_1\\_coconut-cake-charter-schools-school-day/2](http://articles.boston.com/2011-12-18/news/30532026_1_coconut-cake-charter-schools-school-day/2) (“[K]ids in one of [the Apollo 20] schools went from 40 percent proficient in math on a standardized test to 85 percent proficient; high school seniors were 50 percent more likely to enroll in a four year college.”).

128. Dillon, *supra* note 12.



ter schools.<sup>129</sup> As the study also shows, not all of these strategies will be effective. That said, it at least provides a foundation from which traditional public schools can begin to identify and implement new strategies that may lead to increased student achievement.

Coupled with the results of the CREDO study,<sup>130</sup> these reports give policy makers a strong incentive to allow charter schools in their states, both as an alternative to traditional public schools and a vehicle to improve traditional public schools. While CREDO and Apollo 20 show that charter schools are not the panacea that some reformers have hoped for, they also demonstrate that charter schools are able to deliver on their promises – namely that they do have some positive impact on student achievement, and can be useful in developing new, and ideally more effective, teaching strategies.

#### IV. THE SUPREME COURT OF MISSOURI UPHELD A HOSPITABLE ENVIRONMENT FOR CHARTER SCHOOLS

In 2010, amidst a bleak educational landscape, the Supreme Court of Missouri had the opportunity to review Missouri's charter school law for the first time, and responded, as many state courts have, by reading both the state constitution and the charter schools act broadly.<sup>131</sup> Given the poor state of education in Kansas City and St. Louis, this was an especially prudent decision for students living in the St. Louis Public Schools district (SLPS) and the Kansas City Missouri School District (KCMSD) and represents a judicial commitment to the charter school movement. However, the decision was not surprising. In recent education decisions, the Supreme Court of Missouri has noted that Kansas City and St. Louis public schools are inadequate and subsequently rejected their legal claims.

This Part will first discuss the academic performance of Missouri's two largest school districts, SLPS and KCMSD as compared with charter schools in those areas.<sup>132</sup> It will then outline the legal background against which *School District of Kansas City* was decided, including recent Supreme Court of Missouri decisions, the desegregation litigation, and the Missouri charter schools act. It will then analyze how the court decided to uphold the charter schools law. This Part concludes that the Supreme Court of Missouri made the correct policy decision by fostering an environment in which charter schools can be successful, thereby increasing the educational opportunities for Missouri's urban students.

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129. *Id.*

130. *See supra* Part III.A.

131. *Sch. Dist. of Kan. City v. State*, 317 S.W.3d 599 (Mo. 2010) (en banc); *see also supra* Part II.D.

132. This Comment focuses only on SLPS and KCMSD because they are currently the only Missouri school districts in which charter schools operate.

A. *Academic Performance in Missouri's Traditional Public Schools and Charter Schools*

1. St. Louis Public Schools

SLPS has shown improvement on state standardized assessments for four years in a row, but in 2011, only 33.1% of its students tested as proficient or advanced in communication arts and only 30.9% did so in mathematics.<sup>133</sup> Additionally, although it boasted 92.9% attendance, this was not enough to meet its Annual Yearly Progress (AYP) goal for 2011, and its graduation rate was only 62.2%.<sup>134</sup> As a result of its consistently poor academic record, the state board of education stripped SLPS of its accreditation in 2008 and has taken over the school district.<sup>135</sup>

Comparatively, a recent evaluation of St. Louis charter schools revealed that while they also did not meet statewide proficiency standards, some charter schools were outperforming SLPS on state tests.<sup>136</sup> Other charter schools, however, were significantly underperforming.<sup>137</sup> These results show both the strength and weakness of the charter school movement. Some charter schools are failures compared to traditional public schools, but failing charter schools may be closed for violating their charters. Charter school students are not sentenced to failing schools indefinitely as are traditional public school students, where there is more resistance to closing failing schools. Ideally, the practices of the successful charter schools may be replicated in traditional public schools, as they were in Apollo 20.<sup>138</sup>

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133. *AYP Grid*, MO. DEP'T ELEMENTARY & SECONDARY EDUC., <http://mc.ds.dese.mo.gov/guided inquiry/AYP/AYP%20-%20Grid.aspx?rp:DistrictCode=115115> (select "District Overall" for school; then press "View Report") (last visited Oct. 23, 2012). The year before, SLPS was only 30.7% proficient in communication arts and 26.9% proficient in mathematics. *Id.*

134. *Id.* AYP represents the target percentage of students that will test as average and/or proficient on state achievement tests as outlined in NCLB.

135. *See Bd. of Educ. of St. Louis v. Mo. State Bd. of Educ.*, 271 S.W.3d 1 (Mo. 2008) (en banc).

136. FOCUS ST. LOUIS, ST. LOUIS PUBLIC CHARTER SCHOOLS: AN IN-DEPTH LOOK 6 (2011), <http://www.focus-stl.org/LinkClick.aspx?fileticket=yDPHkoQcIAQ%3D&tabid=65>.

137. *Id.* In fact, the Imagine Academy charter school network was closed at the end of the 2011-2012 school year due to their poor academic performance. *See* Elisa Crouch, *Shuttering of Imagine Charter Schools in St. Louis Is Daunting*, ST. LOUIS POST DISPATCH, Apr. 20, 2012, [http://www.stltoday.com/news/local/education/shuttering-of-schools-is-daunting/article\\_ec4adf66-bde4-5e11-91d2-baca703df156](http://www.stltoday.com/news/local/education/shuttering-of-schools-is-daunting/article_ec4adf66-bde4-5e11-91d2-baca703df156).

138. *See supra* Part III.B.

## 2. Kansas City Missouri School District

KCMSD faces similar challenges. Only 29.4% of its students tested as advanced or proficient on the 2011 statewide communication arts test, while 27.9% of students were proficient or advanced in mathematics.<sup>139</sup> It reported 90.7% attendance, but a mere 57.4% graduation rate.<sup>140</sup> When shown the numbers, United States Education Secretary Arne Duncan called KCMSD's graduation rate the worst in the country.<sup>141</sup> Like SLPS, the state board of education declared KCMSD unaccredited due to its poor academic performance.<sup>142</sup>

Studies indicate that about half of Kansas City charter schools provide a viable alternative for KCMSD students. In 2010, eight of twenty charter schools in Kansas City outperformed KCMSD on state math tests.<sup>143</sup> Ten charter schools performed better than KCMSD in communication arts.<sup>144</sup> Similarly, a 2010 report for the Missouri Joint Committee on Education found that students in Kansas City charter schools made more learning gains than their peers in KCMSD.<sup>145</sup> However, some charter schools performed significantly worse on state assessments than KCMSD students, and only two charter schools met state proficiency standards in mathematics and communication arts.<sup>146</sup>

### B. Missouri Education Background

#### 1. State Court Decisions Manifest a Distrust of Urban School Districts

The Missouri Constitution establishes compulsory education and free public schools for all residents under twenty one years old because “[a] general diffusion of knowledge and intelligence [is] essential to the preservation of the rights and liberties of the people.”<sup>147</sup> For this reason, the Supreme

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139. *AYP Grid*, MO. DEP'T ELEMENTARY & SECONDARY EDUC., <http://mcds.dese.mo.gov/guidedinquiry/AYP/AYP%20-%20Grid.aspx?rp:DistrictCode=048078> (select “District Overall” for school; then press “View Report”) (last visited Oct. 22, 2012).

140. *Id.*

141. Joe Robertson & Lynn Horsley, *Kansas City Schools Chief: 'We Are NOT the Worst District'*, KAN. CITY STAR, Jan. 5, 2012, <http://www.kansascity.com/2012/01/05/3354649/irked-by-reports-of-mayors-comments.html>.

142. Joe Robertson, *Can the KC School District Save Itself? Yes, State Says*, KAN. CITY STAR, Oct. 9, 2011.

143. NAT'L ALLIANCE FOR PUB. CHARTER SCHS., *supra* note 15, at 9.

144. *Id.*

145. J. COMM. ON EDUC., 2010 GEN. ASSEM., CHARTER SCHOOLS IN MISSOURI: STUDENT ACHIEVEMENT AND BEST PRACTICES 2 (2010).

146. NAT'L ALLIANCE FOR PUB. CHARTER SCHS., *supra* note 15, at 10-11.

147. MO. CONST. art. IX, § 1(a); MO. REV. STAT. § 167.031 (2000).

Court of Missouri has read many state education statutes in such a way that allows the most flexibility for public schools. Consequently, the Supreme Court of Missouri's decisions have established the necessary legal environment to later uphold its charter schools laws.

In 1955, the Supreme Court of Missouri heard *Rathjen v. Reorganized School District*, which challenged the meaning of the phrase "school purposes" in Missouri Constitution article X section 11(c), a constitutional provision concerning the taxing authority of school districts.<sup>148</sup> Plaintiffs contended that taxes levied for "school purposes" did not authorize the defendant school district to use the funds received to construct new school buildings.<sup>149</sup> Noting that, "[t]he unfettered term, 'school purposes,' connotes an all-inclusive meaning," the court determined that the phrase was broad enough to allow the school district to use tax money to construct new buildings.<sup>150</sup> *Rathjen* was the first example of how the Missouri judicial system has interpreted the constitution in a manner that allows the most freedom for the improvement of schools.

More recently, the Supreme Court of Missouri has issued decisions that show hostility towards failing school districts and a stronger focus on providing a quality education for students in those districts. Two Missouri decisions are especially important: *Board of Education of the City of St. Louis v. Missouri State Board of Education*<sup>151</sup> and *Turner v. School District of Clayton*.<sup>152</sup>

In *Board of Education of the City of St. Louis*, the Supreme Court of Missouri upheld the state's takeover of SLPS.<sup>153</sup> SLPS had struggled for many years academically and financially.<sup>154</sup> Between 1994 and 2006, SLPS had either barely met or fell below state academic performance standards.<sup>155</sup> Pursuant to Missouri Revised Statutes section 162.1100,<sup>156</sup> SLPS lost its accreditation and the state board of education took control of the school district.<sup>157</sup>

SLPS challenged the action on many grounds. It argued that 162.1100 was a special law because it only applied to existing school boards and thus violated Missouri's constitutional ban on special laws.<sup>158</sup> The court agreed with SLPS, but found that the special law was justified because its "passage .

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148. 284 S.W.2d 516 (Mo. 1955) (en banc).

149. *Id.* at 519.

150. *Id.* at 524-27.

151. 271 S.W.3d 1 (Mo. 2008) (en banc).

152. 318 S.W.3d 660 (Mo. 2010) (en banc).

153. 271 S.W.3d at 18.

154. State Respondents' Brief at 60-61, *Bd. of Educ. of St. Louis*, 271 S.W.3d 1 (No. SC89139), 2008 WL 4525971, at \*60-61.

155. *Bd. of Educ. of St. Louis*, 271 S.W.3d at 5.

156. Missouri Revised Statute section 162.1100 was developed in conjunction with the federal desegregation litigation that took place in St. Louis. *Id.* at 10.

157. *Id.* at 6.

158. *Id.* at 9.

. . . was a vital component of the settlement agreement disposing of federal desegregation litigation concerning St. Louis' public schools."<sup>159</sup> On this issue, the court showed its willingness to interpret Missouri law in such a way as to be supportive of innovation in education. Had the court struck down section 162.1100 as an impermissible special law, failing schools could only be run by school boards who were obviously not adept at leading the schools to better performance. While it is debatable that state takeovers are the best option for failing schools,<sup>160</sup> the Supreme Court of Missouri at least displayed a willingness to let different parties attempt to reform Missouri's failing public schools.

Two years later, the Supreme Court of Missouri struck another large blow to SLPS and other failing schools districts in *Turner v. School District of Clayton*.<sup>161</sup> Here, the plaintiff group consisted of parents of school-aged children who resided in St. Louis, and thus lived within the unaccredited SLPS school district.<sup>162</sup> Instead of sending their children to a failing school, those parents paid tuition to send their children to schools in the Clayton School District, a neighboring, accredited school district.<sup>163</sup> After SLPS lost its accreditation, the parents argued that SLPS was liable to Clayton for their students' tuition, suing under Missouri Revised Statute section 167.131, which states that any school district that "does not maintain an accredited school . . . shall pay the tuition of . . . each pupil resident therein who attends an accredited school in another district."<sup>164</sup> Giving broad effect to its plain meaning, the court held that if all of SLPS had lost its accreditation, then it necessarily did not maintain an accredited school and rejected the school district's more narrow interpretation.<sup>165</sup> While the court did not have to stretch much to find that the statute did, in fact, mean what it plainly stated, this case reaffirms the court's willingness to support students' interests by giving them the most options for educational opportunity.

## 2. Missouri Desegregation Litigation and Charter Schools Legislation

Any discussion of education in Missouri, and the claims at issue in *School District of Kansas City v. State* in particular, have roots in the desegregation movement that spanned from the 1970s through the 1990s. This

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159. *Id.* at 10.

160. See generally Justin D. Smith, Note, *Hostile Takeover: The State of Missouri, the St. Louis School District, and the Struggle for Quality Education in the Inner-City*, 74 MO. L. REV. 1143 (2009).

161. 318 S.W.3d 660 (Mo. 2010) (en banc).

162. *Id.* at 662.

163. *Id.*

164. MO. REV. STAT. § 167.131 (2000); *Turner*, 318 S.W.3d at 662-63.

165. *Turner*, 318 S.W.3d at 665.

prolonged legal battle over the racial composition of Missouri's schools ultimately shaped much of the subsequent education policy within the state.<sup>166</sup>

Racial segregation in Missouri dates as far back as Missouri's initial entry into the Union as a slave state under the Missouri Compromise. Before 1865, it was illegal to create or maintain schools for black students.<sup>167</sup> From 1865 to 1954, when the Supreme Court of the United States found official segregation in public schools to be unconstitutional,<sup>168</sup> Missouri maintained statutorily segregated schools.<sup>169</sup> In response to the *Brown v. Board of Education* decision, KCMSD took various measures to integrate its schools.<sup>170</sup> However, despite those measures, the enforcement of racially discriminatory housing covenants left KCMSD segregated.<sup>171</sup>

Against this backdrop, KCMSD, members of its school board, and four school children initiated the desegregation litigation in 1977.<sup>172</sup> After seven years of procedural posturing between parties, the district court found that KCMSD and the state of Missouri had failed to remedy the official discrimination, and "ordered remedial programs and capital improvements."<sup>173</sup> To

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166. In Missouri, desegregation lawsuits developed separately in Kansas City and St. Louis, but both shared many features – namely, they spanned for more than fifteen years each and totaled nearly 200 court appearances. See Kevin Fox Gotham, *Missed Opportunities, Enduring Legacies: School Segregation and Desegregation in Kansas City, Missouri*, AM. STUD., Summer 2002, at 22-29; Smith, *supra* note 160, at 1151-54. Additionally, the two cities share a past that is plagued by the racial injustice that shaped the current school districts. Smith, *supra* note 160, at 1143-44. While both segregation suits have left legal and education legacies that have been studied in depth, this Comment will only examine the Kansas City litigation because it was the legal inspiration to MO. CONST. art. X, § 11(g), which was the gravamen of *School District of Kansas City v. State*.

167. *Adams v. United States*, 620 F.2d 1277, 1280 (8th Cir. 1980).

168. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

169. See *Jenkins v. Missouri*, 593 F. Supp. 1485, 1490 (W.D. Mo 1984).

170. These included an intra-district transfer system, which was mostly used by white students who lived in racially integrated neighborhoods to transfer to mostly white schools. *Id.* at 1493. After 1973, the district altered the program, giving preference to transfers that promoted racial integration. *Id.* As the district was dealing with desegregation, it was also dealing with overcrowding. *Id.* at 1494. Many of its responses to this problem propagated continued segregation. *Id.* For example, from the mid 1950s through the mid 1960s, KCMSD used "intact busing" to deal with crowded schools, where African American students were transferred to all white schools, but kept as "an insular group, not allowing them to be mixed with the receiving population." *Id.*

171. *Id.* at 1491 (finding an "inextricable connection between schools and housing").

172. *Jenkins v. Kan. City Mo. Sch. Dist.*, 516 F.3d 1074, 1076 (8th Cir. 2008).

173. *Id.* at 1076-77.

pay for the capital improvements, the district court ordered KCMSD to increase its property tax to \$4.00 for each \$100 of assessed valuation.<sup>174</sup>

On appeal, the Eighth Circuit approved the order but required that such decisions be made by KCMSD in the future.<sup>175</sup> However, increasing its local levy without a court order seemed problematic for KCMSD because it had \$150 million dollars worth of bonds to repay and voters who had not approved a tax increase since 1969.<sup>176</sup> Fortunately for KCMSD, in April of 1998, prior to the state's dismissal from the suit in 1999,<sup>177</sup> Missouri voters approved a constitutional amendment to maintain KCMSD's ability to set a higher property tax rate without voter approval.<sup>178</sup> The result was Missouri Constitution article X, section 11(g), which allows KCMSD to set a higher property tax in order to finance its bonds.<sup>179</sup> KCMSD was finally declared unitary and released from court supervision in August 13, 2003.<sup>180</sup>

In May 1998, a month after voters approved 11(g) and as desegregation litigation was winding down,<sup>181</sup> Missouri passed its first charter schools legislation<sup>182</sup> in an attempt to move the state into its next chapter of education reform. In Missouri, charter schools are defined as "independent public" schools.<sup>183</sup> They may be authorized or sponsored by a school district, four-year public or private university, community college, two-year vocational or technical school or the newly created Missouri Charter Public School Commission.<sup>184</sup> Charter schools are required to enroll all residents of the school district up to the point of capacity.<sup>185</sup> If more students apply than a charter school has space for, the school must institute a lottery system, with the only

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174. *Id.* at 1077. In reality, capital improvement costs totaled over \$540 million by 1995. *Id.* at 1077 n.4.

175. *Id.* at 1077.

176. *Id.* at 1077 n.5.

177. In 1996, the State and KCMSD negotiated an agreement (the settlement), where the State agreed to pay KCMSD \$320 million to fund desegregation efforts in exchange for being released from subsequent litigation. *Id.* at 1078. Upon the issuance of its final payment to KCMSD, the state was dismissed from the lawsuit on January 28, 1999. *Id.*

178. Dale Singer, *KC Schools, Bond Issue Changes Are Passed*, ST. LOUIS POST DISPATCH, Apr. 8, 1998, at C8.

179. MO. CONST. art. X, § 11(g). Backers likely campaigned for a constitutional amendment because it only required a simple majority vote from throughout the state, as opposed to a two-thirds majority from just Kansas City voters, who had previously voted down similar provisions. Dale Singer, *Two Amendments Are on Ballot, One Would Keep Tax Rate in KC the Same; The Other Will Raise State Bond Rates Neither Has Much Opposition*, ST. LOUIS POST DISPATCH, Mar. 22, 1998, at B4.

180. 516 F.3d at 1079.

181. NAT'L ALLIANCE FOR PUB. CHARTER SCHS., *supra* note 15, at 4.

182. 1998 Mo. Legis. Serv. S.B. 781.

183. MO. REV. STAT. § 160.400.1 (2000).

184. *Id.* § 160.400.3(1)-(6).

185. *Id.* § 160.410.1(1).

preferences being given for geographic areas, siblings or “high-risk” students if the school’s purpose is to serve such students.<sup>186</sup> They are not permitted to charge tuition.<sup>187</sup>

Currently, as separate local education agencies (LEAs), charter schools are publicly funded by the state, meaning they receive their funding from taxes according to the state education funding formula.<sup>188</sup> However, they ultimately receive less funding than traditional public schools because they do not receive any funds raised for capital improvements on bonded indebtedness.<sup>189</sup> Under the current funding mechanism for charter schools, KCMSD still retains the entire local levy, even though its state funding is reduced when students transfer to area charter schools.<sup>190</sup> Litigation concerning how the funding from the increased tax levy and money from the settlement between the state and KCMSD should be used regarding Missouri charter schools has yet to subside. This issue first came before the federal district court in an earlier installment of *Jenkins v. School District of Kansas City*.<sup>191</sup>

The issue in *Jenkins* revolved around an amendment to Missouri Revised Statute section 160.415.2(5), which originally stated the “per-pupil amount paid by a school district to a charter school shall be reduced by the amount per pupil determined . . . to be needed by the district in the current year for repayment of leasehold revenue bonds obligated pursuant to a federal court desegregation action.”<sup>192</sup> Essentially, KCMSD was required to transfer the amount of money it received from the state to charter schools on a per pupil basis, minus the amount of money it required to repay the desegregation bonds. However, in 2005, the Missouri Board of Fund Commissioners and the state board of education determined that KCMSD had enough funds in its reserve to immediately pay the remaining bonds, and subsequently could not withhold that money from charter schools.<sup>193</sup> The relevant section of the charter schools legislation was repealed two months later.<sup>194</sup>

The plaintiffs argued that since the increased property taxes were essentially the result of a court order, KCMSD was entitled to withhold this money from charter schools in order to finance their capital improvement bonds.<sup>195</sup>

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186. *Id.* § 160.410.2.

187. *Id.* § 160.415.11.

188. *Id.* § 160.415.4.

189. See Meagan Batdorff, *Missouri*, in CHARTER SCHOOL FUNDING: INEQUITY PERSISTS 131, 132 (2008).

190. Sch. Dist. of Kan. City v. State, 317 S.W.3d 599, 605-06 (Mo. 2010) (en banc).

191. *Jenkins v. Sch. Dist. of Kan. City Mo.*, No. 77-0420-CV-W-DW, 2006 WL 3386563 (W.D. Mo. Nov. 21, 2006), *aff'd sub nom.* *Jenkins v. Kan. City Mo. Sch. Dist.*, 516 F.3d 1074 (8th Cir. 2008).

192. MO. REV. STAT. § 160.415.2 (2000) (amended 2005).

193. *Jenkins*, 516 F.3d at 1079.

194. *Id.*

195. See *id.* at 1076.



The district court agreed,<sup>196</sup> relying on the fact that the promise of funding from 11(g) was integral in the decision to declare KCSMD unitary.<sup>197</sup> Therefore, KCSMD could rightfully withhold this money from charter schools.<sup>198</sup>

### C. School District of Kansas City v. Missouri<sup>199</sup>

In 2010, the Supreme Court of Missouri had the opportunity to rule on the constitutionality of the funding mechanism for Missouri's charter schools. To rule the funding mechanism invalid would have handicapped charter schools financially by potentially taking millions of dollars away from them. However, by using broad constructions of the relevant statutory and constitutional language, the court upheld the charter schools legislation, thereby enabling charter schools to continue to provide educational opportunities for Missouri's students.

#### 1. Instant Decision

Just one month after the Supreme Court of Missouri issued its controversial *Turner* ruling, it upheld Missouri Revised Statute section 160.400, Missouri's charter school legislation. This result is not surprising when considered in the context of *Board of Education of the City of St. Louis* and *Turner*.<sup>200</sup>

KCMSD filed suit in state court, challenging the constitutionality of the Missouri charter school law. More specifically, it alleged that the funding mechanism in 160.415 unconstitutionally violated section 11(g) of the Missouri Constitution by allowing the state to transfer the money generated from the higher property tax from KCMSD to local charter schools.<sup>201</sup> It further argued that the funding mechanism amounted to both a new and unfunded program and an overall reduction in the total amount of funds KCMSD received in violation of Missouri's Hancock amendment.<sup>202</sup>

In order to evaluate the claims that the charter school mechanism reduced KCMSD's funding, it is necessary to first understand the funding formula. Once charter schools were able to declare themselves independent of KCMSD, they began to receive funding directly from the state.<sup>203</sup> KCMSD,

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196. *Jenkins*, 2006 WL 3386563, at \*2.

197. *Id.* at \*1.

198. *Id.*

199. 317 S.W.3d 599 (Mo. 2010) (en banc).

200. See *supra* Part IV.B.1 and accompanying text.

201. 317 S.W.3d at 599. This argument was very similar their argument in *Jenkins v. Missouri*, 516 F.2d 1074, but was broader in that it attempted to strike the entire funding scheme for charter schools, not just recover money it previously paid to charter schools. See 317 S.W.3d at 603.

202. 317 S.W.3d at 603-04.

203. *Id.* at 603.

in turn, received a “reduction in state funding by an amount equivalent to that the state provides to the public charter schools.”<sup>204</sup>

Turning towards KCMSD’s challenges to section 160.415, the court first determined that the standard of review was *de novo*, and that they would resolve doubts in favor of the statute.<sup>205</sup> KCMSD first challenged the funding mechanism on the premise that it violated 11(g).<sup>206</sup> They argued that since 11(g) only applied to KCMSD and was enacted in connection with the desegregation litigation, it prohibited the state from distributing those funds to any entity besides KCMSD.<sup>207</sup>

The court noted that the money raised by the local levy was never directly transferred to charter schools, but that “nothing in section 11(g) prohibits [the state] from doing so for pupils who choose to attend a charter public school of the district rather than to attend a public school operated by the KCMSD.”<sup>208</sup> Additionally, the court noted that 11(g) specifically authorized KCMSD to levy a local property tax “for school purposes of the district.”<sup>209</sup> Relying on *Rathjen*, the supreme court gave this phrase a broad construction.<sup>210</sup> Since charter schools are statutorily considered public schools, “for school purposes” necessarily includes charter schools.<sup>211</sup> The language of 11(g) is arguably ambiguous, and could either mean, as KCMSD suggested, that only KCMSD was entitled to its funds, or it could mean, as the court found, that the funds were to be used for any public school in Kansas City.

KCMSD then tried to rely on the previous federal desegregation proceedings to argue that it was the sole beneficiary of funds derived from 11(g).<sup>212</sup> The court rejected this argument by referencing the language of 11(g) which states, “[t]he authority granted in this section shall apply to any successor school district or successor school districts of such school district.”<sup>213</sup> Since the charter schools legislation was passed contemporaneously with 11(g), the court determined that the legislature and voters “broadly [authorized the] use of the levy for all forms of school purposes . . . and did not limit use of the funds to the KCMSD school board’s use.”<sup>214</sup> As its last justification for its finding, the court pointed out that KCMSD itself had transferred 11(g) funds to charter schools from 1999-2006 and had even sponsored two charter schools, indicating that “its administrative interpreta-

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204. *Id.*

205. *Id.* at 604.

206. *Id.*

207. *Id.* at 605.

208. *Id.* at 606.

209. *Id.* at 607 (quoting MO. CONST. art. X, § 11(g)).

210. *Id.* (citing *Rathjen v. Reorganized Sch. Dist.*, 284 S.W.2d 516 (Mo. 1955) (en banc)).

211. *Id.* at 607-08.

212. *Id.* at 609.

213. *Id.*; see MO. CONST. art. X, § 11(g).

214. 317 S.W.3d at 608.

tion of section 11(g) [was] that charter schools serving district students are ‘schools of the district.’”<sup>215</sup>

In conjunction with KCMSD, a group of taxpayers argued that section 160.415 violated Missouri’s Hancock amendment, which states the state is prohibited from “requiring any new or expanded activities . . . without full state financing,”<sup>216</sup> and from “reducing the state financed proportion of the costs of any existing activity.”<sup>217</sup> With respect to the claim that authorizing charter schools was an expanded activity, the court determined that it did not require any new or increased activity on the part of KCMSD because it did not require KCMSD to open, fund, or operate any charter schools.<sup>218</sup>

Throughout the opinion, the court noted various criticisms of KCMSD and emphasized the impact its various decisions had on area students. For example, the opinion mentioned that KCMSD “had been found to be providing an inadequate education to students of the district.”<sup>219</sup> When KCMSD tried to rely on the *Jenkins* litigation, the court responded by noting, “KCMSD itself was a defendant, not a plaintiff, in the underlying desegregation litigation, which was brought for the benefit of the students of the district, not for the benefit of KCMSD per se.”<sup>220</sup> Lastly, the court specifically mentioned that KCMSD was inefficiently managing both its building space and transportation.<sup>221</sup>

## 2. The Implications of *School District of Kansas City v. Missouri*

Given the hostility of the Missouri judiciary towards SLPS and KCMSD, this decision is not surprising in its outcome.<sup>222</sup> The court evinced similar concerns here as it did in both *Board of Education of the City of St. Louis* and *Turner*.<sup>223</sup> This point is especially highlighted by the fact that the court upheld Missouri’s charter school legislation just a month after it essentially gave SLPS a no-confidence vote in *Turner*. More importantly, this decision affirmed Missouri’s commitment to the charter school movement by sustaining legislation that could improve the quality of education in Missouri. While studies of Missouri’s charter schools have shown mixed results, they indicate that charter schools have had a positive effect on student achieve-

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215. *Id.* at 609.

216. *Id.* at 610-11; *see* MO. CONST. art. X, § 16.

217. MO. CONST. art. X, § 21.

218. 317 S.W.3d at 611.

219. *Id.* at 605.

220. *Id.* at 609.

221. *Id.* at 612-13.

222. *Supra* Part IV.B.1 and accompanying text.

223. *Supra* Part IV.B.1 and accompanying text.

ment.<sup>224</sup> Charter schools, therefore, are a worthwhile avenue to pursue in reforming Missouri's education system.

As mentioned above, CREDO identified three policy characteristics that make charter schools more effective: (1) no caps on charter schools; (2) fewer charter authorizers; and (3) an appeals process for the rejection of an initial charter or a renewal.<sup>225</sup> Missouri's law essentially has all of these characteristics.

Missouri places only minimal restrictions on charter school growth. Section 160.400 allows charter schools in metropolitan and urban school districts, unaccredited school districts, provisionally accredited school districts in some circumstances, and in accredited school districts if the local school board sponsors them.<sup>226</sup> Since charters are often centralized in urban areas,<sup>227</sup> these restrictions do not necessarily function as a cap on charter school growth since it allows for an unlimited number of charter schools in the areas in which they are most likely to locate.

In its early stages, section 160.400.3 only allowed public or private four-year colleges and community colleges.<sup>228</sup> In May 2012, however, the Missouri legislature created the Missouri Charter Public School Commission, which also has the power to sponsor charter schools.<sup>229</sup> Charter school advocates champion such commissions as a way to strengthen charter school laws.<sup>230</sup>

Last, potential charter schools have multiple opportunities to seek review of their application. Section 160.405.2(4) explicitly allows for charter-seekers to apply to the state board of education for authorization if a sponsor denies its application.<sup>231</sup>

Legislatively, Missouri has a strong charter schools act. This scheme has allowed for more charters to move into the region and has increased charter schools' accountability as sponsors have shown a propensity to shut down underperforming charter schools.

By affirming section 160.415, the Supreme Court of Missouri took a realistic view of the education scheme in Missouri and made the practical ruling to continue to fund charter schools to the largest extent possible. From a policy standpoint, the court read relevant statutes and constitutional provisions to create the policy environment that has proven necessary for the success of

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224. See *supra* Part IV.A.

225. CREDO, *supra* note 15, at 40; see *supra* notes 110-15 and accompanying text.

226. MO. REV. STAT. § 160.400.2 (2000).

227. Ryan & Heise, *supra* note 21, at 2076.

228. MO. REV. STAT. § 160.400.2 (2000) (amended 2012).

229. *Id.* § 160.425 (West, Westlaw through 2012 Reg. Sess.).

230. Brief for the Nat'l Alliance of Pub. Charter Schs. as Amici Curiae Supporting Appellants, *Gwinnett Cnty. Sch. Dist. v. Cox*, 710 S.E.2d 773 (Ga. 2011) (No. S10A1773), 2010 WL 4955486, at \*3.

231. MO. REV. STAT. § 160.405.2(4).

charter schools and improvement of student achievement in Missouri. While it is difficult to apply this ruling to other states, it does provide a model to follow in terms of a policy perspective – courts should read their education laws with an eye towards what is going to most improve student outcomes, just as Missouri did.

## V. THE FAILURE OF CHARTER SCHOOLS IN GEORGIA

Less than one year after Missouri issued its ruling supporting charter schools, the Supreme Court of Georgia had the opportunity to do the same for its state. Unfortunately, the court took a very narrow reading of the Georgia Constitution when it found that the Charter Schools Commission was unconstitutional. Instead, the court should have followed Missouri's example in giving its constitution the necessary construction to support charter schools as a means of improving the quality of education options within the state.

This Part will first look at the historical meaning of the phrase “special schools,” which was the key phrase the court examined. It will then examine the state of Georgia's charter schools and traditional public schools. Next, it analyzes the court's decision in *Gwinnett County v. Cox*, and finally concludes by suggesting the *Gwinnett* court should have followed the Supreme Court of Missouri's lead in upholding its charter school legislation.

### A. History of Local Control and the Meaning of “Special Schools”

The Georgia Constitution states that providing an “adequate public education for the citizens shall be a primary obligation of the State of Georgia.”<sup>232</sup> While the Georgia Constitution has gone through many revisions since its inception in 1777, each version has clarified the obligations of the state regarding what an “adequate public education” looks like. As the state's education philosophy has evolved, so too have two types of schools: common schools and “special schools.” As the decision in *Gwinnett County* turned on the meaning of “special schools,” it is first necessary to understand what the phrase means in a historical context.

Georgia's public school system has gone through many changes since its humble beginnings in 1777.<sup>233</sup> Up until 1945, the general assembly enjoyed broad powers to create county and city school districts.<sup>234</sup> To respond to wide

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232. GA. CONST. art. VIII, § 1.

233. See *McDaniel v. Thomas*, 285 S.E.2d 156, app. (Ga. 1981). This Comment relies heavily on this history of Georgia public schools because the majority in *Gwinnett* cites it as a comprehensive overview of said history. *Gwinnett Cnty.*, 710 S.E.2d at 775. This section is also modeled after the in-depth history provided in the dissenting opinion in *Gwinnett*. *Id.* at 784-801 (Nahmias, J., dissenting).

234. See *Gwinnett Cnty.*, 710 S.E.2d at 788 (Nahmias, J., dissenting).

funding disparities,<sup>235</sup> the 1945 constitution consolidated all school districts into countywide school districts.<sup>236</sup> By 1966, the legislature again expanded its ability to create schools by allowing for the establishment of “area schools, including special schools such as vocational trade schools, schools for exceptional children, and schools for adult education,” but only “pursuant to local law enacted by the General Assembly.”<sup>237</sup>

While the 1945 constitution placed significant restraints on the legislature’s ability to create schools, the 1983 constitution re-vested the general assembly with the power to create new schools, even if limited to “special schools.”<sup>238</sup> Notably, the examples from the 1966 version were deleted, and special schools were no longer defined in reference to “area schools.”<sup>239</sup>

“Special schools” have been a part of Georgia’s legal landscape since at least 1913 even if they did not appear in the constitution until 1966, and have often been judicially defined as schools that are not a part of the common school system.<sup>240</sup> *Vaughn v. Simmons* was the first case to use the phrase “special school.”<sup>241</sup> Similarly, in *State Board of Education v. County Board of Education*, the court found that two school systems were developing in Georgia prior to the start of the Civil War – “the [s]tate systems,” and “a series of *special schools* regulated and controlled by local laws[.]”<sup>242</sup> The court made a similar distinction in 1955 in *Searcy v. Georgia*.<sup>243</sup>

Each of these cases was decided prior to the inclusion of “special schools” in the Georgia Constitution, and therefore do not provide direct guidance as to the constitutional meaning of that term. However, they do indicate that, at least to a certain extent, special schools have previously been defined as schools that operate outside of the county school system, without necessarily offering a different curriculum or catering to a specific type of student.<sup>244</sup> From a historical perspective, it is plausible then that framers of the 1983 constitution used the term “special schools” in this same manner – to mean the general assembly had the ability to create *any* type of school apart from the county school system.

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235. *McDaniel*, 285 S.E.2d at 175.

236. *Gwinnett Cnty.*, 710 S.E.2d at 788 (Nahmias, J., dissenting).

237. *Id.* at 789 (emphasis omitted) (quoting 1966 Ga. Laws 1029-30).

238. *Id.* at 790.

239. *Id.*

240. While the majority opinion dismisses the following cases as irrelevant to its current analysis, they are examined here because they are still informative of historical understanding of the term “special school.”

241. *See* 76 S.E. 1004, 1006-07 (Ga. 1913).

242. 10 S.E.2d 369, 372 (Ga. 1940) (emphasis added).

243. 86 S.E.2d 652, 654-55 (Ga. 1955) (noting a distinction between local school systems and county school systems).

244. *Cf. infra* note 283 and accompanying text.

### B. Georgia's Academic Performance and Charter School Laws

Much like Missouri, Georgia's education system has struggled to produce adequate results for its students. Georgia has two different achievement tests – high school students must pass the High School Graduation Test (HSGT) in order to receive a diploma, and elementary and middle school students take the Criterion-Referenced Competency Test (CRCT) to measure academic achievement. Results on these exams vary across district boundaries, but only 72.7% of Georgia schools met their Annual Yearly Progress (AYP) goals in the 2010-2011 school year.<sup>245</sup> Atlanta Public School (APS) had the lowest passing rate on the HSGT, with only 58% of its high school students earning a passing grade.<sup>246</sup> For middle schools, 77.7% of eighth grade students passed the math portion of the CRCT.<sup>247</sup> In urban districts, such as APS, this number dropped to as low as 65.9%.<sup>248</sup> It is difficult to know how students from APS truly fared, because the results have been embroiled in one of the largest cheating scandals uncovered in recent history.<sup>249</sup>

Georgia passed its initial charter school legislation in 1993,<sup>250</sup> with the purpose to “increase student achievement through academic and organizational innovation.”<sup>251</sup> Using information collected from the 2003-2004 school year through the 2007-2008 school year, the 2009 CREDO study found that overall, Georgia elementary and middle school students in charter schools tend to perform at the same rate as their peers in traditional public schools in reading.<sup>252</sup> They tend to underperform traditional public school

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245. 2011 AYP, GA. DEPT'T EDUC., <http://archives.doe.k12.ga.us/ayp2011/overview.asp?SchoolID=000-0000-b-1-0-0-0-5-6-0-8-0-10> (last visited Oct. 24, 2012). AYP represents the target percentage of students that will test as average and/or proficient on state achievement tests as outlined in NCLB.

246. *GHSGT Statewide Test Scores*, GA. DEP'T EDUC., <http://www.doe.k12.ga.us/Curriculum-Instruction-and-Assessment/Assessment/Pages/GHSGT-Statewide-Scores.aspx> (follow “2011 State Summaries”) (last visted Oct. 24, 2012).

247. Nancy Badertscher & Ty Tagami, *School Districts Learn CTRT Results*, ATLANTA JOURNAL-CONSTITUTION, June 22, 2011, <http://www.ajc.com/news/school-districts-learn-crct-984262.html>.

248. *Id.*

249. Patrik Jonsson, *America's Biggest Teacher and Principal Cheating Scandal Unfolds in Atlanta*, CHRISTIAN SCI. MONITOR, July 5 2011, [http://www.csmonitor.com/USA/Education/2011/0705/America-s-biggest-teacher-and-principal-cheating-scandal-unfolds-in-Atlanta/\(page\)/1](http://www.csmonitor.com/USA/Education/2011/0705/America-s-biggest-teacher-and-principal-cheating-scandal-unfolds-in-Atlanta/(page)/1). It is estimated that 178 teachers and principals collaborated to change student responses on the CRCT in order to artificially inflate their scores. *Id.*

250. Charter Schools Act of 1998, 1998 Ga. Laws 1082.

251. Charter Schools Act of 1998, GA. CODE ANN. § 20-2-2061 (West, Westlaw through 2012 Reg. Sess.).

252. CTR. FOR RESEARCH ON EDUC. OUTCOMES (CREDO), STANFORD UNIV., CHARTER SCHOOL PERFORMANCE IN GEORGIA 2 (2009) [hereinafter Georgia CREDO],

students in math.<sup>253</sup> When researchers isolated the data and looked at just students living in poverty, they found that students enrolled in charter schools did significantly better than students in traditional public schools in both math and reading.<sup>254</sup> However, in other key areas, such as academic growth, charter school students did not perform any better than traditional public school students.<sup>255</sup>

Evaluations of charter schools using the 2010-2011 test scores show similar results. For example, 70% of all charter schools made AYP, which was slightly lower than the statewide average.<sup>256</sup> Charter schools serving middle and high school students had higher percentages meeting AYP, but these differences were small.<sup>257</sup>

For advocates of charter schools in Georgia, these results are somewhat disappointing, as they show that charter schools are not a “magic bullet” for education reform. However, the results are also not surprising given the policy environment in Georgia. As mentioned previously, charter schools perform best in states that (1) do not have a cap on charter schools, (2) have fewer authorizing bodies, and (3) allow for appeals from adverse decisions.<sup>258</sup> Despite the breadth and considerable attention the Georgia General Assembly has paid to its Charter Schools Act, the current statutory scheme does not include any of the above policy recommendations. For example, charter schools are not entitled to an official appeal of an adverse decision. Currently, only local school boards and the state board of education can approve charter schools.<sup>259</sup> If a proposed charter is rejected at the local level, the petitioner may resubmit a revised petition, but cannot have the initial decision reviewed.<sup>260</sup> A denied charter school can also submit a petition to the state board of education, but will not receive any local funding if they do not receive approval from the local school board.<sup>261</sup> Thus, while there are multiple opportunities to submit a petition, charter schools do not have the right to review as was recommended by CREDO.

CREDO’s first two policy considerations – no caps on charter schools and a fewer number of authorizers – can be considered as one, interrelated issue in Georgia. Currently, the primary authorizers of charter schools in

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[http://credo.stanford.edu/reports/GA\\_CHARTER%20SCHOOL%20REPORT\\_CREDO\\_2009.pdf](http://credo.stanford.edu/reports/GA_CHARTER%20SCHOOL%20REPORT_CREDO_2009.pdf).

253. *Id.*

254. *Id.* at 6.

255. *Id.* at 10.

256. CHARTER SCH. DIV., GA DEP’T OF EDUC., CHARTERING IN GEORGIA, 2010-2011 27 (2011); *see supra* note 245 and accompanying text.

257. CHARTER SCH. DIV., GA DEP’T OF EDUC., *supra* note 256, at 31.

258. *See supra* notes 110-15 and accompanying text.

259. Charter Schools Act of 1998, GA. CODE ANN. § 20-2-2064 to 2064.1 (West, Westlaw through 2012 Reg. Sess.).

260. *Id.* § 20-2-2064.

261. *Id.* § 20-2-2064.1, -2068.1.



Georgia are the local school boards, although the state board of education can also authorize charter schools. Since charter schools can operate in any county in Georgia, this means there are 160 authorizers. This scheme also functions as a cap on the number of charter schools. For example, some charter school officials claim that in 2007, twenty-eight charter petitions were submitted to local school boards, and twenty-six were denied.<sup>262</sup> It is not altogether surprising that local school boards do not approve many charter schools, considering they lose a portion of their money if they do so.<sup>263</sup>

Georgia's General Assembly attempted to create a policy environment that was more favorable to charter schools in an effort to improve student achievement. In 2008, it created the Georgia Charter School Commission, which was "a state-level charter school authorizing entity."<sup>264</sup> It was composed of seven members – three appointed by the governor, two by the president of the Senate, and two by the speaker of the House of Representatives.<sup>265</sup> Such commissions are part of a national trend, and are recognized by charter school advocates as an avenue of strengthening charter schools laws.<sup>266</sup> Advocates argue that because the sole endeavor of such commissions is to authorize (or deny) charter applications, they will develop much needed expertise in this area, thus improving the quality of approved charter schools.<sup>267</sup>

However, when *Gwinnett County School District v. Cox* came before the Supreme Court of Georgia, the court found the commission to be unconstitutional, and left sixteen schools and 16,000 students to find either a new sponsor or a new school.<sup>268</sup> By taking a very narrow reading of the phrase "special school," the Supreme Court of Georgia essentially thwarted the growth of quality charter schools.

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262. *Gwinnett Cnty. Sch. Dist. v. Cox*, 710 S.E.2d 773, 791 (Ga. 2011) (citing Caroline Freeman, *Review of Selected 2008 Georgia Legislation*, 25 GA. ST. U. L. REV. 47, 51-52 (2008)).

263. It has been posited that the entire challenge to the Georgia Charter School Commission was motivated only by school district's fear of a loss of funds. Eric Cochling, *The Constitutionality of the Georgia Charter Schools Commission Law*, 3 J. MARSHALL L. REV. 287 (2010).

264. GA. CODE ANN. § 20-2-2082.

265. *Id.*

266. Brief for the Nat'l Alliance of Pub. Charter Schs. as Amici Curiae Supporting Appellants, *Gwinnett Cnty. Sch. Dist. v. Cox*, 710 S.E.2d 773 (Ga. 2011) (No. S10A1773), 2010 WL 4955486, at \*14.

267. A NEW MODEL LAW FOR SUPPORTING THE GROWTH OF HIGH-QUALITY PUBLIC CHARTER SCHOOLS 10 (Nat'l Alliance for Pub. Charter Schs. 2009), available at [http://www.capitol.hawaii.gov/session2011/studies/NAPCS-New\\_Model\\_Law.pdf](http://www.capitol.hawaii.gov/session2011/studies/NAPCS-New_Model_Law.pdf).

268. *Ga. School Board OK's Charter Schools*, ATLANTA JOURNAL-CONSTITUTION, June 9, 2011. Interestingly, the Missouri General Assembly recently created a similar commission for charter school sponsorship. See MO. REV. STAT. § 160.425.1 (West, Westlaw through the 2012 Reg. Sess.).

*C. Gwinnett County Decision and Dissent*

Ivy Preparatory Academy (Ivy), Charter Conservatory for Liberal Arts and Technology (CCAT), and Heron Bay Academy were the first three schools commissioned under the Charter Schools Commission Act (the Act).<sup>269</sup> All three had applied to their respective local school boards for authorization, but were denied.<sup>270</sup> Ivy and CCAT were subsequently authorized through the state board of education, and all three were re-authorized under the newly created Georgia Charter Schools Commission (the Commission).<sup>271</sup> Under the funding mechanism of the Act, this meant that after 2009, the charter schools were entitled to receive an equal share of local tax dollars that the traditional public schools received – funding that was previously denied to them under the Charter Schools Act of 1998.<sup>272</sup>

In 2009 and 2010, six county school boards sued the charter schools, alleging that the Act was unconstitutional because the general assembly had impermissibly authorized the creation of new schools and charter schools did not fit in the parameters of “special schools,” which the legislature was entitled to authorize.<sup>273</sup> In sustaining the school boards’ argument, the Supreme Court of Georgia constructed a narrow definition of “special school”<sup>274</sup> that was both contrary to the legal history of the state and inappropriate given the deferential standard of review. The result was to create a policy environment that would hinder the growth of charter school progress in Georgia.

In addressing the plaintiffs’ argument, the court began its opinion by setting out three basic premises: (1) only county boards of education have the constitutional authority to “establish and maintain public schools within their limits”;<sup>275</sup> (2) there is an exception – the general assembly may “provide by law for the creation of special schools”;<sup>276</sup> and, (3) commission charter schools are statutorily defined as “a special school . . . within the state as a component of the delivery of public education within Georgia’s K-12 education system.”<sup>277</sup> Thus, the entire case turned on whether commission charter schools are, by definition, special schools.

Before evaluating the central issue in the case, the court noted that “all presumptions are in favor of the constitutionality of an act of the legisla-

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269. *Gwinnett Cnty.*, 710 S.E.2d at 792 (Ga. 2011) (Nahmias, J., dissenting).

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 775 (majority opinion).

274. *See id.* at 782.

275. *Id.* at 775 (quoting GA. CONST. art. VIII, § V, para. I) (internal quotation marks omitted).

276. *Id.* at 776 (citing GA. CONST. art. VIII, § V, para. VII).

277. *Id.* (quoting GA. CODE ANN. § 20-2-2081 (West, Westlaw through 2012 Reg. Sess.)).

ture.”<sup>278</sup> It then relied on a very narrow reading of the constitutional provision allowing the “General Assembly [to] provide by law for the creation of special schools in such areas as may require them.”<sup>279</sup> The majority wrongly concluded that because the prior version of this provision included the phrase “as vocational trade schools, schools for exceptional children, and schools for adult education,”<sup>280</sup> these examples were conclusive of the only “conditions existing” when the 1983 version was adopted.<sup>281</sup> In doing so, the majority rejected the more harmonious reading with the constitution: that the deletion of the examples from the 1983 version broadened the definition of special schools.<sup>282</sup> The majority essentially set out a two-prong test for special schools: schools may be special with respect to whom they enroll or what subjects they teach.<sup>283</sup>

The majority looked to the legislative intent of the framers, and determined that they intended the new wording to mean, “schools *other than the primary and secondary education level schools*.”<sup>284</sup> Lastly, they looked to the plain and ordinary meaning of special schools.<sup>285</sup> Here, the majority determined that special schools “are not schools that enroll the same types of K-12 students who attend general K-12 public schools; they are not schools that teach the same subjects that may be taught at general K-12 public schools.”<sup>286</sup> Since commission charters were defined as “a component of the delivery of public education,” the majority concluded they were not special.<sup>287</sup> In doing so, the majority summarily dismissed the charter schools’ arguments for why commission charters are special schools.<sup>288</sup>

In practice, it is more likely that charter schools’ “unique charters, their individualized, performance-based contracts and their educational philosophy” make them special schools.<sup>289</sup> Curiously, the majority determined that *all* schools, “implicit in the unique nature of each school’s faculty, administration and student body,” have a unique charter, and therefore commission charters are not special.<sup>290</sup> In essence, the majority is saying that all tradi-

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278. *Id.* at 777. This is the same standard the Supreme Court of Missouri used in *School District of Kansas City v. State*, 317 S.W.3d 599, 604 (Mo. 2010) (en banc).

279. GA. CONST. art. VIII, § V, para. VII(a).

280. *Gwinnett Cnty.*, 710 S.E.2d at 780.

281. *Id.* at 777.

282. *Id.* at 780.

283. *Id.* at 779.

284. *Id.* at 778.

285. *Id.* at 779.

286. *Id.*

287. *Id.*

288. Charter schools made five arguments as to why they are special schools. *Id.* at 779-81. They are not included here because the majority did not spend much time discussing them. *Id.* at 782.

289. *Id.* at 780.

290. *Id.*

tional public schools are “special” in some way, and the commission charter schools cannot be special just because they are run differently than traditional public schools. In this manner, a school for the blind or a vocational school is no more special than any other public school. Taken to its logical end, then, the general assembly should be unable to create what the majority deems “special schools,” such as vocational schools or schools for the blind or deaf, because they would be just as special as traditional public schools. Since it is unlikely that this was the majority’s desired result, its definition of what makes a school special is too narrow.

Additionally, the dissent argued that because the Commission could create a traditional special school, such as a school for students with disabilities, the statute should be upheld.<sup>291</sup> However, the majority looked past this and held that because there were no safeguards to prevent the Commission from authorizing unconstitutional schools, it could not sustain the statute.<sup>292</sup> To do so would be to “judicially rewrite a statute.”<sup>293</sup>

Two dissenting opinions, however, correctly interpreted “special schools” as broad enough to include commission charter schools. Justice Melton first pointed out that the Act is, in fact, constitutional on its face.<sup>294</sup> According to Melton, the Act meets the first prong of the majority’s test by serving “students who have struggled in [the] traditional school setting” – low-income, low-performing, high-performing and underserved populations – all of which are special needs.<sup>295</sup> Melton then posited that the Commission did, in fact, authorize constitutional schools.<sup>296</sup> For example, Ivy is an all-girls school, which means it is special compared with traditional, co-ed schools.<sup>297</sup>

In his dissent, Justice Nahmias focused on the majority’s misconstruction of the historical context of Georgia’s public schools. After laying out a very detailed account of the evolution of Georgia’s public schools,<sup>298</sup> he defined special schools as ones that are not “common, general, or ordinary.”<sup>299</sup> Unlike the majority, Nahmias determined that individualized, performance-based contracts, and many of the other unique features of charter schools, made commission charters special.<sup>300</sup> Looking to the historical evolution of the phrase “special schools,” Nahmias concluded the “broader constitutional context weighs strongly against the majority’s position, and so the majority

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291. *Id.* at 781-82.

292. *Id.* at 782.

293. *Id.*

294. *Id.* at 783 (Melton, J., dissenting).

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.* at 787-92 (Nahmias, J., dissenting); *see supra* Part V.A.

299. *Gwinnett Cnty.*, 710 S.E.2d at 795 (Nahmias, J., dissenting) (internal quotations omitted).

300. *Id.*

utterly ignores it.”<sup>301</sup> Like Melton’s dissent, Nahmias takes the correct approach in interpreting special schools very liberally so as to preserve the statute. Not only is it consistent with the standard of review, but it is also consistent with research findings on the necessary charter laws for charter success.

In the aftermath of *Gwinnett County*, the battle still continues between the charter schools and their local school districts.<sup>302</sup> Ironically, the local school boards that now authorize them, once denied each school’s charter petition.<sup>303</sup>

#### D. What Georgia Should Have Done for its Students

*Gwinnett County* and *School District of Kansas City* have a substantial amount in common. On the obvious level, they both represent yet another chapter in the battle for education reform. They both took place in states where traditional public schools do not produce consistently adequate test scores,<sup>304</sup> and both cases essentially turned on the meaning of two words.

In *School District of Kansas City*, the Supreme Court of Missouri upheld its charter schools law by giving “school purposes” the broad meaning of any public school in the district.<sup>305</sup> In *Gwinnett County*, the Supreme Court of Georgia struck down its law with a narrow reading of “special school.”<sup>306</sup> Missouri made the right choice for its students. Georgia, on the other hand, will likely continue to see lackluster results from its charter schools unless voters approve a constitutional amendment to cure the defects highlighted in *Gwinnett County*.<sup>307</sup> The Supreme Court of Georgia should have followed Missouri’s model, and had ample opportunity to do so.

Both cases used essentially the same standard of review – a presumption that the statute is constitutional with the burden of proof resting on the challenger.<sup>308</sup> Additionally, both courts claim to give effect to the plain meaning

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301. *Id.* at 798.

302. See D. Aileen Dodd, *Gwinnett School Board Rejects Ivy Preparatory Academy Again*, ATLANTA JOURNAL-CONSTITUTION, Jan. 20, 2012, <http://www.ajc.com/news/gwinnett-school-board-rejects-1309403.html>.

303. *Gwinnett Cnty.*, 710 S.E.2d at 792 (Nahmias, J., dissenting).

304. See *supra* Parts IV.A, V.B.

305. See *Sch. Dist. of Kan. City v. State*, 317 S.W.3d 599, 607-08 (Mo. 2010) (en banc).

306. See *Gwinnett Cnty.*, 710 S.E.2d at 782.

307. A constitutional amendment to allow a statewide charter school commission will appear before Georgia voters in November of 2012. Wayne Washington, *Senate Passes Charter Schools Amendment Resolution*, ATLANTA JOURNAL-CONSTITUTION, Mar. 19, 2012, <http://www.ajc.com/news/georgia-government/senate-passes-charter-schools-1390964.html>.

308. Compare *Sch. Dist. of Kan. City*, 317 S.W.3d at 604, with *Gwinnett Cnty.*, 710 S.E.2d at 777.

of the phrases at issue.<sup>309</sup> Missouri does this very efficiently by concluding that “school purposes” includes *any* school in the district, including charter schools.<sup>310</sup> This is a logical reading of 11(g), especially considering that it could have just as easily read “for purposes of *KCMSD*,” but did not make such designation.

Georgia, on the other hand, takes a relatively narrow construction of “special schools,” by defining it as special in terms of either student enrollment or curriculum taught.<sup>311</sup> It further noted that “special” must be to the degree of “constitutional significance,” which is counterintuitive to “plain meaning.”<sup>312</sup> In contrast, either definition offered by the dissent gives more spirit to the plain meaning of “special.” Even though Melton applies the majority’s limited two-prong test, he finds that the Act meets this standard by including provisions to encourage charter schools to enroll underserved student populations.<sup>313</sup> Nahmias’ dissent is especially critical of the majority’s definition, pointing out that “a single adjective used in a single phrase does not normally have two (but only two) limited and different meanings.”<sup>314</sup> By adopting the more restrictive definition of special, the majority effectively erected a formidable barrier for future charter schools.

The two opinions also differ in how they treat the statutory language itself. For example, in Missouri, charter schools are self-proclaimed public schools.<sup>315</sup> The court in *School District of Kansas City* found this as evidence that charter schools are schools of *KCMSD* and therefore entitled to local property tax funds.<sup>316</sup> Georgia’s commission charter schools were also self-proclaimed “special schools.”<sup>317</sup> In contrast with *School District of Kansas City*, the majority in Georgia warned that “[c]onstruing the [c]onstitution is the function of the judiciary and the General Assembly has no power to make such a construction.”<sup>318</sup>

The last lesson Georgia could have taken from Missouri concerns the use of persuasive authority. In *School District of Kansas City*, Missouri found it telling that *KCMSD* itself had previously transferred 11(g) funds to local charter schools, even though “administrative interpretation . . . [is] not controlling.”<sup>319</sup> Georgia had an opportunity to do the same with respect to

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309. *Compare Sch. Dist. of Kan. City*, 317 S.W.3d at 607, with *Gwinnett Cnty.*, 710 S.E.2d at 779.

310. *Sch. Dist. of Kan. City Mo.*, 317 S.W.3d at 607-08.

311. *Gwinnett Cnty.*, 710 S.E.2d at 777.

312. *Id.* at 779.

313. *Id.* at 783 (Melton, J., dissenting).

314. *Id.* at 796 (Nahmias, J., dissenting).

315. MO. REV. STAT. §§ 160.400, 405.4(6)(c) (2000).

316. *Sch. Dist. of Kan. City v. State* 317 S.W.3d 599, 608 (Mo. 2010) (en banc).

317. GA. CODE ANN. § 20-2-2081(5) (West, Westlaw through 2012 Reg. Sess.).

318. *Gwinnett Cnty.*, 710 S.E.2d at 780 (majority opinion).

319. *Sch. Dist. of Kan. City*, 317 S.W.3d at 609.

two attorney general's opinions.<sup>320</sup> In one official and one unofficial opinion, the attorney general concluded that the general assembly had broad powers to create special schools based on the language in the 1983 constitution.<sup>321</sup> While the Nahmias dissent acknowledges these opinions as persuasive authority,<sup>322</sup> the majority again notes that it has the sole power to interpret the law, not the Attorney General.<sup>323</sup> Instead of focusing on the impacts on student achievement, it appears as if the court is more concerned with asserting its own authority. In doing so, it completely ignores relevant information at the expense of Georgia's students.

Given the broad sweep of the provision, the "General Assembly may provide by law for the creation of special schools in such areas as may require them,"<sup>324</sup> and the presumptive standard of review, the Georgia majority should have found the Act constitutionally valid, as the Supreme Court of Missouri did one year earlier.

## VI. CONCLUSION

Until student achievement scores improve, education reform is likely to remain a top priority for many policy makers. While that reform can take many different forms, research indicates that charter schools may provide a sustainable and replicable model for student growth, which makes it a popular reform choice. Since their inception, charter schools have garnered wide support from politicians at both the state and federal level. Of course, there must still be more research exploring the efficacy of charters. However, they at least offer two distinct promises – an alternative for students in failing schools and a laboratory for educational pedagogy.

As more information emerges about the impact of the different states' charter schools legislation on charter schools' academic performance, policy makers must act purposefully to create laws that will allow charter schools to continue innovation and develop best practices for both charter schools and traditional public schools. This is imperative if lawmakers seek to create a more educated workforce.

Courts, obviously, play a key role in sustaining or invalidating charter laws. Missouri's unanimous ruling to uphold charter school legislation is one such example. Conversely, the Supreme Court of Georgia used a very narrow definition to invalidate the Charter Schools Commission Act. While Georgia unfortunately did not follow suit, Missouri's broad interpretation of its constitution can serve as a model for other states reviewing charter school legislation.

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320. *Gwinnett Cnty.*, 710 S.E.2d at 791 (Nahmias, J., dissenting).

321. *Id.*

322. *Id.*

323. *Id.* at 780 n.9 (majority opinion).

324. GA. CONST. art. VIII, § V, para. VII(a).