IN THE
SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

CIVIL ACTION No. 2004CV91004

CONSORTIUM FOR ADEQUATE SCHOOL FUNDING IN GEORGIA, INC. (CONSORTIUM) on its own behalf and on behalf of its members; BEN HILL COUNTY SCHOOL DISTRICT; *et al.*,

Plaintiffs,

v.

THE STATE OF GEORGIA, *et al.*,

Defendants.

DEFENDANTS' REPLY TO PLAINTIFFS' SUPPLEMENTAL RESPONSE OPPOSING DISMISSAL OF THEIR COMPLAINT

THURBERT E. BAKER
Attorney General

DENNIS R. DUNN
Deputy Attorney General

STEFAN RITTER
Senior Assistant Attorney General

ALFRED L. EVANS, JR.
Senior Assistant Attorney General

DEBRAE KENNEDY
Assistant Attorney General

ALFRED L. EVANS, JR.
40 Capitol Square, S. W.
Atlanta, Georgia 30334-1300
Ph: (404) 656-3389

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CONSORTIUM FOR ADEQUATE SCHOOL FUNDING IN GEORGIA, INC. (Consortium) on its own behalf And on behalf of its members; BEN HILL COUNTY SCHOOL DISTRICT; *et al.*,	*	
Plaintiffs,	*	
v.	*	**Civil Action No. 2004CV91004**
THE STATE OF GEORGIA, *et al.*,	*	
Defendants.	*	

INTRODUCTION

In our Reply to the Consortium Plaintiffs' initial brief in opposition to dismissal, we noted their penchant for conjuring up and attacking supposed positions which we have in fact never taken. *See, Def. II, p. 2.*[1] Examples mentioned in our Reply Brief included Plaintiffs'

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[1] At a "Case Management Meeting" held on March 2, 2005, the Court through the late Judge Rowland W. Barnes, granted the Consortium Plaintiffs' request for permission to file a responsive brief to the customary third and final brief, *i.e.*, which was the reply by Defendants to Plaintiffs brief in opposition to the dismissal of their complaint, with Defendants being given leave to file a response to Plaintiffs' submission. For the purpose of less cumbersome references to the briefs to date we cite them as follows:

Def. I—"Brief in Support of Defendants' Motions to Dismiss Plaintiffs' Complaint" (filed Nov. 15, '04)

mischaracterization of our dismissal motions as being based upon the "failure to state a claim" grounds of CPA Rule 12(b)(6), when they are in fact almost entirely based upon "want of subject matter jurisdiction" under CPA Rule 12(b)(1). *Def. II, p. 2.* We also noted that our reliance on *McDaniel v. Thomas,* 248 Ga. 632 (1981), as controlling, was being contested by a "justiciability" argument which was in fact wholly irrelevant to the specific holding of *McDaniel* upon which we were relying. *Ibid.* This was and is the *McDaniel* Court's conclusion that the "adequate education" clause of Art. VIII, Sec. I, Par. I, the constitutional provision which Plaintiffs have described as the centerpiece of their claims (*Pl. I, p. 1),* was not intended to fundamentally alter the *constitutional* format of educational funding which is based largely on *county ad valorem* taxation, with State fiscal aid being pursuant to spending authorization legislation (currently QBE) **which had not been elevated to constitutional status.** *Def. I, p. 29; Def. II, p. 5.*

Pl. I—"Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss Plaintiffs' Complaint" (filed circa Jan. 21, '05)

Def. II—"The State of Georgia Defendants' Reply to Plaintiffs' Brief in Opposition to The Dismissal of their Complaint" (filed Feb. 22, '05).

Pl. II—"Plaintiffs' Supplemental Brief in Response to Defendants' Reply Brief" (filed circa March 31, '05).

Unfortunately, Plaintiffs harping on peripheral and even self-crafted fictional issues continues unabated in their current supplemental brief, *i.e., Pl. II.* They continue to press the same irrelevant "justiciability" argument in the face of the Supreme Court's specific education funding analysis of the very constitutional provision (VIII, I, I), which Plaintiffs say is controlling, *i.e., Pl. I, p. 1; Pl. II, pp. 8-9.* They continue to assert factual issues which do not exist, in order to place our jurisdictionally based motions under CPA Rule 12(b)(1) into the evidentiary friendlier "failure to state a claim" mold of Rule 12(b)(6). They start off in the very first sentence of their current supplemental reply with a decidedly inaccurate description of our position on constitutional responsibility for the funding of education. *See, Pl. II, p. 1.*

While we will deal with some of these diversionary issues shortly, we cannot help but think that what Plaintiffs are trying to do is but to disguise the reality of what they are attempting, and above all to steer the Court away from the critical constitutional provisions which control all State expenditures, including those for public education. As we should have, we went into these constitutional provisions in considerable detail in our initial Brief. *Def. I, pp. 11-15.* In a case which turns lock, stock and barrel on the Consortium Plaintiffs' quest for a higher level of funding from the State Treasury, is it not passing strange that they have not so much as attempted to

present any counter-analysis to our review of the constitutional provisions which control the budget formation/appropriation process in Georgia?

Because they cannot cope with, and their case cannot stand against, these critical constitutional provisions (as well as implementing legislation as the "Budget Act"), Plaintiffs seek to confine the Court's gaze, as they have their own, to **Article VIII**, Sec. I, Par. I of the Constitution respecting its declaration of *educational policy* (as distinct from the actual funding, *i.e.*, Budget/Appropriation provisions of **Article III),** that "adequate public education for the citizens shall be a primary obligation of the State of Georgia." Based upon their contention that because in their eyes (certainly not ours) the education policy declaration of Article VIII, Sec. I, Par. I is free of ambiguity on its face (is "adequacy," *i.e.*, "enough" free of ambiguity?), they try to convince the Court that it should treat *the rest of the Constitution* as if it did not exist (*see, Pl. I, p. 4),* completely disregarding the fact that in looking at constitutions *"in pari materia"* construction is a constitutional mandate. *See, Def. II, pp. 6-7.* But the rest of the Constitution does exist. And it is these constitutional provisions which Plaintiffs would have the Court ignore which not only control, but indeed constitute the very "funding system" (for education as everything else the State undertakes

fiscally), which the Consortium Plaintiffs tell us, repeatedly, their case is all about.

While we will not reargue what already has been presented in detail in our principal brief, we do think it is perhaps time, in view of all the diversions Plaintiffs attempt by peripheral and in some instances fictional issue creation, to go momentarily back to basics.

THE CONSTITUTIONAL PROVISIONS WHICH THE CONSORTUIM PLAINTIFFS WOULD HAVE THE COURT IGNORE

I. ART. III, SEC. IX, PAR. I

Of the multiple constitutional provisions relating to the disbursement of funds from the State Treasury which Plaintiffs ignore and ask the Court to ignore, perhaps the most important is the first paragraph of Section IX ("Appropriations") of Article III ("Legislative Branch") of our Georgia Constitution. It is the foundational basis of many of the other constitutional provisions which together control the State's funding system which the Consortium Plaintiffs attack on the theory that the funding provided for public education is not enough, *i.e.*, "adequate." As pointed out at p. 12 of our principal Brief (*Def. I, p. 12)*, Art. III, Sec. IX, Par. I is short and to the point:

"No money shall be drawn from the Treasury except by appropriation made by law."

We have discussed this provision, along with its import, in *Def. I, pp. 11-14*, and again in *Def. II, pp. 6-7*, in refutation of Plaintiffs' quite "upside down argument" that the "golden" or "plain meaning" rule of construction means that the Court should look only at VIII, I, I (*i.e.,* the educational *"adequacy"* provision), and not think about the rest of the Constitution. *See, Pl. I, 4, 24-28 and 34-35.* As we pointed out, citing *McLucas v. State Bridge Authority,* 210 Ga. 18 (1953), in constitutional construction the consideration of multiple constitutional provisions dealing with the same matter *in pari materia* is not optional, it is a *constitutional mandate. Def. II, p. 7.*

The truth is that Plaintiffs cannot cope with even this very threshold constitutional impediment to their case. They cannot legitimately argue that the constitutional provision upon which they rely (VIII, I, I), any more than QBE, can generate so much as a single dollar on its own, or squeeze a single dollar out of the State Treasury "*sans* an appropriation made by law." There has not been an appropriation at the higher level they want, which is, of course, the nub of their case.

II. ART. III, SEC. V, PAR. II; ART. III, SEC. IX, PAR. II(b)

Our Constitution is quite specific in its vesting of the power to determine appropriations (*i.e.*, how much money may be made available from the State Treasury) for the various departments and agencies of State government. It is vested **exclusively** in the General Assembly of the State of Georgia. Art. III, Sec. IX, Par. II(b). Even more specifically, the Constitution requires that all bills for raising revenue or appropriating money shall originate in the House of Representatives. Art. III, Sec. V, Par. II. These constitutional provisions do not so much as hint that a funding level determined for State Department or Agency by the General Assembly is subject to second-guessing by the Judicial Branch.

III. ART. III, SEC. IX, PARS. III, II(b) AND IV(c)

The Consortium Plaintiffs would also have the Court ignore those constitutional provisions which define the unique nature of **an appropriations act,** as distinguished from **general legislation. Art. III, Sec. IX, Par. III** limits an appropriations bill to the single subject of the appropriation of money from the State Treasury. Under **Art. III, Sec. IX, Par. II(b)**, the General Assembly's appropriation of funds for the operations of the various departments and agencies of government is made on an annual

basis, with funds not extended or contractually obligated by the end of the fiscal year ordinarily lapsing back into the State Treasury under **Art. III, Sec. IX, Par. IV(c).**

As pointed out in our principal brief, the end result is that it typically takes two entirely different legislative actions before money can be disbursed from the State Treasury. *Def. I, p. 13.* First there must be a general law **"spending authorization act"** which either mandates or authorizes a State agency or official to engage in a particular program or activity. *See, Willis v. Price*, 256 Ga. 767 (1987) [absent clear constitutional or statutory authority for the expenditure of State funds such funds cannot be disbursed from the State Treasury]. Secondly, there must be *an appropriation* which upon the Governor's warrant permits funds to be withdrawn from the State Treasury for the authorized expenditure. *Def. I, pp. 12-15.* Again, Plaintiffs have presented no indication that they have any understanding of this vital distinction between a constitutional or statutory **spending authorization** (as in this case QBE), and an **appropriations act.** In particular, they have failed to present any response as to the import to the case at bar of *Buskirk v. State of Georgia*, 767 Ga. 769, 700 (1997), where the Court concluded that even in the face of a *direct spending mandate* for a specific mathematical ascertainable sum for pay raises, there could be no

salary increases where the General Assembly failed to appropriate the monies necessary to fund the mandate. *Def. I, pp. 13-14* [where we further pointed out that even upon passage, an appropriation act is neither a contract nor an "entitlement" on the part of anyone for the disbursement to be made, since the Governor, in the exercise of his "purse-strings" control of State Government may lawfully revoke a warrant already issued so long as the payment which it warrants has not been made.] *See, Def. I, p. 14.* As we have readily conceded, it is not even remotely unusual for spending authorization enactments as QBE to be less than fully funded. *Ibid.* Surely Plaintiffs must be familiar with the phrase "unfunded mandate" which is an integral part of the lexicon of governmental funding programs (federal and state) quite generally. Among other things, under the Georgia Constitution the General Assembly cannot spend monies the State does not have. Art. III, Sec. IX, Par. II(b); *see also, e.g.*, O.C.G.A. §§ 45-12-86; 45-12-81.

IV. ART. III, SEC. IX, PAR. II AND THE "BUDGET ACT"

Looking at the "made by law" qualification of an "appropriation" which as we have seen is *sine qua non* to a disbursement of funds from the State Treasury under Art. III, Sec. IX, Par. I, we will not repeat the considerable attention we gave in our principal brief to the role of the

Governor in the **budget formation/appropriation process**. *See, Def. I, pp. 11-25.* We pointed to **Art. III, Sec. IX, Par. II**, respecting the Governor's responsibility at the start of a session of the General Assembly (*i.e.* within five day after its convening), to submit to it his view of the appropriate objects and levels of State funding in his **budget report** and **draft general appropriations bill**. *Def. I, p. 15.* We identified the "Budget Act" as the legislation which flushes out the Governor's prerogatives and responsibilities, pointing out in detail the Governor's broad discretion in determining the line-items objects and levels of funding to be proposed to the General Assembly. *Def. I, pp. 12-21, 34-37; see also Def. II, pp. 29-36.*

Again the Consortium Plaintiffs have not attempted to dispute the constitutional location of discretionary political authority respecting the **budget formation/appropriation process** being exclusively in the Executive (the Governor) and Legislative (the General Assembly) branches of State government and not in the Courts. Unable to cope with these constitutional provisions' placement of these plainly political policy determinations (made in light of the competing needs of the various departments, agencies and activities of government under the limited funds and revenues available) in the Executive and *Legislative* Branches, and not

the *Judicial* Branch of government, Plaintiffs again ask the Court to think only of VIII, I, I, and ignore the rest of the Constitution.[2]

V. IMPORT OF THE CONSTITUTIONAL PROVISIONS PLAINTIFFS WOULD HAVE THE COURT IGNORE

It is the above constitutional provisions, and in particular their vesting of exclusive authority over the budget formation/appropriation process **exclusively** in the Governor and General Assembly of the State of Georgia, which give rise to the State Defendants' multiple **jurisdictional** dismissal motions, motions which are not, as Plaintiffs seek to label them, merely "procedural" or "failure to state a claim" motions. *Pl. I, pp. 3, 51.* Small wonder that Plaintiffs ignore, and seek to convince the Court to ignore, these critical provisions of the Constitution which relate directly to, and indeed as a matter of law constitute, the "system for funding education" *(Pl. II, p. 5),* they attack because of their dissatisfaction with the monies produced. Under

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[2] The appropriation process is a **legislative** function. *Johnson v. Fulton County,* 235 Ga. App. 277, 279 (1998). In *McDaniel v. Thomas,* 248 Ga. 632, 644 (1981), the Court expressly noted that for it to second-guess the General Assembly as to how much funding was "enough" (*i.e.*, "adequate") would have it performing a legislative rather than a judicial function, legislating in a turbulent field of social, economic and political policy—and this at a time when there was a provision of the Constitution (since repealed) which arguably did place a funding mandate for education specifically on the General Assembly.

these constitutional provisions which Plaintiff would have the Court ignore, there is, for the reasons set forth in our dismissal motions and supported by all briefing to date, a total want of subject matter jurisdiction over plaintiffs' attempt to persuade this Court to intrude upon and usurp the prerogatives which are exclusively those of the Governor and General Assembly concerning their control of the "purse strings" of government.

PLAINTIFFS' MISCELLANEOUS DIVERSIONARY EFFORTS

I. PLAINTIFFS' INTRODUCTORY MISSTATEMENTS

In the very first sentence of the "Introduction" to their current supplemental brief, Plaintiffs commence by twisting Defendants' position badly out of shape so they can call it "absurd" in their second sentence. *Pl. II, p. 1.* Our position from the start has consistently been that the only "*express **constitutional** mandate respecting the funding of a county's school system,* falls on the county itself" (*Def. I, p. 9),* that the "adequacy"/"primary obligation" language of VIII, I, I (the constitutional provision upon which Plaintiffs tell us their case is based), was not intended by the provisions' framers to change the basic constitutional scheme for educational funding from that of a system based largely on *local ad valorem taxation*, and that while the framers were entirely aware of the State foundation or

"equalization fund," they opted **not** to give it "**constitutional status,**" with the funding of spending authorization acts as QBE being continued as matters of strong and long-standing "legislative policy" but not as a constitutional mandate. Our authority for our "absurd" position is the precise language of the Supreme Court in *McDaniel v. Thomas*, 632, 642 (1981); Def. *I, p. 10.* Moreover, our position was cast in terms of funding *by the General Assembly*, not the "State." There is a considerable difference since the two terms are not synonymous. *Def. II, pp. 4-5.*

II. PLAINTIFFS' EFFORT TO CREATE FACTUAL ISSUES WHERE NONE EXIST

In their current supplemental brief, Plaintiffs try to invent factual issues where none in fact exist. This would seem to go hand-in-hand with their attempt to change our Rule 12(b)(1) "*jurisdictional*" motions (which they are) into Rule 12(b)(6) "*failure to state a claim*" motions (which they are not), thereby elevating the weight and relevance of Plaintiffs' alleged "facts." Plaintiffs say that Defendants are ignoring the "black letter legal principle" that in ruling upon a motion to dismiss all well pled facts must be taken as true. *Pl. II, p. 3.* The accusation is simply untrue. We do indeed assume the truth of all of Plaintiffs' "**well-pled facts.**"

This being said, however, several points need to be made. First, Plaintiffs' well-pled facts have precious little relevance to the **jurisdictional issues** presented by the State Defendants' dismissal motions based upon the constitutional provisions discussed above. For example, there is the critical issue of whether under the furthermost reaches of a court's judicial power, it would be permissible for a court to intrude into and second-guess a **legislative determination of funding adequacy** (how much is enough) for a State department, agency or program in a general appropriations act. This involves a consideration which is not limited to "separation of powers" *simpliciter*. It requires consideration of the particular powers in question, namely the Executive and Legislative Branch value judgments involved in determining appropriate funding levels for the competing needs of state government determinations which must be made through the constitutionally prescribed **budget formation/appropriation process.** And above all it must be recognized that this authority to decide is constitutionally vested **exclusively** in the Governor and General Assembly of the State of Georgia. Similarly, Plaintiffs well-pled facts have little to do with the "sovereign immunity" barrier to the very notion that anyone has any right or entitlement to obtain an increased General Assembly appropriation.

The second point we would make is that even in a 12(b)(6) "failure to state a claim" dismissal motion, the "well-pled facts" rule does not ordinarily extend to mere "opinion" or conclusory allegations. *See, e.g., Next Century Communications Corp. v. Ellis*, 171 F.Supp.2d 1374, 1378 (M.D. Ga. 2001), *aff'd.* 318 F.3d 1023 (2003); *South Florida Water Management District v. Montalvo*, 84 F.3d 402, 408 n.10 (11th Cir. 1996) [as a general rule conclusory allegations are not admitted as true on a motion to dismiss]. In pointing to discrepancies in Plaintiffs' "*well-pled facts*" and their not always well-connected "*conclusions*," as for example, where we use their own data to show the considerable academic success being achieved by a large majority of the students (and hence that "basic educational opportunity" is in fact currently being provided) in the five Plaintiff counties, we are relying upon, not disputing or questioning, Plaintiffs' own "well-pled facts." *See, Def. II, pp. 17-18.* Nor do we violate the "well-pled facts are admitted" rule when we question the inferences Plaintiffs seek to draw from their data, by pointing out the common sense variables in student achievement which can result from family or community attitudes towards education. *See, Def. II, p. 17 n.4.* One does not need to have a doctorate in education to recognize that in a community largely agricultural, there might be somewhat less interest in AP courses in

advanced calculus than would likely be found in an urban or suburban community where more students are looking to college following graduation from high school. Questioning the dubious conclusions Plaintiffs draw from their "well-pled factual data" is fair game.

Third, as to our reference to the appropriateness of the Court's consideration of Georgia's already *massive* fiscal support for public education, which the *McDaniel* court thought important in 1981, Plaintiffs complain that the budgetary figures for FY 2005 are somehow unfit for consideration because they are not in the record. Again, this is simply wrong. Plaintiffs seem to forget that in adjudicating motions to dismiss courts may properly take judicial notice of facts outside the record without converting the dismissal into a summary judgment motion. *See, e.g., Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). The General Assembly's commitment to education in its general appropriation act for FY 2005, almost **6 Billion Dollars** or, approximately 36% of the total State Budget is set forth in the published laws of the State of Georgia, *i.e., 2004 Ga. Laws, pp. 994, 1005, 1058.* It is plainly a matter of which the Court can take judicial notice.

III. WHERE LIES THE POWER TO DETERMINE HOW MUCH STATE FUNDING IS ENOUGH (*i.e., "ADEQUATE"*) FOR STATE SUPPORTED ACTIVITIES AS PUBLIC EDUCATION?

This case is not about educational "adequacy" in terms of divergent teaching methodologies such as the behavioral approach of B. F. Skinner, or the developmentalism of Jean Piaget, and which best serves the cause of educational "adequacy." The one thing that the Consortium Plaintiffs have been clear about from the start is that what their case is about is the adequacy of State funding for the support of Georgia's county school systems. As we have seen, they focus on Georgia's alleged failure to adequately fund QBE (the spending authorization act for State financial assistance to county school systems—which as previously noted does not generate so much as a single dollar in and of itself), complaining among other things of the budget cuts during the recent recession. *See, e.g., Def. II, p. 22 n.7.*

In castigating one conceivable view of minimal educational funding "adequacy," which we suggested might be applicable, *i.e.*, funding sufficient for the basic matter of whether or not schools are open, teachers are teaching, and students are learning to read, write and do simple math, by calling it "an Eighteenth Century" view (*Pl. II, p. 3),* Plaintiffs recognize that the funding needed to support whatever educational "adequacy" is, is

hardly something that can be determined on a computer with the exactitude of a mathematical equation. When all is said and done, Plaintiffs demonstrate in their criticism that "adequacy" and the money needed to get there, are strictly matters of **"opinion."** What Plaintiffs concede by the necessary implication of their comment is what we have been saying all along, that "adequacy" is an intangible which, much as "beauty," lies in the eyes of the beholder.

One of the big questions posed insofar as Plaintiffs' case is concerned, is ***whose "opinion" controls*** on the matter of funding "adequacy," or specifically in this case, who decides how much should be expended from the State's coffers for the State-level fiscal support for the school systems of the various counties. Respectfully, we think that this question has been definitively answered by the constitutional provisions discussed both above and in all of our previous briefs. The State funding system for public education, which to be precise is the budget formation/appropriation process, while contemplating input from educators at various points of the lengthy and quite laborious process, possibly at legislatively committee hearings as well as through the reports Plaintiffs mention (*Complaint, ¶¶ 51-61),* unambiguously places the ultimate decisional authority (*i.e.,* the "opinion" which controls) *exclusively* in the Governor respecting budget formation and

presentation of a draft general appropriation bill to the General Assembly, and *exclusively* in the General Assembly as to the actual appropriation act.

To the extent that Plaintiffs may be imprecisely trying to say at *Pl. II, p. 9,* that the position of the State defendants is that the funding level arrived at in a general appropriation act via the budget formation/appropriation process is not subject to judicial review and enlargement (at least not without gross infringement upon and usurpation of the exclusive *constitutional* prerogatives of the Governor and the General Assembly of the State of Georgia), it is precisely correct. It is axiomatic, not withstanding Plaintiffs' apparent belief to the contrary, that not all actions of the Executive and Legislative branches of government are subject to review and overruling by the third branch under the doctrine of "judicial review."

We have already given examples, in some detail, of executive and legislative determinations which are not reviewable by the judicial branch of government. *Def. II, p. 36.* Typically relating to the various discretionary policy choices of the legislative and executive branches of government, these determinations of judicial nonreviewability have been specifically applied to legislative determination of appropriation act funding levels for public education. The Supreme Courts of Florida and Alabama have both held that judicial interference to directly or indirectly interfere with a

legislatively-determined appropriations for public education would require a court **"to usurp or intrude upon the appropriation of power exclusively reserved to the legislature,"** and by requiring a court to objectively evaluate the legislature's value judgment as to spending priorities to be assigned to the State's many needs, including education, would **"necessarily involve a usurpation of that power entrusted exclusively to the Legislature."** *Def. II, pp. 31-36.*[3] This unlawful usurpation which would occur where judicial review directly or indirectly requires the Governor and the General Assembly to appropriate a higher level of educational funding than it already does, would also appear to have been at least implicitly recognized by the *McDaniel* Court. In affirming the trial court's denial of that case's "adequacy" claims because they dealt with matters which were "undoubtedly political," the *McDaniel* Court observed that to do otherwise would require the Court to function as a legislative body, *i.e., "a 'super-*

[3] Plaintiffs' view of the propriety of having courts second-guess and order increases in legislatively-determined levels of funding in appropriations acts, under the doctrine of "judicial review" (*Pl. I, pp. 54-57; Pl. II, p. 9)*, does not appear to be markedly different from the rule by royal decree we thought the American Revolution had displaced by representative government. As one justice of Alabama's Supreme Court opined in that State's travail prior to final dismissal of its like "educational funding adequacy" case, the trial judge, elected by the voters of a single district but making funding decisions with tax implications for the entire State, gave rise to clear "taxation without representation" concerns, a concept upon whose rejection this nation was founded. *Pinto v. Alabama Coalition for Equity*, 662 So2d 894, 901-902 (1995).

legislature,' legislating in a turbulent field of social, economic and political policy." *McDaniel v. Thomas,* 248 Ga. 632, 644 (1981).

Despite Plaintiffs attempt to twist it completely out of shape (*Pl. II, pp. 9-10), Thompson v. Talmadge*, 201 Ga. 867 (1947), is conclusive as to the inapplicability of judicial review and the limitations of the judicial power when it comes to interference with the level of funding in an appropriation act developed through the budget formation/appropriation process. As much as we dislike doing so, the twisting by Plaintiffs of the meaning of *Thompson* does require us to repeat, at least in abbreviated manner, what we said of this case at *Def. II, pp. 33-34.* In its consideration of the "separation of powers" provision of our Constitution, and noting that if any department of government **including the judiciary**, acts outside the bounds of its authority, its action is "without jurisdiction," "unconstitutional" and "void" (201 Ga. at p. 874), the Court said two things, either of which would be controlling in the case at bar. It said:

(1) "that the judiciary under the Constitution is wholly without jurisdiction to adjudicate a purely political question," and

(2) "that actions of the General Assembly taken in virtue of a power conferred by the Constitution and in conformity with the provisions of the Constitutions are not subject to review by the Courts." 201 Ga. at p. 871.

As to the first criterion, we think for the reasons stated at pp. 33-34 of our Reply Brief (*Def. II*), the legislative determination of how many dollars should be appropriated either on a line-item basis under, or for the total funding of spending authorization acts as QBE, is purely political, involving as it does the social, economic and even philosophical considerations in allocating limited funds among competing needs, of which education is but one. There simply is no non-frivolous argument that this could be anything other than political. *See also, e.g., McDaniel v. Thomas*, 248 Ga. 632, 640 ("undoubtedly political") and 644 (in the turbulent field of "social, economic *and political policy*") (1981).

Moreover, the second and independent criterion is also met. The determination of a funding level in an appropriation act is the very essence of what the General Assembly is *constitutionally* called upon to do, in the exercise of its constitutionally conferred discretionary power. It does this in precise conformity with the applicable constitutional provisions of the budget formation/appropriation process charging it to make the decision it makes.

IV. SOVEREIGN IMMUNITY

With respect to "sovereign immunity," Plaintiffs' argument of the implausibility of the doctrine's application based upon *McDaniel* overlooks the fact that the current extensive constitutional treatment of sovereign immunity in Art. I, Sec. II, Par. IX, was not ratified until November 6, **1990**, approximately nine years after *McDaniel* was decided on November 24, 1981. We otherwise continue to rely on what we have already said in *Def. I, pp. 32-33, and Def. II, pp. 21-28.* Among other things, we continue to be mystified how Plaintiffs can think that the "adequacy" phrase of an Education, not funding, provision of the Constitution (*i.e., VIII, I, I),* which the Consortium Plaintiffs concede was a statement of a general public policy goal, *i.e., a "**goal** toward which the State should strive in its educational programs" (Pl. I, p. 30)*, and as similarly noted by *McDaniel* as the intent of the framers: "to make a broader definition of education" (248 Ga. 641), stated as an obligation to the citizens of the State generally, gives rise to an **individual** right or entitlement which can serve as the basis of a legal action to obtain it. If Johnny fails Algebra, does he have a cause of action based upon the failure to give him an "adequate education"? What percentage of the students would have to fail a given course in a given school system before it could be said that the education being provided by the county was

"inadequate" in the first place, and after that, that it was attributable to insufficient State funding in the second place? 20%, 50%, 80%? Particularly when an appropriation, even when passed, does not constitute a contract or an entitlement to a disbursement of funds from the State Treasury *Def. I, p. 14,* how can there be any serious dispute as to the constitutional "sovereign immunity" barrier to Plaintiffs' action.

CONCLUSION

In this reply to Plaintiffs' supplemental response, we have for the most part confined ourselves to countering the Consortium Plaintiffs' assertions in this response, coupled with a brief "return to basis" regarding the constitutional basis of the State Defendants' dismissal motions which Plaintiffs seek to tell the Court it should not consider, and seek otherwise confuse matters by disinformation. We continue to rely upon the arguments presented both in our initial and primary brief in support of our dismissal motions (*Def. I),* and our Brief in Reply to Plaintiffs' Brief in Opposition (*i.e., Def. II),* as well as in the instant refutation of the Consortium Plaintiffs' supplemental response (*i.e., Pl. II).* The case should be dismissed in accordance with Defendants' motions.

Respectfully submitted,

THURBERT E. BAKER 033887
Attorney General

DENNIS R. DUNN 234098
Deputy Attorney General

STEFAN RITTER 606950
Senior Assistant Attorney General

ALFRED L. EVANS, JR. 251400
Senior Assistant Attorney General

DEBRAE C. KENNEDY 414335
Assistant Attorney General

PLEASE ADDRESS ALL COMMUNICATION TO:

ALFRED L. EVANS, JR.
Senior Assistant Attorney General
40 Capitol Square, S. W.
Atlanta, Georgia 30334-1300
(404) 656-3389
(404) 657-9932 (FAX)

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **Defendants' Reply to Plaintiffs' Supplemental Response Opposing Dismissal of their Complaint** upon Plaintiffs, prior to filing the same, by depositing copies thereof, postage prepaid, in the United States Mail, properly addressed to Plaintiffs' Counsel of Record, to wit:

AMY TOTENBERG, ESQ.

THOMAS A. COX, ESQ.
Suite 300, One Decatur Town Center
150 Ponce de Leon Avenue
Decatur, Georgia 30030

This 22d day of April, 2005.

ALFRED L. EVANS, JR.
Senior Assistant Attorney General