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.

THE STATE OF GEORGIA DEFENDANTS' REPLY TO PLAINTIFFS' BRIEF IN OPPOSITION TO THE 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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Defendants.	*	

INTRODUCTION

The plaintiff "*Consortium for Adequate School Funding*" describes itself as a nonprofit corporation with a mission of **"securing adequate funding"** for the State's local (*e.g.*, county) school systems. *See, Complaint, ¶4(a)*. Together with five allied county school system and school system parent and pupil plaintiffs (subsequently referred to as the "Consortium plaintiffs" or simply "Consortium") who are similarly desirous of obtaining **a higher level of state funding for their schools**, the Consortium has come forth with some 240 pages of briefing and exhibits in opposition to the State of Georgia defendants' dismissal motions.

The Brief presented is not remarkable for its accuracy. Simply by way of example, our dismissal motions are not based upon the CPA Rule 12(b)(6) "failure to state a claim" grounds the Consortium plaintiffs say they are. They are based primarily on a want of subject matter jurisdiction under CPA Rule 12(b)(1). *See, Defendants' Motions to Dismiss, pp. 2-4.* Nor does our reliance on the Supreme Court of Georgia's decision in *McDaniel v. Thomas*, 248 Ga. 632 (1981), as being "on all fours" with and controlling as to the present case, (as it is) have anything to do with what the Court did or did not rule on the threshold issue of "justiciability" presented in that case. *Pl. Br., pp. 3, 13-14.*

There are a number of instances where the Consortium plaintiffs attribute to us and attack, positions we have never taken. And we are routinely faced with and obliged to answer arguments which are more ruse than reality respecting the enormously serious issues presented by their attempt to increase the funding levels provided by the General Assembly in its general and supplemental appropriation acts by judicial decree, rather than the normal political process involved in the budget formation and legislative appropriation functioning of the Executive and Legislative branches of government.

THE REASONS WHY THE CONSORTIUM'S ARGUMENTS AGAINST DISMISSAL FAIL

I. The Consortium plaintiffs' have failed to come forth with any valid reason why their action ought not be dismissed under the authority of *McDaniel v Thomas*, 248 Ga. 632 (1981).

[A] Plaintiffs' "Adequacy" Claims

In the very first sentence of their Brief, the Consortium plaintiffs tell us that the claims they assert in their case "arise from and revolve around Article VIII, Section I, Paragraph I of the Georgia Constitution of 1983" (henceforth simply "VIII, I, I):

> "The provision of an adequate public education for the citizens *shall be a primary obligation of the State of Georgia.* Public education for the citizens prior to the college or postsecondary level shall be free and shall be provided for by taxation..." (Emphasis by the Consortium plaintiffs).

Confining their gaze to this single constitutional provision as though it were the only thing the Constitution had to say on the matter, the Consortium plaintiffs, as we shall see in more detail in a moment, commence their opposition to the application of *McDaniel v. Thomas*, 248 Ga. 632, (1981), with an error of no small proportion. This error is compounded by their viewing the words "State" and "General Assembly of the State of Georgia" (the sole entity empowered by the Constitution to appropriate funds from the State Treasury) as synonyms.

(1) The words "State" and "General Assembly" are not synonyms.

The Consortium plaintiffs tie their case to the false proposition that the constitutional language "primary obligation of the State of Georgia" for the provision of "an adequate education," precludes any allocation of the funding responsibility between the State and its political subdivisions. *See, Pl. Br., pp. 3, 24, 27, 28.*

We have already shown by our principal Brief that one of the most basic elements of a State's political sovereignty is its right to create political subdivisions, and fulfill its design and purpose in doing so by allocating governmental powers and responsibilities, **including funding responsibilities**, between itself and its political subdivisions, and that in Georgia this has been done with respect to school funding by the State Constitution itself. *Br., pp. 6-9 and 29-30.* As noted in a case asserting that a State's obligation to pay for desegregation as an "affirmative obligation *of the State*" did not preclude it from its right as sovereign to allocate that responsibility to its political subdivisions, the United States Court of Appeals for the Sixth Circuit observed:

> "If the State of Tennessee has chosen to let local school boards pull the laboring oar in attempting to eliminate the consequences of segregation, that is no more an evasion of state responsibility than if the state had chosen to act solely through the State Department of Education." *Kelly v. Metropolitan*

County Board of Education of Nashville and Davidson County, 836 F.2d 986. 994 (6th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988)

The Consortium plaintiffs' argument that the "obligation of the State" language of VII, I, I imposes a constitutional funding obligation upon the General Assembly of the State of Georgia which cannot be allocated to the State's political subdivisions even though the Constitution in other provisions provides that this be done (*i.e.*, plaintiffs' argument that for VIII, I, I, purposes "State" and "General Assembly" are synonyms) is, of course, contrary to that precise language of the Court in McDaniel which after referring to explanations of members of the Constitutional Revision Commission to the effect that "adoption of the term 'adequate education' was an attempt to state "the general purpose of education" and not intended to fundamentally alter the existing obligation of the state with regard to education, *McDaniel v. Thomas,* 248 Ga. 632, 641 (1981), rejected this central thesis upon which the Consortium plaintiffs' entire "adequacy" claim rests when it held that State funding through authorization acts as QBE *had not been raised to the level of a constitutional mandate* by VIII, I, I, and remained a matter of legislative policy only. In the words of the Court in M*cDaniel*:

"The framers of the 1945 Constitution envisioned a scheme under which the financing of county and independent school districts was largely based on ad valorem taxation within the district. They understood that disparities in wealth between districts existed and prohibited the formation of new independent school districts. They declined, however, to down-grade existing independent systems by mandating consolidation with county school systems. *They acknowledged the equalization fund set up by the legislature,* "**but did not give it constitutional status.**" 248 Ga. 642 (emphasis added).

(2) The Consortium plaintiffs' argument that VIII, I, I, is the only constitutional provision which may be considered is wrong.

At pp. 4, 24-28, and 34-35 of their Brief in Opposition, the Consortium plaintiffs say that under the "plain meaning" rule, sometimes referred to as the "golden rule" of statutory construction, the constitutional provision they tell us their claims "arise from and revolve around" namely VIII, I, I, (Pl. Br., p.1), is clear as to its language that: "*The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia,*" and that this so-called "plain meaning" precludes consideration of anything else the Constitution has to say about the matter.

Aside from being foreclosed by *McDaniel's* conclusion that VIII, I, I did **not** raise State funding under foundation programs as QBE to the level of a constitutional mandate as opposed to legislative policy (see above), we think that plaintiffs "ignore everything else" argument is so glaringly wrong as to merit some independent response.

The Consortium plaintiffs are wrong first of all because it is basic to constitutional construction that "effect is to be given, if possible, to each section, clause, and word of a written constitution," *Birdsey v. Wesleyan College*, 211 Ga. 583, 586 (1955). *In pari materia* construction is essentially a mandate in constitutional construction, not a mere option which may be used if some "ambiguity" exist. Where as here multiple constitutional provisions deal with the same subject matter, **all** must be considered. As stated in *McLucas v. State Bridge Building Authority*, 210 Ga. 1, 8 (1953), of multiple constitutional provisions dealing with the same subject matter in the 1945 Constitution:

> "They deal with the same subject matter, namely, 'Finance, Taxation & Public Debt.' They are of equal dignity and to give full force and effect to the will of the people, as thus expressed, they must be construed together, being as they are in pari materia."[1]

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[1] The relevant constitutional provisions in this case are not only those found in Article VIII, pertaining to "education," but obviously include those relating to the budget formation/appropriation process, which is the only means by which any funding whatsoever of QBE may constitutionally occur. Not the least of these very relevant constitutional provisions are Ga. Const. (1983), Art. III, Sec. IX, Par. I which prohibits any state-level funding of education or anything else other than by an appropriation of the General Assembly, and the **debt limitation provisions** of Article III, Sect. IX, Par. IV(b), which limits appropriations for all purposes, including education, to funds either on hand or anticipated in the Budget Report for the upcoming fiscal year. In Georgia, even for the worthy cause for education, you simply cannot spend money you do not have.

(3) The Consortium plaintiffs' argument that their "adequacy" claim is not foreclosed by *McDaniel* because *McDaniel* held such claims to be "justiciable" is both a pointless *non sequitur*, and dubious if not wrong on its own merits .

At pp. 3 and 14 of their Brief, the Consortium's plaintiffs argue that *McDaniel* does not foreclose their "adequacy" claim because, they say, *McDaniel* "unequivocally" (p. 3) and "definitively" (p. 14) held that claims to enforce *the state's* obligation to provide an adequate education are "justiciable" in Georgia courts. This argument first of all has absolutely nothing to do with the point we rely upon for *McDaniel's* foreclosure of plaintiffs' adequacy claims. As pointed out both above and in our principal Brief, the Consortium's "funding adequacy" claim is foreclosed by *McDaniel* because of the Court's analysis that the state-level (*i.e.*, General Assembly) funding of QBE and its predecessor *authorization* enactments occurs through **legislative policy**, *i.e.*, the judgmental and essentially political decisions of the General Assembly in its appropriation acts, not pursuant to a constitutional mandate imposed by VIII, I, I, since the legislative appropriations to fund "authorization acts" as QBE were not given "constitutional status." 248 Ga. 642.[2]

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[2] *McDaniel* also demonstrates that the Court, as the General Assembly, fully understood that the words "The State" and the words "General Assembly" are not "synonyms." While the Court in *McDaniel* did find a constitutional

Secondly, the Consortium plaintiffs' argument that the Supreme Court in *McDaniel* "unequivocally" and "definitively" held "adequacy claims" to be justiciable, even though irrelevant to *McDaniel's* foreclosure of these claims on the other grounds we have stated, is so dubious, if not out-and-out wrong, as not to let plaintiff' argument pass unchallenged.

To start with our briefing to the Supreme Court in *McDaniel* argued want of justiciability as a threshold issue respecting the entire case, a case which as the one at bar involved both "adequacy" and "equal protection" claims, but focused more heavily on the latter. It is not at all clear to which category of claims the court was focusing upon in deciding the existence of "justiciability." Each of the two decisions relied upon by the Court in *McDaniel* in rejecting our threshold "justiciability" argument appears to be essentially an "equal protection" case. Obviously, the justiciability of funding issues in connection with how the pie should be sliced (equal protection) differ enormously from those involved where the demand is for a larger pie (adequacy).

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funding obligation which existed on the part of the General Assembly (as opposed to the State *eo nomine*, this was under that entirely different part of the 1976 Constitution (*e.g.*, the separate provision relating to the "Tuition Grant Program") which no longer exists in the 1983 Constitution. The Court clearly identified the source of this "at that time" constitutional obligation *of the General Assembly* by referring to this "new provision" as the source of *the General Assembly's* obligation "to provide funds for an adequate education." 248 Ga. 642.

Moreover, the Consortium plaintiffs' contention that *McDaniel* has "unequivocably" or "definitively" determined that their "adequacy" claims are "justiciable" would appear to be questionable based upon what the same Court said shortly **before**, shortly **after, and for that matter in *McDaniel itself***. Only the year *before McDaniel*, the Supreme Court had considered a complaint which alleged that pupils attending the public schools of Sumter County were being denied "an adequate education" within the meaning of VIII, I, I, **by county school authorities** who were allegedly :

> "not adequately funding the programs being provided; by not building adequate physical facilities; and by not adopting certain recommendations or standards of the State Board of Education." *Deriso v. Cooper*, 246 Ga. 540, 541 (1980).

Upon grant of an application for interlocutory appeal from the trial court's denial of the county school board's motion to dismiss, the Supreme Court reversed, opining that "the trial court should have dismissed the complaint." *Id.* at 544. *McDaniel* cited Deriso with apparent approval (248 Ga. 644), and certainly said nothing about its one year earlier decision being overruled or superseded. In language which we believe to be fully applicable to the Consortium plaintiffs' "adequacy" complaint in the case at bar, the Court in *Deriso* was plainly using the language of "justiciability" when it said:

> "the school patrons have not advanced during their argument a judicially manageable standard for determining whether or not pupils are being provided 'an adequate education.' Courts are

> ill-equipped to make such fundamental, legislative and administrative policy decisions as to how much local supplement to teachers' salaries should be paid in order to attract qualified teachers, how many levels of English or math should be taught, whether a system of pupil ability grouping shall or shall not be used, whether building shall be constructed and, if so, where, and the myriad other matters involved in the everyday administration of a public school system ***which the courts would face were they to embark upon the course of judicial activism desired by the school patrons.*** Resolutions of these discretionary policy determinations can best be made by other branches of government. The fact that the federal courts have decided issues pertaining to school finances, construction, curriculum and general school administration in an effort *to effect a remedy* in school desegregation cases must be put into proper perspective with the fact that **they also have declined to enter the thicket of school funding** [citations omitted]" *Deriso v. Cooper*, 246 Ga. 540, 543 (1980) [Emphasis added].

Looking next to the "**after**," the Court in 1983, in *Woodruff v. Georgia State University*, 251 Ga. 232, 233 (1983), expressly referred to *Deriso* and *McDaniel* as cases where it declined to tell the General Assembly how it should allocate state funds among school systems, again sounding in "justiciability."

Finally, we have what the Court said in *McDaniel* itself. It cited its prior decision in *Deriso* concerning *the inherent difficulty in establishing a "judicially manageable standard for determining whether or not pupils are being provided 'an adequate education.'"* *McDaniel*, 248 Ga. 644. *McDaniel* also noted that entering into the controversial area of "public school financing" would result in the Court becoming a "super-legislature,

legislating in a turbulent field of social, economic and political policy." 248 Ga. 644. We do not see the ringing endorsement of "justiciability" over "adequacy" claims which the Consortium plaintiffs find in *McDaniel.*

Finally, one would like to think that perhaps "common sense" ought to have some role in the "justiciability" issue. Plaintiffs seem to equate QBE statements of educational *goals or objectives* with the very different matter of judicially manageable *standards.* They cite *inter alia* O.C.G.A. § 20-2-131(1), which contains such "gems of certainty" as a quality basic education curriculum being one which ensures that each student is provided an "*opportunity to develop competencies*" needed to "*participate actively in the governing process and community activities,*" "*to protect the environment*" and "*be an effective worker and responsible citizen of high character*" But in a down to earth sense rather than as an educational abstraction, what does this mean and how do we measure it? Another objective or goal of QBE is to provide "an accountability system to ensure that all students are receiving a quality instructional program so that all students can achieve at their highest level" (*Id.*, subparagraph 10), or as the Consortium plaintiffs assert to be a part of a constitutionally adequate education, preparing students "to function as responsible citizens in a democracy and to compete in society on

equal footing both as to find productive employment and qualified for an advance through higher education." *Complaint,* ¶2.

No one would quarrel with these educational objectives or goals as laudable purposes "towards which the State should strive in its education programs." It all sounds wonderful, but again what does it mean and how do we measure it? Looking at plaintiffs' contention that adequacy requires education which is designed to produce individuals who can function in society, and must "provide each child with an opportunity to acquire basic minimum skills necessary for the enjoyment of rights of speech and full participation in the political process," if one leaves the world of abstract educational theory of what is desirable (theory with which we do not disagree) and returns to the real world, how does one measure, in any practical or concrete legal sense, any of these so-called necessities of "an adequate education." The absence of any real measurement of any concrete legal standard was clearly pointed out by a dissent (far better reasoned than the majority) in the lead case respecting most of those decisions upon which the Consortium plaintiffs' rely, namely *Rose, President Pro Tempore of the Senate, et al. v. The Counsel for Better Education, Inc., et al.*, 790 S.W.2d 186 (Ky. 1989). Opining that the doctrine of separation of powers prohibited judicial interference with the legislative prerogative respecting

school funding, and noting the danger of the majority of the Court being "*caught up in a rush of judicial activism*" in its judicial intervention in the legislative process (790 S.W.2d at 228), the dissent said of this unhappy effort to convert educational "goals" into "legal standards" for a judicial determination of funding adequacy:

> "How will the General Assembly be able to know if the legislation it enacts will provide each and every student throughout the Commonwealth with a sufficient grounding in the arts to enable that student to appreciate his cultural or historical heritage? This goal, like the other seven, is so vague that regardless of what legislation is enacted by the General Assembly the door has been opened for another group or groups of students to sue the General Assembly *ad infinitum*, claiming that in some respects that the General Assembly has failed to provide a system of common schools which achieves the common goals of an efficient system. I fear it will be the courts rather than the General Assembly, which will end up monitoring the common school system." *Rose*, 790 S.W.2d at p. 222-223.

Obviously, "adequacy" which like beauty lies "in the eyes of the beholder," is for the most part incapable of any objective legal standard other than what a judge might subjectively think might be a good idea. Certainly once one gets beyond the most basic matters of whether schools are open, teachers are teaching, and students are learning to read, write and do simple math, the adoption of educational goals as legally enforceable standards would have a court operating *as a legislative* body in a "never-never land." The Supreme Court was eminently correct in *McDaniel* when it noted that for the Court to

become involved would turn it into a "super-legislature," legislating in this turbulent field of social, economic and political policy. 248 Ga. 644. This too is hardly the ringing endorsement of the amorphous standards the Consortium plaintiffs suggest as being "justiciable.".

> (4) To the extent that any minimal "adequacy" standards, could be said to exist under VIII, I, I, those standards are manifestly being met and indeed greatly exceeded in each of the five plaintiff counties.

Assuming *arguendo*, that the General Assembly of the State of Georgia had any *constitutional* obligation to appropriate State funds sufficient, in conjunction with county funding, to provide for an "adequate education" for the pupils in each of the five counties plaintiffs, the **"standard"** (as distinct from any abstract educational "goal') for "adequacy" which the Supreme Court mused about and suggested as being at least possibly judicially manageable in *McDaniel*,[3] was confined to a

[3] The Court was clear as to the basic *educational goals, purposes or objectives* of the "adequate education" provisions of VIII, I, I, *i.e.*, that it "must be '*designed*' to produce individuals who can function in society" (248 Ga. 644, emphasis added), citing with respect to the term "adequacy" the explanation of a member of the constitutional framers that "We tried to make a broader definition *of the general purpose of education.*" 248 Ga. 641. *Accord, see Exh.* 5, pp. 14-15 of *Plaintiffs' Exhibits* filed in Support of their Brief in Opposition to Defendants' Motion(s) to Dismiss...[explaining the use of the term "adequate education" as indicating why education is essential and "*describing a goal toward which the state should strive in its educational programs*"]. But in so far as any tangible standards were concerned, this was, appropriately, left to "the legislative branch of

sufficiency of funding to provide a "**basic educational opportunity**" to the students residing in these counties. 248 Ga. 644. Respectfully, this level of "basic educational opportunity" measure of adequacy, based upon both the observations of the Court in *McDaniel* as to the State's massive financial commitment, and with respect to the actual academic achievement of the students in the five counties, is seen not only to have been met, but to have been greatly exceeded.

As pointed out at p. 28 of our principal Brief, the Supreme Court in affirming the trial court's conclusion is *McDaniel* that "the quantum of education provided would be almost exclusively for the General Assembly to determine" (248 Ga. 640), further agreed with the trial court that there had been no abdication of funding responsibility by the General Assembly (248 Ga. 640), since the State-level commitment to public education was "massive," in excess of $1 billion during the 1979-1980 school year, which was at the time fully 36% of the entire State Budget. *Ibid.* In footnote 7 at p. 28 of our principal Brief we pointed to the fact that there had been no diminution of the level of funding under General Assembly appropriations, with the appropriation for FY 2005 almost *six billion dollars*, continuing at

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government, since to do otherwise would be an unwise and unwarranted entry into the controversy area of public school financing whereby this Court would convene as a 'super-legislature.'" 248 Ga. 644.

the rate of 36% of the total State Budget. Under the Supreme Court's reasoning in *McDaniel*, this level of funding from the State treasury is *ipso facto* sufficient.

Looking beyond this, we believe that the fact that the five counties are providing dramatically more than mere "basic educational opportunity," is demonstrated by their own data concerning the academic success of their students as measured by achievement levels on the Georgia High School Graduation Test ("GHSGT").[4] Looking at the obverse of the "failure rates" reported by plaintiffs for their county school districts for 2002-03, we see that a considerable majority of the students, as shown by paragraph 116(b) of the Consortium complaint, are experiencing academic success.

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[4] Failure rates on educational achievement tests, unless they are quite overwhelming, are of questionable utility as a measurement of the education offered. There are too many variables involved, such as county to county differences in familial environment, such as the educational level of the parents, stability of the family, including single parent vis-à-vis two parent families, and the esteem or lack thereof for education. Moreover, the same important variables exist respecting community attitudes towards education, and possible early departure to join the military or engage in occupations where formal education may be, at least in the opinion of some individuals, of lesser import. Positive statistics showing success, on the other hand, do indicate that at least something positive is going on by way of the educational programs offered in the schools attended by the academically successful students.

GHSGT Success Rates in the Plaintiff Districts for 2002-03

	English	Math	Soc. Studies	Science
Ben Hill	85%	86%	74%	62%
Brantley	92%	90%	78%	64%
Elbert	92%	89%	66%	58%
Lamar	90%	86%	79%	60%
Murray	92%	84%	77%	62%

We would respectfully submit that this success which is being enjoyed by most of the pupils in the plaintiffs' counties demonstrates beyond dispute that they are receiving education far in excess of mere "basic educational opportunity" as to which any concrete standard of "adequacy" could even remotely be said to exist.

[B] Plaintiffs' "Equal Protection" Claims

The Consortium plaintiffs attempt to avoid the application of *McDaniel* to their "equal protection" argument by arguing that their "equal protection" claims are very different from those presented to the Court in that case. *Pl. Br., p. 42.* They correctly note at this same page of their Brief that the equal protection claim in *McDaniel* was that "similarly situated children receive very different amounts of educational resources *as a result of disparities* among the school districts in taxable property wealth per

pupil…The inequalities in the school finance system deny students in property poor districts equal educational opportunities." 248 Ga. 638 (emphasis added). The contended difference, we are told, is that the Consortium plaintiffs in the present case base their claim upon the denial of some children, as those in the plaintiff "low property wealth" counties (*Pl. Br., p. 7)* of that amorphous amount of education they say is "enough" (*i.e.*, "adequate"), while other children in Georgia are receiving an adequate education. *Pl. Br., pp. 7, 41, 43.*

The great fallacy in plaintiffs' reasoning, of course, is their attempt to base an "equal protection" claim on a disparity of "result" or "impact," as opposed to what brought the result about. Were we to take this argument literally, the Consortium plaintiffs do not have any "equal protection" claim at all. Taken literally, we have naught but another largely redundant "adequacy" argument. The reason is that it is "equal treatment," not "equal result" to which the federal and State constitutional protections are directed. *E.g., Bell v. Austin*, 2005 Ga. LEXIS 24, pp. 7-8 (2005).[5]

[5] In a practical sense the difference is important because the "equality" of one (treatment vis-à-vis result) is typically a guarantee of the inequality of the other. This does not, of course, preclude differing treatment between differing classes, sub-classes or even sub-sub-classes, all of which is commonplace in funding authorization acts as QBE or in Revenue Enactments, where the purpose is to achieve enhanced equality of result but

The fact is, of course, that plaintiffs have identified the "treatment" or condition which has brought about their claimed "output" or result of disparate "adequacy" throughout their complaint and brief. It is the low level of taxable property wealth in the plaintiffs' counties (*e.g., Complaint, ¶¶ 2, 33, 40, 65)*; *Pl. Br., p. 7*) coupled with inadequate State funding. *E.g., Complaint, ¶¶ 23, 30, 32, 73, 80, 96, 123; Pl. Br., p. 8.* This is precisely the same disparity of treatment presented in *McDaniel*, which is consequently as controlling on the Consortium plaintiffs' "equal protection" claim as it is on their "adequacy" claim.[6]

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still in the context of equal treatment of those within a particular class or subclass.

[6] We do not overlook the Consortium plaintiffs' argument that the Supreme Court should abandon the "rational basis test" which it followed in *McDaniel*, where the Court cited, among other cases, the decision of the Supreme Court of the United States in *San Antonio School District v. Rodriguez*, 411 U.S. 1, 44 (1973). When it comes to State foundation programs for public education, such as QBE, the practical effect of the adoption of a "strict scrutiny" test based upon education being "a fundamental right," would be an absolute guarantee that no foundation plan could ever survive. State financial assistance to local school systems for their educational programs could, of course, satisfy "equal protection" most directly and easily by simply giving a set number of dollars "per child," regardless of local wealth variations or the needs of differing classes of pupils. It is well settled that "equal protection" does not require that a state choose between attacking every aspect of a problem or taking no action at all. *San Antonio School District v. Rodriguez,* 411 U.S. 1, 39 (1973); *Cross v. Stokes*, 275 Ga. 872, 877-878 (2002) ["the legislature may select one phase of one field and apply a remedy there neglecting the others"]. While the direct grant of a flat sum per child would comply with the requirements

II. The Consortium Plaintiffs fail to present any real reason why their action is not barred by the protection afforded to the State Coffers by the "*sovereign immunity*" provision of the State Constitution.

The Consortium plaintiffs start off on the wrong foot once again when they refer to "sovereign immunity," which goes to the very heart of a court's **jurisdiction** to entertain an action, as a mere "procedural" issue. *Pl. Br., p. 51.* Our current Georgia Constitution (1983), after first providing for certain waivers of the state's sovereign immunity regarding certain specified written contracts, or by the General Assembly through enactment of a State Tort Claims Act, states in Art. I, Sect. II, Par. IX that:

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of "equal protection," the approach would, of course, be extraordinarily unfair and extraordinarily at odds with the best interest of providing education to the broadest number of pupils possible. The purpose of foundation enactments as QBE is to provide a higher level of equity of "result" within the framework of "equal treatment," by using classifications on top of classifications on top of still other classifications. With all of the "line-drawing" this involves, the classifications are invariably imperfect and one way or another inadequate. Both federal and State courts have described the problem of legislative classification as "a perennial one, admitting of no of doctrinaire definition, since evils in the same field may be of different dimensions and proportions, requiring different remedies, at least as seen by the legislature. *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 489 (1955); *Cross v. Stokes*, 275 Ga. 872, 877 (2002). Since virtually no line drawing or classification in such an act could meet the compelling reason test of strict scrutiny, courts have typically applied the rational basis test where the court will uphold the statute if under any conceivable set of facts, the classification could be said to bear some rational relationship to a legitimate end of government, the prohibition of the equal protection clause in such circumstances going no further than "invidious discrimination." *Cross v Stokes, supra,* at pp. 877-878.

> "Except as specifically provided in this paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its department and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver."

Certainly one of the main purposes of sovereign immunity, aside from its protection of the political integrity of the State as a sovereign, *see, e.g., Hopkins v. Clemson Agricultural College of South Carolina*, 221 U.S. 636, 642 (1911) [barring suits against state officials which would require them to take any affirmative action affecting the state's "political or property" rights], "is to protect the State coffers." *In the Interest of A.V.B.*, 267 Ga. 728 (1997). As pointed out multiple times in our principal Brief, review of the Consortium plaintiffs' 60-page complaint shows that what this case is about, and in fact the only thing it is about, is the level of state funding for public education. This has not been seriously disputed by the plaintiffs. At p. 4 of their Brief in Opposition, for example, they say in so many words that what they are alleging in their Complaint is that "existing state funding for public education deprives [some] students...of basic educational opportunities." As pointed out at pp. 3-6 of our principal Brief, this same "more money" theme is played over and over throughout the complaint.[7]

[7] Simply by way of a few additional examples with the phrase and paragraph number of the complaint: "school funding system fails to provide...the

The exclusive constitutional means of obtaining the additional state funding which the Consortium plaintiffs want is by an appropriation of the General Assembly of the State of Georgia in a General or Supplemental Appropriations Act. *See,* Ga. Const. (1983), Art. III, Sect. IX, Pars. I through VII.

In a rare moment of agreement with plaintiffs, we recognize that under the federal *Ex parte Young* doctrine and its Georgia equivalent, a suit against a state official (and seemingly in Georgia against a State Board, Commission, or Agency as well), may proceed notwithstanding the sovereign immunity barrier where the State official is enforcing an unconstitutional statute or otherwise behaving in an unlawful manner, in order to terminate, through prospective injunctive relief, the unconstitutional

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resources needed" (¶ 2), Consortium's purpose of "securing adequate funding for Georgia's school systems" (¶ 4a), failure "to fund a Quality Basic Education" (¶ 23), "The QBE formula, as implemented" fails to recognize "the actual cost of an adequate education" (¶ 30), "arbitrary reductions in State funding" (¶ 30n), "funding of grants outside the QBE formula is equally arbitrary and inadequate" (¶ 31), "**As implemented**, the level of support provided through the QBE Act has failed..." (¶ 43), "Because of inadequate financial resources" (¶¶ 68, 69), "under-funding by the State of Georgia, including significant cuts in funding (¶ 73), "Recent State Budget cuts as well as the State's persistent failure to provide and ensure adequate funding" (¶ 75), "Because of inadequate and decreasing levels of funding" (¶ 80), "significant funding limitations" (¶82), "insufficient funding" (¶ 86), "funding limitations" (¶ 95), "budget cuts" (¶ 96), "State funding limitations" (¶ 97), and "Georgia's school funding system fails to provide that level of funding necessary to achieve..." (¶ 123).

or unlawful course of action by that official (or in Georgia the unlawfully acting State Board, Commission or agency). *See, e.g., Ex parte Young*, 209 U.S. 123, 157 (1908); *International Business Machines Corp. v. Evans*, 265 Ga. 215, 216 (1995). We also agree that a corollary of the *In parte Young* doctrine is the "*ancillary impact*" rule under which the conforming of a state official's action to constitutional requirements is permissible notwithstanding the fact that doing so might cause more money to be expended from the State Treasury than would have been the case had the official been left free to pursue his previous unlawful course of action. *E.g., Milliken v. Bradley*, 433 U.S. 267, 289 (1987); *Edelman v. Jordan*, 415 U.S. 651, 668 (1974) [the ancillary impact sometimes being an inevitable consequence of the principle announced in *Ex parte Young*]; *Accord, Employees' Retirement System of Georgia v. Martin*, 272 Ga. 535 (2000).

But the "ancillary impact" rule does not have any application in the case at bar. We do not have a situation of the enforcement of an unconstitutional statute or unlawful cause of action as to which an expenditure of funds could be said to be "ancillary." The increased State funding for education (which as noted can occur only through an appropriations act) is not "ancillary" to anything other than the higher funding level itself. In a similar situation of county plaintiffs seeking to

obtain more state funds to pay for desegregation costs of the county's schools, the United States Court of Appeals for the Sixth Circuit said in *Kelley v. Metropolitan County Board of Education of Nashville and Davidson County*, 836 F.2d 986, 992 (6th Cir. 1987), *cert denied*, 487 U.S. 1206 (1988), that:

> "The effect on the state treasury of the order entered by the district court in the case at bar is not 'ancillary' to anything at all other than the command to 'assume sixty percent (60%) of the cost directly attributable to Metro's desegregation program.' The order to pay is ancillary only to itself, in other words, and therefore it goes beyond *Milliken* [which had enunciated the *ancillary impact* rule]. If the payment order in *Milliken* had not been ancillary to some command outside itself, affirmance of the order would have been utterly inconsistent with *Jumel* [another Supreme Court decision] (bracketed matter added for clarification).

The "ancillary impact" rule affords no help to the Consortium plaintiffs in this case where the objective is a higher level of funding from the State Treasury.

The only other argument plaintiffs mount against the seemingly obvious "sovereign immunity" barrier of the Georgia Constitution to their "more money" case is the incredible assertion, in a case which is in reality all about and only about the level of state funding which is being provided for public education, that the barrier does not apply because in this first phase of what would almost certainly be many years of protracted litigation,

the Consortium plaintiffs' say they do "*not seek an award of money damages or a judicial directive that Defendants appropriate or disperse money to Plaintiffs.*" *Pl. Br., p. 51.*

Sometimes it is difficult to know where disingenuousness ends and out-and-out intellectually dishonest argument begins. But the Consortium's argument is pure farce. As we have repeatedly emphasized, the only entity which is constitutionally empowered to increase state funding for public education is the General Assembly of the State of Georgia through its general and supplemental appropriation acts. And it is not even a party *in this initial phase* of the litigation. The State of Georgia *eo nomine* does not have and cannot itself exercise the power to raise revenues and appropriate public funds. It is not a monolith. *See, e.g., Perdue v. Baker*, 277 Ga. 1, 6 (2003).

Plaintiffs' order of battle is readily discernible. In this first stage they do not seek the increased state funding they want *directly*, but resort to *indirection* instead. They would have the Court strike as unconstitutional not the **appropriation act**, but the **authorization act**, namely QBE. *Complaint, ¶ 142.* They ask this even though they find no particular fault

with QBE *per se*, but rather with the allegedly insufficiently General Assembly funding of this authorization act. *See, pp.22-23, and n.7, supra.* [8] The Consortium plaintiffs' plan is obvious. They seek to blackjack the General Assembly into submission by having the present QBE, and presumably all subsequent "authorization acts," held unconstitutional until the General Assembly "gets it right" by appropriating the funding level the Consortium plaintiffs want. This is perfectly apparent at p. 60 of plaintiffs' Brief where they say that they are giving "the political branches" a first opportunity to correct these alleged constitutional funding deficiencies, taking "more direct remedial actions only if and when the executive and legislative branches fail to correct identified violations" [to wit: provide the higher level of state funding for education plaintiffs want]. What the Consortium plaintiffs are plainly saying to the Governor and General Assembly, of course, is that if you voluntarily surrender your

[8] While the Consortium plaintiffs do complain at several points of "QBE allocations" for particular items such as textbooks and educational staff (*e.g., Complaint, ¶ 30(a) and (b)*), these allocations too are driven strictly by the budget and the implementing appropriations of the General Assembly. The State Board of Education's "cost estimation" functions under QBE are strictly limited by the State Budget and the General Assembly Appropriation. Under O.C.G.A. § 20-2-322, the State Board of Education is prohibited from initiating any program, program expansion, activity or activity expansion under QBE "which would result in additional expenditures by the state if such expenditures are not funded or otherwise contemplated by the General Assembly in an appropriations act enforced or to be enforced within one year."

constitutionally vested powers over the budget formation and appropriations process (along with your concomitant powers to raise taxes), they will not be taken from you by force, namely a judicial decree. Some choice!

We believe that the rule that the substance of a claim must be considered, and that a party cannot do indirectly what the law does not allow to be done directly ends the matter. *See, e.g., Jordan v. Board of Public Safety*, 253 Ga. App. 339, 343 (2002); *Richmond County v. McElmurray*, 223 Ga. 440, 443 (1967); *see also, Perdue v. Baker*, 277 Ga. 1, 14 (2003). In fact, the attempt to control the Governor as to budget formation and the General Assembly respecting its appropriations (regardless of the Consortium plaintiffs' "phase one" and "phase two" stratagem) is scarcely less "direct" than it would have been had the Consortium plaintiffs mounted a direct (and more honest) frontal assault on the budget formation and appropriation process which under the Constitution of the State of Georgia reposes exclusively in the Executive and Legislative branches of State government. If there is a case which is more obviously barred by the constitutional doctrine of "sovereign immunity," it is hard to imagine what it would be.

III. The Consortium plaintiffs' argument that attempting to control, by judicial decree, the level of funding for public education as determined by the Governor and General Assembly in the budget formation/appropriation process, would not involve the Court in a usurpation of the power our Constitution places *exclusively* in the Executive and Legislative Branches of Government, is divorced from reality.

Far and away the most frightening aspect of this case, looking at the larger picture, is its total disregard for and inconsistency with, the system of representative government we have had in Georgia for some 206 years.[9] Government by decree rather than through the legislative process of the elected representatives of the People was one of the root causes of the American Revolution, and it in no small part revolved around control over the public purse (taxing and spending). It is not mere happenstance that starting with the Constitution of the State of Georgia of 1798, each and every Constitution has contained substantially the same provision now found in Ga. Const. (1983), Art. III, Sect. V, Par. II: "All bills for raising revenue

[9] We note simply in passing that plaintiffs at pp. 54-55 of their oppositional brief have once again mischaracterized our dismissal motion on the point as presenting a mere "procedural issue," as well as referring to it as a matter of "justiciability." Plaintiffs are again wrong in both respects. As our "Third Motion to Dismiss" shows on its face, it is based upon a want of subject matter jurisdiction under CPA Rule 12(b)(1), the ground being that what plaintiffs ask is for the Court to act entirely outside the constitutional limits of its judicial power, and to assert control, either directly or indirectly, over the purse strings of government on matters which our Constitution places other than in the Judicial Branch of Government. This is jurisdiction, not "justiciability."

or appropriating money, shall originate in the House of Representatives." The constitutional powers which are placed **exclusively** in the Executive Branch of Government (*i.e.*, the Governor) respecting budget formation and a draft proposal for a General Appropriation's Bill (Art. III, Sect. IX, Par. II), and **exclusively** in the Legislative Branch (*i.e.*, The General Assembly) respecting the annual general appropriations and supplemental appropriation acts (Art. III, Sect. IX, Pars. IV and V), together with the constitutional prohibition on any money being dispersed from the State Treasury other than through this process (Art. III, Sect. IX, Par. I), have been discussed in some detail, along with the implementing provisions of the State Budget Act, at pp. 12-19 of our principal Brief.

We think it important to note at the start that plaintiffs are only partially correct when they refer our argument as a "separation of powers" argument. It is not "separation of powers" *simpliciter*, but as stated in our dismissal motion, it is "separation of powers" **plus the fact that the particular powers here in question, the quintessentially *political* powers over the budget formation/appropriations process, are by our Constitution** placed **exclusively** in the hands of the Executive and Legislative Branches of Government.

At. p. 54 of their Brief in Opposition, plaintiffs suggest that we have presented a want of authority respecting our argument that what they ask would be a usurpation of these exclusive constitutional prerogatives of the Governor and General Assembly. Of course, the constitutional provisions we have cited are in and of themselves persuasive authority. In addition, in the Appendix to our principal Brief, we cited a number of decisions of sister states directly on point. In particular, we cited the Supreme Court of Florida in *Coalition for Adequacy and Fairness in School Funding, Inc. v. Lawton Chiles, Governor of the State of Florida, et al.*, 680 So.2d 400 (1996). As we pointed out in that Appendix, the Supreme Court of Florida reviewed a decision of the trial court which had dismissed the Florida Coalition's complaint, largely on the ground to grant relief the trial court **would have to usurp or intrude upon the appropriation power exclusively reserved to the legislature.**" *Id.*, at p. 402n.2. The Supreme Court of Florida decision is significant because it involved constitutional provisions quite similar to those we have in Georgia. In Florida as in the case at bar, the plaintiffs advanced the sham argument that they were not asking the Court to compel the legislature to appropriate any specific sum, but merely to declare the present funding level to be constitutionally inadequate. In rejecting the plaintiffs' argument and affirming the trial court's dismissal of the

complaint, the Court observed that to decide the matter of "adequate funding," the Court would necessarily be required to subjectively evaluate the legislature's:

> "value judgments as to the spending priorities to be assigned to the state's many needs, education being one among them. In short, the Court would have to usurp and oversee the appropriations power, either directly or indirectly, in order to grant the relief sought by Plaintiffs." (Emphasis added).

When Alabama's almost ten-year travail with its "adequacy" litigation ended with dismissal, the Supreme Court of Alabama similarly concluded that descending from abstract theory to the concrete, it was clear that any specific remedy that the judiciary could impose, were it to be effective, would **"necessarily involve a usurpation of that power entrusted exclusively to the Legislature."** *Ex parte Governor Fob James, et al.*, 836 So.2d 813, 819 (2002). Noting that the duty to fund Alabama's public schools was a duty that for over 125 years rested squarely upon the shoulders of the Legislature, the Court opined that it was the Legislature, and not the courts from which any further redress should be sought. *Id.*, at p. 815. The extraordinary course of the litigation prior to dismissal of what started out as a "sweetheart" case in Alabama, with the Governor and state school authorities on the side of the plaintiffs (initially freezing in a "law of

the case" problem by the "in name only" defendants failure to appeal), has been set forth in more detail in the Appendix to our principal Brief.

Moreover, we would respectfully submit that controlling precedent does exist in Georgia too. In *Thompson v. Talmadge*, 201 Ga. 867 (1947), the Supreme Court, in its consideration of the "separation of powers" provision of our Constitution, noted that if any department of the government, **including the judiciary**, acts beyond the bounds of its authority, "such action is without jurisdiction, is unconstitutional, and is void." 201 Ga. at p. 874. The Supreme Court said two things which we believe are directly controlling as to 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 Constitution are not subject to review by the courts." 201 Ga. at 871.

We do not think that it can be seriously argued that the determination of how many dollars should be appropriated on a line-item basis for the multiple components of QBE in the State Department of Education's appropriation, as determined through the budget formation/appropriation process, is anything other than a purely political question. As stated in our principal Brief, it is quintessentially political. It is a collective legislative

value judgment. It is influenced by the personal educational, social and economic views of individual legislators, who have typically listened to experts and other interested parties in committee hearings, and who must then determine what they think to be appropriate priorities in spending for education, as measured against the competing needs of other governmental activities of even greater importance than education, such as police protection and health, *and always in light of the great reality of funds available since the Georgia Constitution does not permit deficit financing.*

The second standard of *Thompson v. Talmadge* is also met. The actions of the Governor in budget formation, and those of the General Assembly in coming up with a finalized dollar figure determination for the various line-items appropriations for public education are obviously actions taken and judgmental political determinations made not only in conformity with, but under the specific direction of the Constitution.

McDaniel v. Thomas, 248 Ga. 632 (1981), reaches towards the same conclusion. The decision of the trial court that the quantum of education provided "would be almost exclusively for the General Assembly to determine," and that "the solution...is undoubtedly political" (248 Ga. 640) was affirmed, with the Supreme Court admonishing that "it is primarily the legislative branch of government which must give content to the term

'adequate,'" noting that to do otherwise would end up with the Supreme Court acting as a "super-legislature" (248 Ga. 644).

The Consortium plaintiffs' argument that the less than absolute language of *McDaniel, i.e.*, "almost exclusively" or "primarily," repudiates our argument (*Pl. Br.*, p. 17), is a repudiation of our position, is once again an argument against a position we have never taken. We do not contend that the deference to the legislature in funding could never be less than total, absolute, or without exception. It is always conceivable that there could be some remote constitutional "exception," for example, some sort of a "continuing appropriation" for some narrow purpose as retirement or pensions, to rule out use of the word "never."

However, where as here we are dealing with line-item appropriations through the normal budget formation and appropriation process, it is difficult if not impossible to imagine any "exception," since here it plainly is the general budget/appropriation constitutional provision which is involved. The doctrine of "judicial review" does not, contrary to the Consortium plaintiffs' argument (*Pl. Br.,pp. 54-60*), include the power to review a political value judgment in the exercise of a discretion (as the determination of the specific dollar amount of each line-item appropriation contained in a general or supplemental appropriations act) which is constitutionally vested

in the Legislative Branch of Government. Under *Thompson v. Talmadge*, 201 Ga. 867, 871 (1947), the Judicial Branch of Government is without jurisdiction to interfere either directly **or indirectly** with this political judgment of the legislature. This is the general rule, *e.g., In Re: Austrian and German Holocaust* litigation, 250 F.3d 156, 164 (2d Cir. 2001) [beyond the judicial power of the courts to interfere with the Executive Branch's foreign policy judgments]; *Moosa v. I.N.S.*, 171 F.3d 994, 1009-1012 (5th Cir. 1999) [Court of Appeals will not second-guest policy choices properly made by Legislative Branch]; *Harrison Co. v. Code Revision Commission*, 244 Ga. 325, 332 (1979) [the question of whether a Code Revision Commission established by the General Assembly abused its discretion or exceeded its powers was for the General Assembly to decide not the courts].

The Contrary Decisions Upon Which Plaintiffs Rely

We agree with plaintiffs that the expansive view of "judicial review" (*i.e.*, unfettered to the normal corollary doctrine of "judicial restraint") which they urge has been adopted by the eleven cases they repeatedly cite in their Brief. We disagree, however, that these cases are in any way "persuasive," as opposed to being a reflection of the "judicial activism" found in some State as well as in some federal courts, but uniformly rejected in what we think to be a majority of state courts, and certainly rejected to date by the

appellate courts of Georgia as reflected in such cases as *McDaniel*, and *Deriso v. Cooper,* 246 Ga. 540 (1980), as well as wholly inconsistent with the analysis of *Thompson v. Talmadge*, 201 Ga. 867 (1947), discussed above.

In speaking of these "other decisions" which are favorable to their theory, the Consortium plaintiffs spend far more time than it is worth on our comment about the Northwest Ordinance as a perhaps historical basis for education being in many States a "*state function*" vis-à-vis the "*county function,*" it is in Georgia. Certainly our reference to the Northwest Ordinance was never intended as a conclusive delineation rather than a mere historical starting point respecting the State versus local control dichotomy. It might be one reason why in the Northwest Ordinance model states, the constitutional phraseology appears to more directly place funding obligations *in the state legislature*, rather than in the less specific term "State" as is used in Georgia. This specific vesting of funding responsibility in a state *legislature* could provide a basis for arguing against the existence of a state option of internally allocating this funding responsibility to a political subdivision.

Plaintiffs correctly point out that some of the states which were original colonies have also adopted the view of their state legislature having

a direct and non-allocable responsibility for funding. But upon review each and every one of these other "original" states have constitutions which place funding responsibility specifically in the state *legislature*, rather than simply the "State." Indeed, a review of the cases of all eleven states coming down with decisions favoring the plaintiffs' side of the debate, shows that all but one (Arkansas) expressly place the responsibility on the state legislature, and not merely on the state *eo nomine* as in Georgia.[10]

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[10] **North Carolina**: *Leandro v. State,* 488 S.E.2d 249, 254 (N.C. 1997) [State Const. Art. XI, § II: "General Assembly shall provide…"]

New York: *Campaign for Fiscal Equity v. State*, 801 N.E.2d 326, 327 (N.Y. 2003) [Const. Art. XI, § 1: "The legislature shall provide for the maintenance and support…"]

Kansas: *Montoy v. State*, 2005 Kan. Lexis 2, 8 (3 Jan. '05) [Const. Art. VI, § I" "The legislature shall provide…"]

South Carolina: *Abbeville County School Dist. v. State*, 515 S.E.2d 535, 540 (1999) [State Const. Art. XI, § III: "General Assembly shall provide…"]

Tennessee: *Tennessess Small School Systems v. McWherter*, 851 S.W.2d 139, 148 (1993) [State Const. Art. IX, §. XII: "The General Assembly shall provide…"]

Kentucky: *Rose v. Council for Better Education*, 790 S.W.2d 186, 200 (1989) [State Const. § 183: "General Assembly shall by appropriate legislation provide…"]

New Hampshire: *Claremont School Dist. v. Governor*, 703 A.2d 1353, 1358 (1997) [Const. Part II, Art. 83: "It shall be the duty of the legislators…"]

IV. "Case or Controversy" and "Standing"

The parties agree on the centrality of "standing" to the existence of that "case or controversy" necessary to the existence of subject matter jurisdiction. *Pl. Br., pp. 61-62; Br., pp. 38-40.* They are at odds, however, over the applicability of the facts relevant to the existence of plaintiffs' "standing" in this case.

[A] Plaintiffs' want of "Standing" based upon the want of any legally cognizable "injury."

Again, the Consortium plaintiffs' argument starts off badly. In rejecting our argument at p., 41 of our principal Brief, that no one has a right or entitlement to go into Court about the size of a line-item appropriation by the General Assembly, they argue that acceptance of what we believe to be

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Arizona: *Hull v. Albrecht*, 950 P.2d 1141, 1142 (Ariz. 1997) [Const. Art. I, § 1: "The legislature shall enact such laws as shall as provide..."]

Massachusetts: *McDuffy v. Secretary*, 615 N.E.2d 516, 517 (Mass. 1993) [Const. Part II, c5, § 2: "It shall be duty of the legislature..."]

Montana: *Columbia Falls Elementary School District v. State of Montana*, Pl. Exh. 20, p. 2. [Const. Art. X, § 1: "The legislature shall provide..."]

Arkansas: *Lake View School Dist. v. Huckabie*, 91 S.W.3d 472, 485-486 (2002) is the one exception. Art. XIV, § 1 of the Arkansas Constitution uses "the State shall," but further provides in the very same section that the State legislature was "authorized" to spend monies for public schools]

obvious would make "*the adequacy* ***guarantee"*** of the Constitution unenforceable. *Pl. Br., p. 60.*

In the first place, the provision of the Constitution plaintiffs tell us their case revolves around (VIII, I, I), does not use the word "guarantee." It speaks in terms of an adequate education being an "obligation" of the State. The Consortium plaintiffs' concede that this "adequacy" phrase was intended by the framers of what was to become our current 1983 Constitution, to be a "***goal*** *towards which the states should strive in its education programs." Pl. Br., p. 30.* This is consistent with *McDaniel* attributing this same view of the nature of the phrase by the Constitutional Revision Committee for the 1945 Constitution where the language first appeared: *"We tried to make a broader definition of* ***the general purpose*** of education." 248 Ga. 641.

Nowhere do plaintiffs explain by what magical incantation this State "purpose" or "goal," which is announced as a generalized obligation to the citizens in general, gives rise to an individual right or entitlement which can serve as the basis of a legal action to obtain it. If the agency employees in *Buskirk v. State of Georgia*, 267 Ga. 769, 700 (1997), could be denied *a very specific percentage salary increase* which general law had promised them on the ground that the promise had not been funded by the General

Assembly, how much less could the Consortium plaintiffs in this case maintain an action based upon a General Assembly "obligation" to appropriate a sum sufficient to be "enough" (*i.e.*, "adequate"), which is but an abstraction.[11] "Adequate" (which the dictionary tells us means "enough") gives us dimensions which are unknown if not unknowable. As applied to Education, at least beyond the minimal level of schools being open, teachers teaching, and children in general learning the basics as reading, writing and arithmetic, what is "adequate" remains a matter of subjective opinion, which as beauty, unquestionable lies, as we have said before, in the eyes of the beholder. In sum, the very first element of "standing," namely the existence of some concrete as opposed to merely abstract "injury" respecting the invasion of a "legally protected interest," is plainly missing in this case. Even if what is "adequate" or "enough" could be defined, it still remains the

[11] At pp. 13-14 of our principal Brief, we pointed to the typicality of spending authorization enactments, both at the federal and State level, frequently having some provisions funded while others are less than fully funded or not funded at all. In *McDaniel*, the Supreme Court noted that the vital "power equalization" provision which had been added to QBE's predecessor foundation program, the Adequate Program for Education in Georgia (APEG), and would have provided additional funding to help the counties' most severely disadvantaged in terms of their local property tax digest, had never been funded. While critical of the want of funding by the General Assembly, calling the unfunded provision "an empty gesture," the Court did not, of course, so much as hint the failure to fund this important provision was anything other than a matter addressed exclusively to the discretionary prerogative of the General Assembly, 248 Ga. 648, n.13, 14.

fact that no one has a legal right to any level of funding beyond that which the General Assembly decides upon in the exercise of its political discretion in its appropriations. This total want of a legally cognizable "injury" in and of itself is fatal to jurisdictional "standing," and hence to the existence of "case or controversy" subject matter jurisdiction respecting the Consortium plaintiffs' action.

[B] Plaintiffs' want of "standing" due to the absence of a causal relationship to, or "redressability" respecting, the entities they have named as defendants.

A second and independent preclusion of "standing" and hence constitutional "case or controversy" jurisdiction, lies in the fact that neither the "State" *per se*, nor any other named defendant, is either involved in, or possessed of any control over, the determination of the line item appropriations contained in the General and Supplemental appropriation acts. The best that plaintiffs seem to be able to come with is that they can sue "the State" because the term State as used in the constitutional "adequacy" provision is all embracing. *Pl. Br., pp. 68-69.* The argument does not hold up upon analysis. While the term "State of Georgia," is quite often, and not at all improperly, used as a convenient shorthand term, it is not a monolithic entity. As pointed out in *Perdue v. Baker*, 277 Ga. 1, 6 (2003):

> "The State of Georgia is not one branch of government, one office, or one officer. The State's authority resides with the people who elect many officers *with different responsibilities* under valid law."

It is basic that where a statute or action is being challenged as to its constitutionality, injunctive relief will obtain only against ***that particular person (or in Georgia arguably agency) which bears the responsibility for its implementation and enforcement,*** not against anyone else. As stated in *McCrimmon v. Daley, Mayor*, 418 F.2d 366, 368 (7th Cir. 1969):

> "Before a state officer, here the Attorney General, may properly be made a defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, he must have some connection with the enforcement of the Act."

In fact, the very foundation of the right to seek injunctive relief at all against a state official *ex officio* (or arguably against a State Agency) based upon his or its unconstitutional behavior or actions under the doctrine of *Ex parte Young*, 209 U.S. 123, 157 (1908), is the theory that the immunity *which the State possesses* does not bar action against the individual (or arguably agency) because the unconstitutional behavior or action is *ultra vires* and therefore not covered by the mantel of "sovereign immunity" enjoyed by the State itself. Along this line, it is axiomatic that to sue anyone, his or her involvement with the purported unconstitutional action or enforcement of an unconstitutional statute must be direct and substantial. It is universally

accepted, for example, that general obligations on the part of a Governor to see that the laws are faithfully executed, or any such other general duty to enforce state law, is insufficient to render him an appropriate defendant based upon the allegedly unconstitutional behavior or action. E.g., *Harris v. Bush*, 106 F.Supp.2d 1272, 1276-1277 (M.D., Fla. 2000); *Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1415-1416 (6th Cir. 1996); *Okpalobi v. Foster*, 244 F.3d 405, 416-417 (5th Cir. 2001).

What is true of suits against the Governor would be all the more true where instead of the Governor it is the State *eo nomine* which is named. Since the State *eo nomine* has no constitutional authority *in its own right, as distinct from the specific constitutional prerogatives of the General Assembly,* to appropriate funds from the State Treasury, any decree against the State itself would be a total nullity insofar as any obligation on the nonparty members of the General Assembly were concerned. For this reason too, plaintiffs fail to meet the "standing" requisites for a "case or controversy" sufficient to support subject matter jurisdiction.

V. The Want of "Substantiality" Barrier to Constitutional "Case or Controversy" Jurisdiction

Respectfully, we think that the want of "case or controversy" jurisdiction based upon both the Supreme Court of Georgia's foreclosure of

the issues presented in *McDaniel* and the facial want of substantiality as to the issues plaintiffs would present, all as set forth at pp. 44-47 of our principal Brief do not require any further amplification.

VI. Political Subdivision "Standing" to Sue the State.

In addition to the want of "standing" by virtue of the absence of any legally cognizable injury as pointed out in Division IV of this Brief, we continue to rely upon what we said at pp. 48-49 of our principal Brief concerning the separate and independent want of "standing" of the plaintiffs' county school systems to maintain their action. On the other hand, we think that the Consortium plaintiffs' argument on this point is so wide of the mark as to merit some reply.

Again, plaintiffs attribute to us an argument we do not make. Plaintiffs are wrong when they refer to *Stewart v. Davison*, 218 Ga. 760 (1963), as a case we "rely upon," and then having erected a position we have never occupied saying that our argument has been "decimated." We used *Davison* to illustrate, accurately, that situations do exist where a county school system may sue State school officials *personally* (although not in their "official capacities" and most certainly not sue the State or a State agency *per se*). We pointed out that as *Stewart v. Davison* shows, this can

be done in a *mandamus* action against a state official in his personal capacity to correct a discrete cost calculation provision in a spending authorization act (as QBE) where the method of "how the pie is sliced" is violative of "equal protection." We distinguished that "how the pie is sliced" equal protection concern of *Davison*, with the predominantly "size of the pie" concern of the case at bar. Unlike *Davison*, we are not in this case concerned with how some discrete cost calculation provision of the funding authorization Act (*i.e.*, QBE) is being carried out, and whether or not what is being done violates "equal protection." Our concern is with the political value judgments made by the General Assembly in the line-item appropriations of its general and supplemental appropriations acts, and whether the funding is insufficient to provide "an adequate education" to the plaintiff "property wealth poor" school systems. We continue to think that cases as *City of Atlanta v. Spence*, 242 Ga. 194, 195 (1978), not to mention the "sovereign immunity" bar, prevents the county school systems in this case from looking to the Courts rather than the General Assembly for the purely political legislative action of appropriating the higher level of State funding they want.

VII. The Fatal Defect in Plaintiffs' Constitutional Claims.

The Consortium plaintiffs do not appear to have made any specific response to our citation of Georgia Supreme Court authority (*see Br., pp. 50-51),* which bars the nonspecific broadside constitutional attack they make against QBE.

We would in fact respectfully submit to the Court that the Consortium plaintiffs' Brief in Opposition to Dismissal in important respects actually strengthens our position that their constitutional attack on QBE cannot be maintained. What appeared to be clear enough from the Complaint is now placed beyond all reasonable doubt by plaintiffs' Brief. It is no longer debatable but that the action of the Consortium plaintiffs is not based upon any purported flaw in the funding "authorization" enactment, namely QBE itself. According to plaintiffs' own allegations and now argument, the subject of their complaint is pure and simple the failure of the General Assembly to appropriate the funds necessary "to implement" QBE. *See, Br., pp. 3-6 and p. 22-23, n.7, supra.*

As a result, the situation we now have is not merely one of a legally impermissible nonspecific broadside attack against QBE, but a plain showing that their complaint is not with this funding *authorization* act at all, but rather with the failure of the General Assembly **to implement** QBE with

enough state funds to provide for what plaintiffs think to be an "adequate education" in the plaintiff counties. Respectfully, the Consortium plaintiffs own submissions to the Court demonstrate beyond dispute that their constitutional attack against QBE is bogus. It is a sham attack on a general authorization enactment which is not itself faulted for the purpose of blackjacking the General Assembly (which is not a party) into submission on what plaintiffs case is now and always has been all about—increasing the level of state funding for public education in the General Assembly's general and supplemental appropriation acts. This is all upon pain of having the "innocent" authorization acts, present and future, declared unconstitutional until the General Assembly "gets it right" as the higher funding levels wanted. For this reason too, the constitutional attack made on QBE should be rejected.

CONCLUSION

The Consortium plaintiffs Brief in Opposition to the dismissal of their case, while perhaps in a few areas superficially attractive, is upon analysis both wanting in substance and at odds with settled Georgia law. For the reasons stated in our principal Brief as well as in this Reply, plaintiffs' case should be dismissed with all prayers for relief denied.

Respectfully submitted,

THURBERT E. BAKER 033887
Attorney General

DENNIS R. DUNN 234098
Deputy Attorney General

Stefan R. Ritter (by permission)

STEFAN RITTER 606950
Senior Assistant Attorney General

Alfred L. Evans Jr.

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

DeBrae C. Kennedy

DE BRAE 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)

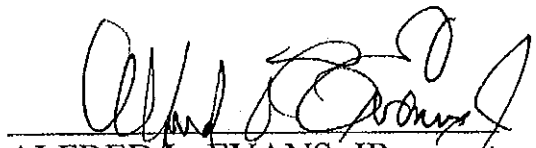
CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **Defendants' Reply to Plaintiffs' Brief in Opposition to the 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 22nd day of February, 2005.



ALFRED L. EVANS, JR.
Senior Assistant Attorney General