

The battles over Georgia's school boards

Today's federal court hearing challenging the constitutionality of Governor Nathan Deal's efforts to oust six members of the DeKalb County Board of Education marks the latest round in more than a decade of fighting between Georgia governors and fractious local school boards.

The state's last three governors—Roy Barnes, Sonny Perdue and now Deal—have suspended or removed from office members of local boards of education in Spalding, Clayton, Warren and Miller counties when those districts' accreditation was threatened, in part, by dysfunctional behavior on the part of their boards.

Deal, who removed Miller County school board members last year, added to the list in November when he announced his intent to suspend and ultimately remove members of the Sumter County Board of Education after that school district's accreditation was placed on probation by the Southern Association of Colleges and Schools. Then on Monday, the governor suspended the DeKalb board members in response to SACS' decision to place the DeKalb school district on probation, and the state Board of Education recommended suspensions that would pave the way for their removal.

But as today's hearing shows, some school board members have pushed back, filing legal challenges to block their removal from office as an unconstitutional exercise of executive authority, despite state assertions that Georgia's governors have simply made use of powers bestowed on them by state law.

Those constitutional questions—whether the governor's authority can trump the will of the voters, and whether elected officials have a constitutional right to remain in office until they are voted out—have resonated, at least initially, with some of the judges called on to consider them.

On Feb. 22, the DeKalb school district and board member Eugene Walker secured a temporary restraining order from a federal judge that blocked any suspension of board members—under a 2011 law giving the governor that authority—until after today's hearing.

Last November, Fulton County Superior Court Judge Bensonetta Tipton Lane temporarily enjoined Deal from relying on that same statute to suspend members of the Sumter County school board. Lane said more time was needed to consider "significant questions" involving both the right of school board members "to serve in the offices to which they have been duly elected, but also the right of their constituents to be served by the elected representative whom they selected."

That case is pending before Fulton County Superior Court Judge Kelly Lee.

Sumter County board members "are still functioning ... still holding meetings," said Brian Watkins, who is representing members of the Sumter board that the state had sought to oust. "They are fulfilling their duties."

In today's hearing, U.S. District Judge Richard Story will consider allegations by the DeKalb school district that the governor has overstepped his authority and that the 2011 state law on which he relied fails to pass constitutional muster. Story's ruling could affect whether Georgia governors can—when a school district's accreditation is jeopardized—use their executive authority to remove a recalcitrant or difficult, but duly elected, board in place of an election or a recall.

"I think the claims by board members are by no means frivolous," said Ronald Carlson, a professor at the University of Georgia School of Law. "Judge Story will have some serious constitutional challenges to consider."

"This is a new law," he continued. "It's going to be interesting because there is uncharted ground to cover. ... It's shaping up to be a pretty dramatic showdown."

Today's hearing was prompted by two suits filed this month by the DeKalb school district and Walker, a DeKalb school board member and the board's former chairman. The suits filed in Fulton County Superior Court and in U.S. District Court initially sought to bar the Georgia Board of Education from convening a hearing on whether DeKalb board members should be suspended from office. They also sought to stop the governor from suspending or removing school board members from their elected posts.

Both Story and Lee initially rejected the school district's requests for restraining orders. In a Feb. 20 order, Story said the school district and Walker could not show they would be irreparably harmed if the state school board held its hearing or made a recommendation regarding board suspension to the governor.

"No suspension or removal from office can result directly from the [state Board of Education] hearing," Story held. "The Governor is the ultimate decision-maker under the statute."

According to the school board's federal complaint, Lee refused to hear the TRO motion and sent word through a law clerk that she would not convene a hearing on the matter before Feb. 25.

On Feb. 22—after the state school board recommended to the governor that six DeKalb school board members be suspended and Deal announced his intention to take action on Feb. 25—the school district and Walker asked the federal court a second time for a restraining order.

This time, Story complied, enjoining the implementation of Deal's decisions "to preserve the status quo" until after the hearing. "If Governor Deal decides to appoint any new member to the Board, that proposed member shall not be permitted to take office at this time," the judge said. "Similarly, if Governor Deal decides to remove any current member of the Board, that member will remain in office, but shall not be permitted to act on behalf of the Board or take any other official action in his or her capacity as Board member."

After securing the restraining order, Decatur attorney Robert E. Wilson, who is representing the school district and Walker, dropped the Fulton County suit. "We were going down two tracks at once," he said Thursday. "For a variety of tactical and legal reasons, especially legal reasons, we dismissed the state case and consolidated all of our federal and state claims under the federal case."

"The primary issues are obviously constitutional," he continued. The federal constitutional questions rest on due process; the state issues challenge whether the state law invoked to suspend Walker and other school board members "runs afoul of the Georgia Constitution," he said.

In the federal complaint, Wilson argued that members of the DeKalb school board have a constitutional right to retain the office to which they were duly elected. "Elected officials have a property right in their office that cannot be taken away without due process," the complaint states.

Due process was jeopardized when the state school board hearings did not inform DeKalb school board members of any specific misconduct of which they were accused, the complaint alleged, and "placed the burden on the members of the [DeKalb County Board of Education] to prove why they should not be removed."

The suit also claimed that state law provided no specific requirements for removal, leaving state school board members "free to base their decision on personal whim or avarice."

"Such prejudging, burden shifting and standardless review by [the state Board of Education] constitute a denial of procedural due process," the complaint stated.

The suit also claims that the 2011 state law "illegally defers to the unelected and unaccountable [Southern Association of Colleges and Schools] to initiate suspension proceedings based on anonymous hearsay sources, fails to provide notice of charges against members, fails to provide a standard of review for the [state Board of Education] to apply, then upon suspension places the burden of proof on the member to gain reinstatement essentially by showing that a private accreditation agency would have a favorable view of the member's participation in district governance," the complaint stated.

Georgia Attorney General Sam Olens and his staff, who are defending the state law and the governor, have countered that DeKalb board members received "extensive due process" in a 14-hour evidentiary hearing at which they had the opportunity to subpoena and examine witnesses, were represented by counsel and allowed to make personal statements. State lawyers also argued that board members' suspensions also can be appealed to the governor "and only become dismissals if those appeals are unsuccessful."

State attorneys also defended the law's constitutionality, asserting that the state constitution empowers the governor to make appointments. In addition, state lawyers cited a 2012 ruling by the Supreme Court of Georgia in a challenge by members of the Warren County school board. Perdue had removed four Warren County board members in 2010 after the school district's accreditation was placed on probation.

In its ruling, the state high court held that Georgia's constitution allows the state to establish qualifications for local boards and "presumably authorizes the General Assembly to establish a mechanism for the administrative removal of board members." But in the Warren County case, the high court reversed a Fulton County Superior Court ruling that had allowed Perdue to remove the Warren County board members—saying that another state law on which he had relied did not give him the authority he sought.

Atlanta attorney **Joshua Belinfante**, who was Perdue's executive counsel when the then-governor removed four members of the Clayton County School board and the Warren County board, said that Perdue had relied on another state law that gave the governor power to remove or suspend members of the state's executive and licensing boards.

"We found a way we thought for him to act without a [new] statute," Belinfante said. "It certainly would have been better with one."