

**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, *et al.*,**

**Plaintiffs,**

**v.**

**THE STATE OF GEORGIA, *et al.*,**

**Defendants.**

**PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS'  
MOTIONS TO DISMISS PLAINTIFFS' COMPLAINT**

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TO DISMISS PLAINTIFFS' COMPLAINT**

**I. INTRODUCTION**

The claims asserted in this case arise from and revolve around Article VIII, Section I, Paragraph I of the Georgia Constitution of 1983<sup>1</sup> which provides:

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

As alleged in the Complaint, Defendants' breach of their constitutional obligations under Article VIII, Sec. I, Par. I has caused, and is causing, children in the Plaintiff and Consortium Districts to suffer grave educational and life-long harm. The Complaint sets forth in detail the

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<sup>1</sup>A copy of Article VIII of the 1983 Constitution, as ratified by the voters is found at Exhibit 1 ("Exh.1"). (The Exhibit numbers reference the exhibits included in the separately filed "Exhibits In Support of Plaintiffs' Brief in Opposition To Defendants' Motions to Dismiss.")

manner in which the constitutionally inadequate and arbitrarily constructed school funding system operates. Finally, Plaintiffs allege and demonstrate with concrete and shocking data how the system results in woefully inadequate educational opportunities that are not reasonably calculated to enable students in the Plaintiff and Consortium Districts to meet minimum state proficiency standards, to function as productive members of society, or to advance through higher education.

Count I of the Complaint alleges that the State of Georgia's system for funding public schools violates the rights of Plaintiff Students, children enrolled in the Plaintiff School Districts and the Consortium School Districts, to obtain an adequate education guaranteed them by Article VIII, Section I, Paragraph I of the Georgia Constitution. Plaintiff School Districts and the Consortium School Districts further claim that the State's school funding system has prohibited their board members and officers from fulfilling their constitutional and statutory responsibilities and obligations to provide their students the constitutionally mandated adequate education.

Plaintiffs allege in Count II that the State of Georgia's school funding system deprives them of an equal opportunity to obtain an adequate education guaranteed by Georgia's Constitution, statutes and regulations in violation of the equal protection provision of the Georgia Constitution, Article I, Section I, Paragraph II.<sup>2</sup>

Plaintiffs seek a declaratory judgment that, based upon the State's breach of its constitutional obligations under Art. VIII, Sec. I, Par. I, students enrolled in the public schools in the Plaintiff and Consortium School Districts receive an education that falls below the

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<sup>2</sup>Article I, § I, ¶ II provides: "Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws."

constitutionally mandated "adequate public education" that the State of Georgia is obligated to provide to the children of those districts and that, based upon Art. I, Sec. I, Par. 1., they are thereby denied an equal opportunity for an "adequate public education."

The State has moved, pursuant to Rule 12(b)(6), Civil Practice Act, to dismiss both the "adequacy" and equal protection counts on the grounds that these counts fail to state a claim upon which relief may be granted. Defendants make two primary substantive arguments in support of dismissal. First, they argue that the requirement of Art. VIII, Sec. I, Par. I, which states that "[t]he provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia," does not impose *any* constitutional obligation on the State to provide Georgia school children an "adequate public education." Instead, Defendants ask this Court to construe that language, which specifically refers to the "State of Georgia," to mean that the provision of an adequate public education" shall be a primary obligation of only the County boards of education." Second, they argue that Plaintiffs' claims have been definitively decided adversely to Plaintiffs in *McDaniel v. Thomas*, 248 Ga. 632 (1981). Defendants also raise a laundry list of other, largely procedural, objections including sovereign immunity, separation of powers, lack of case or controversy and standing.

Defendants' Motions to Dismiss Plaintiffs' 60-page Complaint are utterly without merit and should be denied. In summary, Plaintiffs demonstrate in this brief:

(1) The claims asserted in this lawsuit are plainly not barred by the terms of the Supreme Court's decision in *McDaniel v. Thomas*, *supra*. Plaintiffs' Brief ("Pl. Br."), Section IV. A..

First, *McDaniel* unequivocally held that claims to enforce the State's obligation to provide an adequate education are "justiciable" in Georgia courts. *McDaniel*, 248 Ga. at 633. Second, while the Court ruled adversely to the Plaintiffs' claims on the merits in that specific

case, it recognized that an actionable constitutional “adequacy” claim could potentially be asserted against the State upon presentation of strong evidence “to show that existing state funding for public education deprives students in any particular school district of basic educational opportunities. . . .” *McDaniel*, 248 Ga. at 644. Plaintiffs’ Complaint alleges precisely such facts.

Additionally, the equal protection claims asserted in this action are distinctly different from the school district comparative wealth disparity claims asserted in *McDaniel*. Plaintiffs’ claims here are premised upon the fundamental contention that when the State’s obligation is met for some of Georgia’s children and breached as to other children, this creates an arbitrary, capricious and unlawful classification of children prohibited by Georgia’s equal protection provision.

(2) Plaintiffs state a cognizable and valid claim against the State for breach of its “primary” constitutional obligation to provide an adequate education under Art. VIII, Sec. I, Par. I of the Georgia Constitution. The State’s attempt to distort and convert the obvious and straightforward meaning of this constitutional provision so as to absolve itself of all responsibility under the Constitution (and shift such responsibility exclusively to county school districts) runs completely contrary to the golden rule of constitutional and statutory construction – the “plain meaning” rule. *Telecom\*USA, Inc. v. Collins*, 260 Ga. 362, 363-364 (1990). Defendants have failed to satisfy the fundamental prerequisite for proper reliance on the “*in pari materia*” rule argued in their brief -- ambiguity in the provision under consideration. Furthermore, clear and compelling evidence of the constitutional framers’ intent and the history of the Constitution’s Education Clause completely undermine Defendants’ proposed tortured construction of the plain language of this paragraph. Finally, the Court’s holding in *McDaniel*

and state statutory and regulatory provisions can properly be relied upon to define the parameters of Plaintiffs' adequacy claim, as demonstrated by persuasive authority from other states' highest appellate courts. (Pl. Br., Sec. IV. B.)

(3) Plaintiffs assert cognizable equal protection claims. (See paragraph (1) above and Pl. Br., Sec. V.)

(4) Plaintiffs' claims are not barred by sovereign immunity.<sup>3</sup> This action for declaratory and injunctive relief against the State is squarely authorized by the Georgia Supreme Court's decision in *IBM v. Georgia Dept. of Admin. Servs.*, 265 Ga. 215 (1995). (Pl. Br., Sec. VI. A.)

(5) Plaintiffs' claims do not usurp the legislative or executive function and are justiciable. *McDaniel* 248 Ga. at 633. The fact that a Court's resolution of a constitutional or statutory claims may entail political or financial ramifications for the legislative branch of government does not render a claim non-justiciable. *See, e.g., Employees' Retirement System of GA v. Martin*, 272 Ga. 535 (2000) (See Pl. Br., Sec. VI. B.)

(6) Plaintiffs' allegations satisfy all the requirements to establish standing and "case" and "controversy." (Pl. Br., Sec. VI. C. and D.)

The Complaint's allegations clearly satisfy Georgia's "notice pleading" requirements<sup>4</sup> and are well within the broad pleading parameters for declaratory judgment actions raising issues of significant public interest.<sup>5</sup>

Finally, Plaintiffs call to the Court's attention several basic facts regarding the nature of

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<sup>3</sup>Def. Br. pp.32-34.

<sup>4</sup>See, Civil Practice Act, O.C.G.A. § 9-11-8.

<sup>5</sup>See, Declaratory Judgment Act, O.C.G.A., § 9-4-1.

Their claims and relief sought and rebut several misleading contentions asserted in Defendants' Brief. Contrary to Defendants' representations --

(1) Plaintiffs *do not* seek money damages ("more money") as a remedy. Instead they seek a Court declaration of the parties' constitutional rights and obligations with regard to Georgia's system of public education.<sup>6</sup>

(2) Plaintiffs *do not* seek a declaration and order that raise a separation of powers issue. Instead they seek a declaration that the public education delivered to Plaintiffs is constitutionally *inadequate*, and an order that Defendants take basic remedial action, but that leaves the details of a constitutionally compliant system to the legislative and executive branches of government.<sup>7</sup>

(3) Plaintiffs *do not* claim money damages for injury-in-tort caused by any State Defendant entitled to "sovereign immunity." Instead they seek declaratory and equitable relief from Defendants' infringement of Plaintiffs' constitutional rights, an action which does not fall within the doctrine of "sovereign immunity."

(4) Plaintiffs *do not* raise frivolous "insubstantial" claims. Instead they raise constitutional claims that by definition are substantial and justiciable.<sup>8</sup>

## **II. SUMMARY OF FACTUAL ALLEGATIONS**

For purposes of considering Defendants' motion to dismiss, the facts as alleged in

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<sup>6</sup>Def. Br., pp. 2, 3, 5, 14, 19, 21.

<sup>7</sup>Def. Br. pp. 34-37.

<sup>8</sup>Def. Br. pp. 44-48.

Plaintiffs' Complaint must be taken as true. O.C.G.A. § 9-11-12 (b) (6); *Lathem v. Hestley*, 270 Ga. 849, 850 (1999)

Plaintiffs in this case include the parents and guardians of 32 children enrolled in five Plaintiff School Districts that share similar low property wealth and the low income characteristics. (Complaint, ¶¶ 2-4, 33, 38, 65-125.) The Plaintiff School Districts -- the Ben Hill County School District, Brantley County School District, Elbert County School District, Lamar County School District, and Murray County School District -- are located in almost every region of the State. The Consortium for Adequate School Funding in Georgia, Inc. ("Consortium") also brings this lawsuit in its capacity as a nonprofit corporation consisting primarily of Georgia school districts adversely affected by the constitutional deficiencies alleged in the Complaint and dedicated to securing adequate funding to ensure that Georgia schools can meet the educational needs of their students. (Complaint, ¶¶ 4, 65-125.) The Plaintiff and Consortium Districts are primarily low property wealth and income districts serving student populations that include high proportions of disadvantaged children requiring significant educational resources and interventions. (Complaint, ¶¶ 65-125).

Defendants include the State of Georgia, the State School Superintendent, the State Board of Education and its members in their official capacities. The State Superintendent and Board of Education and members are constitutional officers charged with the responsibility for execution and administration of the State's educational programs, policies and funding. (Complaint, ¶ 5.) The State Board of Education is specifically required by law to "establish and enforce standards for operation of all public elementary and secondary schools and local units of administration in this state so as to assure, to the greatest extent possible, equal and quality educational programs, curricula, offerings, opportunities, and facilities for all of Georgia's

children and youth. . . .” (O.C.G.A. § 20-2-240; Complaint, ¶ 5.)

Plaintiffs allege that students in the Plaintiff school districts and in the Consortium school districts have been denied their constitutional right under Article VIII, Sec. I , Par. I to an adequate public education. Plaintiffs assert that as a result of the Defendants’ failure to implement a rational and reasonable funding system (pursuant to O.C.G.A. § 20-2-130 *et seq.*) that fulfills the State’s “primary obligation” to provide an adequate education under Article VIII, students in the referenced districts are deprived of an education that meets the core fundamental requisites for a constitutionally adequate education. (Complaint, ¶¶ 2, 3, 23-64, 67-125.) Similarly, Plaintiff school districts as well as other Consortium member districts allege that they are unable to provide students with the educational resources, staff, facilities, and interventions necessary to enable them to fulfill their duty to provide enrolled students with an education that meets the floor of constitutional adequacy guaranteed by the Georgia Constitution. *Id.*

A constitutionally adequate education, as alleged by Plaintiffs, prepares students to function as responsible citizens in a democracy and to compete in society on an equal footing both to find productive employment and to qualify for and advance through higher education. Georgia legislation equates an “adequate” education with a “quality basic education” in order “to discharge the responsibilities and obligations of the State to ensure a literate and informed society” and to produce individuals who can function in society based upon their development of “essential competencies.” *See, e.g.*, O.C.G.A. § 20-2-131 (1) and (20). (Complaint, ¶¶ 15, 16, and 17.)

In the past two decades, Georgia has expressly defined standards of an adequate education through legislation as well as regulations and policies adopted by Defendant State Board of Education. The General Assembly has articulated these standards both in terms of

broad standards for students' instructional achievement as well as in specific requirements that the State Board of Education establish competencies that each student is expected to master prior to graduation through a sequenced core curriculum. O.C.G.A. §§ 20-2-140, 20-2-151.

(Complaint, ¶¶ 14-21.) Georgia school districts, schools, and students are held accountable for students' achievement of minimum levels of proficiency based on State standards and examinations such as the Georgia High School Graduation Test and other criterion referenced examinations. O.C.G.A. §§ 20-2-281, 20-14-33, 20-2-41. (Complaint, ¶¶ 101-103.) Georgia students must pass the Georgia High School Graduation Test in order to obtain a regular high school diploma. O.C.G.A. § 20-2--281. (Complaint, ¶ 104.)

The State of Georgia has established State standards that require “adequate yearly progress” toward 100% of students reaching proficiency on certain State academic measures, including reading and math assessments, by 2013-14 for schools and school districts that receive federal funds based upon high rates of economically disadvantaged students, including the Plaintiff and Consortium school districts. (Complaint, ¶¶ 106-107.) Schools and school districts are subject to a series of punitive measures by the State if they fail to meet these adequacy standards. (Complaint, ¶¶ 106-107.) Many students in the Plaintiff Districts and Consortium Districts, and in particular, high numbers of students who are “at risk” – e.g., low-income, English learner, special education, or ethnic minorities – are not able to meet these basic academic standards in the absence of substantial educational interventions on the part of school districts and are failing or not graduating from high school.<sup>9</sup> (Complaint, ¶¶ 106-112; 116-120.)

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<sup>9</sup>For example, 61% of 8<sup>th</sup> grade students in Plaintiff Lamar County failed the State mathematics proficiency exam in 2002-03, while the State average failure rate was 33%. (Complaint, ¶ 111b.)

The State's academic adequacy standards represent minimum standards, as opposed to higher national standards of proficiency. (Complaint, ¶¶ 106-107.) Similarly, high school graduation has been established as a recognized, fundamental yardstick for adequacy under mandatory State and federal standards. However, a shockingly high number of students in Georgia, especially in the Plaintiff and Consortium Districts, do not graduate from high school. (Complaint, ¶ 106.) For instance, the overall graduation rate in Murray County in the 2002-03 school year was 45% and only 38% for Hispanic students. In Elbert County, the overall graduation rate was 50% and only 33% for Black students. (Complaint, ¶114.)

In 1985 the State of Georgia adopted the Quality Basic Education Act (O.C.G.A. § 20-2-130, et seq.) as its chosen statutory mechanism for implementing the State's Article VIII obligations. In structure, the QBE Act was intended to identify the components for the public education programs and resources deemed essential for an adequate education, determine the cost necessary to provide each component, and provide the basis of implementation of the State's constitutional obligation to provide an adequate education to the children of Georgia. (Complaint, § 25.) As recognized by a series of Commissions appointed by the Governor and General Assembly, the rationality, adequacy, and equity of the QBE funding formula have been eroded by persistent failures to provide the needed comprehensive review, revision, and funding of the funding formula. (Complaint, ¶¶ 48-64.) The 1998 Blue Ribbon Study Committee Report thus noted that, "if state funds are not available to carry out QBE programs . . . the current problems related to adequacy and equity would become even more serious." (Complaint, ¶ 55.) As the Complaint sets forth in specific detail, funding allocation formulas for critical educational resources – ranging from staff, professional development, and textbooks to transportation, maintenance, and facilities – are arbitrary and irrational and not based upon the actual costs to

provide required services and instructional materials, much less an adequate education.

(Complaint, ¶¶ 30-43.)

The fundamental irrationality and inadequacy of the funding system, as currently implemented, has ultimately now stripped many school districts, particularly those with low wealth, of the ability to furnish students with a constitutionally adequate education. (Count I.)

Plaintiff Districts suffer from high rates of unemployment and high levels of poverty among their citizens. Most of the districts include a diverse range of students in terms of academic proficiency, primary language and racial/ethnic backgrounds as well as income levels.

Compared to the rest of the State of Georgia, a disproportionately high percentage of students in these districts are economically disadvantaged, with 50% or greater of their students being so classified. Plaintiff Districts also have relatively low levels of property tax base per student and are therefore unable to raise significant revenues from property taxes compared to more affluent school districts in the state. (Complaint, ¶¶ 33, 65, 67.)<sup>10</sup> Burdened by a deficient and irrational funding system, Plaintiff Districts lack sufficient trained staff, educational programs, services, instructional materials, equipment and facilities, and intervention programs to provide an adequate education to all their students, including the individual Plaintiffs. The Complaint alleges in great and precise detail the wide range of significant deficiencies that render the instructional programs in the Plaintiff districts and many other districts (including Consortium member districts) wholly inadequate both in terms of available resources (“inputs”) and actual student performance results (“outputs”). (Complaint, ¶¶ 65-125.)

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<sup>10</sup>Even if Plaintiff and Consortium Districts raised their tax rates to the 20 mill maximum permitted, the school districts would fall far short in revenues and resources to furnish a constitutionally adequate education for their students. (Complaint, ¶¶ 33-35, 65-100.)

As a result of the serious educational resource deficiencies alleged in the Complaint in the Plaintiff and other Consortium Districts, Plaintiff students suffer clear and palpable harm. They are denied the constitutionally adequate education guaranteed by Article VIII of the Georgia Constitution and receive a separate and inferior form of education than students in those high wealth school districts capable of providing a constitutionally adequate education by compensating for the major shortfalls in the State's funding system. (Counts I and II.)

**III. THE COMPLAINT SATISFIES THE LIBERAL PLEADING REQUIREMENTS OF GEORGIA'S CIVIL PRACTICE ACT, O.C.G.A. § 9-11-8, AND DECLARATORY JUDGMENT ACT, O.C.G.A. § 9-4-1.**

In Georgia, "pleadings serve only the purpose of giving notice to the opposite party of the general nature of contentions of the pleader". *DeKalb County v. Georgia Paperstock Co.*, 226 Ga. 369, 370 (1970). The Civil Practice Act, O.C.G.A. Sec. 9-11-8, reflects the following principles: (1) pleadings shall be construed to do substantial justice, that is, that they be liberally construed in favor of the pleader; (2) the plaintiff need not allege a cause of action but only sufficient facts to place the defendant on notice of the claim against him; (3) a complaint should not be dismissed for insufficiency unless it appears to a certainty that the plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. *Cotton v. Federal Land Bank of Columbia*, 246 Ga. 188, 188 (3) (1980); *Herring v. R.L. Mathis Certified Dairy Co.*, 118 Ga.App 132, 137 (1968) (summarizing applicable principles). As stated by the Georgia Supreme Court in *Lathem v. Hestley*, 270 Ga 849, 850 (1999):

Such a [(12)(b)(6)] motion should be granted only when the petition "shows with certainty that the plaintiff would not be entitled to relief under any state of facts that could be proved in support of the claim." *Property Pickup v. Morgan*, 249 Ga. 239, 240, 290 S.E.2d 52 (1982). The nonmovant's pleadings must be construed most favorably to him and all

doubt resolved in his favor. *Alford v. Public Svc. Comm.*, 262 Ga. 386, n. 2, 418 S.E.2d 13 (1992).

The Declaratory Judgment Act, O.C.G.A. Sec. 9-4-1, under which Plaintiffs' lawsuit is brought, is also construed "liberally" for pleading purposes. *Atlanta Casualty Co. v. Fountain*, 262 Ga. 16, 17 (1992). The inclusion of subsection (b) of section 9-4-1, *supra* -- which gives courts the power to "declare rights and other legal relations of any interested party . . . [where] it appears . . . that the ends of justice [so] require" -- makes the Georgia Declaratory Judgment Act "much broader in scope and more comprehensive in its jurisdiction of justiciable controversies than the declaratory judgment acts of many other states." *Pangle v. Gossett*, 261 Ga. 307, 308 (1991) (*citation omitted*). The Act's key requirement is an "'actual controversy' where interested parties are asserting adverse claims upon a state of facts wherein a legal judgment is sought that would control or direct future action." *Atlanta Casualty Co, supra*, 262 Ga. at.17 (*citation omitted*). This simply means that the subject controversy "must include a right claimed by one party and denied by the other, and not merely a question as to the abstract meaning or validity of a statute." *Pangle v. Gossett, supra*, 261 Ga. at p.308 (*citation omitted*); *see Gwinnett County v. Blaney*, 275 Ga. 696, 704 (2002).

#### **IV. PLAINTIFFS' ADEQUACY CLAIM IN COUNT I STATES A CLAIM UPON WHICH RELIEF MAY BE GRANTED.**

##### **A. Plaintiffs' Claims Are Cognizable Under *McDaniel***

The Georgia Supreme Court's decision in *McDaniel v. Thomas*, 248 Ga. 632 (1981), establishes that Count I of Plaintiffs' Complaint states a claim under the "adequate public education" provision of the Georgia Constitution, 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.

Plaintiffs agree with Defendants that the Supreme Court's decision in *McDaniel v. Thomas* answers the question of whether Count I states a claim for relief. However, contrary to Defendants' contention, *McDaniel* is powerful authority that calls for Defendants' motion to dismiss Count I to be denied. This claim is not "on all fours" with *McDaniel* as Defendants claim. In fact, Count I is precisely the claim that the *McDaniel* Court said was not before the Court, but if it had been, would have been actionable under Article VIII.

For at least four independent reasons, the holding and rationale of the *McDaniel* decision necessitates the denial of Defendants' Motions to Dismiss:

First, *McDaniel* definitively held that claims to enforce the State's obligation of providing an adequate education are "justiciable" in Georgia courts. (Justiciability is discussed in Section VI. B., *infra*.)

Second, *McDaniel* held that the "adequate education" standard of the 1976 Constitution's version of Art. VIII, Sec. I, Par. I was a standard capable of judicial definition. Although the Court noted that the term "adequate education" is not defined in the Constitution, the Court specified that an "adequate" education must be *designed to produce individuals who can function in society.*" 248 Ga. at 644 (emphasis added). This reasoning applies equally to the current "adequate education" provision.

The Court in *McDaniel* went on to compare an "adequate education" to a "minimum" education. It said that "it is clear that even a 'minimum' education must 'provide each child with an opportunity to acquire the basic minimum skills necessary for the enjoyment of the rights of speech and of full participation in the political process.'" 248 Ga. At 644, *citing San Antonio*

*School District v. Rodriguez*, 411 U.S. 1, 37 (1973))” However, according to *McDaniel*, an “adequate education” offers more than a “minimum education”: “Beyond this minimum, then, lies an ‘adequate’ education . . .” 248 Ga. at 644. Thus, *McDaniel* holds that the constitutional standard of an “adequate education” is a higher standard than a “minimum education” and “must be designed to produce individuals who can function in society.”

The Georgia Constitution specifies in plain language what other state courts, through interpretation, have held is constitutionally required. The *McDaniel* opinion points out that “. . . Georgia appears to be the only state in the union which employs [the phrase “adequate public education”] in its constitution to delineate the state's basic obligation with respect to education. See *Pauley v. Kelly*, 255 S.E.2d 859, 863-874, 884- 886 (W.Va.1979).” *McDaniel*, 248 Ga. at 644. In contrast to Georgia, other state courts have had to interpret a variety of terms in the education clauses of their state constitutions to ensure a right to an “adequate” education.<sup>11</sup>

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<sup>11</sup>State constitutions in other states use a variety of terms in referencing this obligation to provide an enforceable and substantive “adequate” education consistent with constitutional standards, including:

*North Carolina*: right to “privilege of education” deemed to give rise to right to “sound basic” education with qualitative standards. *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997).

*New York*: constitutional mandate of a school system “wherein all the children of this state may be educated,” creates state obligation to ensure “sound basic education” for all children.

*Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 328 (N.Y. 2003).

*Arkansas*: “a general, suitable, and efficient system of free public schools.” *Lake View Sch. Dist. v. Huckabee*, 91 S.W.3d 472, 484 (Ark. 2002).

*Kansas*: “the legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools.” *Montoy v. State*, 2005 Kan. LEXIS 2 (Jan. 3, 2005).

*South Carolina*: requirement that “the General Assembly shall provide for the maintenance and support of a system of free public education” deemed to guarantee a “minimally adequate education” that meets certain broad substantive academic and vocational standards. *Abbeville County Sch. District v. State*, 515 S.E.2d 535, 540 (S.C. 1999).

*Tennessee*: requirement “for the maintenance, support and eligibility standards of a system of free public schools.” *Tennessee Small Scho. Syst. v. McWherter*, 851 S.W.2d 139, 148 (Tenn. 1993).

The *McDaniel* Court indicated that, at least in the first instance, it would look to the legislature “to give content to the term ‘adequate.’” 248 Ga. At 644. Consequently, a primary source of the content of an “adequate education” is those standards set by statute or by the State Board of Education through delegation from the General Assembly. This is not the first time the Georgia Supreme Court has looked to State statutes and regulations for guidance concerning State obligations under Article VIII. For example, the Georgia Supreme Court has consulted legislative requirements in determining the scope of a “free” education under this article. *Crim v. McWhorter*, 242 Ga. 863 (1979); *Callihan v. Reid*, 149 Ga. 704 (1919).

Similarly, in a number of school funding cases in other states, courts have applied already-established standards both to determine whether school funding systems are constitutionally adequate and to evaluate the constitutionality of reform efforts.<sup>12</sup>

Plaintiffs’ Complaint alleges in great detail specific education standards set by statute or

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*Kentucky*: requirement for “efficient” system of common schools. *Rose v. Council for Better Educ.*, 790 S.W.2d at 186, 210 *et. seq.* (Ky. 1989).

<sup>12</sup> *Montoy v. Kansas*, No. 92,302, 2005 WL 11558 (Kan. Sup. Ct. Jan. 3, 2005) (state’s school financing scheme unconstitutional because it did not comply with the “legislature’s own definition of suitable education.”); *Hoke County Board of Education v. State Board of Education*, 599 S.E.2d 365, 381 (N.C. 2004) (evidentiary factors concerning constitutionally required sound basic education include the level of performance of children on standardized achievement tests and any educational goals and standards adopted by the legislature); *Lake View Sch. Dist. v. Huckabee*, 91 S.W.3d 472 (Ark. 2002) (failure of school districts to meet state education standards evidence of constitutional violation); *Opinion of the Justices*, 765 A.2d 673 (N.H. 2000) (“Justices II”) (determining whether proposed reform package would in fact deliver the level of funding estimated by the other branches as needed to meet adequacy standards); *Hull v. Albrecht*, 950 P.2d 1141, 1145-46 (Ariz. 1997) (determining whether school funding system would enable students to master the state’s own educational standards); *Vincent v. Voight*, 614 N.W.2d 388 (Wis. 2000) (recognizing fundamental right to “equal opportunity for a sound basic education” and relying on standards from state statutes to help define substantive content, even though a majority of the court concluded no constitutional violation had occurred).

the State Board of Education. Plaintiff Students have further alleged that the educational opportunities they receive are not reasonably calculated to permit them to meet many of these State educational standards, including minimum academic proficiency standards, and that as a result they are unprepared to function in society.

It is important to note that *McDaniel* does not hold, as Defendants contend, that deference to legislative judgments is total or absolute. If this were so, it would virtually eliminate the proper role of the courts as the ultimate interpreters of the Constitution, and could eliminate valuable Constitutional protections through unreviewable legislative fiat.<sup>13</sup> Consequently, the Supreme Court in *McDaniel* did not give the General Assembly unfettered discretion to determine the meaning of "adequate education." The *McDaniel* decision qualified the limits of the judiciary's deference with the statement that "it is *primarily* the legislative branch" which must give content to the term "adequate." 248 Ga. at 644. The Courts' words appear to have been carefully chosen. Defendants' interpretation would distort the Supreme Court's term "*primarily* the legislative branch" to "*only* the legislative branch."<sup>14</sup>

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<sup>13</sup>Indeed, *McDaniel* recognized this in its ruling that constitutional claims concerning Georgia's school funding system are justiciable. (See discussion of justiciability in Sec. VI. B., *infra*.)

<sup>14</sup>Other state courts have articulated the elements of an adequate education under the courts' authority to interpret their state constitutions. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212-214 (Ky. 1989) (adopted seven-part definition of constitutional adequacy including providing students with sufficient communication skills; sufficient knowledge of economic, social, and political systems; sufficient understanding of governmental processes; and sufficient academic or vocational skills to compete favorably with other states). This definition has been extensively relied on by other state courts that have considered issues concerning whether their school funding systems provided a constitutionally adequate education, including several of Georgia's sister states. *E.g.*, *Lake View Sch. Dist. v. Huckabee*, 91 S.W.3d 472, 487-488 (2002); *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535, 540 (S.C. 1999); *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997); *McDuffy v. Secretary of Executive Office of Education*, 615 N.E.2d 516, 554-555

Third, in *McDaniel*, the Court held that Art. VIII, Sec. I, Par. I of the 1976 Constitution imposed a duty on the state to provide its citizens an "adequate" education. This duty includes the obligation to provide funds for an adequate education. 248 Ga. at 644-645. These obligations under Article VIII of the 1976 Constitution are clear from *McDaniel*, and there can be no fair dispute about them. The current Constitution imposes the same obligations on the State. (See Plaintiffs' fuller discussion of this issue in Section IV. B.)

Fourth, *McDaniel* made clear that issues concerning an "adequate education" are factual issues to be decided on an evidentiary record. *McDaniel* was a decision on the merits. The Supreme Court there did not express any disapproval of the factual record made in that case. Nor did it indicate that the claim should have been rejected as a matter of law on the pleadings. Indeed, its decision repeatedly refers to the facts in the record or lack thereof. The Court in *McDaniel* is very clear about the need for a factual determination to reach a conclusion about alleged educational inadequacies: "[W]e must decide whether public education in some school districts is so deficient in basic areas of study that it fails to meet the 'adequacy' standards of the state constitution." 248 Ga at 644. Issues concerning deficiencies in basic areas of study are not resolvable in the absence of a factual record. The court also specifically referred to the need for "evidence" on the question of educational inadequacy: "*In the absence of evidence to show that existing state funding for public education deprives students in any particular school district of basic educational opportunities, cross-appellants' contention that low wealth districts fail to provide an "adequate education" must be rejected.*" *Id.* (emphasis supplied.) Thus *McDaniel*

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(Mass. 1993); see also, *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 349 (N.Y. 2003) (constitutional mandate of a school system "wherein all the children of this state may be educated," creates state obligation to ensure "sound basic education" to all children).

stands for the proposition that a claim of inadequate education is justiciable and must be proven with strong evidence. Plaintiffs are prepared to meet this burden.

While the plaintiffs in *McDaniel* lost on the merits of their claim, that loss does not diminish in any respect the *McDaniel* holding that the predecessor version of Art. VIII, Sec. I, Par. I imposed a constitutional obligation on the State "requiring the state to provide education opportunities to its citizens" that comply with the "adequate education" mandate and to provide funding for this purpose. 248 Ga. at 645. This same article of the 1983 Constitution imposes the same obligation on the State. (See discussion in following sections.)

Contrary to Defendants' assertion, the "adequacy" claims in *McDaniel* and facts offered in support of those claims were significantly different from those in this case. The plaintiffs in *McDaniel* alleged that disparities in the quality of education provided in their relatively "low-wealth" school districts, as compared to the higher quality of education provided children in "high-wealth" districts, violated their rights under the "adequate education" provision of the 1976 Constitution (as well as under the Equal Protection guarantee of that Constitution). 248 Ga. at 632. They alleged, and the Supreme Court agreed, that the disparities challenged in the litigation arose from the ability of wealthier counties, which had greater property tax bases, to contribute more local tax revenue to the total costs of their district school systems than low wealth school districts could contribute from their small tax bases. Those greater local revenues allowed the high wealth counties to provide a better quality of education than low wealth counties could provide to their school children. *Id.* At 637-38. The plaintiffs did not allege that the education provided in their low wealth districts fell below some discernible standard of an "adequate education" but rather, that the "adequate education" standard and the State's Equal Protection Clause required that the difference in the local school tax contributions to the school systems be

"equalized". See *Id.* at 646. The Court's opinion recognized that the plaintiffs were challenging the disparities resulting from local supplements and not the constitutional adequacy of the basic education provided in their districts through the State foundation program - the Adequate Program of Education in Georgia (APEG):

If APEG were the only source of public school funding in this state, there would be no significant disparities between school districts insofar as revenues per student in ADA [average daily attendance] is concerned. However, APEG is not the only source of school revenues. In addition to the categorical aid referred to above, all 187 local school districts in Georgia supplement APEG with funds derived from local property tax assessments. (citing) *It is this feature of the Georgia public school finance system which is largely responsible for the present action.*

248 Ga at 636 (Emphasis added).

The Court also observed that "local supplements, and not APEG, are responsible for existing disparities in educational expenditures." 248 Ga. At 637. Thus, the *McDaniel* plaintiffs' attack was *not* on the minimum educational program provided in their districts measured against the standard of an "adequate education" stated in *McDaniel*, but on the higher quality of public education in wealthier districts resulting from substantial amounts of local supplement tax revenue.

Two of the three issues considered by the Supreme Court in *McDaniel* were straightforward equalization claims and require little discussion here. First, the plaintiffs there argued that the term "adequate" education incorporated an equal educational opportunity concept. Second, the *McDaniel* plaintiffs' included an equal protection claim that also articulated an equal opportunity concept (discussed further in Section V., *infra.*). The Court rejected those claims as not being grounded in the Court's definition of an "adequate education." Unlike the plaintiffs in *McDaniel*, Plaintiffs here are not asserting that the "adequate education" provision is a basis for

an equal educational opportunity claim.

The third issue in *McDaniel* appears closer, in appearance at least, to Plaintiffs' Count I here: "(2) that public education in some school districts is so deficient in basic areas of study that it fails to meet the "adequacy" standard mandated by the state constitution." *McDaniel*, 248 Ga at 640. Although this may appear to be similar to Plaintiffs' claim in Count I, in fact the two claims are very different. The *McDaniel* plaintiffs did not attack the APEG foundation amount as inadequate; so this claim in *McDaniel* was also necessarily based on disparities in tax bases available for local supplemental funding, presented as a violation of the "adequate education" provision. Although the plaintiffs in *McDaniel* argued that public education in some school districts was deficient in basic areas of study, plaintiffs neither alleged nor provided direct evidence of this. This absence was noted in the *McDaniel* court's holding on this third issue:

In the absence of evidence to show that existing state funding for public education deprives students in any particular school district of basic educational opportunities, cross-appellants' contention that low wealth districts fail to provide an "adequate education" must be rejected. . . .

248 Ga. at 644.

Unlike the low wealth/high wealth claim rejected in *McDaniel*, the "adequate public education" claim set forth here in Count I is precisely the claim that the *McDaniel* decision recognized would state an "adequate education" claim under Art. VIII, Sec. I, Par. I. Moreover, to the extent that the plaintiffs in *McDaniel* did intend to argue that students were deprived of "basic educational opportunities", the Court made clear this is a factual issue that was decided against the plaintiffs for failure of proof.

In contrast, the allegations of Count I of the present case, taken as true for this motion, clearly provide a basis for concluding that the existing state funding system for public education

is not designed to prepare Plaintiff Students to function in society and denies them basic educational opportunities that the State of Georgia is constitutionally obligated to provide. Rather than foreclosing Plaintiffs' Count I claim, as State Defendants so vociferously argue, the *McDaniel* decision specifically recognized and judicially validated this claim. Of course, the *McDaniel* opinion's endorsement and ratification is subject, ultimately, to Plaintiffs adducing evidence proving "that existing state funding for public education deprives students in any particular school district [i.e., in the Plaintiff Districts] of basic educational opportunities" that are "designed to produce individuals who can function in society." That evidentiary burden is for a trial on the merits of Plaintiffs' claims. In accordance with *McDaniel*, the Court must deny State Defendants' Motions to Dismiss Count I and allow this case to proceed to trial.

Defendants would have this Court believe that only a few aberrant state courts have found school funding systems unconstitutional in recent years. Defendants have attached to their brief an Appendix that states that a "minority of decisions" have followed the reasoning of those few courts in which "judicial activism" resulted in finding a school finance system unconstitutional. Defendants' Appendix bears no relationship to reality. In recent years a significant number of courts in other states have considered whether their school funding systems pass constitutional muster. Most of these decisions have addressed the constitutional "adequacy" of school funding systems. During the past seven years, plaintiffs have prevailed in substantive decisions of the highest courts in education adequacy cases in fourteen states, while defendants have prevailed in only three.<sup>15</sup>

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<sup>15</sup>Specifically, since 1997, plaintiffs have prevailed in: *Montoy v. State*, 2005 Kan. LEXIS 2 (Jan. 3, 2005); *Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365 (N.C. 2004); *Columbia Falls Elem. Sch. Dist. No. 6 v. State of Montana*, No. 04-390 (Mont. Nov. 9, 2004)(Preliminary Order; see Appendix 20); *Campaign for Fiscal Equity, Inc. v. State*, 801

Defendants further argue that a distinguishing feature of those cases that have been decided for plaintiffs in school funding litigation is the force of the Northwest Ordinance, which Defendants argue required the state to take responsibility for education, unlike in Georgia, whose admission to the United States predated the Northwest Ordinance.<sup>16</sup> (Def. Br., pp. 23-24.) Defendants' argument about the Northwest Ordinance lacks any thread of validity. First, a significant number of the states in which plaintiffs in school funding cases have prevailed, or in which appellate courts held that a claim is justiciable and should be tried, are, like Georgia, states admitted to the Union as the original 13 colonies prior to the adoption of the Northwest Ordinance. These include North Carolina, South Carolina, New Hampshire, New Jersey and New York (*see* footnote 15, *supra.*). Second, a search of virtually all published opinions in school finance cases discloses not a single instance where a state court that ruled for plaintiffs relied on

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*N.E.2d 326* (N.Y. 2003); *Lake View Sch. Dist. v. Huckabee*, 91 S.W.3d 472 (Ark. 2002); *Tennessee Small Sch. Systems v. McWhorter*, 91 S.W.3d 232 (Tenn. 2002); *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535 (S.C. 1999); *Idaho Schs. for Equal Educ. Opportunity v. State*, 976 P.2d 913 (Idaho 1998); *Hull v. Albrecht*, 960 P.2d 634 (Ariz. 1998); *Abbott v. Burke*, 693 A.2d 417 (N.J. 1997); *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997); *Brigham v. State*, 692 A.2d 384 (Vt. 1997); *Claremont Sch. Dist.*, 703 A.2d 1353 (1997); *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997). Defendants have prevailed only in: *Vincent v. Voight*, 614 N.W.2d 388 (Wis. 2000); *Lewis E. v. Spagnolo*, 710 N.E.2d 798 (Ill. 1999); and *Pennsylvania Assn. of Rural & Small Schs. v. Ridge*, 737 A.2d 246 (Pa. 1999). Moreover, in *Vincent*, the Wisconsin Supreme Court, while rejecting the plaintiffs' equity claim, held that the state constitution guarantees schoolchildren the right to "an equal opportunity for a sound basic education [which] will equip students for their roles as citizens and enable them to succeed economically and personally," and impliedly suggested that the plaintiffs present evidence on the adequacy issue in a future lawsuit. *Vincent v. Voight*, 614 N.W.2d at 396.

<sup>16</sup>The Northwest Ordinance was adopted in 1787 by the Continental Congress to provide for the government of the territory and the eventual establishment of states northwest of the Ohio River. It stated: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Section 14, Article III, Northwest Territory Ordinance of 1787; 1 Laws of the United States 475, 479.

any alleged legal mandate flowing from the Northwest Ordinance.<sup>17</sup> Consequently, Defendants' purported distinction among states that have decided school funding cases based on the effect of the Northwest Ordinance is pure fiction.

In light of the guidance of *McDaniel* and the overwhelming precedent from the highest courts of other states, Defendants' Motions to Dismiss are utterly without merit.

**A. The Provision of An "Adequate Public Education" Is a "Primary Obligation" of the "State of Georgia" To Be Provided for by State Taxation, Pursuant to Article VIII, Section I, Paragraph I of the Constitution of Georgia of 1983.**

Defendants want this Court to construe Art. VIII, Sec. I, Par. I of the 1983 Constitution so as (1) to impose the constitutional obligation to provide an "adequate public education" only on local boards of education, rather than on the "State of Georgia" and (2) to impose the taxation obligation for public education solely on counties and local boards of education, rather than the State. The construction of Article VIII sought by Defendants would absolve the State from any constitutional obligation to provide or fund public education in Georgia.

As discussed above, the Georgia Supreme Court in *McDaniel v. Thomas*, construing the 1976 Constitution's version of Art. VIII, Sec. I, Par. I, interpreted that provision as imposing a constitutional obligation on the State to provide an "adequate education." This 1976 version of Art. VIII, Sec. I, Par. I stated:<sup>18</sup>

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<sup>17</sup>No state highest court of which we are aware has relied on the Northwest Ordinance as a basis for holding a state school funding system unconstitutional. The closest we have been able to come to a relevant citation of the Northwest Ordinance is in a concurring opinion that cited the Ordinance in support of the importance of education. *DeRolph v. State*, 677 N.E.2d 733, 768-769 (Ohio 1997).

<sup>18</sup>The predecessor version to the 1976 Constitution's version was Art. VIII, Sec. I, Par. I contained in the Constitution of 1945 (Exh. 3), which stated:

The provision of an adequate education for the citizens shall be a primary obligation of the State of Georgia, the expense of which shall be provided for by taxation.

The Supreme Court in *McDaniel v. Thomas* construed the 1976 Version of Art VIII, Sec. I, Par. I to be a general provision "*imposing a duty on the state* to provide its citizens with an adequate education." 248 Ga. at 643.<sup>19</sup> Leaving no doubt as to the State's obligations, the Court's opinion further stated:

*This court has construed the 'adequate education' provisions of the Georgia Constitution as requiring the state to provide basic education opportunities to its citizens, and we have found that the existing public school finance system meets constitutional requirements in this regard.*

248 Ga. at 645 (Emphasis added.). Mindful of that precedent construing the 1976 version of Art.

VIII, Sec. I, Par. I as a Constitutional provision "requiring the state to provide basic educational opportunities to its citizens," Plaintiffs turn to the current 1983 Constitution and apply the most basic and appropriate canons of construction to ascertain the meaning of Art. VIII, Sec. I, Par. I of the 1983 Constitution.

**1. The Plain Meaning of Article VIII Obligates the "State of Georgia" to Provide Adequate Public Education to Its Citizens**

The "plain meaning" rule of construction is the starting point for this Court in its task of ascertaining the obligations established by this paragraph. *Hollowell v. Jove*, 247 Ga. 678, 681

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The provision of an adequate education for the citizens shall be a primary obligation of the State of Georgia, the expense of which shall be provided for by taxation. Separate schools shall be provided for the white and colored races.

<sup>19</sup>The Court also ruled that a separate provision, Art. VIII, Sec. VIII, Par. I imposed a duty on the General Assembly to provide its citizens with an adequate education. That provision, adopted by Amendment in 1962 to allow the State of Georgia to use its public revenues to give private school tuition grants to parents opposing public school desegregation, is discussed *infra*, Sec. IV. B. 2.

(1981) sets out this rule of construction (citations omitted):

It is, of course, fundamental that 'the cardinal rule to guide construction of laws is, first to ascertain the legislative intent and purpose in enacting the law, and then to give it the construction which will effectuate the legislative intent and purpose. Although 'the legislative intent prevails over the literal import of words,' 'where a constitutional provision or statute is plain and susceptible of but one natural and reasonable construction, the court has no authority to place a different construction upon it, but must construe it according to its terms. [Citations] 'In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent.'

The "plain meaning" rule is the paramount rule of construction, not merely one canon of construction among many. Where a constitutional provision is plain and susceptible of but one natural and reasonable construction, a court must construe it according to those terms. The Georgia Supreme Court has characterized the "plain meaning" rule as the "golden rule" of statutory construction, a rule which is equally applicable to the construction of constitutional provisions:<sup>20</sup>

We begin our analysis with the "golden rule" of statutory construction, which requires us to follow the literal language of the statute "unless it produces contradiction, absurdity or such an inconvenience as to insure that the legislature meant something else."

*Telecom\*USA, Inc. v. Collins*, 260 Ga. 362, 363 (1990).

Application of this "golden rule" of constitutional construction to Art. VIII, Sec. I, Par. I conclusively ascertains the meaning of this provision: that the "adequate public education"

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<sup>20</sup>*Odom v. Union City D.D.A.*, 251 Ga. 248, 254 (1983):

"It is an elementary rule of construction that when the words of a statute are plain and unambiguous, and their meaning so obvious so as to eliminate any need for construction, it is the duty of the court to give expression to the obvious meaning of the General Assembly.' *Irwin v. Busbee*, 241 Ga. 567 (1978). The same rule is applicable to constitutional provisions. *Jones v. Darby*, 174 Ga. 71 (1931)."

obligation is a "primary obligation" borne by the "State of Georgia" and the "State of Georgia" is constitutionally required to provide for the "adequate public education" of its citizens through taxation. The plain meaning of the term "State of Georgia" as used in this Constitutional provision is that the Governor, the General Assembly, the State Board of Education, and any other entities within State government are assigned responsibility for public education in Georgia. As stated in *Perdue v. Baker*, 277 Ga. 1, 6 (2003):

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

No application of the "plain meaning" rule could countenance Defendants' substitution of "Local Boards of Education" for "State of Georgia" and their further construction that the "taxation" obligation contained therein applies only to school districts, rather than the State. Accordingly -- and not surprisingly -- Defendants' brief evades any discussion or acknowledgment of the "plain meaning" rule. Instead, Defendants represent that the rule of construction this Court should apply, in its judicial ascertaining of the framers' intent regarding the obligations of this paragraph, is the *in pari materia* rule, which provides generally that statutes or rules that relate to the same topics should when possible be construed consistently with one another. As discussed more fully below, Defendants' wayward invocation of the *in pari materia* rule fails to acknowledge that the rule is inapplicable and may not be resorted to if, as here, the language of the provision under consideration is clear.

The "plain meaning" rule should be the starting and the ending point of the Court's consideration of Defendants' Motion to Dismiss Count I. If the framers' intent had been to achieve the meaning pressed by Defendants (that is, that the obligation to provide an "adequate

public education" rests only on the governmental shoulders of local boards of education, and further that the only funds that constitutionally must be used to fund this obligation are *ad valorem* taxes raised locally as provided for in Art. VIII, Sec. V, Par. I), then the framers could have proposed a paragraph such as the following for ratification by the voters of Georgia:

The provision of an adequate public education for the citizens shall be a primary obligation of the county boards of education established by Art. VIII, Sec. IV, Par. I in each county in Georgia. Public education for the citizens prior to the college or post-secondary level shall be free and shall be provided for by the local tax for education authorized by Article VIII, Sec. V, Par. I.

This provision, had it been adopted, would have implemented the judicial construction that Defendants urge this Court to give to the language of Art. VIII, Sec. I, Par. I. It clearly would have conveyed the framers' intent (had it actually been their intent) that all constitutional obligations regarding an "adequate public education" were to be imposed on local boards of education, thus exonerating the State of Georgia from any possible constitutional obligation to provide, or to use the State's taxation powers to fund, an adequate public education for Georgia's students. Of course, the framers did not draft, the General Assembly did not approve, and the voters of Georgia did not adopt a provision similar to the one above for inclusion in the 1983 Constitution. Yet Defendants ask this Court to re-write the present Art. VIII, Sec. I, Par. I in a manner entirely inconsistent with the provision's clear and unambiguous language.

Plaintiffs respectfully submit that this Court, in ruling on Defendants' Motions to Dismiss Count I, need go no further than application of the "plain meaning" rule in the Court's analysis of the merits (or, more precisely, the lack of merits) of the Rule 12(b)(6) Motion to Dismiss, and must deny such Motion.

**2. Even if the Meaning of Article VIII Were Unclear, the Framers Clearly Intended to Maintain the Obligation of the "State of Georgia" to Provide an**

### **Adequate Public Education.**

The language and meaning of "State of Georgia" in Art. VIII, Sec. I, Par. I of the 1983 Constitution being clear and unambiguous, it is unnecessary for the Court to examine the constitutional history in an attempt to discern the framers' intent. To the extent that such an effort is undertaken, however, it reveals the clear intent that the primary obligation for providing an adequate education lies with the State of Georgia, rather than the local school districts.

The 1983 Constitution was the result of a long, persistent effort lead by former Governor George Busbee. The process that led to the adoption of the 1983 Constitution is described in an article published by the Mercer Law Review in 1984, titled "An Overview of the New Georgia Constitution" and authored by Governor Busbee. 35 Mercer L.R. 1 (1984). (A copy is attached as Exh. 4.)

The proceedings of the various committees established to oversee the drafting of a new constitution, and working between 1977 and 1981, were recorded, transcribed, and transcripts are available to the public. The Georgia appellate courts have relied on those transcripts in construing various provisions of the 1983 Constitution. *Fulton v. Baker*, 261 Ga. 710, 711 (1991); *Nelms v. Georgian Manor Condominium Assoc.*, 253 Ga. 410, 412 (1984); *In the Interest of T.A.W.*, 214 Ga.App.1, 5 (1994).

The Committee to Revise Article VIII met a number of times beginning in 1979 and their proceedings produced three volumes of transcripts. On June 18, 1981, the Article VIII Committee, through its Chairman David Gambrell and the Assistant Executive Director Melvin Hill, submitted that Committee's proposed new Article VIII to the Legislative Overview Committee ("LOC"). (State of Georgia, Select Comm. on Constitutional Revision, Transcripts of Meeting, 1977-1981, Legislative. Overview Committee, Vol. I, June 18, 1981 (A copy of the

transcript of that June 18, 1981, session of the LOC is attached as Exh. 5.). In his introductory remarks to the LOC, Melvin Hill, stated:

Section I, Paragraph I. *The proposed revision of this section maintains the state's present obligation to provide an adequate public education for the citizens.* The committee felt that it was important to include a statement explaining why education is essential, and a statement describing the goal toward which the state should strive in its education programs. (Emphasis added.)

The proposal clarifies the state's obligation to provide free education prior to the college or post-secondary level, and its authority to provide by law for the expense of other education.

The following exchange transpired between Governor Busbee and David Gambrell, Article VIII Committee Chairman, regarding the language in the proposed paragraph that would later become Article VIII, Sec. I, Par. I:

GOVERNOR BUSBEE: This apparently to me and I'll just ask you the question -- *there's no change in the existing constitution through high school*, but this does clarify the provision that we do not have the obligation to provide a free public education beyond high school is this the way you read it?

MR. GAMBRELL: Right. Yes.

GOVERNOR BUSBEE: *It's the concept in the constitution now*, and I think what they're trying to do is to spell out that the only way we have an obligation beyond high school is through statute. (Emphasis added) (Exh. 5)

The clarifying point being made by Governor Busbee in this colloquy was that, like "the concept in the constitution now," the State had an obligation to provide for and fund public education below the post-secondary/college level. This colloquy further clarified that any financial obligation of the State to provide for the expense of post-secondary education would be left to the discretionary legislative choice of the General Assembly through its enactment of statutes. The amended Art. VIII, Sec. I, Par. I, with the Committee's first sentence eliminated, was adopted by

the LOC (Exh. 5), and that version became Art. VIII, Sec. I, Par. I of the 1983 Constitution.

As Governor Busbee himself explained in his Mercer Law Review article:

Finally, and perhaps most importantly, *the new education article does not change or diminish the basic obligation of the state* to provide "an adequate public education for the citizens. Attempts to change this language were unsuccessful because of fears and uncertainties about possible interpretation by the courts of any new language."

Exh. 4, pp 12-13 (Emphasis added).

The proceedings before the LOC provide as authoritative an expression of the framers' intent underlying Art VIII, Sec. I, Par. I as anyone could reasonably hope to locate. Even if the language of Art. VIII, Sec. I, Par. I were not completely clear as it is, this "legislative" history supports the unqualified assertion that this provision's "primary obligation" is the State's obligation to provide and fund as necessary.

This legislative history of the framers' intent, both standing alone and in conjunction with the compelling result of applying the "plain meaning" rule of construction, frankly leaves no room for reasoned debate about either the intent or how this paragraph properly should be construed: the paragraph imposes the constitutional obligation to provide an "adequate public education" on the State of Georgia, not local boards of education, and further provides that, to the extent necessary to satisfy this "primary obligation," the expense of providing that standard of public school education through taxation is also a State obligation.<sup>21</sup>

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<sup>21</sup>Additional evidence that the framers of this provision's "State of Georgia" term did not intend to absolve the State of Georgia of the constitutional obligation and cast it on local boards of education can be found in what the framers did not put into this provision.

When the 1983 Constitution was being prepared, the earlier versions of 1964 and 1970 were available to the various committee members. The 1964 version provided:

An adequate common school education for its citizens shall be a primary obligation of

Given that this evidence of the framers' intent completely undermines Defendants' proposed tortured construction of the plain language of the Paragraph, it also completely undermines Defendants' argument premised on adoption of a 1962 Amendment to the 1945 Constitution, which was carried over into the 1976 Constitution, but not included in the 1983 Constitution's Article VIII. The 1962 Amendment provided:

Paragraph II. Freedom from compulsory association at all levels of public education shall be preserved inviolate. The General Assembly shall by taxation provide funds for an adequate education for the citizens of Georgia.

Defendants argue that the failure to include this 1962 Amendment in the 1983 Constitution negates the possibility that Art. VIII, Sec. I, Par. I of the 1983 Constitution could be construed to impose its adequate education obligation on the State of Georgia. (Def. Brief, p. 27.) Defendants

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the State of Georgia *and its political subdivisions*, the expenses of which shall be borne out of public funds. The General Assembly shall by taxation or otherwise provide for such public funds and may prescribe the terms and conditions upon which State funds shall be made available for this purpose. (Emphasis added)

The 1970 version was identical to the 1964 version:

An adequate common school education for its citizens shall be a primary obligation of the State of Georgia *and its political subdivisions*, the expense of which shall be borne out of public funds. The General Assembly shall by taxation or otherwise provide for such public funds and may prescribe the terms and conditions upon which State funds shall be made available for this purpose. (Emphasis added)

In both the 1964 version and the 1970 version of a new Constitution, the framers' intent to include county boards of education along with the State of Georgia within the reach of the constitutional obligation is clear. What is equally clear is that, with these recent historical examples before them, the framers of the 1983 Constitution did not intend to include local boards of education within the constitutional mandate but left that constitutional obligation with the State of Georgia. Had the framers of the 1983 Constitution intended to cast all constitutional obligation and funding responsibility on local boards of education and county commissions, the 1964 and the 1970 versions showed the framers how to draft this Paragraph to reflect such an intent. Since the framers had no such intent, they did not insert the key term "and its political subdivisions" into Art. VIII, Sec. I, Par. I.

argue that the 1962 amendment was an "anomaly" and, when no longer in the Georgia Constitution, the Article VIII, Sec. I, Par. I obligations were no longer imposed on the State of Georgia but, instead, reverted back to "County Boards of Education." But nothing in the analysis of the 1983 provision relates to the discarded 1962 Amendment, and conversely, nothing in that Amendment bears on the evidence of framers' intent as discussed above.

Plaintiffs do agree with the State defendants' characterization that the 1962 Amendment was adopted in conjunction with official efforts to resist school desegregation. The 1962 Amendment joined a 1954 Amendment (Exh. 10) to Article VIII of the 1945 Constitution. The 1954 Amendment, adopted also in opposition to public school desegregation, authorized the State to make grants of public money to private citizens for payment of private school tuition purposes. The purpose of this 1954 Amendment was to extend the "obligation of the State to provide an adequate education" to include private school tuition grants. This 1954 Amendment not only ratified the State's obligation to provide an adequate education, but also extended that obligation to include tuition for private schools as an alternative to desegregated public schools.

In 1961 the General Assembly adopted the language of the 1962 Amendment, which was submitted to the voters and ratified. The General Assembly also adopted legislation implementing the 1954 Amendment's extension of the State "adequate education" obligation to include private school tuition grants. That 1961 Act (Exh. 12) directed local boards of education to make private school tuition grants of State and local funds, authorized the Governor and the State Board of Education to make available additional sums of State funds to be used by local Boards for such tuition grant purposes, and provided that any local Board refusing to make such grants with State funds would have its State fund allotment reduced.

In fact, the 1954 and 1962 Amendments only highlight the State's continuing obligation to

provide an adequate education to its public school students. These Amendments were clearly deemed necessary to enable the State to spend State tax dollars to pay for students' private school education, as part of the continuing effort to defeat school desegregation. Prior to those Amendments, as now, the States' obligation was limited to funding public education. The existence of the 1962 Amendment, and its subsequent disappearance from the Georgia Constitution, only reinforce the point that the State's current obligation is to provide an adequate education to public school students. Thus, elimination of this relic of segregationist Georgia in no way supports Defendants' tortured construction of the clear language of Article VIII.

**3. Defendants' *In Pari Materia* Argument Lacks Merit**

Georgia law forbids the application of the *in pari materia* rule of construction in this case because the language of the constitutional provision in question, Art. VIII, Sec. I, Par. I, is plain and unequivocal – i.e., “State of Georgia” means “State of Georgia.” Even if *in pari materia* were applicable, however, it would not support Defendants' desired interpretation.

**a. The *In Pari Materia* Rule May Not be Invoked Where, as Here, the Meaning of the Constitutional Provision is Clear.**

Defendants, ignoring the primacy of the "plain meaning" rule of construction, invoke the secondary *in pari materia* rule as the basis for their contention that Art. VIII, Sec. I, Par. I should be re-written by this Court to relieve the State of its obligation to provide an adequate education for its citizens. *See* Def. Br., pp.44-46. To support their inherently implausible assertion that “State of Georgia” (in Art. VIII, Sec. I, Par. I) really means “local boards of education,” Defendants cite the provision of Art. VIII, Sec. V, Par. I that vests "the management and control" of each county school system in the county board of education, and the provision of Art. VIII, Sec. VI, Par. I that authorizes a local county school tax. *See* Def. Brief, p. 9.

The two provisions of the 1983 Constitution relied on by Defendants do relate to public education, and so, in the broad sense, they are *in pari materia* with Art. VIII, Sec. I, Par. I. However, the fact that various provisions relate to the same general subject matter does not by itself permit the invocation of the *in pari materia* rule of construction, which does not apply where the language under construction is plain and clear. In *State Ethics Commissioner v. Moore*, 214 Ga. App. 236, 239 (1994), the court declined to use a general statement of intent from another part of the Act, obviously *in pari materia* with a separate part of the Act being construed, to change the clear language and plain meaning of the other statute within that Act:

However, as the dissent concedes, when the language of the statute is plain and unequivocal, judicial construction is not only unnecessary but forbidden. *City of Jessup v. Bennett*, 226 Ga. 607, 609(2) (176 S.E.2d 81) (1970). We cannot, as the dissent contends, use a general statement of intent from another part of the Act to change the clear language and plain meaning of OCGA § 21-5-34, particularly in a case involving the imposition of a fine or penalty..

*See also Corey Outdoor Advertising, Inc. v. Boards of Zoning Adjustments*, 254 Ga. 221, 223 (1985)("Even statutes *in pari materia* may not be resorted to where the language of the statute under consideration is clear. *Ryan v. Comm's of Chatham Cty*, 203 Ga. 730, 732 (1948)"); *Undercofler v. L.C. Robinson & Sons, Inc.*, 111 Ga. App. 411, 414 (1965).

Defendants have failed to satisfy the fundamental prerequisite for proper reliance on the *in pari materia* rule - ambiguity in the provision under consideration. Defendants' unjustified reliance on the *in pari materia* rule results in the "plain meaning" of Art. VIII, Sec. I, Par. I being "distorted by resort to another paragraph, particularly where both can be so construed that both may stand in their obvious sense." *Cottingham v. Weekes*, 56 Ga. 201, 203 (1876).

**b. In The Alternative, Defendants' *In Pari Materia* Argument Fails Because the State Has Ultimate Authority and Responsibility Over the**

### **Public Education System.**

Even assuming *arguendo* (1) that ambiguity does exist in the language of Art. VIII, Sec. I, Par. I, (2) that there was no evidence of the framers' intent, and (3) that *in pari materia* could properly be relied on as a rule of construction, the application of that rule still would not lead to the interpretation advocated by Defendants. To the contrary, the local "management and control" power and the local taxation powers have always been grants of limited powers and have never conferred unfettered authority or discretion as asserted by Defendants. Local board "management and control" operates within the parameters established under State law. Article VIII sets out the structure of Georgia's allocation of responsibility for public education in this State. Section I, the provision at issue, establishes the over-arching obligation of the State of Georgia to provide an adequate public education. Section II (State Board of Education) and Section III (State School Superintendent) establish the State-level offices that direct public education for elementary and secondary education while Section IV (Board of Regents) establishes the State-level offices directing post-secondary education in the State. Sections V (Local School Systems) and VI (Local Taxation for Education) address the contributive role of the local boards of education.

With respect to the vesting of "management and control" of the local school system by Sec. V, Par. I, both the history of that provision and its interpretation by the General Assembly establish that this "management and control" responsibility is subject to the over-riding authority of the State, as evidenced by the numerous State school laws enacted by the General Assembly and the rules and regulations of the State Board of Education. First, the impetus behind the vesting of control in local boards at the county level was largely motivated by the intent to eliminate the local districts and their Trustees and to consolidate the management and control of a

county's school system in a single entity, the county board of education.<sup>22</sup> Second, one need only reference the several hundred statutes governing local public education (as set out in O.C.G.A. Tit. 20, Art. 2) relating to local school systems to be reminded of the General Assembly's pervasive control and regulation of local education.

State statutes directly govern local boards of education in almost every basic aspect of the provision of education to their students. State law mandates the curriculum local school boards

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<sup>22</sup> The original Act of 1870 used the "management and control" language. However, during the years prior to the adoption of the 1945 Constitution, the management and control over a county school system was shared between the county board of education and the sub-districts created in counties that were managed by District Trustees. These local school districts (really sub-districts of a county) had authority to levy taxes for the school or schools in their district in addition to the authority for a county-wide school tax. This divided allocation of management and control had resulted, by the time of the 1943 Commission to Revise the Constitution, in a proliferation of approximately 2000 school districts; with taxing authority, in Georgia. The framers' intent in including the "management and control" provision in the 1945 Constitution was to consolidate, as a constitutional matter, the management and control of a county's school system in the county board of education so that the local school districts managed by their Trustees could be eliminated. Immediately upon the adoption of the 1945 Constitution with this consolidating "management and control" provision included, a new statute, the "Culpepper School Act" (Ga. L 1946), was adopted. This act legislatively abolished these local districts governed by Board of Trustees. The Attorney General in a formal opinion to the State School Superintendent, dated April 23, 1946, discussed the abolition of these local districts:

I must call your attention to the Act approved February 1, 1946 entitled An Act to Amend Chapter 32-9 of the Code of 1933. This Act has the effect of abolishing local school districts and of reducing the powers of the trustees of schools to one of advisory capacity only. . . .

That opinion of the Attorney General further provided that:

Since the adoption of the Constitution of 1945, the local districts can no longer make a levy for maintenance purposes.

Paragraph 1, Section 8, Article 8 of the Constitution of 1945 provides that the county Board of Education shall make a county-wide levy for maintenance purposes for not less than five nor more than 15 mills on all property located outside of independent school districts.

must follow as set forth in O.C.G.A. § 20-2-140. That statute directs the State Board of Education to establish competencies which each student is expected to master prior to completion of the student's public school education, directs the State Board of Education to adopt a uniformly sequenced core curriculum for grades kindergarten through 12, and commands that local school districts employ that curriculum."<sup>23</sup>

Other examples of State authority over local education abound. For example, the State Board of Education has imposed requirements on each county board of education with respect to student promotion and retention. (*See* State Board of Education Rule 160-4-2-.111, which mandates that students shall not be promoted to sixth or ninth grade if they do not pass the State's Criterion-Referenced Competency Test in reading and mathematics.)

The local board's "management and control" of its teaching staff is subject to State mandates in every basic element of the employment relationship. For example, minimum teacher salaries are mandated by the State. O.C.G.A. § 20-2-212(a). The State requires local boards of education: to evaluate their teachers and other personnel annually (O.C.G.A. § 20-2-210); to comply with minimum qualifications as the State Board of Education may prescribe for employment of personnel (O.C.G.A. § 20-2-211(a)); to comply with State timelines regarding the tendering of teacher employment contracts (O.C.G.A. § 20-2-211(b)); and to refrain from hiring any person dishonorably discharged for desertion from the Armed Services (O.C.G.A. § 20-2-211(c)). The State also restricts a local board of education's authority to demote or fail to renew the contract of a teacher for a fourth or subsequent consecutive school year (O.C.G.A. § 20-2-942).

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<sup>23</sup>The State Board of Education's "core curriculum and student competencies" are set forth in Rule 160-4-2-.01 of the Rules and Regulations of the State Board of Education.

The local board's relationship to the State (General Assembly and State Board of Education) has always been one of ultimate State authority taking precedence over local school board "autonomy." The General Assembly has exercised the State's plenary power over local boards of education since the public school system was established in 1870. This legislative control at the State level over local boards of education continues unabated today. Rather than supporting Defendants' construction that the primary obligation for providing adequate education is that of the counties, the State's authority over public education supports Plaintiffs' position that the primary obligation for providing an adequate education rests with the State of Georgia.

Defendants attempt to buttress their defective *in pari materia* argument by relying on Art. VIII, Sec. VI, Par. I of the Constitution, which provides that the local board of education shall annually levy a school tax not greater than 20 mills, unless locally authorized to levy more. The fact that the Georgia Constitution provides for and permits locally levied taxes for education neither logically nor historically relieves the State of its constitutional obligation to provide an adequate education.

The history of this constitutional provision authorizing a local school tax demonstrates that it has always been intended to be a *limited* local school tax requiring a minimum local contribution to the total expense of the school system. As originally adopted, the Constitution of 1877 merely authorized the use of local taxation for school purposes. (The 1877 Constitution also established a State school fund for public school purposes funded from certain dedicated revenue sources.) The 1920 Constitutional Amendment (Exh. 14) first established the requirement that a local county make a minimum contribution toward the overall expense of funding the public school system. The 1920 Amendment required that each local school board levy a local tax of at least one mill. That Amendment also placed a constitutional limitation of

five mills on the maximum amount of local financial contribution a county could make toward the total expense of the county school system. At the same time, the General Assembly enacted a statute, in 1919, supplementing the Constitution's common school fund, that directed one half of the State's revenues be spent for school purposes:

Fifty per cent of all revenues received by the State from all sources of income or taxation shall be used and expended for the support and maintenance of the common schools for the year in which said income or taxes are due and payable."

(former Ga.Code Ann. 32-935.) (Exh. 15.)

Implicit in this law was the obvious understanding that primary responsibility rested with the State rather than the local counties whose contribution was constitutionally limited. Subsequent constitutional amendments governing local school taxation confirm this understanding. The 1945 Constitution, for example, raised the minimum required contribution from one mill to five mills and increased the constitutional maximum limit on the amount a county could contribute locally to its school system from five mill to fifteen mills. A 1954 Amendment (Exh. 17) authorized counties, by local referendum, to increase their local contributions beyond the maximum limitation of 15 mills. In 1960, the maximum allowed contribution was increased from 15 mills to 20 mills and a minimum five mill levy requirement was maintained for each local system. (Exh. 18) The 1983 Constitution maintains the limit of a maximum 20 mills of ad valorem taxation, without requiring any minimum levy for public education. Art. VIII, § VI, ¶ I.

In summary, the constitutional history demands the conclusion that the local school tax has never been intended to relieve the State of its constitutional obligation to provide an adequate education and has always been intended as a limited authority to levy local taxes for school

purposes. Even if the language of Art. VIII, Sec. I, Par. I were unclear or ambiguous (which it is not) and the *in pari materia* rule were properly invoked, the necessary resulting constitutional interpretation would support Plaintiffs', rather than Defendants', construction of the "adequate education" obligation in Art VIII, Sec. I, Par. I.

## **V. PLAINTIFFS STATE A CLAIM UNDER THE EQUAL PROTECTION PROVISION OF THE GEORGIA CONSTITUTION**

Count II of the complaint alleges that Plaintiff Students and children in Plaintiff and Consortium Districts are denied an equal opportunity for a constitutionally adequate education in violation of the equal protection provision of the Georgia Constitution. The Complaint alleges that the State of Georgia provides an adequate education to some children while at the same time providing a constitutionally inadequate education to Plaintiff Students and other children in Plaintiff and Consortium Districts. As discussed in the prior section, the provision of an adequate education is not optional under the Georgia Constitution. Rather, it is a "primary obligation" -- a solemn duty. Consequently, when this obligation is met for some of Georgia's children and breached as to other children, this creates an arbitrary, capricious and unlawful classification of children prohibited by Georgia's equal protection provision:

"Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws."

Georgia Constitution, Art. I, § I, ¶ I.

Defendants in their motion to dismiss ignore that the classification challenged as a denial of equal protection concerns Georgia's children. Instead, Defendants erroneously assert that Plaintiffs' basic claim is about the unequal wealth of local government units and that Plaintiffs are mounting an attack on local government. (Def. Br., pp. 4, 6-10, 29-32.) They then compound

this factual error with the erroneous assertion (discussed in the prior section) that providing an adequate education to some children and not to others cannot be laid at the State's doorstep because education is solely a function of county government and the State has no constitutional obligation with respect to public education or its funding. Then, ignoring the differences between the facts and legal theories in this case and the *McDaniel* case, they argue that *McDaniel* forecloses Plaintiffs' equal protection claim -- a claim that was not even raised in *McDaniel*.

This case raises very different equal protection issues than those in *McDaniel*. The equal protection claim in *McDaniel*, as framed by the trial court and quoted by the Supreme Court, was that "similarly situated children receive very different amounts of educational resources as a result of disparities among school districts in taxable property wealth per pupil . . . The inequalities in the school finance system deny students in property poor districts equal educational opportunities." 248 Ga. at 638. In *McDaniel*, plaintiffs claimed that, unlike school districts with small tax bases, school districts with substantial tax bases per pupil were able to spend amounts well above the level of the State's funding mechanism -- a foundation program called the Adequate Program of Education in Georgia ("APEG"). *McDaniel* addressed whether it was a denial of equal protection that school districts with small tax bases were unable to raise as much revenue per mill of tax on a per student basis as school districts with larger tax bases.

Plaintiffs in *McDaniel* sought to require the State to equalize for spending *above* the level of the APEG foundation, to give their districts the same ability to exceed the APEG level as districts with larger tax bases. There was no claim in *McDaniel* that resources in any district were inadequate to meet the constitutional standards of an adequate education as identified by the Georgia Supreme Court. That is, there was no claim, and no factual showing, that as a result of an inadequate school funding system some children were provided educational opportunities that

were not reasonably calculated to enable them to meet state minimum proficiency standards or to function as productive members of society. The Court in *McDaniel* noted that plaintiffs there did not show any denial of basic educational opportunities that jeopardized their ability to function in society -- the legal standard of a constitutionally "adequate" education that the Court indicated would be actionable. 248 Ga. at 644. Plaintiffs here are not claiming that the State must equalize educational opportunities *above* the level of a constitutionally adequate education, nor are they claiming a general right to "equal educational opportunities." Rather, their equal protection claim results from the denial to some children of a constitutionally adequate education (as defined by the Court in *McDaniel*) while an adequate education to others is being provided. This equal protection claim is not above and beyond the State's constitutional obligation as was the claim in *McDaniel*, but rather is at the heart of the State's obligation to provide an adequate education to all of Georgia's children. Consequently, *McDaniel* does not preclude a challenge to unequal educational opportunities to obtain a constitutionally adequate education.

The Georgia equal protection provisions have generally been considered the equivalent of federal equal protection requirements. "The protections offered by the equal protection clauses of the state and federal constitutions are coextensive." *Kendrix v. Hollingsworth Concrete Prods.*, 274 Ga. 210 (2001).<sup>24</sup> Georgia equal protection "requires that the State treat similarly situated individuals in a similar manner." *City of Atlanta v. Watson*, 267 Ga. 185, 187 (1996). Both

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<sup>24</sup>The Georgia Supreme Court has left open the possibility that Georgia's equal protection provision offers greater protection than federal equal protection, consistent with the greater protection afforded by the Georgia Constitution in a number of other areas. *Grissom v. Gleason*, 262 Ga. 374, 376 n1 (1992); *Powell v. State*, 270 Ga. 327, 331 n3 (1998) (lists areas in which the Georgia Constitution provides greater protection than the federal Constitution). However, we do not rely on any expansion of Georgia's equal protection provision since Georgia equal protection standards as currently construed require a trial on Plaintiffs' equal protection claim.

Georgia and federal equal protection cases employ different standards of judicial scrutiny, including the rational relationship standard and the strict judicial scrutiny standard.<sup>25</sup> Under the rational relationship standard a statutory classification is presumed valid and will comport with constitutional standards if “the classification is based on rational distinctions, and the basis of the classification bears a direct and real relation to the object or purpose of the legislation.”

*Kendrix v. Hollingsworth Concrete Prods.*, 274 Ga. 210 (2001). Under the strict judicial scrutiny standard, which is employed when a classification involves a fundamental right or interest or is a suspect classification, the governmental classification will fall unless the government demonstrates that the classification is *necessarily* related to a *compelling* governmental objective.<sup>26</sup> Plaintiffs contend that regardless of the equal protection standard applied to this unequal access to a constitutionally adequate education, their equal protection claim in Count II states a cause of action that requires a trial on the merits.

**A. Heightened scrutiny should be applied to this claim of denial of a constitutionally adequate education.**

As the Georgia Supreme Court noted in *McDaniel*, the United States Supreme Court in *San Antonio Independent School District v. Rodriguez* would have considered public education a

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<sup>25</sup>Following the lead of the United States Supreme Court, Georgia courts apply what is termed “intermediate scrutiny” to certain important but not fundamental constitutional interests such as preventing discrimination based on gender. Using intermediate scrutiny, a “classification must ‘serve important governmental objectives and must be substantially related to achievement of those objectives’ to withstand scrutiny under the equal protection clause.” *Perini v. State*, 245 Ga. 160, 160-161 (1980) (gender discrimination alleged); *State v. Causey*, 246 Ga. 735, 738 (1980) (prosecution for child abandonment held to be gender discriminatory based on evidence that no prosecutions in county had been filed against women).

<sup>26</sup>“If the State’s classification operates to the disadvantage of a suspect class or impedes the exercise of a fundamental right, it is tested under a standard of strict judicial scrutiny.” *City of Atlanta v. Watson*, 267 Ga. 185, 187 (1996)

fundamental interest for equal protection analysis if the provision of education had been explicitly or implicitly guaranteed by the federal Constitution. This determination would have triggered strict scrutiny of the alleged discrimination. 248 Ga. at 646. In *McDaniel* the Georgia Supreme Court refused to apply heightened equal protection scrutiny to the discrimination found in that case because the court considered the "explicit or implicit" guarantee model to be "without meaningful limitation insofar as our state constitution is concerned." 248 Ga. at 647. Consequently, the Court in *McDaniel* applied the rational basis test. However, as noted above, the *McDaniel* Court dealt with a claim of unequal educational opportunities that arose above the level of a constitutionally adequate education.

Although educational opportunities above the level of constitutional adequacy were not considered fundamental in *McDaniel*, educational opportunities needed for a constitutionally adequate education most assuredly must be considered fundamental. And denying a constitutionally adequate education to some children while providing a constitutionally adequate education to others should be strictly scrutinized for equal protection analysis. It is also significant that subsequent to *McDaniel* the Georgia Supreme Court specified that "[f]undamental constitutional rights are those that are recognized as having a value so essential to individual liberty in our society that their infringement merits careful scrutiny by the courts." *Ambles v. State*, 259 Ga. 406, 408 (1989). Although the court in *Ambles* noted that the list of "fundamental" rights identified by the United States Supreme Court is not long (259 Ga. at 408), the Georgia Supreme Court has added to the list of fundamental rights under the Georgia Constitution the right to privacy. *Powell v. State*, 270 Ga. 327 (1998)

The fundamental importance of an "adequate" education protected by the Georgia Constitution is undeniable. Although *McDaniel* declined to rely on the federal "explicit or

implicit” right standard for fundamental interests, this is a consideration relevant to the analysis of education’s value to individual liberty. The Georgia Supreme Court has long recognized the importance of the public education protected by the Georgia Constitution. It is of sufficient importance that “the paramount and sole objective in the maintenance of the public schools of the State” is “the education and best interest of the school children themselves. If at any point other considerations conflict with this worthy objective, all such considerations must yield.” *Keever v. Board of Education*, 188 Ga. 299, 302 (1940).

Moreover, education is so important that the State of Georgia requires compulsory attendance by law, making education unique among State functions. O.C.G.A. § 20-2-690.1. The importance of an adequate education is further evidenced by the prohibition on granting driving permits to persons below the age of 18 who have not completed high school or are not currently in school. O.C.G.A. § 40-5-22.

As noted by the Georgia Supreme Court in a case nearly contemporaneous with *McDaniel*, a threshold question for determining whether heightened equal protection scrutiny is appropriate under *Rodriguez* " is whether the relative -- rather than absolute -- nature of the asserted deprivation is of significant consequence.." *Crim v. McWhorter*, 242 Ga 863, 868 (1979), *citing Rodriguez*, 411 U.S. at 19. There can be no question that the alleged deprivation here of an adequate education is “of significant consequence.”

The Georgia Supreme Court has also noted that, in equal protection analysis, an "adequate substitute" for the resulting deprivation had been found by the federal courts as a defense to certain forms of unconstitutional inequalities. *Crim*, 242 Ga. at 868. In *Crim*, plaintiffs challenged summer school tuition fees as a violation of the free schools provision of Article VIII of the Georgia Constitution. The court found that the opportunity to obtain a fee waiver for

summer school was an adequate substitute. *Ibid.* Plaintiffs know of no “adequate substitute” for a constitutionally adequate education.<sup>27</sup>

Because the State is constitutionally mandated to provide an adequate education to all children and because an adequate education is of paramount importance to enable citizens to survive in an increasingly complex world, the infringement of this basic right to education merits careful scrutiny by this Court.

**B. Plaintiffs’ Claim of Unequal Access to an Adequate Education Also States an Equal Protection Claim Using the Rational Basis Standard.**

The Supreme Court in *McDaniel* articulated the rational basis test it applied to the inequalities in educational opportunities above the APEG foundation level as follows: “Thus, if the Georgia school financing system ‘has a rational and reasonable basis *and meets the educational mandate of our constitution* [it] should, unless otherwise [invidiously] discriminatory or capricious, be upheld.” 248 Ga at 648, quoting *Shofstall v. Hollins*, 515 P.2d 590 (1973) (Emphasis added). As this statement makes clear, the assumption of the Court in *McDaniel* was that it was not dealing with educational opportunities that failed to meet “the educational mandate of our constitution.” *McDaniel* provides no authority for dismissing Plaintiffs’ complaint, which pleads in significant detail facts showing that children in Plaintiffs’ districts are denied a constitutionally adequate education at the same time other children are receiving a constitutionally adequate education.

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<sup>27</sup>Although the Georgia Supreme Court has applied intermediate scrutiny primarily to gender classifications, the classification alleged here between students provided a constitutionally adequate education and those not provided an adequate education should trigger at least equivalent scrutiny given the importance of the constitutional rights at stake and the dire consequences for both the State and individual from the deprivation of the opportunity to receive an adequate education.

Under the rational basis standard the Court must consider whether a classification under which some children receive a constitutionally adequate education and others do not “is based on rational distinctions” and “bears a direct and real relation to the object or purpose of the legislation.” *City of Atlanta v. Watson*, 267 Ga. 185, 187-188 (1996); *State v. Moore*, 259 Ga. 139, 141 (1989); *Consol. Gov't of Columbus v. Barwick*, 274 Ga. 176, 178 (2001) (classification drawn by the legislation must be “be reasonable and not arbitrary, and rest upon some ground of difference having a fair and rational relationship to the legislation's objective, so that all similarly situated persons are treated alike.”). The rational basis standard is not “toothless.” It has been applied to strike down unreasonable classifications in a variety of areas. Because specific facts are essential for the fair application of the rational basis test, it should not be applied in the absence of a factual record.

The Georgia Supreme Court has on many occasions applied the rational basis test to declare statutes and ordinances unconstitutional under the State’s Equal Protection Clause. For example, in *Bailey Inv. Co. v. Augusta-Richmond County Bd. of Zoning Appeals*, 256 Ga. 186, 187 (1986), the Court struck down an ordinance that refused to provide retroactive application of a set-back provision. The Court found that the policy justification for the set-back provision was equally applicable to properties to which retroactive application was denied. Consequently, the classification lacked “some fair and substantial relation to the object of the legislation” and “a legitimate ground of differentiation.”

In *State v. Moore*, 259 Ga. 139, 141 (1989), the Court found no rational basis for a statute that subjected trucks carrying general freight to a different length limit than trucks used to haul live poultry. The court applied the well accepted rational basis test under which “the essential of any such classification is that it bear a direct and real relation to the object or purpose of the

legislation.”

Prohibitions on doing certain business on Sundays based on the percentage of dollar volume that the prohibited items represented of a businesses total sales were found to be arbitrary and a denial of equal protection under the rational basis test. *Hughes v. Reynolds*, 223 Ga. 727 (1967).

In addition, the Georgia Supreme Court has relied heavily on specific facts and factual findings made by trial courts in deciding whether a classification challenged as a denial of equal protection has a rational basis. See, e.g., *City of Atlanta v. Watson*, 267 Ga. 185, 190 (1996) (City’s decision to purchase only single-family residences in its airport noise abatement programs was upheld based on trial record and facts establishing a rational basis for the city’s actions); *Farley v. State*, 272 Ga. 432, 434-435 (2000) (upheld mandatory seat belt law that only applied to passenger cars and not light trucks after extensive evaluation of evidence); *Love v. State*, 271 Ga. 398, 402-403 (1999) (overturned a statute that prohibited illegal users of marijuana from driving irrespective of the amount of marijuana in their systems but prohibited legal users of marijuana from driving only if marijuana use impaired their driving); *City of Lilburn v. Sanchez*, 268 Ga. 520, 522-524 (1997) (upholding, after extensive reliance on factual record from trial, local ordinance regulating the keeping of pigs as pets); *Moultrie Milk Shed, Inc. v. Cairo*, 206 Ga. 348, 353-354 (1950) (striking down under the rational basis test an ordinance prohibiting the sale of milk that was not pasturized within the county).

It is plainly apparent that the interests at stake in these equal protection cases were not as constitutionally significant and the injuries resulting from the classifications challenged were less serious than those at issue in this case, which alleges denial of an adequate education. Plaintiffs in their Complaint allege specific facts indicating that the educational opportunities they receive

under the Georgia school funding system do not meet the educational mandate of the Georgia Constitution. Plaintiffs further allege specific facts indicating that there are other children in Georgia who do receive an adequate education. *McDaniel* provides no authority for undercutting this equal protection claim. In contrast to the inequalities in educational opportunities challenged in *McDaniel*, there is and can be no rational basis for denying a constitutionally adequate education to some children while providing a constitutionally adequate education to others. No justifying interest in local option funding or local control is present in this case, because neither the State nor school districts have the *option* of providing students with constitutionally inadequate educational opportunities. It is the State's obligation to assure all children a constitutionally adequate education. The State cannot absolve itself of this obligation by pointing its finger at local school boards. Plaintiffs are prepared to prove that the State has caused the educational inadequacies and inequalities about which Plaintiffs complain. But even if other factors contribute to inadequate educational opportunities, the State, which has the constitutional obligation, cannot remain a passive bystander. Moreover, arguments about causation are inappropriate for resolution in a motion to dismiss. They can only be resolved after the evidence is presented at trial. Even under the rational basis test, denying a constitutionally adequate education to some children while providing a constitutionally adequate education to others is *per se* unreasonable, arbitrary and capricious.<sup>28</sup>

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<sup>28</sup>Courts in other states have held unconstitutional under state equal protection provisions the denial of a constitutionally adequate education to certain children and have readily found classifications triggering equal protection concerns based on such unequal treatment. See *Pauley v. Kelly*, 255 S.E.2d 859, 865 n.7 (W. Vir.1979); *Helena Elem. Sch Dist. No. 1 v. State*, 769 P.2d 684, 690 (Mont.1989).

## VI. PROCEDURAL ISSUES

### A. **Plaintiffs' Claims for Injunctive and Declaratory Relief are Not Barred by the Doctrine of Sovereign Immunity.**

Through a combination of misstatement of the Plaintiffs' legal theory and misapplication of Georgia law, Defendants attempt to erect a sovereign immunity defense to Plaintiffs' attack on the constitutionality of Georgia's school funding system. In so doing, Defendants adopt the facially astounding position that, unless the State has by statute expressly waived its immunity, a citizen has no legal recourse to prevent or enjoin the State's ongoing denial or violation of that citizen's constitutional rights. The State's position crumbles upon even cursory analysis.

Contrary to Defendants' consistent and inaccurate characterization of this action as a lawsuit to "litigate more monies out of the State Treasury", the Complaint in fact seeks declaratory and injunctive relief, including, *inter alia*, (1) a judicial determination that Georgia's school funding system is unconstitutional because it does not provide students with an adequate education as guaranteed by Article VIII of the Georgia Constitution and (2) an injunction against the State's further implementing that system. The Complaint does *not* seek an award of money damages or a judicial directive that Defendants appropriate or disburse money to Plaintiffs. The Georgia Supreme Court has held that claims for injunctive or declaratory relief, as distinguished from money damages, are not barred by sovereign immunity. *IBM v. Georgia Dept. of Admin. Servs.*, 265 Ga. 215 (1995). After discussing this sometimes confusing area of the law, the Court in *IBM* announced that "a suit for injunctive relief to restrain an illegal act [is] an exception to sovereign immunity." *Id.* at 216.

DOAS and the commissioner both contend that sovereign immunity protects them from injunctive relief. We disagree. This court has long recognized an exception to sovereign

immunity where a party seeks injunctive relief against the state or a public official acting outside the scope of lawful authority. See *Chilivis v. National Distributing Co.*, 239 Ga. 651, 654 (238 S.E.2d 431) (1977) (citing cases); *Irwin v. Crawford*, 210 Ga. 222, 224 (78 S.E.2d 609) (1953) ("if the actions of [public corporations, boards or commissions] are illegal or contrary to law, the courts will intervene in order to prevent [an action] illegal or contrary to law").

To avoid the harsh results sovereign immunity would impose, the court has often employed the legal fiction that such a suit is not a suit against the state, but against an errant official, even though the purpose of the suit is to control state action through state employees. See *Undercofler v. Seaboard Air Line R. Co.*, 222 Ga. 822, 827 (152 S.E.2d 878) (1966) (suit seeking to enjoin assessment of property taxes was not suit against the state because complaint alleged tax commissioner was acting contrary to state and federal constitutions). . . . However, the use of such legal fictions and circular reasoning has contributed greatly to the confusion that exists regarding the proper application of sovereign immunity. Recognizing a suit for injunctive relief to restrain an illegal act as an exception to sovereign immunity will permit a more logical analysis.

265 Ga. at 216.

The Georgia Supreme Court has consistently followed the holding that claims for injunctive relief not involving money damages are not barred by sovereign immunity. In *In the Interest of A.V.B.*, 267 Ga. 728 (1997), the Court reaffirmed its decision in *IBM*, holding:

The doctrine of sovereign immunity shields the state from suits seeking to recover damages. Sovereign immunity does not protect the state when it acts illegally and a party seeks only injunctive relief. The relief sought in this case is akin to injunctive relief in that GAO is seeking to remove Dougherty DFCS as A. V. B.'s custodian. Additionally, the primary purpose of sovereign immunity is to protect state coffers. Because GAO is seeking no monetary relief, this public policy concern is not implicated here.

Defendants cite only one case in support of their argument that sovereign immunity bars Plaintiffs' action; that case bears no relevance to the claims asserted by Plaintiffs in the case at bar. In *Dollar v. Olmstead*, 232 Ga. App. 520 (1998), the Court of Appeals held that sovereign

immunity barred the plaintiff's "equitable" claims for recovery of money (under an "unjust enrichment" theory) against the State Commissioner of Human Resources. By precluding the recovery of a monetary award against the State (whether styled by the plaintiff as a money damages claim at law or an unjust enrichment claim in equity), the Court of Appeals merely affirmed that the sovereign immunity doctrine is intended to prevent a direct claim for an award of money against the State. Thus, *Dollar* stands only for the proposition that, in the absence of a statutory waiver of immunity, plaintiffs may not circumvent the bar of sovereign immunity by styling their claim for money relief as an "equitable" action. As discussed above, however, Plaintiffs in the instant case neither plead nor request from the Court an award of money damages against the State. Accordingly, the above-mentioned Georgia Supreme Court decisions, including *IBM v. DOAS*, compel the conclusion that sovereign immunity does not bar the Plaintiffs' claims for declaratory and equitable relief in this action.

Moreover, even if the State were correct in its repeated insistence that this lawsuit is only a claim for "more money," there is no support for the State's implicit position that sovereign immunity would bar a claim seeking an injunctive remedy that would require the state to spend money. For example, in *Stewart v. Davidson*, 218 Ga. 760 (1963), members of the DeKalb County Board of Education and members of the City of Decatur Board of Education in their official capacities filed suit against members of the Georgia State Board of Education and the State Superintendent of Schools in their official capacities. Plaintiffs alleged that the State's funding formula as applied to DeKalb County schools and the City of Decatur schools was unconstitutional and sought mandamus against the defendants requiring them to disburse additional funds pursuant to the Minimum Foundation Program of Education Act. The Court held the portion of the statute at issue unconstitutional and granted the relief prayed for by plaintiffs.

The fact that additional money was thereby paid by the state to local school districts did not implicate the doctrine of sovereign immunity

In other cases, the Georgia appellate courts have allowed claims of constitutional deprivation to proceed and have not invoked the doctrine of sovereign immunity, notwithstanding the fact that the relief sought might force the State to spend significant additional money. For example, in *Employees' Retirement System of Georgia v. Martin*, 272 Ga. 535 (2000), the Supreme Court faced an equal protection challenge to a statute allowing state employees to receive different benefits depending on date of transfer from county employment to state employment. The Court unanimously held the statute unconstitutional on equal protection grounds: there was no rational basis for the differences in benefits based solely on the date of transfer. Even though the remedy would have forced the state to pay a good deal of money to plaintiffs and those similarly situated, there is no suggestion in the Court's opinion that this remedy would be barred by sovereign immunity.

**B. The Doctrine of Separation of Powers does Not Relieve the Court of its Duty to Rule upon the Constitutionality of State Laws or Actions.**

Defendants insist that this is a nonjusticiable controversy -- that by considering Plaintiffs' claims the court would be usurping the authority of the legislative and executive branches. It is significant that Defendants cite no authority in this section of their brief. Indeed, the Georgia Supreme Court has consistently recognized that the courts have a duty to decide issues involving the constitution and laws of the state, even if the determination may affect other branches of the government. The Supreme Court has long adhered to the classic holding of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 at 177 (2 L. Ed. 60) (1803): "It is emphatically the province and duty of the judicial department to say what the law is."

In *Thompson v. Talmadge*, 201 Ga. 867 (1947), the Supreme Court forcefully articulated the authority of the judicial branch:

The Constitution vests all legislative power in the General Assembly. Article 3, sec. 1, par. 1. It vests all judicial power in the courts. Art. 6, sec. 1, par. 1. It commands that these powers remain forever separate and distinct. Art. 1, sec. 1, par. 23. This court in *McCutcheon v. Smith*, 199 Ga. 685 (35 S. E. 2d, 144), citing in the opinion a number of older decisions supporting its ruling, held that construing the Constitution and the statutes is the function of the judiciary, and that the General Assembly has no power to make such construction. By this was meant that determining the meaning of the Constitution, which is binding upon everyone, was the exclusive function of the courts in the adjudication of cases properly brought before them for decision. Therefore, it must be held that if in the present cases a construction of the Constitution is involved, that is a justiciable question which the courts have the exclusive jurisdiction to adjudicate in determining such cases.

201 Ga. at 872-873.

The Defendants also claim the dispute is nonjusticiable by characterizing the issues in this case as a "political rather than legal determination." (Def. Br., p. 35.) The Supreme Court has also clearly rejected such reasoning:

The fact that a controversy has political overtones does not place it beyond judicial review. The law is equally as well settled that the judiciary is by the Constitution given the power and jurisdiction to adjudicate any and all justiciable questions presented to it in litigation, and that this jurisdiction of the courts is neither ousted nor impaired by the fact that there may be involved in such cases political questions.

*Bowen v. Griffith*, 258 Ga. 162, 163 (1988) (citing *Thompson v. Talmadge*, *supra* in support).

Defendants in *McDaniel*, *supra*, made the same claim of nonjusticiability that State Defendants assert here, and the Supreme Court soundly rejected that claim:

Such an argument, in our view, misperceives the nature of this dispute. Neither the trial court nor this court has been called upon to decide whether, as a policy matter, a particular financing scheme is "better" than another. We have been asked to determine whether the existing method of financing public education in this state meets constitutional

requirements. Judicial review of legislative enactments is central to our system of constitutional government and deeply rooted in our history (*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 2 L.Ed. 60 (1803)). A substantial number of courts have been called upon to decide issues similar to those presented in this case and have not found the difficulties associated therewith to be insurmountable. See, e.g., *Northshore School District No. 417 v. Kinnear*, 84 Wash.2d 685, 530 P.2d 178 (1974); *Shofstall v. Hollins*, 110 Ariz. 88, 515 P.2d 590 (1973). Indeed, "[w]e know of no sister State which has refused merits treatment to such issues, and we would regard our own refusal to adjudicate plaintiffs' claim of constitutional infringement an abdication of our constitutional duties. We turn, then, to the merits of the action." *Board of Education, Levittown v. Nyquist*, 83 App.Div.2d 217, 443 N.Y.S.2d 843 (1981).

248 Ga. at 633.<sup>29</sup>

It is likewise clear that a declaratory judgment action concerning the constitutionality of a state statute constitutes a justiciable claim. In *Higdon v. City of Senoia*, 273 Ga. 83 (2000), the Georgia Supreme Court, in affirming the trial court's refusal to dismiss an action seeking a declaration regarding the constitutionality of a state law, held that the Declaratory Judgment Act (O.C.G.A. § 9-4-1) should be liberally construed to afford a judicial remedy:

An action for declaratory judgment is "an available remedy to test the constitutionality of a statute in a case where an actual controversy exists with respect thereto." *Harper v. Burgess*, 225 Ga. 420, 422 (1969). The Act has been broadened to provide relief in cases

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<sup>29</sup>*Deriso v. Cooper*, 246 Ga. 540 (1980), cited in Defendants' brief (at p. 24), does not alter or modify the justiciability ruling rendered in *McDaniel*. Instead, the Court in *Deriso* held as a matter of both policy and law that Plaintiffs' claims regarding the defendant local school board for alleged negligent and racially discriminatory management of the district (and the resulting inadequate education of students) could not be considered in equity as the plaintiffs had not exhausted their statutory remedies. The Court therefore held that the plaintiffs' claims were not properly before the Court as they had not been raised pursuant to the local educational controversy dispute procedure set forth in Ga. Code Ann. §32-669a (the predecessor to O.C.G.A. 20-2-1160). 246 Ga. at 542. Additionally, the Court rejected the Plaintiffs' attempt to sidestep the established administrative review process for disputes regarding the construction of local school law based upon the Court's concern that plaintiffs were seeking the Court's *ongoing direct supervision and management* of the school district and appointment of a receiver in place of the board. 246 Ga. at 542-43.

where a justiciable controversy exists. O.C.G.A. § 9-4-2 (b); *Baker v. City of Marietta*, 271 Ga. 210 (1999). There is a justiciable controversy "where a concrete issue is present, and there is a definite assertion of legal rights, and a positive legal duty with respect thereto, which are denied by the adverse party." *City of Nashville v. Snow*, 204 Ga. 371, 377-378 (1) (a) (1948).

273 Ga. at 83.

The fact that a remedy to unconstitutional State conduct may have financial implications provides neither a basis for the State's invocation of sovereign immunity nor a bar to a Georgia court performing its traditional constitutional review function. For example, in *Irvin v. Gregory*, 86 Ga. 605, 614 (1891), the Court held unconstitutional a statute requiring a county school district to collect fees from participants as violating the free common schools requirement of the Georgia Constitution. Although elimination of the authority to impose student fees would likely require additional tax revenues to support the schools, this factor did not enter the court's analysis in determining whether this provision was unconstitutional. *See also, Wilson v. Stanford*, 133 Ga. 483 (1909) and *Mayor, etc., of Gainesville v. Simmons*, 96 Ga. 477 (1895) (in both cases, court struck down matriculation fees for common schools).

Persuasive authority from a significant number of other jurisdictions<sup>30</sup> clearly establishes that judicial review of the constitutional adequacy of a State's funding of public education does not entail a "usurpation" of the legislative appropriations process and executive function, as argued by the Defendants. (See also, Section IV. A., *infra*, re discussion of other courts' rulings

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<sup>30</sup>The Georgia Supreme Court has held in a variety of contexts that persuasive authority from other jurisdictions may be relied as a basis of judicial decision. See, e.g., *Crim v. McWhorter*, 242 Ga. 863, 866 (1979); *Cobb County v. Kennestone Hospital v. Prince*, 242 Ga. 139, 246-149 (1978).

on adequacy cases.)<sup>31</sup> While, as in other states, the State of Georgia through its legislative and executive branches bears responsibility for the provision (and funding) of an adequate education to all students beneath the college/university level, courts retain the power -- and indeed the duty -- to decide if those branches of government have complied with fundamental constitutional requirements in carrying out such duties.

Accordingly, as in *McDaniel*, the vast majority of state courts in these cases have determined that constitutional challenges to the adequacy of school funding structures are justiciable.<sup>32</sup> As these rulings have pointed out, and as recognized in *McDaniel*, 248 Ga. at 632-633, it is the province and responsibility of the judiciary to interpret constitutional requirements and declare governmental actions in conflict with such requirements to be invalid.<sup>33</sup> While courts must accord all due respect to the other branches' expertise in crafting appropriate remedies in the event that a constitutional violation is found, these decisions have concluded that refusing to

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<sup>31</sup>Specifically, since 1997, a broad range of Courts have determined that plaintiffs' claims were justiciable in ruling favorably on adequacy claims. See, e.g., *Montoy v. State*, 2005 Kan. LEXIS 2 (Jan. 3, 2005); *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004); *Columbia Falls Elem. Sch. Dist. No. 6 v. State of Montana*, No. 04-390 (Mont., Nov. 9, 2004) (Preliminary Order; see Exh. 20); *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326 (N.Y. 2003); *Lake View Sch. Dist. v. Huckabee*, 91 S.W.3d 472 (Ark. 2002); *Tennessee Small Sch. Systems v. McWherter*, 91 S.W.3d 232 (Tenn. 2002); *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535 (S.C. 1999); *Idaho Schools for Equal Educational Opportunity v. Evans*, 976 P.2d 913 (Idaho 1998); *Hull v. Albrecht*, 960 P.2d 634 (Ariz. 1998); *Abbott v. Burke*, 693 A.2d 417 (N.J. 1997); *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997); *Brigham v. State*, 692 A.2d 384 (Vt. 1997); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997); *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997).

<sup>32</sup>See, e.g., cases cited at footnote 31 above.

<sup>33</sup>See, e.g., *Leandro v. State*, 488 S.E.2d 249, 253-54 (N.C. 1997); *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535, 540 (S.C. 1999); *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 147-48 (Tenn. 1993); *State v. Campbell County Sch. Dist.*, 32 P.3d 325, 331 (Wyo. 2001); *Levittown v. Nyquist*, 439 N.E.2d 359, 363-64 (N.Y. 1982).

decide school financing cases simply “because of ‘legislative discretion,’ ‘legislative function,’ etc. would be a denigration of our own constitutional duty.” *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 209 (Ky. 1989); *Leandro v. State*, 488 S.E.2d 249, 253 (N.C. 1997) (“When a government action is challenged as unconstitutional, the courts have a duty to determine whether that action exceeds constitutional limits”).

Indeed, courts have recognized that “[o]ne need only examine the litany of case law . . . interpreting the broad language of such constitutional provisions as the due process and equal protection provisions . . . to reject the disingenuousness of the “absence-of-standards” rationale” for the State’s justiciability argument. *State v. Campbell County Sch. Dist.*, 32 P.3d 325, 335-36 (Wyo. 2001). Courts can and do look to a variety of sources, including the executive and legislative branches’ own standards, to determine constitutional adequacy. *See, e.g., Montoy v. State*, No. 92,032, 2005 WL 11558 (Kan. Jan. 3, 2005) (per curiam). Case law from states across the nation, including Georgia’s neighboring states, establishes a body of judicially discoverable and manageable standards for determining whether a school financing system is constitutionally adequate.<sup>34</sup> Contrary to the Defendants’ contention, this broad range of judicial rulings establishes that educational adequacy is not a meaningless constitutional norm that merely

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<sup>34</sup>*Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 214 (Ky. 1989) (adopted seven-part definition of constitutional adequacy including providing students with sufficient communication skills; sufficient knowledge of economic, social, and political systems; sufficient understanding of governmental processes; and sufficient academic or vocational skills to compete favorably with other states) *Id.* at 212. This definition has been extensively relied on by other state courts that have considered issues concerning whether their school funding systems provided a constitutionally adequate education, including several of Georgia’s sister states. *E.g., Lake View Sch. Dist. v. Huckabee*, 487-488; 91 S.W.3d 472 (2002) *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535, 540 (S.C. 1999); *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997); *McDuffy v. Secretary of Education*, 615 N.E.2d 516, 554-555 (Mass. 1993). *See also, Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326 (N.Y. 2003). *See also*, footnotes 12 and 14.

appears in “the eyes of the beholder” for which the State is not accountable. Def. Br. at 36. As in other states, clear, judicially manageable standards exist in Georgia for determining the constitutional adequacy of the state’s provision and funding of public education in Plaintiff Districts and Consortium Districts.

Finally, as other states’ highest courts have also recognized, a determination that a particular funding system violates constitutional standards entails no greater “usurpation” of the authority of the coordinate branches than any other constitutional determination. *See, e.g., Seymour v. Region One Bd. of Educ.*, 803 A.2d 318, 326 (Conn. 2002). Courts accord proper respect to the other branches in school financing cases not by concluding that their state constitutions are unenforceable, but rather by providing the political branches the first opportunity to correct constitutional deficiencies after issuing such a determination and by taking more direct remedial actions only if and when the executive and legislative branches fail to correct identified violations. *See, e.g., id.* at 324; *Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365, 390-91, 393-94 (N.C. 2004); *Campaign for Fiscal Equity v. State*, 801 N.E.2d 326, 345 (N.Y. 2003); *Roosevelt v. Bishop*, 877 P.2d 806 (Ariz. 1994); *State v. Campbell County Sch. Dist.*, 32 P.3d 325, 332 (Wyo. 2001).

**C. The Complaint Properly Pleads and Raises a "Case or Controversy" Sufficient to Establish Standing and Subject Matter Jurisdiction.**

Defendants contend (at pp. 37-44 of their brief) that this Court lacks subject matter jurisdiction over the claims asserted by Plaintiffs, all of whom allegedly lack “jurisdictional standing” to maintain this action. Defendants would incorrectly interpret the “case or controversy” requirement so as to render meaningless – and totally unenforceable by any person or entity – the adequacy guarantee of the Georgia Constitution.

Georgia has adopted the two-part federal test for standing in cases (like the instant case) in which government action taken pursuant to constitutional directive or statute is challenged. Standing exists if the complainant (1) contends that the challenged action has caused him "injury in fact" (economic or otherwise), and (2) asserts an interest "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question". *Amdahl Corp. v. Georgia Dep't of Administrative Services*, 260 Ga. 690, 696 (1990), quoting from *Association of Data Processing Service Organizations, Inc. v. Camp* ["Data Processing"], 397 U.S. 150, 152-153 (1970); see *Hilton Constr. Co. v. Bd. of Education*, 245 Ga. 533, 538 (1980). Thus, standing requires that the provision or the challenged action is "hurtful" to plaintiff (*Agan v. State*, 272 Ga. 540, 542 (2000), citing *Bo Fancy Productions v. Rabun County Bd. of Commrs.*, 267 Ga. 341, 344 (1996)) in that it "adversely impacts" plaintiff's rights. *Ambles v. State*, 259 Ga. 406, 407 (1989).

Furthermore, standing is considered in the framework of constitutional requirements that restrict judicial power to "cases" and "controversies". See *Data Processing, supra*, 397 U.S. at p.151; U.S. Const., Art. III, § II; Ga. Const. (1983), Art. VI, §, IV, Par. I. Article VI of the Georgia Constitution expressly limits state court jurisdiction to "cases". See, e.g., *In re I.B.*, 219 Ga. App. 268 (1995) As the Georgia Supreme Court stated in *Cheeks v. Miller*, 262 Ga. 687, 685 (1993) [*citations omitted*]:

The existence of an actual controversy is fundamental to a decision on the merits by this court.' A controversy is justiciable when it is definite and concrete, rather than being hypothetical, abstract, academic, or moot. Similarly, federal courts employ the doctrine of 'ripeness' under the Article III requirement of a 'case or controversy.

Because Georgia's "case or controversy" requirement is historically linked to the federal Article III requirement, U. S. Supreme Court decisions can help explicate the necessary elements

that plaintiffs must allege in a complaint to establish "constitutional standing",<sup>35</sup> namely: (1) an invasion of a legally protected interest, which is concrete and particularized (affects Plaintiff in a personal and individual way); (2) a causal connection between the injury and the conduct complained of, meaning that the injury is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court"; and (3) a likelihood that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1981).

Under these principles, Plaintiffs' complaint in the instant case adequately alleges a "case" or "controversy" with regard to the three elements of (1) injury in fact, (2) causation and (3) redressability.

#### **1. Plaintiffs Students' Standing**

As alleged in the complaint, Plaintiff Students attend schools in the Plaintiff School Districts (Complaint Par. 4, subs.(g)-(k)), and have suffered and are suffering actual and particularized "injury in fact" because of the Defendants' failure to provide a constitutionally mandated adequate public education. Plaintiffs' injury, and Defendants' acts and omissions which caused it, are properly alleged in the Complaint, both in terms of deficient State education "inputs" (e.g., resources, instrumentalities, teaching, etc.), and resulting deficient student education "outputs" (high secondary school drop-out rates, poor standardized test results, disproportionate post-high school remediation needs in college and on the job, etc.). These deficiencies are redressable by the Court, through declaratory, injunctive and other appropriate

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<sup>35</sup>*See Inserction, A Fantasy Store v. City of Marietta*, 278 Ga.170, 172-173 (2004) [noting re issue of "mootness", that Georgia courts have depended repeatedly on Supreme Court of the United States precedent].

relief, against the State and the other Defendants, declaring unconstitutional and enjoining continued implementation of the State's educational funding system. If students, who themselves are being denied an opportunity to receive an adequate education by the State in the Plaintiff Districts, have no standing to assert the claims alleged in the Complaint, then it is clear that no claim for violation of Article VIII's adequate education mandate may be maintained and that Article VIII consists of nothing more than constitutional window-dressing. In point of fact, the Plaintiffs' standing in *McDaniel* was presumed and clearly unassailable.

## **2. Plaintiff School Districts' Standing**

Plaintiff Districts are bodies corporate with the capacity to sue and be sued. Complaint, Par. 4(b)-(f). They are responsible for local supervision and administration of the State's public education system, pursuant to both delegated and independent self-executing grants of constitutional authority. As entities with both constitutional and statutory responsibilities for spending public funds and maintaining public schools for the benefit of citizens residing within their respective counties, Plaintiff Districts have an obvious and cognizable interest in assuring that the State meets its constitutional obligation to provide and fund an adequate education to students enrolled in the respective districts, including Plaintiff Students. Thus, a Court declaration and order that the educational funding system is constitutionally *inadequate* will fundamentally affect Plaintiff Districts in the performance of their duties and activities, bringing them within the "zone of interest" to be protected by the constitutional provisions at issue in this declaratory judgment action and thereby establishing Plaintiffs' standing. *See, e.g., Hoke County Board of Education*, 599 S.E.2d 365, 376-378 (2004) (finding that both the student and school district plaintiffs have proper standing after examining "whether the supporting evidence demonstrates that a harm has occurred to those "within the zone" to be protected by the

constitutional provision at issue”) and *Baker v. Carr*, 369 U.S. 186 (1962).

### 3. Plaintiff Consortium’s Standing

Plaintiff Consortium for Adequate School Funding in Georgia, Inc. (the “Consortium”) has standing to sue as representative of some fifty local school districts (“Consortium Districts”). Complaint, Par. 4, subs.(a). It satisfies the three-part test for “standing of an association” articulated in *Hunt v. Wash. State Apple Advertising Comm.*, 432 U.S. 333, 341 (1977), and adopted in *Aldridge v. Ga. Hospitality &c. Assn.*, 251 Ga. 234 (1983). *Aldridge* involved a trade association which sought declaratory and injunctive relief against the DeKalb County Board of Health on behalf of its members. After acknowledging the absence of Georgia cases addressing associational standing, the Georgia Supreme Court turned to federal precedent and adopted the *Hunt* test:

[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

*Aldridge*, *supra*, 251 Ga. at p.236; *see also Warth v. Seldin* (cited, *supra* fn.12), 422 U.S. 490, 511 (1975).<sup>36</sup>

The Consortium meets the *Aldridge/Hunt* test for Standing of an Association. First, each Consortium member is a county school district alleged to be “adversely affected by *one or more*

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<sup>36</sup>*Warth v. Seldin* states: “Even in the absence of injury to itself, an association may have standing solely as the representative of its members. . . . The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.” 422 U.S. at p.511.

of the constitutional deficiencies" of the current public education system (Complaint, Par .4, subs.(a)), and each district member is a body corporate with both the capacity to sue and be sued and with standing to sue individually, based on the *rationale* applied to Plaintiffs School Districts, *supra*. Second, the constitutional interests that the Consortium seeks to protect are germane to its purpose -- "securing adequate funding for Georgia school systems so that they can meet the educational needs of their students." Complaint, Par. 4, subs.(a). Third, this lawsuit seeks declaratory and injunctive relief; therefore, it does not present complicated issues of *individual damages*, which would require direct participation of the member Consortium Districts. As *Hunt* states:

If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind."

432 U.S. at p.343, quoting *Warth v. Seldin*, 422 U.S., 490,515 (1975); cf. *Equitable Life Assurance Society v. Tinsley Mill Village*, 249 Ga. 769, 294 S.E.2d 495 (1982).)

Relevant policy considerations also support the Consortium's standing. First, as demonstrated by the thoroughness with which the Complaint was drafted, the Consortium is and will continue to be a zealous advocate of its members' interests. See *Aldridge, supra*, 251 Ga. at 236. Second, allowing the Consortium to represent members promotes judicial economy, in that "[o]ne litigant can, in a single lawsuit, adequately represent many members with similar interests, thus avoiding repetitive and costly separate actions." See *Aldridge, supra*, 251 Ga. at p.236. Third, the constitutional issues presented are significant, yet capable of repetition and evading review if prosecuted by individual Consortium Districts. See *Perdue v. Baker*, 277 Ga. 1, 3

(2003) (citing this as the reason for merits review of a moot issue). Finally, the Consortium -- like associations generally -- would be "less susceptible than [its] individual [members] to retaliation by those [State] officials responsible for executing the challenged policies." See *Aldridge, supra*, 251 Ga. at 236. Indeed, given the ongoing State budget problems in Georgia, which have already "led to across-the-board budget cuts" (Def. Br. p.1), concerns about further cuts or retaliatory action by State officials targeting Consortium Districts that choose to sue the State individually can hardly be described as far-fetched.

**D. The School District Plaintiffs Do Not Lack Standing to Bring This Action as Subordinate Governmental Entities to the State.**

Defendants attack Plaintiffs' standing, citing the State's preemptive rights over governmental subordinates where the latter institute constitutional challenges against the will of the State. Def. Br., pp. 48-49, citing *Caldwell v. Hospital Authority of Charleston County*, 248 Ga. 887 (1982), *City of Atlanta v. Spence*, 242 Ga. 194, 195 (1978), and *Stewart v. Davidson*, 218 Ga. 760 (1963). This doctrine does not apply to the facts alleged in the complaint. The School District Plaintiffs' constitutional challenge is not against "the will" of the State Defendants. Def. Br. p. 48. The *Stewart* case, *supra* -- relied upon by Defendants (Def. Br. p. 48) -- actually decimates their "State preemption" claim. In *Stewart*, members of the DeKalb County Board of Education and the City of Decatur Board of Education petitioned for mandamus against members of the Georgia State Board of Education and the Georgia State School Superintendent, to require that they calculate funding due plaintiffs under a state law, without giving effect to the last sentence of that law alleged to be unconstitutional. The Georgia Supreme Court rejected the defendants' attack on the plaintiffs' standing, and found the plaintiffs' status as subordinate units of State government to be irrelevant:

It is not a valid argument to contend that since petitioners are public officers of a subordinate unit of the State they can not attack this State law. The only requisite to the right to make the attack is a showing that it is hurtful to the attacker. It is admitted that this clause hurts petitioners. . . .

*Stewart, supra*, 218 Ga. at p.763, *citations omitted*.

The cases Defendants cite on p. 48 of their brief hold simply that cities and counties are not persons within the meaning of the due process and equal protection clauses of the constitution. The *Spence* case they quote relies upon *Bibb County v. Hancock*, 211 Ga. 429, 440-441 (1955), which held:

Neither counties nor municipal corporations stand in the same position as individuals or private corporations, and as against the State they do not own the taxes collected by them and public property held by them as if it were private property. They are not persons as against the State within the meaning of the constitutional provision guaranteeing due process to all persons.

Indeed, *Spence* itself makes clear that counties may sue for other constitutional violations. Immediately after the sentence quoted by Defendants (to the effect that counties or municipal corporations lack standing to invoke the equal protection and due process clauses of the State or federal Constitution in opposition to the State), the court concluded: "This does not mean that the city does not have standing *to raise other constitutional questions* concerning the statute attacked by them."

In short, Defendants have cited, and can cite, no support for the proposition that a political subdivision of the State of Georgia is barred from asserting a claim against the State for breach of its constitutional duty to provide an adequate public education for the children of the Plaintiff Districts. It necessarily follows that Defendants' assertion that the individual Plaintiff Students' claims are barred because they are "plainly derivative" and "appertaining to the right of the

Counties to maintain their action” is not only totally without merit but is in fact incomprehensible.

**E. The Complaint Names Proper Defendants**

Finally, Defendants assert that jurisdictional standing cannot be established because no purported “causal connection” exists between the alleged breach of the State’s constitutional obligation under Article VIII and the named Defendants. This argument is untenable first and foremost because the State of Georgia is a named Defendant. It is the State that bears the constitutional obligation to provide an adequate education, and not the individual members of the General Assembly or even the Governor as an individual. Cf., *Perdue v. Baker, supra*, 277 Ga. at 6 (“The State of Georgia is not one branch of government, one office, or one officer.”); *IBM v. Georgia Dept. of Admin. Servs.*, 265 Ga. 215 (1995) (holding that State may be sued in its own name for injunctive or declaratory relief and that plaintiffs need not resort to the fiction of naming individual “errant” officials to avoid the defense of sovereign immunity).

Additionally, the Complaint names as Defendants the State Superintendent and Board of Education (and its members), all of whom are constitutional officers, charged with the responsibility for executing, regulating, and overseeing the state’s educational programs and financing. See, Ga. Const. Art. VIII, Sec. II, Par. I, and Art. VIII, Sec. III, Par. I; O.C.G.A. § 20-2-11 (State Board’s responsibility for submission of budget necessary for the operation of the State public school system); O.C.G.A. § 20-2-160 *et seq.* (QBE financing provisions administered through the State Department of Education); O.C.G.A. § 20-2-240 (State Board of Education’s “responsibility to establish and enforce standards for operation of all public” schools “so as to assure . . . equal and quality educational programs, curricula, offerings, opportunities and facilities for all of Georgia’s children.”); O.C.G.A. § 20-2-34 (State School Superintendent’s

responsibility to implement all laws governing public schools and regulations of the State Board of Education); see also, Section IV. B. 3, *infra* (describing State Department of Education's extensive regulation of public education.)

In sum, the Plaintiffs have named precisely those Defendants with authority to redress the asserted constitutional violations by naming the State itself and also naming the State constitutional officials who execute and administer the statutory education programs and funding mechanisms adopted by the State to implement its constitutional obligations.

## **VII. CONCLUSION**

Plaintiffs respectfully submit that for the foregoing reasons, Defendants' Motions to Dismiss Plaintiffs' Complaint should be denied in their entirety.

Respectfully submitted,

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Amy Totenberg

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

This will certify that on this date the undersigned served the within and foregoing BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS PLAINTIFFS' COMPLAINT and PLAINTIFFS' EXHIBITS FILED IN SUPPORT OF BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT on Defendants in this action by depositing copies hereof in the regular U.S. Mail, postage prepaid, addressed to the following:

Stephan Ritter  
Alfred L. Evans, Jr.  
Senior Assistant Attorneys General  
40 Capitol Square, S.W.  
Atlanta, Georgia 30034-1300

Attorneys for Defendants

This \_\_\_\_ day of January, 2005.

\_\_\_\_\_  
Thomas A. Cox