

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

**CONSORTIUM FOR ADEQUATE)
SCHOOL FUNDING IN GEORGIA,)
INC., et al.,)**

Plaintiffs,)

v.)

THE STATE OF GEORGIA, et al.,)

Defendants.)

**CIVIL ACTION FILE
NO. 2004-CV-91004**

**PLAINTIFFS' SUPPLEMENTAL BRIEF IN RESPONSE
TO DEFENDANTS' REPLY BRIEF**

I. INTRODUCTION

In their initial brief, Defendants denied that the State has any obligation to provide an adequate education, arguing that this obligation rests solely on individual school districts and school boards. Indeed, this argument was the cornerstone of Defendants' initial brief. Apparently realizing the absurdity as well as the implications of this argument, Defendants in their reply brief have softened it; however, the argument of no constitutional responsibility reappears periodically¹ and continues to constitute the premise lurking beneath all of Defendants' substantive legal arguments. At best, Defendants vacillate between the arguments that (1) the State has no responsibility for an adequate education; (2) the State has some obligation but, whatever that is, the State has fully delegated that obligation to school boards and

¹ For example, Defendants, in an attempt to distinguish the overwhelming weight of authority from decisions of other state supreme courts (including neighboring states) that have held school funding systems unconstitutional, revert to the argument that education in Georgia is a "county function." Def. Rep. Br., p. 37.

school districts and having delegated its responsibility, the State can wash its hands of the consequences of the educational inadequacies resulting from that delegation;² (3) there can be no obligation on the State because the concept of an “adequate education” is meaningless, completely politically determined and a matter of State largess rather than State obligation; and alternatively, (4) the State has fulfilled the core minimum requirements for provision of an adequate education based upon Defendants’ factual allegations and evidentiary interpretation that are not properly before this Court.

The State’s vacillating arguments ultimately boil down to one theme – that the mandate of the State’s primary obligation to provide an adequate education contained in Georgia Constitution Article VII, §I., Para. I is a meaningless concept that cannot be enforced *under any circumstances* on behalf of the children of the Plaintiff school districts. This argument clearly flies in the face of the Georgia Supreme Court’s holding in *McDaniel v. Thomas*, 248 Ga. 632 (1981). The instant brief demonstrates both the fallacies underlying Defendants’ core arguments and the implicit and explicit factual findings and assumptions that the State improperly asks this Court to make in reviewing its motions. As the Plaintiffs’ original Brief in Opposition to Defendants’ Motions to Dismiss Plaintiffs Complaint provided an extensive response to many of the arguments raised anew in the Defendants’ reply brief, this brief does not address each and every point made by the Defendants’ reply brief.

² See, e.g., Def. Rep. Br. p. 4

II. DEFENDANTS' OBFUSCATION OF THE FACTS AND DISCLAIMER OF ANY LEGAL RESPONSIBILITY FOR AN ADEQUATE EDUCATION POWERFULLY DEMONSTRATE THE IMPORTANCE OF JUDICIAL INTERPRETATION OF THE OBLIGATION TO PROVIDE AN ADEQUATE EDUCATION

A. Defendants Belittle, Distort and Deny Well Pledged Facts Showing a Serious Denial of the Opportunity for an Adequate Education to Large Numbers of Georgia's Children.

Defendants ignore the black letter legal principle that, in ruling upon a motion to dismiss, the Court must assume that all well pleaded facts are true; instead Defendants repeatedly ask the Court to accept contrary factual assertions. This in and of itself undermines a number of Defendants' arguments which are made in an effort to avoid a trial on Plaintiffs' claims, and are premised on facts contrary to those alleged in the complaint – and thus deemed accurate for purposes of this motion. Defendants ask the Court to consider “evidence” not in the record in reaching a judgment that they are in fact fulfilling the 1983 Constitution's education clause's mandate which they construe in Eighteenth Century terms – ensuring merely that “students are learning to read, write and do simple math.” Def. Rep. Br., p. 14. They also ask the Court to consider the General Assembly's total current level of funding for all Georgia schools in FY 2005 (which is not in the record), without regard to what sums are actually expended in the Plaintiff districts. Def. Rep. Br., pp. 16-17. Similarly, Defendants ask the Court to interpret the results of Georgia's constitutional breach – its dismal student achievement results – in light of a host of variables that are not properly before the Court. Def. Rep. Br., p. 17, n. 4. Through these evidentiary-based arguments, Defendants seek to evade the *McDaniel* Court's recognition that evidence in a future case might establish that the State's funding system for public education deprives students in particular school districts of an adequate education. *McDaniel v. Thomas*, 248 Ga. at 644.

There is another significance to Defendants' refusal to acknowledge the well pleaded facts showing that students in Plaintiff Districts and Consortium Districts are denied an opportunity for an adequate education: Defendants' briefs constitute a clear admission that Defendants, including the State of Georgia, view themselves as having *no responsibility whatsoever* for the disastrous lack of adequate educational opportunities affecting many of Georgia's children. It is precisely this failure of the State of Georgia to acknowledge and take seriously its constitutional responsibilities to provide an adequate education that is at the heart of this case.

Throughout their reply brief, Defendants obfuscate and ignore the serious issues raised in Plaintiffs' complaint of injury to children from Georgia's woefully inadequate educational system; indeed, Defendants make light of this tragic situation. Even though Georgia's education system consistently competes for worst in the nation on a number of critical indicators of educational adequacy, Defendants refuse to discuss or acknowledge the serious ongoing harm to Georgia's children from the lack of adequate educational opportunities.³

Defendants also attempt to place the blame for educational failure on parents, students and the communities in which they live. Def. Rep. Br., p. 17, n. 4. This is simply a variant of the argument that the State has no constitutional responsibility for an adequate education. Plaintiffs are willing to test these arguments in a trial if Defendants wish to pursue their defense that everyone but Defendants is responsible for these inadequacies; however, these arguments

³ Defendants' factual assertion that the complaint shows that children in Plaintiff Districts enjoy academic success (Def. Rep. Br., pp. 17-18) flies in the face of the detailed allegations of serious academic failure, including high rates of school non-completion, resulting from inadequate educational opportunities. (Complaint, ¶¶ 101-125.)

have no place in resolving a motion to dismiss except to illustrate Defendants' apparent resolve to disregard their constitutional responsibilities.

Defendants' unwillingness even to acknowledge, much less address, the tragic facts demonstrating the woeful inadequacy of George's school financing system highlights the importance of this Court's role in interpreting the Constitution and considering the evidence on Plaintiffs' claims.

B. Defendants' Legal Arguments Similarly Demonstrate a Disregard for the State's Constitutional Obligation to Provide an Adequate Education

Defendants argue repeatedly that the constitutional obligation to provide an adequate education is essentially meaningless. Contrary to *McDaniel*, Defendants suggest that, although the claim to enforce the State's obligation to provide an adequate education may be justiciable, the Legislature has unfettered discretion to implement or ignore this obligation as it chooses. See, e.g., Def. Rep. Br., p. 8. According to Defendants, the constitutional "primary obligation" of the State is no obligation whatsoever because whatever resources the State makes available to the children of Georgia for their education are provided as a purely political act and one that must be viewed as largess rather than a constitutional obligation. Def. Rep. Br., p. 34. Moreover, Defendants continue to argue that the State's primary constitutional obligation to provide an adequate public education, "which shall be provided for by taxation" does not in any way relate to the adequacy of the system for funding education.

Even though both the 1976 Constitution (construed in *McDaniel*) and the current 1983 Constitution (1) make the provision of an adequate education "a primary obligation of the State of Georgia" and (2) require that the expense of this education "shall be provided for by taxation," Defendants persist in arguing that the State's constitutional obligation is somehow

nullified by the elimination from the 1983 Constitution of a pro-segregation 1962 amendment that redundantly specified: "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." Def. Rep. Br., pp. 8-9, n. 2. Compare Plaintiffs' Initial Br. at pp. 28-35. According to Defendants, the elimination of this redundant reference to the "General Assembly"⁴ means that the constitutional obligation to provide and fund an adequate education no longer exists because the concept of the "State" is too nebulous to use in enforcing this obligation. The only authorities that Plaintiffs can identify that have addressed the significance of a difference between the obligations of the "State" and the "General Assembly" to provide an adequate education directly contradict Defendants' specious argument.

In a recent decision holding the Arkansas school funding system constitutionally inadequate, the Arkansas Supreme Court found that the constitutional reference to "State" in the education provision of the Arkansas Constitution includes the General Assembly and imposes an *even greater* and enforceable obligation than does reference to the "General Assembly" alone. *Lake View School District No. 25 v. Huckabee*, 91 S.W.3d 472, 483-484 (Ark. Sup. Ct. 2002). Similar to the Georgia Constitution, the Arkansas Constitution designates the *State* as the entity to "maintain a general, suitable, and efficient system of free public schools." The Arkansas court held that the reference to the "State" meant that *all* departments of government are responsible

⁴ Reference to the "General Assembly" is redundant because the General Assembly is included in the term "State."

for assuring that this constitutional obligation is met, not just the General Assembly. Moreover, the court found that the fact that the education obligation was on the "State" in the current Arkansas constitution, and this term had replaced "General Assembly" that appeared in earlier Arkansas constitutions, reinforced the justiciability of this constitutional obligation. Indeed, the Arkansas court distinguished most of those few state supreme court decisions that have held education clauses of state constitutions nonjusticiable or unenforceable on the ground that the state constitutions interpreted by those courts did not explicitly make education a "State" obligation (including those from Alabama, Florida and Rhode Island relied on by Defendants here):⁵

. . . [I]n those state constitutions it is incumbent upon the *General Assembly* to provide, maintain, or promote the public schools. See *James v. Alabama Coalition for Equity, Inc.*, *supra* ("The legislature may by law provide for or authorize the establishment and operation of schools. . . ."), *Marrero v. Commonwealth of Pennsylvania*, *supra* ("The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education. . . ."); *Coalition for Adequacy & Fairness in School Funding, Inc. v. Chiles*, *supra* ("Adequate provision shall be made by law for a uniform system of free public schools. . . ."); *City of Pawtucket v. Sundlun*, *supra* ("It shall be the duty of the general assembly to promote public schools. . . .").

Lake View School District No. 25, 91 S.W.3d at 484. Consequently, Defendants' purported justification for ignoring the "State's" obligation in the Georgia Constitution to provide an adequate education, by distinguishing it from an obligation on the "General Assembly,"

⁵ See Def. Rep. Br., p. 31-33; Def. Initial Br., pp. 36-37, A6-A13. Defendants speculate that states subject to the Northwest Ordinance are more likely to have successful challenges to inadequate school funding systems because, according to Defendants, funding obligations in those states are placed on state legislatures rather than on the State itself. Def. Rep. Br., p. 37. This analysis by the Arkansas Supreme Court shows that both the legal predicate and conclusion of this speculation are wrong.

reinforces rather than refutes the justiciability of Plaintiffs' claims and the need for all relevant evidence to be presented at a trial.

According to Defendants, "no one has a legal right to any level of funding beyond that which the General Assembly decides upon in the exercise of its political discretion in its appropriations." Def. Rep. Br., p. 42. Consequently, a dismissal of Plaintiffs' claims would make the State's obligation to provide an "adequate education" a dead letter.

The denial of responsibility for provision of an adequate education is also evident in Defendants' attempt to focus this case solely on the "line items" of the QBE and on the State appropriation for education. Defendants refuse to acknowledge that Plaintiffs' claims relate to a constitutional obligation that is not encompassed simply by the QBE line items or the State appropriation for education. Rather, as interpreted in *McDaniel*, the State's obligation is to provide an adequate education to Georgia's children and such an education must be designed to prepare all of Georgia's children to function in society. Defendants' various attempts to divert the Court's attention from this issue are tantamount to a denial that the State has this obligation.

In all its particulars, Defendants' reply brief exemplifies the very State conduct, alleged in the Complaint, that has attempted to refute and evade the State's constitutional obligation to provide an adequate education.

III. MCDANIEL HELD THAT ALLEGATIONS OF CONSTITUTIONALLY INADEQUATE EDUCATIONAL OPPORTUNITIES ARE JUSTICIABLE AND THAT FACTS ARE RELEVANT TO RESOLUTION OF THESE ISSUES; ACCORDINGLY, THE MOTION TO DISMISS SHOULD BE DENIED.

As was fully discussed in Plaintiffs' initial brief, the Georgia Supreme Court's decision in *McDaniel v. Thomas*, 248 Ga. 632 (1981) establishes that Plaintiffs' allegations of inadequate educational opportunity state justiciable claims under the Georgia Constitution, Art. VIII, Sec. I,

Par. I, which makes the provision of an adequate public education a primary obligation of the State. *McDaniel* held that an “adequate education” provides a standard capable of judicial definition. It determined that an adequate education offers more than a “minimum education” and must be designed to produce individuals who can function in society. It also indicated that the Court would look to the legislature to give substantive content to the term “adequate.” The legislature, through statute and delegated authority to the State Board of Education, has given content to this term, and the resulting educational standards are alleged in detail in Plaintiffs’ Complaint. Moreover, *McDaniel* made clear that whether an adequate education is provided is a factual issue to be decided on an evidentiary record. In accordance with *McDaniel*, Plaintiffs allege in great detail the lack of adequate educational opportunities in their school districts and the resulting serious harm from being unprepared to function in society.

Virtually ignoring *McDaniel*’s language favorable to Plaintiffs, Defendants argue that the State’s obligation to provide an adequate education, to the extent it exists at all, should be exempt from judicial review. In Defendants’ view, any review of this constitutional obligation, and the very fact that a court would hear evidence on this obligation, would be inconsistent with “the system of representative government.” Def. Rep. Br., p. 29. Contrary to Defendants’ assertion, the core of representative government is a written constitution whose interpretation is consigned to an independent judiciary. *McDaniel* stands foursquare in support of this proposition.

The Defendants inaptly rely on *Thompson v. Talmadge*, 201 Ga. 867 (1947), arguing that the actions of the State of Georgia to implement its primary responsibility for the provision of an adequate education are not reviewable because, pursuant to *Talmadge*, these are actions (and

funding decisions) the General Assembly has taken pursuant to a power conferred by the Constitution and amount to purely political questions. Def. Rep. Br. at 33-34. Defendants fatally ignore, however, the central requirement in *Talmadge* that these State or legislative actions be “in conformity with the provisions of the Constitution.” 201 Ga. at 871. In fact, the heart of Plaintiffs’ claims is that the State’s actions (and inaction) have violated their rights under Art. VIII, Sec. 1, Par. I. of the Georgia Constitution. As the Supreme Court held in *Thompson v. Talmadge*, 201 Ga. 867, 871 (1947): “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, or actions by the General Assembly.*” (Emphasis supplied).

Plaintiffs’ initial brief analyzed *McDaniel* in detail. Rather than respond to the specifics of what *McDaniel* actually determined, however, Defendants’ reply brief obfuscates the holding in *McDaniel*. According to Defendants, the definition of an “adequate” education in *McDaniel* – an education designed to prepare students to function in society – is simply an unenforceable goal, purpose or objective. Def. Rep. Br. P. 15-16, n. 3. If this were so, the Supreme Court in *McDaniel* would not have specified an evidence-based determination on the issue of whether an “adequate” education is provided: “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,” the Court would assume the obligation is met.⁶ *McDaniel*, 248 Ga. at 644. This

⁶ Defendants reluctantly concede that *McDaniel* does not require total deference to legislative judgments concerning the constitutional adequacy of school funding. Def. Rep. Br., p. 35. However, they are unwilling to concede that a court could review any issues that actually

determination by the Georgia Supreme Court belies Defendants' assertions that Plaintiff's complaint should be dismissed: if provision of an adequate education were unenforceable by the judiciary, no evidence of the failure to carry out this obligation could make it so.

Defendants argue that the Court's statement in *McDaniel* that the "equalization fund set up by the legislature" was not given "constitutional status" was intended to negate any obligation of the State to provide a constitutionally adequate education. Def. Rep. Br. pp. 5-6. This argument ignores both logic and the context of this statement in *McDaniel*. Plaintiffs in *McDaniel* argued that the Constitution guaranteed equal educational opportunities and required the State to equalize for inequitable local taxable wealth, and the statement in the opinion about an "equalization fund" was in response to plaintiffs' arguments about equal educational opportunity. In the same opinion, the Court clarified that the State has a constitutional obligation to provide and assure funding for an adequate education even though the Constitution does not specify the precise form of the funding system the legislature must provide. (See Plaintiffs' Initial Brief, pp. 13-21, 42-43)

Defendants also seek to avoid *McDaniel's* holding of justiciability by claiming that it only applies to equal protection claims. Def. Rep. Br., p. 9. This argument is based on a misreading of *McDaniel* – and it is inconsistent with Defendants' other argument that the *McDaniel* ruling on adequacy precludes Plaintiffs' adequacy claim. A correct reading of

relate to the object of the constitutional obligation: Georgia's children. The example provided by Defendants of a possible justification for court review is "some sort of a 'continuing appropriation' for some narrow purpose as retirement or pensions" If Defendants concede judicial review in the case of this far fetched example, which appears unrelated to the object of an adequate education, how much more important is judicial review of the claims presented by Plaintiffs which allege serious educational inadequacies that cause life-long harm to Georgia's children?

McDaniel is that the Supreme Court's justiciability ruling applied to both the adequacy and equal protection claims and that its adequacy ruling was based on the absence of a factual record showing that children in particular districts were actually receiving a constitutionally inadequate education.⁷

Defendants claim that there are no standards against which an adequate education can be measured. However, Defendants assiduously ignore the educational standards of an adequate education established by the General Assembly and State Board of Education designed to assure that students will be able to function in society as adults. They also ignore the fact that a large percentage of children in Plaintiff Districts and Consortium Districts fail these standards and lack reasonable opportunities to meet them. Defendants further ignore that the educational resources made available for these children bear no relationship to the actual costs of providing an adequate education to these students and that the State has neither made nor sought to make a valid determination of the programs and services necessary to provide these children an adequate education.

Ignoring the *McDaniel* definition of an "adequate" education, Defendants repeatedly argue that this case, and the State's role in providing educational opportunities, is all about the State appropriation for education and the line items of the QBE.⁸ Defendants acknowledge that

⁷ As discussed in Plaintiffs' initial brief, similar issues of educational adequacy have been considered justiciable and triable by nearly every other state court that has considered them, and since 1997 plaintiffs in similar cases have prevailed in the vast majority of cases. See Pl. Initial Br., p. 22, n. 15. Incredulously, Defendants, without citing a single authority, baldly assert that what they "think to be a majority of state courts" have rejected the plaintiffs' claims in educational adequacy cases in other states. Def. Rep. Br., p. 36.

⁸ Most of Defendants' spurious arguments about "sovereign immunity," "standing" and "case and controversy" are based on the erroneous assertion that Plaintiffs' case is an attack

the State has delegated certain responsibilities for providing educational opportunities to school boards and school districts. What Defendants do not recognize is that the State, when it delegates, is still constitutionally responsible for the provision of an adequate education. Contrary to Defendants' assertion, Plaintiffs concur that school districts and school boards have some delegated responsibilities relevant to the provision of the constitutionally required education.⁹ The State can delegate aspects of its obligation, but the State remains obligated to assure that an adequate education is provided throughout the state and that school districts and school boards have the wherewithal to carry out any delegated responsibilities. As the Texas Supreme Court held in finding the Texas school funding system unconstitutional, "Whether the legislature acts directly or enlists local government to help meet its obligation, the end product must still be what the constitution commands – i.e., an efficient system of public free schools throughout the state." *Edgewood Independent School District v. Kirby*, 777 S.W.2d 391, 397-98 (Texas Sup. Ct. 1989). Whether the State has met the obligation to provide an adequate education through any delegations to school districts and school boards is a factual issue

on specific line items of the QBE and on the appropriation power. Defendants' thus attempt to divert attention away from Plaintiffs' claims of a constitutionally inadequate education provided to actual children in Georgia. See Def. Rep. Br., pp. 3, 5-7, 8, 16, 23, 26, 27-33, 35, 39, 42, 46-48.

⁹ Defendants assert that Plaintiffs "tie their case" to the proposition that the State's primary obligation to provide an adequate education "precludes any allocation of the funding responsibility between the State and its political subdivisions." This reflects a complete misreading of Plaintiffs' complaint and initial brief. Def. Rep. Br., pp. 4-5. The pages referred to in Plaintiffs' Brief, in which Plaintiffs purport to "tie their case" to this proposition, simply criticize the Defendants' illogical and unsupportable position that *only* local boards of education, and not the State, have any obligation to provide and fund an "adequate education". By claiming this non-existent proposition is the "central thesis upon which the Consortium Plaintiffs' entire 'adequacy' claim rests", Defendants argue with "straw men" of their own making and fail to join issue with Plaintiffs' claims.

requiring a full airing of the evidence at trial.

The State's constitutional obligation to provide an adequate education to Georgia's children is neither meaningless nor beyond judicial review. Whether the State is meeting this obligation, and in particular whether the school funding system is designed to provide opportunities that will prepare students to function in society, is the issue that *McDaniel* found to be justiciable. Under the clear holding in *McDaniel*, whether this obligation is met is a factual issue. Defendants cannot hide behind a veil of politics or raise the "red herring" of the appropriations power to avoid judicial review of claims of inadequate educational opportunities that have a powerful factual basis.

IV. SOVEREIGN IMMUNITY

Defendants labor mightily to make the argument that Plaintiffs' constitutional claims are somehow barred by sovereign immunity. However, it is significant that Defendants do not cite for this proposition a single state case in which a state's constitutional obligation to provide an adequate education (or similar constitutional language) was at issue. Given the large number of state constitutional cases relating to constitutional obligations pertaining to education cited in the parties' briefs, this is a telling omission. Moreover, it is entirely implausible that the Georgia Supreme Court in *McDaniel* could have bothered to find these issues justiciable if all the claims it found justiciable were barred by sovereign immunity.

V. CONCLUSION

For the reasons discussed both in this supplemental brief and in Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss Plaintiffs' Complaint, Defendants' Motions

should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that on this date the undersigned served the within and foregoing
PLAINTIFFS' SUPPLEMENTAL BRIEF IN RESPONSE TO DEFENDANTS' REPLY BRIEF
on Defendants in this action by depositing copies hereof in the regular U.S. Mail, postage prepaid,
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This ___ day of March, 2005.

Thomas A. Cox