IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

CHICAGO URBAN LEAGUE and
QUAD COUNTY URBAN LEAGUE,

Plaintiffs,

v.

STATE OF ILLINOIS and
ILLINOIS STATE BOARD OF EDUCATION,

Defendants.

FILED - 4
2009 FEB 11 PM 4:41
CIRCUIT COURT OF COOK
COUNTY, ILLINOIS
CHANCERY DIV.
DOROTHY BROWN CLERK

08 CH 30490
Hon. Martin S. Agran

NOTICE OF FILING

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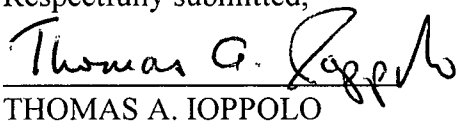
PLEASE TAKE NOTICE that on the **11th day of February, 2009,** I caused to be filed the attached Defendants' Reply Brief in Support of Their Section 2-619.1 Combined Motion to Dismiss and Response to Amicus Curiae Brief in the above-titled action in the Circuit Court of Cook County, Illinois.

Respectfully submitted,



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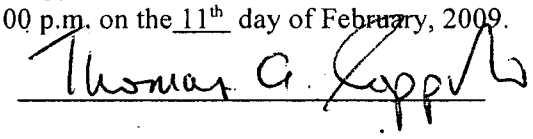
CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a copy of the foregoing was served upon the above named parties, by mail, postage prepaid, by depositing a copy in the U.S. mail located at 100 West Randolph Street, Chicago, Illinois 60601 at or before 5:00 p.m. on the 11th day of February, 2009.



IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
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CHICAGO URBAN LEAGUE, *et al.*, Plaintiffs,	)	
v.	)	08 CH 30490
STATE OF ILLINOIS, *et al.*, Defendants.	)	Judge Martin S. Agran

DEFENDANTS' REPLY IN SUPPORT OF SECTION 2-619.1 MOTION TO DISMISS

A. The School Funding System Does Not Violate the Illinois Civil Rights Act

Defendants' motion to dismiss Count I is based on a simple and basic argument: the Illinois Civil Rights Act ("ICRA") was enacted by the General Assembly in 2003 and the school funding system has been re-enacted every year since 2003, including this year. Given this sequence, one cannot reasonably conclude that the school funding system violates the ICRA. *See* Def. Mot. Memo. at 10-12 (citing *Illinois Native American Bar Ass'n (INABA) v. University of Illinois*, 368 Ill. App. 3d 321, 327 (1st Dist. 2006)("presum[ing] the legislature is aware of all previous enactments when it enacts new legislation").

Plaintiffs argue that *INABA* is not controlling because it involved a facial challenge to a statute. While Plaintiffs characterize this case as an *as-applied* challenge to the school funding system, the allegations in the Amended Complaint and the prayer for relief contradict this assertion and show that it is the school funding system itself that Plaintiffs attack. Am. Compl. ¶ 1 ("This lawsuit challenges the State's method for raising and distributing education funds to local school districts and ISBE's implementation of that *fatally flawed system*."); *Id.* at ¶ 8 ("The school funding scheme is *fundamentally* flawed."); *Id.* at ¶ 9 ("At the *core* of the State's school funding system is an over-reliance on local property taxes.") (emphasis added to all); *Id.* at ¶ 147a.-b. (requesting declarations that Defendants' "enactment" of the system's statutory framework discriminates against

Plaintiffs and violates the ICRA). There are no factual allegations in the Amended Complaint to suggest that what Plaintiffs really want is for the state funding system to be *administered* or *enforced* differently by the State. Thus, the substance of Plaintiffs' claim challenges as unconstitutional the General Assembly's repeated re-enactment of the school funding system. But this is untenable. If Plaintiffs could use the ICRA to challenge the political decision to fund public education in part through local property taxes, then a plaintiff could use the ICRA to challenge the State sales tax–an arguably regressive means of raising revenue–on the grounds that it disparately impacts minorities as a group. Clearly, this would intrude on the General Assembly's long recognized prerogative to determine tax policy. *See, e.g. San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 40, 93 S. Ct. 1278, 1300-01 (1973)(recognizing "the large area of discretion which is needed by a legislature in formulating sound tax policies").

Plaintiffs' reading is also inconsistent with the plain wording of the ICRA, which prohibits disparate-impact discrimination by a "unit" of State government that engages in "administration," not by enactments of the General Assembly itself. 740 ILCS 23/5(a). Plaintiffs' reference to Senator Harmon's remarks in the legislative debates (Pl. Resp. at 7) does not provide a reasonable basis for Plaintiffs' overly expansive interpretation of the ICRA. In reaching its holding in *INABA*, the appellate court already surveyed the relevant legislative history before concluding that the ICRA could not be used to attack a subsequently enacted statute. Plaintiffs cannot use "snippets of legislative history" to override the statute's plain meaning. *People v. Hudson*, 228 Ill.2d 181, 192 (2008) (holding that "isolated comments of four legislators" did not override statutory language).

Plaintiffs' contention that their "claim is no different than other ICRA disparate impact claims successfully maintained against state actors" is both unsupported and wrong. Pl. Resp. at 4.

Neither the defendant in *McFadden/Leslie* nor the defendants in *Thornton Township* were "state actors." Pl. Resp. at 4. They were *local* boards of education. More importantly, neither case involved a challenge to a statute of statewide applicability or even to any application of law by a state actor. In every important respect, these cases are inapposite.

B. The School Funding System Does Not Violate the Uniformity of Taxation Clause

Plaintiffs attempt to bolster their claim under the Uniformity Clause in part by citing cases interpreting prior enactments by the General Assembly related to *state-wide* taxation. *Mobile & O.R. Co. v. State Tax Com.*, 374 Ill. 75 (1940), and *Board of Education v. Haworth,* 274 Ill. 538 (1916), are cited to support the notion that the State can be an "appropriate taxing district," for purposes of uniformity of taxation analysis. The Court in *Mobile & O.R. Co.* premised its decision on the fact that the tax in question was a *state-wide* tax on railroads. *Mobile & O.R. Co.*, 374 Ill. at 86; *see also People ex rel. Ruchty v. Saad*, 411 Ill.390, 397 (1952). *Haworth* addressed a statute providing for the payment of high school tuition for students residing in districts without high schools from the "state school fund," which consisted of "the proceeds of a *state-wide* tax levied annually" and the interest on monies in the fund. *Haworth,* 274 Ill. at 542 (emphasis added).

For a tax assessed on a state-wide basis, the State would likely be the appropriate taxing district for purposes of uniformity analysis. However, since the "tax scheme" actually challenged by Plaintiffs under the Uniformity Clause involves "real property taxes assessed at a local level" (Pl. Resp. at 11), the State can not be deemed the appropriate taxing district under Article IX, section 4 of the Illinois Constitution of 1970. Ironically, the statute in *Haworth* was held to violate the "fundamental principle of uniformity and equality" because "(t)he taxpayers of a high school district offering the advantages of a high school education are indirectly forced to assist in the education of

pupils living in other districts," which appears to mirror the primary objective of Plaintiffs in this case. *Id.*, 274 Ill. at 545.

The other cases cited by Plaintiffs under the former 1870 Constitution are not germane. In *Proviso Tp. High School v. Oak Park & River Forest Tp. High School,* 322 Ill. 217 (1926), the relevant taxing district for purposes of uniformity was the *local* district, and the Court rejected the claim of non-uniformity. The Court noted that the Legislature could create local school districts and confer on those boards "the power of taxation to the extent of the Legislature's will." *Id.* at 222 (internal citation omitted).[1]

The more recent cases cited by Plaintiffs, *Allen v. Maurer,* 6 Ill. App. 3d 633, 640 (4th Dist. 1972), and *Elliott v. Board of Education*, 64 Ill. App. 3d 229, 235 (1st Dist. 1978), in no way undermine the authority of *Blase v. State,* 55 Ill. 2d 94 (1973), for the proposition that the Education Article's reference to school finance represents a goal rather than an obligation for the State. Consequently, although a "State purpose" may unquestionably be accomplished by local taxation, Plaintiffs cannot employ the Education Article to bootstrap an otherwise non-existent Uniformity of Taxation claim.

C. The School Funding System Does Not Violate the Education Article

Count III alleges that the school funding system violates the Education Article of the Illinois Constitution because it fails to provide a constitutionally adequate "high quality education." Neither

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[1] Another pre-1970 case, *People ex rel. Nelson v. Jackson-Highland Bldg. Corporation*, 400 Ill. 533, 536 (1948), cited by Plaintiffs for the proposition that the State can not "delegate away" its obligations regarding "State functions" such as education, also addresses a tax (funding teacher pensions) contested under Article IX, section 10 of the Illinois Constitution of 1870. Contrary to Plaintiffs' contention, the very fact that a "State function" is involved is what allows the General Assembly to direct a municipality to levy a tax for the purpose of funding teacher pensions without contravening Article IX, section 10. *Id.*, 400 Ill. at 536-537.

Plaintiffs nor their amicus dispute that this is the same legal claim brought by the plaintiffs in *Edgar*. Nor do they dispute that the Supreme Court held that the claim was "outside the sphere of the judicial function" and properly dismissed on the pleadings. *Edgar*, 174 Ill. 2d at 32.; *see* Pl. Resp. at 15; Br. of Amicus at 4. Under the doctrine of *stare decisis*, "where the Supreme Court has declared the law on any point, it alone can overrule and modify its previous opinion, and the lower judicial tribunals are bound by such decision and it is the duty of such lower tribunals to follow such decision in similar cases." *Panchinsin v. Enter. Cos.*, 117 Ill. App. 3d 441, 444 (1st Dist. 1983) (*quoting Agricultural Transp. Ass'n v. Carpentier*, 2 Ill. 2d 19, 27). Plaintiffs argue that this Court may ignore the clear, undisputed holding of *Edgar* because of "changing circumstances." Pl. Resp. at 16. The supposed "factual change," Br. of Amicus at 3, on which Plaintiffs and their amicus rely was the Illinois General Assembly's decision to promulgate the Illinois Learning Standards (ILS) and the decision of the United States Congress to condition federal education aid on the State's progress in meeting those standards through the No Child Left Behind Act (NCLB). Br. of Amicus at 5-6, 8-9; Pl. Resp. at 19.

These legislative acts do not undermine *Edgar*'s reasoning, rationale or holding that "[t]he *constitution* provides no principled basis for a judicial definition of high quality." *Edgar*, 174 Ill. 2d at 28-29 (emphasis added). This is so because the Supreme Court did not rest its holding in *Edgar* solely on a supposed "lack of manageable standards" for ascertaining educational quality, as Plaintiffs contend. Pl. Resp. at 16. Rather, *Edgar* rested on multiple, interrelated rationales. The Court relied on its own precedent, which had long-recognized the judiciary's limited and circumscribed role in determining and enforcing educational standards. *Edgar*, 174 Ill. 2d at 25. It relied on the intent of the Constitution's framers, who wanted educational standards established

and enforced through the political process, not by judicial mandate. *Id.* at 27. And, most importantly, it relied on "considerations of separation of powers." *Id.* at 28. Because education was not "a subject within the judiciary's field of expertise," there was no basis to impose "a judicial role in giving content to the education guarantee." *Id.* at 28-29. On the other hand, the Court identified strong reasons to defer to legislative judgments on the issue: "[T]he question of educational quality is inherently one of policy involving philosophical and practical considerations that call for the exercise of legislative and administrative discretion." *Id.* at 29; *see also id.* ("[N]onexperts – students, parents, employers and others – also have important views and experiences to contribute which are not easily reckoned through formal judicial factfinding.").

There is nothing in the reasoning or holding of *Edgar* suggesting that the political process initiated by the legislature to develop the ILS transformed "the question of educational quality" from one "of policy" suited to the political branches, to one of law "within the judiciary's field of expertise." *Id.* at 28-29. And there is nothing in the ILS that purports to, or could, alter the meaning of the Constitution's Education Article. To the contrary, as the amicus points out, the ILS expressly are non-binding. Br. of Amicus at 9. Non-binding administrative learning standards cannot create binding constitutional duties especially where, as here, the Illinois Supreme Court already has declared that the Constitution contains no judicially enforceable education standards. Thus, the facts relevant to the decision in *Edgar* have not changed, and *Edgar* compels the dismissal of Count III. *Panchinsin*, 117 Ill. App. 3d at 444 (court must follow earlier decision of Supreme Court when "faced with a set of facts indistinguishable in any material particular from those in the precedent case").[2]

[2] Plaintiffs' reliance on *Baker v. Carr*, 369 U.S. 186 (1962), and *Abbeville Cty. Sch. Dist. v. State*, 515 S.E.2d 535 (S.C. 1999), is misplaced because the courts in those cases did not, as Plaintiffs contend, adjudicate claims previously found non-justiciable. Pl. Resp. at 16. *Baker* involved a claim

D. The Equal Protection Claims Fail as a Matter of Law

Plaintiffs' wealth disparity claim in Count V is governed by *Edgar* and the case on which it heavily relied, *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1 (1973). Because wealth is not a suspect classification and a fundamental right is not implicated, the state school funding system need only be rationally related to a legitimate governmental interest. Local control of schools is a legitimate state interest, and local taxing decisions are at the core of local control. "Centralization reduces the freedom of localities and families to choose their own levels of educational spending." *Edgar,* 174 Ill.2d at 38 (citation omitted). A system favoring local control serves freedom of choice in educational matters and is constitutional even if it results in funding disparities among localities.

Plaintiffs attempt to evade *Edgar* by arguing localities no longer make decisions related to education. But this is not correct. Now, as in 1996 when *Edgar* was decided, locally elected school boards and their administrators make countless decisions about school practices, policies, and curricula. *See, e.g.,* 105 ILCS 5/10-2 (school boards can sue and be sued); 10-20.8 (direct what branches of study taught, what apparatus and textbooks used); 10-20.9a (determine final grades and promotion to next grade); 10-20.14 (develop discipline policy); 10-20.21 (enter into contracts); 10-22.14 (borrow money and issue bonds); 10-22.18(establish kindergarten). The School Code does not impose rigid top-down management on local schools. Local control exists, and *Edgar* still controls.

Plaintiffs' claim in Count IV also fails. The state's property tax system and state aid formulas

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under the Equal Protection Clause, a constitutional provision that has always been justiciable. In both *Abbeville*, 515 S.E.2d at 540, and an earlier South Carolina school funding case, the South Carolina Supreme Court addressed and resolved Plaintiffs' claims on the merits. *Richland Cty v. Campbell*, 364 S.E.2d 470, 472 (S.C. 1988). Thus, there is no support for Plaintiffs' contention that a constitutional provision outside the judicial purview can be transformed into a judicially enforceable one through any means other than a constitutional amendment.

are facially neutral and Plaintiffs do not allege that the property tax laws are administered in a deliberately racially discriminatory manner. There is no claim that two similarly situated school districts, each entitled to the same amount of state foundational aid, actually get different amounts because of their racial composition. Purposeful discrimination is essential to an equal protection claim and there are no allegations of purposeful discrimination here. *See Hearne v. Board of Education of City of Chicago*, 185 F.3d 770, 776 (7th Cir. 1999); *Washington v. Davis*, 426 U.S. 229 (1976). As the Court noted in *Washington v. Davis*, 426 U.S. 229, 242 (1976), "we never have held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than another." Few if any laws, particularly a tax system focused on local taxing districts of widely differing economic resources, will impact all groups in a society equally. All members of society, of all races and ethnic groups, could point to the disparities present in such a system. Such differences, stemming from facially neutral laws "serving ends otherwise within the power of government to pursue" do not state a claim under the Equal Protection Clause, and Counts IV and V should be dismissed.

E. The State and Its Agencies Are Immune From Suit

Plaintiffs claim that this suit against the State and Board may proceed because it does not seek monetary damages as compensation for past harms. Pl. Resp. at 22-23. This is incorrect for several reasons. First, a claim that expressly names the State, or an agency of the state, and does not seek to enjoin a state official, is presumptively barred by sovereign immunity. *Herget Nat. Bank of Pekin v. Kenney*, 105 Ill. 2d 405, 411 (1985); *Smith v. Jones*, 113 Ill. 2d 126 (1986); *Westshire Retirement v. Dep't of Public Aid*, 276 Ill. App. 3d 514, 520-21 (1st Dist. 1995). The cases on which Plaintiffs rely

to support claims directly against the State and the Board are distinguishable because they involved (a) an express waiver of immunity on the part of the sued agency, *City of Chicago v. Bd. of Trs. of Univ. of Ill.*, 293 Ill. App. 3d 897, 902 (1st Dist. 1997) (relying on statute providing that the "Board shall have the power to sue and be sued"); or (b) an effort to enjoin the actions of a state official, not an agency as a whole, *C.J. et al, v. Dep't of Human Servs.*, 331 Ill. App. 3d 871, 877 (1st Dist. 2002) ("action sought prospective relief against the illegal actions of state officials").

But even assuming a claim against an agency would be permitted under the same circumstances as a claim against a state official, Counts II through V are still barred because the circumstances that would permit such a claim are not present. There is no categorical rule that sovereign immunity permits declaratory judgment actions against state officials. *See* Pl. Resp. at 23. Rather, to determine if sovereign immunity applies, the court must look past labels to "the issues raised and the relief sought." *Ellis v. Bd. of Governors of State Colleges & Univs.*, 102 Ill. 2d 387, 394 (1984). "If a judgment for plaintiff could operate to control the actions of the State or subject it to liability, the action is effectively against the State and is barred by sovereign immunity." *Westshire Retirement*, 276 Ill. App. 3d at 520.

Plaintiffs request that the court enjoin the State from spending money appropriated under 105 ILCS 5/18-8.05, Am. Compl. ¶¶ 147(c), 159(b), 169(c)-(d), 177(c)-(d), 185(c)-(d), until such time as the General Assembly has "reform[ed] the current system of school funding," *id.* ¶¶ 147(e), 169(f), 177(f), 185(f), to substantially increase the amount of State money going to the Plaintiffs' school districts. It is hard to conceive of relief more intrusive into the "performance of the functions of government," *Groves & Sons Co.*, 93 Ill.2d at 401, or more likely to interfere with the State's control over its resources than what Plaintiffs seek here. *Westshire Retirement*, 276 Ill. App. 3d at 521 ("Of

course, an attempt to enjoin an entire department of the State evinces an intent to control the actions of the State."). Because the relief sought in Counts II through V would effectively "control the actions of the state," the claims are barred by sovereign immunity.

Count I against the Board is not barred by sovereign immunity, but the State is immune from suit for alleged violations of the ICRA. Plaintiffs do not dispute that waivers of sovereign immunity must be "express and unequivocal." Def. Mot. Memo. at 25; *see also In re Walker*, 131 Ill. 2d 300, 307 (1989) ("Our courts have indicated in numerous decisions that an explicit indication of intent to waive the State's immunity is required."). Nor do they contend that the ICRA contains "an explicit indication of intent to waive the State's immunity." Rather, they claim that because the ICRA is "a remedial statute," it would be "consistent with the legislative intent of the ICRA" to allow a suit against the State. Pl. Resp. at 24. But this is just another way of saying that the State's waiver is implied, which it cannot be. In any event, the purpose of opening a new venue in which to pursue discrimination claims is equally served if the statute applies only to the State's various units, and not to the State as a whole. Thus, there is no reason to imply a waiver where none is explicitly included.[3]

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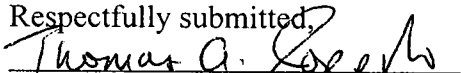
Respectfully submitted,



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[3] Plaintiffs' reliance on snippets of the legislative debate for the proposition that "the General Assembly intended to allow the State government to be sued under the ICRA," Pl. Resp. at 24, is unpersuasive because they are taken out of context. In the cited passages, Senators Harmon and Dillard were discussing whether the ICRA would apply retroactively. Neither Senator offered an opinion on whether the statute allowed a suit against both the State and units of state government. 93rd Ill. Gen. Assem., Senate Proceedings, May 13, 2003 at 136-37.