

**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.

**BRIEF IN SUPPORT OF DEFENDANTS'
MOTIONS TO DISMISS PLAINTIFFS' 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**

INDEX

	<u>Page</u>
PREFACE	1
PART ONE	3
I. NATURE OF THE CASE	3
II. STATEMENT OF THE PERTINENT LEGAL AND FACTUAL BACKGROUND OF THE CASE	6
[A] Public Education is a Function of County Government in Georgia	6
[B] A County's Constitutional Responsibility for School Funding	9
[C] Georgia's "School Funding System"; What it is and What it is not	11
(1) Georgia's "Funding System" for Public Education just as for all other State Funding, is the State's lengthy "budget formation/appropriation process."	12
(2) QBE has but a Peripheral Relationship to the "State Funding System," <i>i.e.</i> , the budget formation/appropriation process.....	19
[D] Similar Litigation Elsewhere	21
PART TWO	25
ARGUMENT AND CITATION OF AUTHORITIES	25

I.	Plaintiffs’ action is foreclosed by the Supreme Court of Georgia’s Decision in <i>McDaniel v. Thomas</i> , 248 Ga. 632 (1981), a decision which is both controlling and <i>constitutionally binding</i> on this Honorable Superior Court of Fulton County, Georgia.	25
	[A] Adequacy	27
	[B] “ <u>Equal Protection</u> ”	29
II.	There is a want of subject matter jurisdiction over Plaintiffs’ attempt to “litigate” more monies out of the State Treasury for the benefit of their respective county school systems because of the protection afforded to the State, State Agencies, and State Officers by the <i>constitutional</i> doctrine of “ <i>sovereign immunity</i> .”	32
III.	Plaintiffs’ attempt to bring about an increased appropriation for public education via judicial decree would require the Court to act far beyond the constitutional limits of its judicial power, unlawfully seizing and exercising control over the purse strings of government through a usurpation of the powers and prerogatives over Georgia’s budget formation/appropriation process which our Constitution places <i>in the Executive and Legislative Branches of State Government</i> .	34
IV.	There is a want of <i>constitutional</i> (<i>i.e.</i> , “case or controversy”) ... subject matter jurisdiction over Plaintiffs’ action in that Plaintiffs are multiple reasons without jurisdictional “standing” to maintain the action they present against the parties they name as Defendants.	37
	[A] Case or Controversy	37
	[B] Standing	38

1.	“Injury in Fact”	40
2.	Causal Connection	42
3.	Redressability	43
V.	There is a want of “substantiality” respecting the legal issues Plaintiffs seek to present to the Court, both (1) facially, and (2) because these issues are foreclosed by the Supreme Court of Georgia’s decision in <i>McDaniel v.</i> <i>Thomas</i> , 248 Ga. 632 (1981), which independent of the just discussed jurisdictional “standing” bar precludes the existence of that actual “case or controversy” which is <i>sine qua non</i> to the existence of constitutional subject matter jurisdiction.	44
[A]	Supreme Court Foreclosure	45
[B]	The Facial “Insubstantiality”	46
(1)	“Adequacy”	46
VI.	The County Plaintiffs are all political subdivisions of the State of Georgia, and therefore lack “standing” to invoke the “equal protection” or “due process” clauses of the State or federal constitutions, much less “standing” to assert any right or entitlement to a particular level of General Assembly appropriations from the State Treasury. This same want of “standing” also applies to each and every individual Plaintiff since any rights they might have in the matter would be a derivative right (appertaining to the right of the counties) as opposed to any independent right on his, her or their own part. This too is fatal to the existence of subject matter jurisdiction.	48

VII. The Complaint fails for multiple reasons to state a claim against any of the named Defendants upon which relief can be granted.	49
[A] The Prior Jurisdictional Motions	49
[B] Plaintiffs' Defective Constitutional Claims	50
 CONCLUSION	 51

IN THE
SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

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. *

Civil Action No.
2004CV91004

PREFACE

The Plaintiffs in this case would take the old adage about “hard facts making bad law” to a new level. In common with almost all departments, agencies and political subdivisions of the State of Georgia which rely upon State funding via appropriation acts of the General Assembly, the Plaintiff counties in this case have found themselves financially pinched in recent years in connection with the maintenance and operation of their respective county school systems. Reduced State revenues have led to across-the-board budget cuts, with concomitant funding reductions in the General Assembly’s appropriation acts.

There is some indication that the situation may be improving. After two years of declining State financial assistance, the General Appropriations Act for FY '05 reflects an increase in the "equalization formula" funds used to give additional State support to Georgia's less affluent counties. The increase in this categorical grant is almost \$64,000,000, going from \$288,182,775 for FY '04, to \$341,006,547 for FY '05. *Compare* 2004 Ga. Laws, pp. 994, 1006 and 2004 Ga. Laws, pp. 2, 14.

But whether or not Plaintiffs think this increase is "enough," one thing is certain, by turning their backs on the normal political and legislative process, and seeking the "more money" they want from the State Treasury via *litigation* rather than *legislation*, Plaintiffs enter the wrong forum. What they do is invite the Court to take over the **political** "purse strings" control of State government, specifically the budget formation and appropriation process which our Constitution places *exclusively* in the hands of the **Executive** (*i.e.*, budget formation) and **Legislative** (appropriations) branches of government.

This proposed usurpation of the constitutional prerogatives of the Governor and General Assembly which Plaintiffs solicit, is not, happily, a case of first impression in Georgia. Each of the two arguments Plaintiffs advance in their attempted treasury raid: (1) a contended failure of the

Defendants to provide “an adequate education,” and (2) a contended obligation on Defendants’ part to equalize educational opportunity from county to county across the State, were fully considered and definitively decided by the Supreme Court of Georgia, contrary to Plaintiffs’ contentions, in *McDaniel v. Thomas*, 248 Ga. 632 (1981). *McDaniel* and the present case meet the “on all fours” test. While there are multiple other fatal jurisdictional defects of Plaintiffs’ case, *McDaniel* controls absolutely, and for the reasons we shall come to, is constitutionally binding on this Honorable Superior Court of Fulton County, Georgia. The Plaintiffs’ case should be dismissed.

PART ONE

I. NATURE OF THE CASE

The purpose of Plaintiffs’ action is “more money.” The funding of public education in Georgia is both State and local. Plaintiffs would have the General Assembly of the State of Georgia greatly increase its already massive annual appropriations (almost Six Billion Dollar for FY ’05),¹ to fund the vehicle through which legislatively appropriated sums are allocated to local county and independent school systems, namely Georgia’s “Quality

¹ See, 2004 Ga. Laws, pp. 994, 1005.

Basic Education Act.” (QBE). *See* O.C.G.A. § 20-2-130, *et seq.* In their lengthy (139 paragraph) Complaint, Plaintiffs state over and over that the monetary assistance which the Plaintiff counties receive for the support of their local school systems through QBE is insufficient and has no relationship to their actual costs of providing an adequate education for the students in their respective school systems. (*Complaint, e.g.,* ¶¶ 23, 30-32, 41-43, 73-75, and *passim.*) Plaintiffs catalog an abundance of educational programs and activities, including “field trips,” which they say they cannot carry out as well, if at all, because of the insufficiency of the legislatively appropriated funds they receive through QBE. (*Complaint, ¶¶* 81-100.) Plaintiffs allege that the existing condition of inadequate State financial assistance has been exacerbated by the undisputed budget cuts brought about by the recent economic downturn (*Complaint, ¶¶* 30(n), 75, 80, 93, 95, 96), requiring counties Plaintiff counties, to rely more heavily upon other “primarily local” funding sources for the maintenance and operation of their respective school systems. (*Complaint, ¶* 33.) Plaintiffs notably do *not* allege that they are at, or even close to, the 20 mills per dollar school tax they are constitutionally authorized to levy on the assessed value of taxable property within their county without voter approval, let alone turning to the

voters for removal of the 20 mill cap. *See* Ga. Const. (1983), Art. VIII, Sec. VI, Par. I.²

In attempting to obtain the additional State dollars they want for the support of their public school systems through the courts rather than the usual political route of seeking an increased General Assembly appropriation, Plaintiffs advance two constitutional theories. First they contend that the monies they receive from the State through QBE (the basic “spending authorization” which is annually funded, to the extent the General Assembly deems appropriate, through legislative appropriations) is not enough to provide students with the “adequate” education they say is guaranteed by Ga. Const. Art. VIII, Sec. I, Par. 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.

² Simply by way of information, State Department of Education data for calendar year 2003 reflects the following millage rates for school taxes in the Plaintiff counties: Ben Hill (16.27 mills), Brantley (16.26 mills), Elbert (16.90 mills), Lamar (16.20 mills), and Murray (15.50 mills). By way of contrast, the same data shows the millage rates for that calendar year were as follows in the Atlanta area: Atlanta City (21.46 mills); Decatur City (25.30 mills), DeKalb County (22.98 mills), Cobb County (19 mills), Fulton (17.76 mills).

According to Plaintiffs, Georgia's "school funding system" (which they leave largely undefined and seem to confuse with QBE), is unconstitutional because it:

"fails to provide resources sufficient to provide the opportunity for the adequate education guaranteed pursuant to Ga. Const. Art VIII, Sec. I, Par. I, to each named minor child and student plaintiff and to each Plaintiff District and Consortium District student." *Complaint*, p. 56, ¶ 133.

Secondly, Plaintiffs say that Georgia's undefined "school funding system" fails to comport with the "equal protection" provisions of the Georgia Constitution, namely Ga. Const. Art. I, Sec. I, Par. II, because:

"Georgia's school funding system fails to provide each Plaintiff District and Consortium District student an equal opportunity to obtain an adequate education guaranteed by Georgia's Constitution, statutes, and regulations. *See Complaint*, p. 57, ¶ 137.

II. STATEMENT OF THE PERTINENT LEGAL AND FACTUAL BACKGROUND OF THE CASE

[A] Public Education is a Function of County Government in Georgia

Historically, local control of public education in Georgia has existed from the very start, when an intrepid colony of Salzburgers started Georgia's

first public school at Ebenezer in 1734.³ When Georgia's first comprehensive public school legislation was enacted in 1870, it was the **county** (not the State) which was vested with the primary responsibility for the operation and control of public education. 1870 Ga. Laws, pp. 49, 52, 54. As the Supreme Court of Georgia noted as early as 1911 in *Meadows v. Board of Education of Paulding County*, 136 Ga. 153(1) (1911):

“The policy of the legislature, as declared in the several enactments relating to the establishment, maintenance, and control of the public schools of a county, is to devolve on the county board of education supervision of the schools and the duty of administering the school law.”

This vesting of authority to manage and control county schools in the county board of education has long since become a part of our State Constitution, currently being found in Ga. Const. (1983), Art. VIII, Sec. V, Pars. I and II.

“Authority is granted to county . . . boards of education to establish and maintain public schools within their limits. Existing county and independent school systems shall be continued . . .” (Par I).

³ Actually any assertion of central control over the school in Ebenezer by the English-speaking Trustees of the Georgia colony would have been awkward since this very first public school in Georgia was conducted in the German language.

“Each school system shall be under the management and control of a board of education” (Par. II).⁴

This salient characteristic of public education in Georgia has been recognized not only by numerous decisions by the Supreme Court of Georgia⁵ but by federal courts up to and including the Supreme Court of the United States. In *Armour v. Nix*, 179 U.S. Dist. Lexis 9609 (order entered on September 24, 1979), *affirmed*, 446 U.S. 930 (1980), *reh. denied*, 448 U.S. 908 (1980), the three judge district court observed that:

“public education in Georgia is more an integral part of local self government than in many other states... Georgia’s educational system is organized *on a county basis*...” *Id.*, at p. 7 (emphasis added).

The Court went on to conclude that:

“public education in Georgia is an integral part of local self-government and that the basic unit of education in Georgia is the county.”

Id. at p. 38 (emphasis added).

⁴ Independently operated municipal school systems existing as of the time of the adoption of Georgia’s 1945 Constitution have been permitted to continue, but the creation of any new “independent” municipal school system is constitutionally prohibited. Ga. Const. (1983), Art. VIII, Sec. V, Par. I). Under Georgia’s so-called Hara-Kiri law, we have what is essentially a one-way street out of existence, since citizens of a municipality may vote to repeal their independent status *sans* county approval. O.C.G.A. § 20-2-370.

⁵ See e.g. O.C.G.A. § 20-2-50; *Powell v Studstill*, 264 Ga. 109, 110-111 (1994); *Deriso v Cooper*, 246 Ga. 540, 541-542 (1980).

To put it another way, county school board members and school superintendents are in Georgia the **county** officials through whom the **county** operates in public education, just as its county commissioners speak for it in other areas. *See, e.g., Rosser v. Meriwether County*, 125 Ga. App. 239, 241 (1971).

**[B] A County's Constitutional Responsibility
for School Funding**

Consistent with the authority “**to establish and maintain public schools**” being constitutionally vested in the county board of education by Ga. Const. (1983), Art. VIII, Sec. V, Par. I, and the *constitutional* placement of each county school system under “**the management and control**” of the county board of education by Ga. Const. (1983), Art. VIII, Sec. V, Par. II, the only *express constitutional mandate respecting the funding of a county's school system*, falls on the county itself. Under Ga. Const. (1983), Art. VIII, Sec. VI, Par. I, entitled “**Local taxation for education,**” subparagraph (a) provides:

“(a) The board of education of each school system shall annually certify to its fiscal authority or authorities a school tax not greater than twenty mills per dollar for the support and maintenance of education.”

Paragraph II of the same Article and Section further provides, however, that this 20 mill cap may be increased or removed by a county board of education, subject to voter approval.

The framers of Georgia's 1945 Constitution, in which the clause that "The provision of an adequate education for the citizens shall be a primary obligation of the State of Georgia" first appeared (Sec. 2-6401), viewed the **constitutional** scheme as one:

"under which the financing of county and independent school districts was largely based on ad valorem taxation within the district." *McDaniel v. Thomas*, 248 Ga. 632, 641-644 (1981).

Adoption of the term "adequate education" by the framers of the 1945 Constitution was not intended to fundamentally alter the existing obligation of the state with regard to education." *McDaniel*, at 641. While the framers knew that a foundation or "equalization fund" was being established by the General Assembly, they deliberately "**did not give it constitutional status.**" *McDaniel*, at 642.

In short, while State fiscal assistance to counties under the initial minimum foundation program and ensuing enactments up to and including the present QBE, represents a strong and long-standing legislative policy imperative, it is not a constitutional mandate." *McDaniel*, at 642.

**[C] Georgia's "School Funding System"; What it is
and What it is not**

Plaintiffs' confusion of QBE with Georgia's "School Funding System" betrays either ignorance as to what the "funding system" they attack actually is, or it is an attempt through a highly convoluted presentation, to convince the Court that it can by indirection do what it obviously could not do directly, *i.e.*, compel the General Assembly to increase its annual appropriations for QBE under the guise of using the doctrine of "judicial review" to strike as "unconstitutional" not the "funding system" which is at the heart of the matter, namely the budget formation/appropriation process, but the "spending **authorization**" Act (QBE), as well as any replacement for QBE, unless and until the General Assembly comes up with sufficiently increased "*appropriations*" to get "more money" out of the State Treasury so that the dollar flow is "enough," "sufficient," or "adequate." Respectfully, we believe that this requires Defendants to set forth some of the background law and facts of the matter, to show (1) what the "school funding system" of which Plaintiffs are complaining about in fact is, *i.e.*, Georgia's "*budget formation/appropriation process,*" and (2) what the role of QBE is in the budget planning process, and as a vehicle for the allotment and transmission of such funds as are budgeted and to the extent the General Assembly deems appropriate in light

of other competing needs and total funds available appropriated to the State Department of Education for allocations to the various local school systems.

We look at each in turn.

- (1) **Georgia's "Funding System" for Public Education, just as for all other state funding, is the State's lengthy budget formation/appropriation process.**

QBE does not, of course, fund anything in and of itself. It does not, and constitutionally cannot, generate a single dollar for the support of public education. When it comes to the disbursement and expenditure of funds from the State Treasury nothing is more fundamental than the command of the Georgia Constitution that:

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

Ga. Const. (1983), Art. III, Sec. IX, Par. I.

And under Ga. Const. (1983), Art. III, Sec. IX, Par. III:

"The general appropriations bill *shall embrace nothing except appropriations* fixed by previous laws,...for support of the public institutions and educational interests of the state...."

(Emphasis added).

General Assembly appropriations are made on an annual basis. Ga. Const.

(1983) Art. III, Sec. IX, Par. II(b). Subject to certain constitutional

exceptions not here relevant, funds remaining unexpended and not

contractually obligated by the expiration of the fiscal year lapse. Ga. Const. (1983), Art. III, Sec. IX, Par. IV(c).

Before State funds may be lawfully paid out from the State Treasury, there ordinarily must be two very different types of statutory enactments. First, there must be a **spending authorization act** (as QBE), which enables or requires a State Agency or official to engage in a particular activity and expend public funds for its purposes. Secondly, there must be an **appropriation act**, this being the action which actually permits the funds to be made available and drawn upon by the Governor's warrant from the State Treasury for the authorized expenditure.

The distinction between a general law activity and spending authorization and an appropriation was recognized by the Supreme Court in *Buskirk v. State of Georgia*, 267 Ga. 769, 700 (1997), where the Court concluded that even assuming that an Agency salary increase policy had the force of law, this in essence "authorization law" would be nugatory "unless the General Assembly authorized the expenditure of salary increases for a given fiscal year." The point is important. It is not at all unusual, in either federal or state government, to have some parts of a spending

authorization act as QBE left unfunded, some partially funded, and some fully funded through the budget formation and appropriation process.⁶

The Appropriations Act is itself neither a contract nor an “entitlement” to receive any sum of money. The necessary warrant of the Governor (under O.C.G.A. § 45-12-21) to provide for a transfer from the Treasury to a budget unit as the State Department of Education, even when signed by the Governor, is not an impediment to the Governor’s exercise of his discretion to change his mind even to the point of revoking a warrant he has already issued. This was decided over a hundred years ago in *Fletcher v. Renfroe*, 56 Ga. 674(1) (1876):

“An executive warrant upon the treasury of the state, authorizing the payment of money in pursuance of an appropriation made by law, *is not a contract* nor in the nature of a contract, *but is only a license or power, and is revocable as long as the payment which it warranted has not been made.*” (Emphasis added). [Noting further that the Governor is invested by law with the discretion in issuing warrants and can be put under no direct compulsion to issue the same].

(Emphasis added.)

⁶ As the State Department of Education’s former Director of Pupil Transportation, Sam McCullough, noted in connection with recent “pupil transportation” litigation, *i.e.*, *Schrenko v. DeKalb County School District*, 276 Ga. 786 (2003), bus drivers cannot be employed at the salary the General Assembly appropriates, and “we hardly ever are at a 100 percent of calculated earnings for operations or replacement” of school buses. *Dep. McCullough*. [R 3062-3063].

No less important is the fact that the General Appropriations Act does not spring forth from the General Assembly as Minerva from Jupiter's head, "full-blown." It is both constructed upon and constitutionally tied to the Governor's Annual Budget Report. Ga. Const. (1983), Art. III, Sec. IX, Par. II requires the Governor to:

"submit to the General Assembly within five days after its convening in regular session each year **a budget message and a budget report, accompanied by a draft of general appropriations bill** in such form and manner as may be prescribed by statute, which shall provide for the appropriation of the funds necessary to operate all of the various departments and agencies and to meet the current expenses of the State for the next fiscal year."

(Emphasis added).

Under the "Budget Act" which fleshes out his budget formation duties, the Governor exercises his responsibilities through the Office of Planning and Budget (OPB) which is located within the Office of the Governor. See O.C.G.A. §§ 45-12-70 to 45-12-74.

This constitutionally mandated action of the Governor of presenting a recommended budget and an accompanying proposed appropriations bill is not surprisingly closer to the end than the start of the overall process.

Under O.C.G.A. § 45-12-78, the head of each budget unit (as the State Board of Education) is required to submit its budget request (*i.e.*, estimates of its financial requirements for the next fiscal year) by September

1st of each year on the forms of, and in the manner prescribed by, OPB. In the State Department of Education, the first tangible event in the process is much earlier, usually occurring around May of each year. The Department's Budget Office typically sends out a directive to the various units and divisions in the State Department of Education to submit what have been called "improvement packages" (or more currently "enhancement packages") for consideration as possible inclusions in the budget proposal the State Board of Education submits to the Governor.

The budgetary submissions contain first of all an "adjusted base." This is the continuation budget which runs from year to year, even though dollar adjustments may be involved because of, for example, student enrollment increases, or legislatively authorized increases in salary schedules. Secondly and separately, there will typically be identified "improvement package" items which appear in the written budget request below the dollar sub-total for the adjusted base or continuation items. Under the Budget Act the Governor is empowered to make such changes or revisions he finds warranted in his review of agency budget requests. O.C.G.A. § 45-12-79(a).

The Governor's proposed Appropriations Bill, accompanying his Budget Report to the General Assembly, proceeds through the normal

legislative channels of committee consideration and recommendations and full consideration first by the House and then by the Senate. The Legislative Budget Office maintains a tracking document called the "Comparative Summary" which reflects legislative changes in the House, Senate and Joint Committee versions of the Governor's recommendation both as to the "Adjusted Base" and for each "enhancement" item, and showing whether and where an enhancement item agreed to by the Governor was deleted rather than passed.

The Governor's signing of the General Appropriations Act into law for a given fiscal year is not the end of the process. The General Appropriations Act in and of itself does not transfer so much as a single dollar from the State Treasury to the State Department of Education. To the contrary, the Governor's "purse string" discretion and control continues. Before the new Fiscal Year has been reached, and before any allotment of his appropriation can be obtained, the State Board and Department of Education must, by May 31 of the Fiscal Year proceeding the effective date of the General Appropriations Act, submit an **Annual Operating Budget** to OPB. O.C.G.A. § 45-12-80(d). The Governor has the authority to direct an agency "to bring the annual operating budget into conformity with approved appropriations" even at this point in time, several months after enactment of

the General Appropriations Act into law. *Ibid.* Additionally, budget units as the State Department of Education are required to file periodic work programs with OPB, with no allotment of funds permissible unless the budget unit has filed its periodic work program. O.C.G.A. § 45-12-82. The Governor is empowered to direct changes in the provisions of a work program to conform it to the “**budget**” approved by the General Assembly. O.C.G.A. § 45-12-85. The Governor is also authorized to require State agencies to reserve specified appropriations for budget reductions when it appears that an appropriation is expected to exceed annual revenues. O.C.G.A. § 45-12-86.

O.C.G.A. § 45-12-81 provides that:

“All expenditures by the State and its budget units of monies drawn from the state treasury shall be made under the authority of appropriations Acts, **which shall be based upon a budget provided in this part**; and no money shall be drawn from the Treasury except by appropriation made by law pursuant to Article III, Section IX, Paragraph I of the Constitution of Georgia.”

(Emphasis added.)

O.C.G.A. § 45-12-87 of the Budget Act similarly provides that no payment shall be made and no obligation incurred against any appropriation other than as authorized by the Act, and further declares that:

“every official authorizing payment in violation of this part or taking part therein,...shall be jointly and severally liable to the state for the full amount so paid...”

(2) QBE has but a Peripheral Relationship to the “State Funding System”, i.e., the budget formation/appropriation process.

The heart of Plaintiffs’ case is that they are not receiving sufficient State financial assistance via QBE. (*See, e.g., Complaint*, ¶¶ 23, 30-32, 41-43, 81-100, and *passim*). But as we have just seen in the preceding section of this Brief, QBE, which seems to be the focus of Plaintiffs’ remedial efforts, does not in and of itself fund anything, showing that Plaintiffs are off on the wrong foot to start with by their misunderstanding of what is the controlling law. QBE’s relationship to the actual “State Funding System,” which is to say the budget formation/appropriation process, is first of all one of calculating the estimated educational costs of the QBE program. As to these estimations, QBE expressly provides that it functions as a planning document in which the State Board of Education presents funding proposals to the Governor and General Assembly for their consideration in the budget formation/appropriation process.

In the words of QBE, the Board of Education’s cost calculations for the foundation program contemplated by QBE:

“shall be construed as setting out a basic plan for the direction of the State Board of Education in planning a program and presenting proposals to the Governor and to the General Assembly. Nothing in this article shall be construed as amending or modifying in any way Part One of Article IV of Chapter 12 of Title 45, known as the ‘Budget Act.’ The state board shall in all of its programs involving allocation or expenditure of funds, be governed and controlled by Part One of Article IV of Chapter 12 of Title 45 and all other laws of general application pertaining to the handling and expenditure of state funds, none of which are amended, modified, or appealed by this article unless specifically so provided in this article.”

O.C.G.A. § 20-2-167(d).

Secondly, QBE is the vehicle through which funds appropriated and disbursed to the State Department of Education for the purpose are in turn allocated to local school systems.

Many provisions of QBE expressly provide that particular programs are “subject to appropriation by the General Assembly,” *see* O.C.G.A. § 20-2-156 (“Program for Limited-English-Proficient Students”), O.C.G.A. § 20-2-185 (Program Weights for Assistant Principals and Secretaries), and even the Quality Basic Education Formula with its multiple components, expressly states that:

“the General Assembly shall annual establish through the General Appropriations Act the base amount to be used each year. In the event that the base amount so established when multiplied by the program weights in subsection (b) of this Code section requires funds in excess of the appropriation for the Quality Basic Education Formula grants, the funds which

are appropriated for the Quality Basic Education Formula shall be pro rated to each of the Quality Basic Education Formula cost categories.”

O.C.G.A. § 20-2-161.

In short, it is the annual Appropriation Act and not the **authorization enactment** which Plaintiffs are of necessity attacking when they complain of insufficient funding or inadequate “equalization” of funding between differing counties.

[D] Similar Litigation Elsewhere

Cases of this *genre* have been around for some time and have been quite widespread. In 1973 the Supreme Court of the United States was faced with an “equal protection” argument concerning extremely wide wealth differentials (with contended “unequal educational opportunities”) among local Texas school districts where notwithstanding some State equalization aid, local property taxes remained the primary source of school funding. *See San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973). After concluding that notwithstanding its extraordinary importance, education *per se* was not a “fundamental right” for purposes of equal protection analysis, the Court rejected what it viewed to be, when analyzed, nothing less than an attack upon the very existence of local government. Noting that the Plaintiffs were urging that the Texas system was unconstitutionally arbitrary

because it allowed the availability of local taxable resources to turn on “happenstance,” with the quality of education fluctuating on the basis of the fortuitous positioning of the boundary lines of political subdivisions and the location of valuable commercial and industrial property, the Court responded:

“But any scheme of local taxation—even the very existence of identifiable local governmental units—requires the establishment of jurisdictional boundaries that are inevitably arbitrary. It is equally inevitable that some localities are going to be blessed with more taxable assets than others.

Rodriguez, supra, at p. 54.

The Court reasoned that:

“if local taxation for local expenditures were an unconstitutional method of providing for education then it might be an equally impermissible method of providing other necessary services customarily financed largely from local property taxes, including local police and fire protection, public health and hospitals, and public utilities facilities of various kinds. We perceive no justification for such a severe denigration of *local property taxation and control* as would follow from appellees’ contentions.”

Rodriguez, at p. 54 (emphasis added).

Noting that the Texas’ approach was not the result of hurried or ill-conceived legislation, but rather the product of responsible studies by qualified people reflecting what many educators had thought to be an

enlightened approach to a problem for which there is no perfect solution

(*Rodriguez, supra*, at p. 55), the Court concluded:

“we stand on familiar ground when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues.”

Rodriguez, at p. 41. Rebuffed in the federal courts, Plaintiffs turned to the State courts.

Unlike Georgia, where public education has historically been, and constitutionally remains today, a function of **county** and not State government, States coming into the Union through the Northwest Ordinance of 1787 (probably the most important accomplishment of the pre-Constitution Congress under the older Articles of Confederation) inherited education grounded at the “territorial, and hence later, *State level* of government.” *See, e.g., United States v. Board of School Commissioners of Indianapolis, Indiana*, 368 F.Supp. 1191, 1199-1200 (1973). For this reason, education in many of the Northwest Ordinance States, as well as in subsequently admitted States using the same model, is apt to continue today to be a function of **State** government rather than a **county** function as it is in Georgia.

This difference, often reflected in State constitutions, is one element of the fact that State litigation on school funding leads to state supreme courts going in opposite directions, although it would also appear that the opposite results depend in no small measure upon the level of “judicial activism” as opposed to “judicial restraint” of a Court in assessing the validity of statutes under the doctrine of “judicial review.” In *Deriso v. Cooper*, 246 Ga. 540 (1980), for example, our own Supreme Court rejected an “adequate education” attack based upon the ground that the defendant county school board was not providing certain curricular and extracurricular programs, and not adequately funding the programs being provided. Citing *San Antonio v. Rodriguez*, it opined that:

“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 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 buildings shall be constructed and, if so, where and the myriad other matters involved in the every day 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 be best be made by other branches of government.

Id., at p. 543.

The differing state constitutional provisions and factual situations involved, not to mention the most critical dichotomy of “judicial activism”

versus “judicial restraint” in the approach of differing courts to the doctrine of judicial review tend to lessen the importance of any detailed review of these other decisions in other jurisdictions, particularly since the Supreme Court of Georgia has spoken, conclusively, on the matter. On the other hand a review of some of these other decisions does serve to shed light on the jurisprudential conflicts involved, including of the hazards which come into play when activist courts take on a legislative role. We consequently set forth an encapsulated review of some of these opposed decisions as an Appendix to this Brief.

PART TWO

ARGUMENT AND CITATION OF AUTHORITIES

- I. **Plaintiffs’ action is foreclosed by the Supreme Court of Georgia’s Decision in *McDaniel v. Thomas*, 248 Ga. 632 (1981), a decision which is both controlling and *constitutionally binding* on this Honorable Superior Court of Fulton County, Georgia.**

Central to our entire system of Anglo-Saxon jurisprudence is the principle that the decisions of the Supreme or other Court of last resort on what **the law** is on a matter are binding on all inferior courts. Not surprisingly, this foundational principle is in Georgia, as elsewhere, of constitutional dimension:

“The decisions of the Supreme Court shall bind all courts as precedents.”

Ga. Const. (1983), Art. VI, Sec. VI, Par. VI; *see also*, *Zachery v. State*, 233 Ga. App. 519, 521 (1998); *National Health Network, Inc. v. Fulton County*, 228 Ga. App. 584, 587 (1997).

The case at bar is in all material respects identical to that presented to and decided by the Supreme Court of Georgia in *McDaniel v. Thomas*, 248 Ga. 632 (1981). In both cases, the purpose of the litigation was and is to judicially compel that more money be appropriated from the State Treasury for the Plaintiff and other counties said to be less affluent than the norm, in support of their respective school systems. In both cases “the basic question presented...is whether the current system of funding public education in Georgia conforms to the mandates of our state constitution.” *McDaniel*, at 632; *Complaint, e.g.*, ¶¶ 23, 30-32, 41-43, and *passim*. In both cases, Plaintiffs base their constitutional attack on the dual grounds of (1) the current system of funding allegedly failing to provide “*an adequate education*” within the meaning of the constitutional provisions declaring it to be “a primary obligation of the State” (*McDaniel*, at 633, 640-644; *Complaint, e.g.*, p. 56, ¶ 133), and (2) violating the “*equal protection*” provisions of our State Constitution by its failure to sufficiently compensate for county to county wealth differentials in order to “equalize educational opportunities throughout the state.” *McDaniel*, at 632-633, 636- 643;

Complaint, e.g., p. 57, ¶ 137. We look at the Supreme Court of Georgia's determination of "the law" as to each.

[A] **Adequacy**

In *McDaniel*, the Plaintiffs had a colorable argument of the "*General Assembly*" having a funding obligation to provide for an "adequate" (whatever this might be) education. But this colorable argument in 1981 was in fact based upon constitutional provision which no longer exists. In 1962 in conjunction with school closing and tuition grant legislation passed in opposition to school desegregation, a supporting constitutional amendment had been adopted which was an anomaly respecting the general constitutional-level vesting of the governance, maintenance, control **and funding responsibility** for public schools at the **county** and not State-level in Georgia (*see*, pp. 6-9, *supra*). It was still in the 1976 Constitution as Art. VII, Sec. VIII, Par. I:

"Freedom of Association Freedom from compulsory association at all levels of public education shall be preserved *inviolata*. **The General Assembly** shall by taxation provide funds for an adequate education for the citizens of Georgia."
(Emphasis added).

Even assuming that this provision was ever intended to place any funding responsibility on the General Assembly other than in the tuition grant situation, it was still found wanting by the *McDaniel* court as a means

of attempting to obtain more money from the State Treasury. The Supreme Court noted in *McDaniel*, the inherent difficulty in establishing a “judicially manageable standard” for determining what “adequate” is, saying that “it is primarily the legislative branch of government which must give content to the term ‘adequate.’” *McDaniel*, at p. 644. It affirmed the trial court’s conclusion that “the quantum of education provided would be almost exclusively for the General Assembly to determine” (*McDaniel*, at p. 640), and that “to do otherwise would be an unwise and unwarranted entry into the controversial area of public school financing, whereby this Court would convene as a ‘super-legislature,’ legislating in a turbulent field of social, economic and political policy.” *Id.*, p. 644. The Court also noted that even if an obligation to provide an adequate education existed, it could not be said that the State was shirking its duty when its financial commitment to public education was “massive,” in excess of one billion dollars during the 1979-1980 school year, *McDaniel*, p. 644, fully 36% of the entire State Budget of \$1,089,546,897. *See*, 1980 Ga. Laws at pp. 1799, *et seq.*⁷

⁷ State aid to counties respecting their constitutional obligation to maintain and fund the public schools confined to their governance, maintenance and control, continues to be massive, amounting for FY 2005 to be almost six billion dollars (36%) of a total State Budget of \$16, 376, 321, 137. *See*, 2004 Ga. Laws, pp. 994, 105, 1058.

Under *McDaniel*, Plaintiffs “adequacy” argument was found wanting even though it existed as a colorable claim under the 1976 Constitution. Today, with the “General Assembly duty” proviso no longer a part of the Constitution, there is no credible argument of a *constitutional* imperative that the General Assembly provide any funding at all—the massive aid it is in fact providing being a matter of sound legislative policy, not a constitutional mandate. The Supreme Court pointed out in *McDaniel*, that the term “adequate education” was not intended to fundamentally alter Georgia’s basic *constitutional* format of funding being based primarily on local based ad valorem taxation within the county, and that the equalization fund which the General Assembly created at the same time the term “adequate education” was first employed in the (1945) Constitution, had plainly been left to legislative policy as opposed to being given “constitutional status.” *McDaniel, supra.*, at p. 642.

[B] “Equal Protection”

It’s hard to imagine what could be more fundamental to a state’s existence as a sovereign than its right to create political subdivisions, as counties and municipalities, and to fulfill its design and purpose in their creation, by allocating governmental powers, responsibilities **and funding obligations**, between itself and its political subdivisions. *See, e.g., Hunter v.*

City of Pittsburgh, 207 U.S. 161, 178-179 (1907); accord, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 31, 40-43, 58-59 (1973). Inherent in the very existence of local government and its role in maximizing a citizen's opportunity for direct input into as many as possible of the governmental decisions which affect his life, health and pocket book, is, of course, disparity of result, or to put it another way, "inequality." These disparities are brought about not only by county to county wealth differences, but no less important, by differing philosophical, social, economic, and political views of county and municipal officials on what government ought to be doing, and the appropriate levels of fiscal support for all of the competing "needs" which government is called upon to satisfy. The equal protection clause has not generally been thought of as being akin to a "manifesto" requiring the leveling of wealth disparities (or their consequences), between individuals, cities, counties or states. The Supreme Court of the United States pointed out over a hundred years ago in *Missouri v. Lewis*, 101 U.S. 22, 31-32 (1879) that:

"A uniformity which is not essential as regards different States cannot be essential as regards different parts of a state, provided that in each and all there is no infraction of the constitutional provision. Diversities which are allowable in different states are allowable in different parts of the same state."

Since this is such an integral part of the very existence of local government, the Supreme Court of Georgia has not surprisingly reached the same conclusion. *See, e.g., Bobo v. Mayor & Council of Town of Savannah Beach, Tybee Island, Georgia*, 216 Ga. 12, 14 (1960); *appeal dismissed*, 364 U.S. 409 (1960). In Georgia, the Constitution itself makes education a function of **county** and not State government. *See, pp. 6-9, supra*. Small wonder that the Supreme Court in *McDaniel* rejected the contended obligation of the State to “*equalize*” educational opportunities” in the face of an entire Article of the Constitution devoted to education and unambiguously vesting of governance and funding of county schools at the local (*i.e.*, county or in some instances municipal) level. *McDaniel*, p. 645. The Court found, among other things, that in Georgia education is **not** a “fundamental right”—citing and following the reasoning of the Supreme Court of the United States respecting federal “equal protection” in *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973).

Respectfully, attempting to advance an “equal protection” argument in a State where the constitutional scheme makes public education a function of County government with the sole **constitutionally imposed** funding burden placed on the counties, places Plaintiffs in the interesting if untenable position of arguing that a constitutional provision is unconstitutional.

Plaintiffs present action is controlled by *McDaniel* in all respects and should for this reason alone, be dismissed.

II. There is a want of subject matter jurisdiction over Plaintiffs' attempt to "litigate" more monies out of the State Treasury for the benefit of their respective county school systems because of the protection afforded to the State, State Agencies, and State Officers by the constitutional doctrine of "sovereign immunity."

Plaintiffs' Complaint shows on its face that it is a suit designed to require the Defendants, in specificity the State, the State Board of Education, all Members of the State Board of Education, the State School Superintendent, and other individual defendants *sued in their official capacities*, to pay out additional monies from the State Treasury for the enhanced State fiscal support which Plaintiffs demand on the theory that they are not getting enough from the State for educational "adequacy."

Quite apart from the mind-boggling notion of anyone having an entitlement to an appropriation at some particular fixed level (higher, of course), from the State Treasury, and the even more mind-boggling notion that Plaintiffs can accomplish this by suing the Defendants they name -- who have no control over the budget formation appropriations process, what the suit does not do is also important. It does not purport to be predicated upon, and certainly alleges no compliance with, the requisites of, the Georgia Tort

Claims Act [*i.e.*, O.C.G.A. § 15-21-20, *et seq.*]. Nor is it based upon “any written contract” which has been allegedly authorized by and entered into by the State or one of its departments or agencies. And finally, it is not shown to be based upon any other enactment of the General Assembly which has specifically waived the constitutional immunity of the State and its agencies from suit under Ga. Const. (1983), Art. I, Sect. II, Par. IX.

Thus even without regard to Plaintiffs’ error in thinking they have a right to sue anyone to get an increased General Assembly appropriation, there is simply no Act whatsoever by the General Assembly which Plaintiffs identify as expressly and unequivocally waiving the constitutional shield against unconsented to suits, of whatever form, brought against the state. The matter has been well covered by the Court of Appeals in its recent decision in *Dollar v. Olmstead*, 232 Ga. App. 520, 522 (1998):

“The common law doctrine of sovereign immunity, adopted by this state in 1784, protected governments at all levels from unconsented to legal actions.’ (Footnote omitted). *Gilbert v. Richardson*, 264 Ga. 744, 745(1), (452 SE2d 476). A 1991 amendment to the Georgia Constitution reiterates that ‘sovereign immunity extends to the state and all of its departments and agencies.’ Ga. Const. 1991, Art. I, Sec. II, Par. IX(e). However, it also provides that ‘[t]he sovereign immunity of the state and its departments 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.’ *Id.* The General Assembly has enacted no statute waiving sovereign immunity for equity claims against the state. Since *Olmstead* has been sued in his

official capacity as the Commissioner of the Georgia Department of Human Resources, it is construed that a suit against the State and he is entitled to sovereign immunity for the plaintiffs' claim for equitable relief. *Price v. Dept. of Transp.*, 257 Ga. 535, 537 (361 SE2d 146); *Roberts v. Barwick*, 187 Ga. 691, 695 (1 SE2d 713)."

Respectfully, Plaintiffs, who bear the burden of showing subject matter jurisdiction, have failed to provide so much as a wisp of a hint of a suggestion of any General Assembly waiver of the State's constitutional immunity respecting their suit. The resulting want of subject matter jurisdiction over Plaintiffs' action is plain and properly calls for their Complaint's dismissal.

III. Plaintiffs' attempt to bring about an increased appropriation for public education via judicial decree would require the Court to act far beyond the constitutional limits of its judicial power, unlawfully seizing and exercising control over the purse strings of government through a usurpation of the powers and prerogatives over Georgia's budget formation/appropriation process which our Constitution places *in the Executive and Legislative Branches of State Government.*

Among the important things Plaintiffs fail to acknowledge or recognize in their demand that more money be made available to them from the State Treasury, is the difference between a *spending authorization enactment*, as QBE, and the *Appropriations Act* needed to fund it. As previously noted, the Constitutional starting point is that:

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

Ga. Const. (1983), Art. III, Sec. IX, Par. I.

The budget formation/appropriation process is discussed at length in the Legal and Factual Background portion of this Brief (*see*, pp. 12-19, *supra*), including the “purse-strings” powers and prerogatives which under our Constitution and Laws are vested solely in the **Executive** and **Legislative** (and **not Judicial**) branches of government. Specifically, as we have seen, it is the constitutional responsibility of the Governor to prepare a budget report and draft of a general appropriations bill, and that of the General Assembly to make the final decisions as to what budget objects receive how much money in its appropriations bills. *See*, pp. 12-21, *supra*.

There are many reasons why the “budget formation/appropriation process” is placed exclusively in the hands of the Governor and General Assembly and not the courts. One is the obvious fact that funding objects and levels of funding, whether for education or anything else, are quintessentially **political** rather than legal determinations. It is hard to think of anything more fraught with the necessity of making debatable political decisions than issues of appropriate funding levels and the best allocation of tax burdens between State and local government for particular services or programs. Such things go to the root of social, economic and political

philosophy. How much money is “enough,” “sufficient,” or “adequate,” at least when it is beyond the minimum of schools being open and children being taught the basics, is at least as apt as “beauty,” to be in the eyes of the beholder. Even from a viewpoint of pure educational theory, different models of education have different price tags. Also, is it to be a very basic, “no frills” education, or does “adequacy” mean something more?

When one descends from pure academic theory to the real world of what the Governor and General Assembly must face in trying to decide on what funding level is adequate in the context of competing governmental programs and needs, and always in the harsh reality of funds available, the picture is more complex, and more obviously a political determination as opposed to something which can be achieved by a computer printout or abstract educational (or legal) theory. The Supreme Court of Florida, in reviewing the matter of educational adequacy in light of a constitutional background quite similar to that of Georgia’s, took note of these political value judgments as to spending priorities, and recognized the obvious when it concluded that granting the “more money” relief demanded would require the Court not only to ignore the “separation of powers” provision of Florida’s Constitution, but:

“To usurp the exercise of the appropriations power allocated exclusively to the Legislature under our Constitution.”

See Coalition for Adequacy and Fairness in School Funding v. Lawton Chiles, Governor of the State of Florida, 600 So.2d 400, 407 (1996).

Respectfully, there is no way in which the “more money” relief Plaintiffs seek in this case can in the final analysis be granted short of the Court unlawfully seizing and exercising control over Georgia’s budget formation/appropriation process and usurping political prerogatives which under our Constitution are visited exclusively in the Governor and General Assembly of Georgia.

IV. There is a want of *constitutional* (i.e., “case or controversy”) subject matter jurisdiction over Plaintiffs’ action in that Plaintiffs are multiple reasons without jurisdictional “standing” to maintain the action they present against the parties they name as Defendants.

[A] Case or Controversy

Article III, Sec. II of the United States Constitution limits the exercise of the judicial power of federal courts to “cases and controversies.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Constitution of the State of Georgia does essentially the same thing, limiting the exercise of subject matter jurisdiction by our Superior Courts to “cases,” Ga. Const. (1983), Art. VI, Sec. IV, Par. I, which our appellate courts have defined in the same manner as federal courts construing Article III. *E.g., In the Interest of I.B., a child*, 219 Ga. App. 268, 269 (1995) (“cases are live disputes, actual controversies”). As opined in *Norman Enterprises, Interior Design*

Inc. v. DeKalb County, 245 Ga. App. 538, 543 (2000), where the Court expressly concluded that there was *a want of subject matter jurisdiction over the claim presented*:

“There is no question that a trial court [or an appellate court] cannot issue advisory opinions. Throughout Article VI of the Georgia Constitution, jurisdictional authority is given over cases. *Cases are live disputes, actual controversies*. Not even in a declaratory judgment action is the court permitted to enter an advisory opinion. The Declaratory Judgment Act itself makes that plain by allowing only in *cases of actual controversy* what might otherwise be considered advisory opinions.”

(Emphasis added).

[B] Standing

At the very heart of the “case or controversy” requisite of both our federal and State constitutions, is the concept of “standing,” which has to do with the ability of a complainant to maintain the action he asserts (or of any particular issue presented) against the person or entity he sues. *E.g., Warth v. Seldin*, 422 U.S. 490, 498-499 (1975). “Standing,” which if not the same as, certainly overlaps greatly with, considerations of “justiciability,” comes in two packages, *prudential* and *jurisdictional*. *E.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Warth v. Seldin, supra*. ***Prudential “standing”*** relates to the judiciary’s self-imposed restraint on the exercise of its power, as for example, adherence to the rule that a plaintiff ordinarily

must assert his own rights, and cannot rest his claims to relief on the rights or interests of third parties (*e.g.*, *Warth v. Seldin*, at 499), or, with respect to those generalized citizenship grievances which are more appropriately addressed, often because of their political nature, to the non-judicial branches of government. *E.g.*, *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 475 (1987).

Jurisdictional “standing” goes to the very judicial power of a court to entertain an action. It is embedded in the fundamental separation of powers principles which are at the heart of the “Case or Controversy” requirements of our United States and State of Georgia constitutions. In both our federal and State systems, “standing,” in its *jurisdictional* sense, requires more than the mere existence of some disagreement or dispute about something between the plaintiff and the defendant—there must be a ***justiciable*** dispute over the specific claim the plaintiff asserts. *See Tucker v. Phyfer*, 819 F.2d 1030, 1034 (11th Cir. 1987) (“the plaintiff and the defendant must have a justiciable dispute over the *specific claim* the plaintiff asserts”); *In the Interest of I.B., a child*, 219 Ga. App. 268, 269 (1995) (“The role of the judiciary is to address justiciable cases”).

As developed over the past thirty years by a substantial number of United States Supreme Court decisions, the bedrock and irreducible

constitutional requirements of “case or controversy” jurisdiction which a plaintiff must show are:

FIRST: That the plaintiff has suffered, or is in imminent danger of incurring, an **injury in fact**,

SECOND: A “**causal connection**” exists between the injury asserted and the complained of conduct *on the part of the defendant*, and

THIRD: That the complained of injury would be likely to be “**redressed**” by a favorable decision *as to the defendant in question*. See, e.g., *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103 (1998).

Looking at each in turn, we think it doubtful that Plaintiffs meet the first, but in any event they clearly fail to meet the second or third requisites of jurisdictional standing.

1. **“Injury in Fact”**

The requisite “injury in fact” must be first of all *concrete and particularized* not “abstract,” “conjectural,” or “hypothetical.” *Lujan, supra*, at p. 560; *O’Shea v. Littleton*, 414 U.S. 488, 494 (1974). As the party invoking the jurisdiction of the court, the plaintiff must show that the

claimed “injury” is particularized as to the plaintiff, that the injury affects him in a personal and individualized way. *Raines v. Byrd*, 521 U.S. 811, 819 (1997). As the Supreme Court of Georgia puts it in *Shanta v. Municipal Court of City of Atlanta*, 240 Ga. 280, 281 (1977):

“While in his amended complaint appellant urges that the City of Atlanta ordinances authorizing search and inspection of his property are unconstitutional on their face, the record shows that he was not charged under these particular provisions, **and therefore, has no standing to raise the issue in any court.**”

(Emphasis added). The “standing” requisite of the existence of a “substantial controversy, between parties having adverse legal interest,” if not actual, being of “sufficient immediacy,” as opposed to merely “anticipatory,” has also been applied by the appellate courts of Georgia. *Patterson v. State of Georgia*, 242 Ga. App. 131, 132-133 (2000).

The Plaintiffs cannot satisfy even this initial requisite (*i.e.*, a cognizable legal injury) of jurisdictional “standing.” The notion that anyone could have a right or entitlement to a General Assembly appropriation of any state funds, much less at some particular level, seems by itself to be somewhat breathtaking. And beyond that, certainly Plaintiffs point to nothing in the 1983 Constitution which mandates that the General Assembly provide any funding whatsoever for public education as a matter of *constitutional command* as distinct from *legislative policy*. As we have seen,

the only express constitutional mandate respecting the funding of a county's school system is that which falls upon the county itself under Ga. Const. (1983), Art. VIII, Sec. VI, Par. I. *See pp. 9, 39-42.* In sum, there is no legally cognizable right on the part of any Plaintiff to direct the General Assembly to increase the amount of its appropriation to that level which Plaintiffs think would cure the underfunding or lack of funding of the spending authorization act (QBE), of which they complain. The lack of a legally cognizable "injury" in and of itself defeats Plaintiffs' "standing," and hence the existence of *constitutional* (*i.e.*, "case or controversy") subject matter jurisdiction over their action.

2. Causal Connection

The second requisite for the existence of jurisdictional "standing" which a plaintiff must demonstrate to establish *subject matter jurisdiction*, is that there must be a causal connection between the injury and conduct complained of, or, in other words, a showing that the injury is fairly traceable *to the challenged conduct or action of the Defendants*. *E.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

As we have seen, the vesting of the responsibility, power, and discretion respecting the budget formation/appropriation process is placed exclusively in the Governor and the General Assembly, each of which

entities enjoys a virtual unfettered discretion as to what they include, and what the appropriate levels of funding for included terms will be in the State Budget and Appropriations Act. The Defendants against which and whom Plaintiffs have elected to proceed in this case manifestly have no control or veto power over the decisions of the Governor and General Assembly as to what is or is not funded in QBE, or as to the level of funding various QBE objects or programs will receive under the Budget and Appropriations Act. Even if a legally cognizable “injury” exists at all to satisfy the first requisite of jurisdictional “standing,” it is clear beyond dispute that no causal relationship exists between the inadequate funding which is at the base of Plaintiffs’ suit and any act or decision taking by or on the part of the Defendants against which and whom Plaintiffs seek to maintain their action.

3. Redressability

The third requisite of “standing” in its jurisdictional sense is that it must be “likely,” as opposed to merely “speculative,” that the plaintiff’s injury is capable of being “redressed” by a favorable decision *as to the defendant in question*. *E.g., Lujan, supra.* at 561.

Again, it seems perfectly obvious that the contended “not enough money” injury upon which Plaintiffs’ action is based cannot conceivably be redressed by any relief fashioned against the named Defendants, none of

whom have or exercise control over the budget formation and appropriation process which our Constitution vests **exclusively** in the Governor and General Assembly.

For all of the reasons stated, there is a plain want of **constitutional** (*i.e.*, “case or controversy”) subject matter jurisdiction over Plaintiffs’ action.

V. There is a want of “substantiality” respecting the legal issues Plaintiffs seek to present to the Court, both (1) facially, and (2) because these issues are foreclosed by the Supreme Court of Georgia’s decision in *McDaniel v. Thomas*, 248 Ga. 632 (1981), which independent of the just discussed jurisdictional “standing” bar precludes the existence of that actual “case or controversy” which is *sine qua non* to the existence of constitutional subject matter jurisdiction.

With respect to the **constitutional** (*i.e.*, “case or controversy”) requisite of subject matter jurisdiction discussed in the immediately preceding division of this Brief, it is, as is true of jurisdictional matters generally, substance, not form, which controls. It is not enough to simply assert the existence of a claim or controversy by setting forth some specious theory of recovery against a Defendant simply as a peg upon which to hang one’s jurisdictional hat. The Supreme Court of the United States has long required that for subject matter jurisdiction to exist, the question sought to be raised to create the constitutional “case or controversy,” must be

“substantial.” See, e.g., *ex parte Poresky*, 290 U.S. 30, 31-32 (1933); *McLucas v. De Champlain*, 421 U.S. 21, 28 (1975). This appears to be the rule followed by our appellate courts in Georgia which require that a controversy be actual, concrete and definite if it is to be “justiciable.” See, e.g., *In the Interest of I.B., a child*, 219 Ga. App. 268, 269-270 (1995) [expressly noting the analogy of federal Art. III “case or controversy” jurisdiction]. The legal question sought to be raised by a plaintiff may be unsubstantial either because (1) previous Supreme Court decisions have foreclosed the question and leave no room for any inference that the question sought to be raised against the defendant rises to the level of a *bona fide* “controversy” or (2) because the question is on its face obviously “without merit.” Respectfully, we think that Plaintiffs’ instant case lacks substantiality and would be properly dismissed for want of subject matter jurisdiction on both grounds.

[A] Supreme Court Foreclosure

The foreclosure of the issues Plaintiffs seek to present has previously been discussed in the context of *McDaniel v. Thomas* being *constitutionally binding* upon this Honorable Superior Court of Fulton County at pp. 25-32 of this Brief and is in all respects controlling as to the want of

“substantiality” of Plaintiffs’ attempt to raise these same issues in the present case.

[B] The Facial “Insubstantiality”

(1) “Adequacy”

Assuming that Plaintiffs are attempting to posit funding obligation on the General Assembly based upon the general provision of Art. VIII, Sec. I, Par. I that: “the provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia...and shall be provided for by taxation,” (*See Complaint*, ¶ 1), the argument and issue sought to be presented is facially unsubstantial under the various constitutional provisions outlined at pp. 6-10 of our Brief, which we submit are conclusive as to the fact that the means by which “the State” has carried out its responsibility has been directed by the very same constitutional in its vesting of the governance, maintenance, and taxation responsibility at the count level.

Mindful of the rule that constitutional provisions relating to the same subject matter are to be construed *in pari materia*, we would say that they can be harmonized without difficulty under this construction of the State having carried out its “adequate public education” obligation under the other provisions of the same 1983 Constitution which make public education in Georgia a function of county government. Were any irreconcilable conflict

to exist, of course, the earlier more generalized and prior in position Art. VIII, Sec. I, Par. I, would, under the familiar rules of construction that the specific controls over the general, and the later in position controls over the earlier, have to yield to the more specific and later in position constitutional direction making education a function of county government. For these reasons, we think that Plaintiffs' "adequacy" contentions are facially "unsubstantial."

(2) "Equal Educational Opportunity"

With utmost respect, we think that Plaintiffs' contention of an obligation on the part of the State to provide "equal educational opportunity" in all counties of the State is facially frivolous. Since the county organization, governance and control, along with a taxation obligation, is directed by the Constitution, the county-to-county wealth differences of which Plaintiffs complain are the inevitable result of the Constitution itself. As previously mentioned, this leaves Plaintiffs in the untenable position of contending that the Constitution is unconstitutional.

VI. The County Plaintiffs are all political subdivisions of the State of Georgia, and therefore lack “standing” to invoke the “equal protection” or “due process” clauses of the State or federal constitutions, much less “standing” to assert any right or entitlement to a particular level of General Assembly appropriations from the State Treasury. This same want of “standing” also applies to each and every individual Plaintiff since any rights they might have in the matter would be a derivative right (appertaining to the right of the counties) as opposed to any independent right on his, her or their own part. This too is fatal to the existence of subject matter jurisdiction.

We would agree that a discrete cost calculation proviso in a Spending Authorization Act as QBE, if it is violative of the “equal protection” clause, might be subject to judicial remedy through a *mandamus* action against the public official administering the Act. A *mandamus* action, which lies against public officials personally and not in their “ex officio” character, could be used to compel the official to make his calculations without giving effect to the specifically identified constitutionally defective provision. See *Stewart v. Davidson*, 218 Ga. 760 (1963). There is nothing we are aware of, on the other hand, which alters the general rule that:

“A county or municipal corporation, created by the legislature, does not have standing to invoke the equal protection and due process clauses of the State or federal Constitution in opposition to the will of its creator.”

City of Atlanta v. Spence, 242 Ga. 194, 195 (1978); accord *Caldwell v. Hospital Authority of Charleston County*, 248 Ga 887 (1982).

Since the claims presented by the individual Plaintiffs are plainly derivative (appertaining to the right of the counties to maintain their action) as opposed to any existing independent right on the part of any individual plaintiff, the want of jurisdictional “standing” on the part of the Plaintiff counties would apply equally to the Plaintiff individuals who sue because of the allegedly inadequate funding by the State for the support of their county school systems.

VII. The Complaint fails for multiple reasons to state a claim against any of the named Defendants upon which relief can be granted.

[A] The Prior Jurisdictional Motions

While dismissal motions for want of subject matter jurisdiction under Rule 12(v)(1), and for dismissal for failure to state a claim upon which relief can be granted under Rule 12(b)(6) are very different, they are not always mutually exclusive. Defendants respectfully submit that in the present case each of the above six dismissal motions predicated on a want of subject matter jurisdiction equally support dismissal under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

[B] Plaintiffs' Defective Constitutional Claims

It has long been the rule in Georgia that:

“In order to raise a question as to the constitutionality of a ‘law, at least three things must be shown: (1) the statute or the particular part or parts of the statute which the party would challenge must be stated or pointed out with fair precision; (2) the provision of the Constitution which it is claimed has been violated must be clearly designated; and (3) it must be shown that wherein the statute, or some designated part of it, violates such constitutional provision.”

Cooper v. The State, 277 Ga. 282, 284 (2003); *DeKalb County v. Post Properties, Inc.*, 245 Ga. 214, 218 (1980).

Under this rule it is perfectly clear that sweeping attacks on broad statutory enactments which fail to meet these requirements fail to present any question for a court’s decision. As stated over 50 years ago in *Flynn v. The State*, 209 Ga. 519, 522 (1952):

“in cases where the constitutionality of an act was challenged in its entirety, it has been said repeatedly by this court that the attack was not good and would consequently fail unless the act so challenged was invalid in every part for some reason alleged.”

In Plaintiffs’ prayer for relief, they seek a declaration that massive portions of QBE be declared “unconstitutional, and thus void and without effect.” *Complaint*, p. 59, ¶ 142. They enumerate: O.C.G.A. §§ 20-2-160 through 20-2-170 (Financing); 20-2-180 through 20-2-189 (Program Weights and Funding Requirements); 20-2-250 through 20-2-259 (Grants

for Educational Programs); 20-2-260 through 20-2-262 (Capital Outlay Funds); (Unfunded Programs and Activities); 20-2-212 through 20-2-214 and 20-2-216 through 20-2-220 (Conditions of Employment). Respectfully, we think it obvious that Plaintiffs' broad scale constitutional attack fails in all respects to meet the specificity requisites which the Supreme Court requires for constitutional issues to be properly raised. Plaintiffs constitutional attack on QBE should for this reason be dismissed for failure to state a claim upon which relief can be granted.

CONCLUSION

For all of the reasons stated, Defendants respectfully submit that their motions to dismiss are meritorious and ought to be sustained with Plaintiffs' action dismissed as prayed in the motions proper.

Respectfully submitted,

THURBERT E. BAKER 033887
Attorney General

DENNIS R. DUNN 234098
Deputy Attorney General

STEFAN RITTER 606950
Senior Assistant Attorney General

[Signatures continued next page]

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' **Brief in Support of Motions to Dismiss** 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 ___ day of November, 2004.

ALFRED L. EVANS, JR.
Senior Assistant Attorney General

APPENDIX

SCHOOL FUNDING DECISIONS ELSEWHERE

INCLUDING

THE MOST REMARKABLE ADVENTURES OF

THE STATE OF ALABAMA

One of the most commonly cited decisions in favor of the Plaintiffs in contemporary school “funding” litigation is *Rose, President Pro Tempore of the Senate, et al. v. The Council for Better Education, Inc., et al.*, 790 S.W.2d 186 (1989). To put the matter in context, Kentucky’s school organization appears to be of the “Northwest Ordinance” model, where unlike Georgia public education is a State as opposed to county function. As the Supreme Court of Kentucky explained:

“a school district is nevertheless, an agency of the state subject to the will of the legislature and existing for one public purpose only—to locally administer the common schools within a particular area subject to the paramount interest of the state.”
Id. at p. 200.

The pertinent constitutional provision of Kentucky places responsibility for providing for public education directly on **the state legislature**. The constitutional provision upon which *Rose* was decided was Section 183 of the Kentucky Constitution which states that:

“The General Assembly shall, by appropriate legislation, provide for *an efficient system of common schools throughout the state.*” *Id.*, at p. 200 (emphasis added).

Even with this “education as a State function” starting point, the “judicial activism” of the Supreme Court of Kentucky’s decision seems quite extraordinary, and certainly is in stark contrast to the United States

Supreme Court's decision in *Rodriguez*.⁸ First of all, the Court took the language of Section 183 about "appropriate legislation" to "provide for an efficient system of common schools throughout the state" not as a constitutional goal towards which the legislative branch of government should strive, but rather as a constitutional mandate, and beyond that a constitutional mandate under which the courts could enforce "education quality standards". *Id.* at p. 210. The Court concluded that "Courts may, should and have involved themselves in defining the standards of a constitutional mandated educational system." *Id.*, at p. 210. Instead of the normal process of having task forces and groups of "educational experts" presenting their views for the considered opinion of and evaluation by, legislative committees, leading to the legislature's determination of the appropriate funding level with due regard for the funding needs of other governmental activities, not to mention funds available and constitutional debt limitation provisions, the Court, thought it acceptable for the same sort of opinion, expert educator or otherwise, to be viewed by a trial court as "evidence." *Id.*, at p. 189. As one would readily anticipate, the testimony of educator "experts" in the abstract, divorced from the real world of competing needs and limited funds, about what they think public education

⁸ *San Antonio School District v. Rodriguez*, 411 U.S. 1(1973).

ought to be doing, led the trial court to find, and the Supreme Court of Kentucky to affirm that public education in Kentucky was greatly “underfunded”. *Id.*, at p. 197. The trial court held, and the Supreme Court of Kentucky affirmed, that Kentucky’s General Assembly was constitutionally required to “provide funding which is sufficient to provide each child in Kentucky an adequate education.” *Id.* at p. 213. The Kentucky Supreme Court, gave short shrift to the defendants’ argument of “separation of powers” and the legislative prerogative concerning raising taxes, and spending levels, and its power to enact legislation specific as to the handling of particular aspects of public education. It simply opined that in Kentucky education was “a fundamental right,” and in essence that “separation of powers” along with the prerogatives of the legislative branch of government, were all trumped by the doctrine of “judicial review.”

As in other cases decided in favor of the Plaintiffs, the Kentucky Courts have avoided, or at least postponed, the constitutional crisis of direct confrontation between the Legislative and Judicial Branches of Government, by casting the initial judicial remedy as one of declaratory relief only, with a pious recitation that the legislative branch of government will undoubtedly accept the judicial declaration and “proceed with their duty” to enact legislation, levy taxes, and appropriate additional funds which in the eyes of

the judicial (as opposed to legislative) branch is “enough” or “sufficient.” *Id.* at p. 214. Whether state legislatures will supinely submit to a judicial takeover of their traditional legislative prerogatives and control over appropriate levels of taxation and funding remains, of course, a very “open question.” The **dissent** in the Kentucky decision deemed it to be completely outside the province of the court to interfere with legislative discretion as to the level of school funding, and that “the doctrine of separation of powers prohibits judicial interference with legislative prerogatives.” *Id.*, at p. 221. Ridiculing the majority opinion’s infatuation with abstract “quality standards”, the dissent points to the impossibility of the General Assembly knowing whether or not legislation would enable a student “to appreciate his cultural or historical heritage,” concluding that it would likely end up being the courts rather than the legislature which would have to be monitoring the common school system. *Id.*, at p. 223. Opining that the majority decision “exceeded the judicial power vested” in the Courts as well as the doctrine of “separation of powers,” was “caught up in a rush of judicial activism”, and had departed from the traditional concept of “*justiciability*” under which the power of judges pertains only to “legal” as opposed to “political,” decision making, the dissent concluded that:

“Our majority opinion is fundamentally unsound, not because there is no problem but because the case does not present issues

capable of judicial resolution. We have now become a part of the problem when we intend to be a part of the solution.” *Id.*, at pp. 228-229.

Although appearing to be somewhat in the minority of decisions rendered, it is unquestionably true that a number of other State Supreme Courts have followed the reasoning of the majority in *Rose*. See, e.g., *Campbell County School District, et. al. v. State of Wyoming*, 907 P.2d 1238 (1995); *Abbeville County School District, et al. v. The State of South Carolina, et al.*, 335 S.C. 58; 515 S.E.2d 535 (1999), and in a Court of some note respecting its recent “judicial activism” in other areas, a decision of the Supreme Judicial Court of Massachusetts, in *McDuffy v. Sec. of the Exec. Office of Education*, 415 Mass. 545, 615 N.E.2d 516 (Mass. 1993).

A typical decision in favor of the Defendants, and one which reached its conclusion in a factual setting which reflects a high degree of similarity to that of Georgia, is that of 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.*, 600 So.2d 400 (1996). In that case the Supreme Court of Florida reviewed a decision of the trial court which had dismissed Plaintiff’s complaint, largely on the ground that to grant relief the trial court “**would have to usurp or intrude upon the appropriation power exclusively reserved to the legislature.**” *Id.*, at p. 402, n.2. The

Supreme Court of Florida affirmed *per curiam*. It reviewed the matter of educational adequacy under the Florida Constitution, which provided in Article IX, Sec. 1, that:

“Adequate provision shall be made by law for a uniform system of free public schools and for the establishment, maintenance and operation of institutions of higher learning and other public education programs that the needs of the people may require.”
Id., p. 405.

The Florida Supreme Court concluded that to decide such abstract questions as whether funding is or is not constitutionally “adequate,” the courts 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.** While Plaintiffs assert that they do not ask the Court to compel the Legislature to appropriate any specific sum, but merely to declare that the present funding level is constitutionally inadequate, what they seek would nonetheless require the Court to pass upon those legislative value judgments which translate into appropriations decisions. And if the Court were to declare present funding levels “inadequate,” presumably the Plaintiffs would expect the Court to evaluate, and either affirm or set aside future appropriations decisions...Accordingly, the Court declines to interpret Article IX, Section 1, of the Florida Constitution as Plaintiffs urge. That clause must be read in *pari material* with the rest of the Constitution. The Court declines to read it in a manner **which allows the judiciary to usurp the exercise of the appropriations power allocated exclusively to the Legislature under our Constitution...**the separation of powers provision of the Florida Constitution, Article II, Section 3, clearly prevents this court from granting the relief sought by Plaintiffs.” *Id.*, at p. 407.

In expounding upon the “separation of powers” doctrine, the Florida Supreme Court agreed with the position of the State Defendants that any judicial intrusion into the appropriations prerogative under the Florida Constitution “**would involve usurping the legislature’s power to appropriate funds for education.**” *Id.*, at p. 407. We believe that The Supreme Court of Florida’s decision in “*Coalition for Adequacy*” represents both the better reasoning and the weight of authority. *See, The Committee for Educational Rights, et al. v. Edgar, Governor of the State of Illinois, et al.*, 174 Ill.2d 1; 672 N.E.2d, 1178 (1996) [The Supreme Court of Illinois, under State constitutional provisions giving the State the primary responsibility for “financing the system of public education,” and for providing “an efficient system of high quality public educational institutions and services”, held that these provisions did not render disparities in education funding which resulted from differences in local property wealth, unconstitutional, and that the question of whether education was of “high quality” was an issue almost exclusively within the province of the legislative branch of government, citing “separation of powers”; *School Administrative District No. 1, et al. v. Commissioner, Department of Education*, 659 A.2d 854 (1995) [Supreme Judicial Court of Maine: notwithstanding critical importance of education, the level of state fiscal

support is largely a matter for the legislature, and the wisdom of funding reductions is a matter for the Legislature and not the Court]; *Scott v. Commonwealth of Virginia*, 247 Va. 379; 443 S.E.2d 138 (1994) [Virginia: General Assembly has the ultimate authority for determining and prescribing “standards of quality” for public schools].

Two State Supreme Courts decisions rejecting the “activist” approach are worthy of special mention. In *City of Pawtucket, et al. v. Bruce Sundlun, et al.*, 662 A.2d 40 (1995), the Supreme Court of Rhode Island, in its reversal of a trial court’s decision which adopted the standards of “adequacy” enunciated by the Supreme Court of Kentucky in *Rose*, and by the Supreme Judicial Court of Massachusetts in *McDuffy*, in addition to its reliance upon “separation of powers,” was of the view that the Legislature of Rhode Island was “endowed with *virtually unreviewable discretion* in this area”, and that the “plaintiffs should seek their remedy in that forum, rather than in the courts.” *Id.*, at p. 57. Pointing to what can happen when a court “takes on the duties of a Legislature” in attempting to define such abstractions as a “thorough and efficient education” in a state’s Constitution, it noted that once the New Jersey Supreme Court took over “its self-appointed role as overseer of education” in *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d, 273 (1973), the absence of “justiciable standards” had resulted in

a continuing involvement [what is “adequate” today is not necessarily what is “adequate” tomorrow], consuming funds, fees, time, effort and court attention for more than twenty-one years, and continuing. *Id.* at p. 59.

The Most Remarkable Adventures of The State of Alabama

Also worthy of some review are the remarkable adventures of the Supreme Court of Alabama in connection with its lengthy litigation over a constitutional attack upon an alleged denial of **equitable** and **adequate** educational opportunities in that state. In 1993, the circuit court for Montgomery County, Alabama, in *Alabama Coalition for Equity, Inc., et al. v. Guy Hunt, in his official capacity as Governor, et al.*, listening to the testimony of nationally prominent “school finance experts”, found the level of spending on education in Alabama to be “inadequate,” and citing the decision of the Supreme Court of Kentucky in *Rose*, concluded that the doctrine of judicial review authorized that trial court to review and determine whether the Alabama Legislature was providing sufficient funding for public education, which the trial court held to be “a fundamental right” under the Alabama Constitution. *See* Appendix II “Opinion of the Justices,” 624 So.2d 107 (115-116, 124, 144-145 (1993)). The case when first brought, had the aroma of a “sweetheart suit”. The State School

Superintendent and all members of the State Board of Education, along with others, including the Speaker of the House and Lieutenant Governor, promptly indicated they were really on the side of the Plaintiffs, and sought and obtained realignment as parties plaintiff. *See*, "Opinion of the Justices," 624 So.2d 107, 111 (1993).⁹

The absence of what appeared to be any real adversarial parties ended up with the case not being appealed. What did happen was a request for an advisory opinion by the Alabama Legislature (permissible in some situations under Alabama law). The *pro forma* answer of the Supreme Court of Alabama was that the Legislature was required to follow the Order of the Circuit Court of Montgomery County. *Opinion of the Justices*, 624 So.2d 107, 110 (1993).

When Governor Hunt was convicted of a felony and removed from office in 1993, the first new Governor, John Folsom, Jr., was succeeded by Governor Fob James in the November 1994 election who took a very different view from his predecessors on the liability order of the trial court. He filed a *writ of prohibition* which would have directed the trial court to vacate both the liability order and the remedy order. The Supreme Court of

⁹ State Agency Officials and Boards are not invariably opposed to funding suits against the State or its Agency when "losing" will mean a substantial increase in appropriations.

Alabama denied the petition on the ground that since the liability decision of the trial court had not been appealed, it was a final order which was no longer appealable. *Pinto v. Alabama Coalition for Equity, et al.*, 662 So.2d 894, 898 (1995). In *Pinto*, which also permitted intervention by “taxpayers and citizens”, a concurring opinion expressed skepticism over the want of an appeal, and also raised questions as to the legitimacy of the entire litigation, including the trial court’s liability determination, noting that the power to tax was a legislative and not a judicial power. *Id.*, at p. 902.

In September, 1995, the Governor and Attorney General jointly moved the trial court to vacate its orders relating both to the liability phase and remedy plan, and to dismiss the action for want of subject matter jurisdiction. The motion was denied. On appeal, the Supreme Court of Alabama continued to view the trial court’s March 31, 1993 Order to be final, thereby upholding the trial court’s reasoning that the doctrine of “judicial review” trumped “separation of powers”. *Ex parte Governor Fob James*, 713 So. 2d 869, 879 (1997). But at the same time the Supreme Court concluded that while the trial court did have the power to implement a remedy plan, that power was abused by the trial court in not providing the coordinate branches of government the opportunity to act unilaterally, expressing its confidence that both coordinate branches would hasten to

discharge their duties to fashion a remedy consistent with the judgment in the liability phase. *Ex parte Governor Fob James*, 713 So.2d 869, 882 (1997).

In a strongly worded dissent, Chief Justice Hooper said that it appeared to him that the want of any appeal in litigation of this magnitude made the Liability Order “sham litigation”, which allowed a lower court “activist” judge to inflict enormous damage upon the State *sans* any judicial review of the merits of his action. *Id.* at pp. 895-897. Viewing the litigation to run afoul of both the “separation of powers” clause of the Alabama Constitution and the basic “*non-justiciability*” of the State’s school funding and its “adequacy” or lack of “adequacy,” the Chief Justice said:

“Thus, the Legislature has the sole responsibility for deciding how much money to spend on education. The Legislature must do so in the context of the limited financial resources of this state and every other service the state must provide. If the principle of equitable funding applies to education, why should it not also apply to the provision of police and fire protection to each county? The police power of the state existed before the Alabama Constitution of 1901. The Legislature must make policy decisions as to how high taxes should be and what departments receive what resources. The courts cannot make these types of policy choices without becoming a ‘super legislature.’” *Id.*, at p. 904.

When other issues in the same equity funding case were subsequently brought before the Supreme Court of Alabama, including an attack on the Governor’s *pro-rata* cut in funding to comply with the debt limitation

provisions of the Alabama Constitution, the Supreme Court of Alabama entered an Order vacating a relatively insignificant December 19, 1997 remand orders and asked the parties to present briefs on whether the trial court's March 31, 1993 Order was in fact a final appealable order. *See, Ex parte Governor Fob James, et al.*, 836 So. 2d 813, 818 (2002). Following its receipt of this "limited" briefing, the Supreme Court of Alabama decided in essence that "enough was enough" respecting the Court's engagement in a role reserved for Alabama's Legislature. Citing the "separation of powers" command of the Alabama Constitution which it hadn't paid much attention to the earlier decisions, the Court now held that what had become known as the "Equity Funding Case" had reached its end, that the duty to fund Alabama's public schools was a duty that for over 125 years the people of Alabama had rested squarely upon the shoulders of the Legislature, and that it was the Legislature, not the courts from which any further redress ought to be sought. *Id.*, at p. 815. While continuing to find a distinction between "separation of powers" respecting the finding of "liability", and in the application of a "remedy," the majority of the Court opined that in descending from the abstract to the concrete it was clear that any specific remedy that the judiciary could impose, in order to be effective, would

“necessarily involve a usurpation of that power entrusted exclusively to the legislature.” *Id.*, at p. 819.

Chief Justice Moore actually dissented in part, not because he disagreed with dismissal of the case, but because he thought the majority opinion did not go far enough. In his view the trial court never had subject-matter jurisdiction over the original complaints in the first place, and therefore every act the trial court took was illegal and void. *Id.*, at p. 841. Chief Justice Moore opined that any attempted distinction between the “liability” phase and the “remedy” phase for purposes of judicial review of funding “adequacy”, was a false distinction. As Chief Justice Moore put it:

“The liability and the remedy are not analytically distinct. It is impossible to know that an education system is deficient (*i.e.*, that there is liability), unless the judge has determined that a constitutional right to an education requires a certain quality of education (*i.e.*, a remedy). For example, a court could not have known that teachers are not being paid an adequate salary (liability) unless the court had already determined what the Constitution requires as to teacher’s salaries (remedy).” *Id.*, at p. 861.

As Chief Justice Moore saw it:

“Under our Constitution, the power over public education belongs to the Legislature and not the courts. An attempt to usurp that power by the judicial branch is a fundamental breach of the separation-of-powers doctrine and an improper subject of the court’s jurisdiction.” *Id.*, AT P. 845.

