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TEACHERS COLLEGE, COLUMBIA UNIVERSITY

THE RIGHT TO PRESCHOOL IN EDUCATION ADEQUACY LITIGATIONS

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This policy brief summarizes developments in students' rights to preschool education services, as reflected in state court decisions in "education adequacy" cases. Until recently, a right to preschool services was not generally included in the claims plaintiff attorneys presented to the courts or in the decisions state courts issued in education adequacy cases. In the past few years, however, the courts have begun declaring preschool a necessary element of a constitutionally guaranteed level of educational opportunity for low-income students. Potentially adding weight to this trend, plaintiffs now preparing cases for trial in a growing number of states plan to present evidence on the need for and the benefits of high quality preschool programs. Also, because preschool advocates have already built support among a broad constituency, the context for these legal arguments has become more favorable.

I. Historical Background

The Adequacy Cases

Plaintiffs have filed school funding lawsuits in 45 states over the last 37 years, almost always on behalf of low-income and minority children in under-funded urban or rural schools. Since 1989, most plaintiffs have sought adequate funding based on education articles that set out a positive right to education in all 50 state constitutions. Plaintiffs have garnered legal victories in almost 75 percent of these "adequacy" cases, winning 20 of 27 decisions.¹

Initially, plaintiffs bringing these cases focused on kindergarten or first grade through high school and did not include preschool in their requests for remedial relief. This is because state constitutions generally empower the state legislature to determine the age at which compulsory school attendance begins, and historically most states have established ages five or six as the school

readiness standard.² Nonetheless, the plaintiffs' focus on low-income children's education led them to learn about programs and services that meet the needs of these students. Once researchers documented early childhood development and accumulated a body of evidence demonstrating the positive effects of high quality preschool, plaintiffs began arguing for preschool and presenting preschool testimony at trial. With increasing frequency, plaintiff attorneys began asking the courts to order states to establish and fund high quality preschool programs for "at-risk" children.

First to do so were the *Abbott v. Burke* litigators in New Jersey. The state supreme court "identified early childhood education as an essential educational program for children in the [low-wealth urban districts]" and found that "[i]ntensive pre-school and all-day kindergarten enrichment program[s] are necessary] to reverse the educational disadvantage these children start out with."³ Concluding that the legislature had made inadequate provision for preschool services, the New Jersey court directed the state's education commissioner to require the 30 urban "Abbott" districts to provide half-day preschool for their three- and four-year olds and ordered the state to provide adequate funding to support these preschool programs.⁴ Furthermore, the court sought to ensure high quality by requiring class sizes of 15, a certified teacher in every classroom, sufficient facilities, supplies, equipment, and transportation, and community outreach to build enrollment.⁵

Research-based Advocacy and Cost Studies

In related developments, advocates have lobbied most state governments for broad access to high quality early childhood education. Arguing that preschool is both essential for children and their parents and cost-effective in raising achievement and closing achievement gaps, they have garnered support from policymakers in many states.⁶

At the same time, business leaders, who have come to see preschool programs as wise investments for the nation's future, are supporting these efforts. The Federal Reserve Bank of Minneapolis, for example, has proposed that Minnesota create an early childhood education foundation to fund pre-kindergarten programs for all of its three- and four-year olds. The bank's analysis found that investing in quality preschool would generate a 12% annual return, after inflation.⁷ Emphasizing the fact that we already know how to mount successful preschool programs, the Committee for Economic Development and the Business Roundtable have released position papers advocating strong state and federal commitments to high quality early childhood education interventions because they are crucial to improving children's learning and strengthening the workforce.⁸

Because these research and advocacy efforts have raised awareness of the benefits of preschool, they have also influenced education finance and the recent wave of education "costing-out studies." The use of cost studies, which are

designed to determine the actual costs of a constitutionally adequate education, has grown dramatically over the past decade. Such studies have now been conducted in over 30 states, sometimes as the result of an explicit court order.⁹ In a number of the studies, “professional judgment” panels convened to delineate essential programs and services have designated high quality preschool as essential for students from at-risk backgrounds. Therefore, the economists pricing out the identified essentials have included preschool in the studies’ reports and recommendations.

The New York Adequacy Study, conducted by the American Institutes for Research and Management Analysis and Planning in 2003-04, for example, included the costs of full-day preschool services for “at risk” four-year olds and half-day services for “at risk” three-year olds in its final recommendations. Another New York cost study conducted by Standard & Poor’s used the “successful school district” costing-out methodology; S&P’s report recommended “targeted investments in pre-kindergarten” programs, based on the research of the Center for Children and Families at Teachers College.¹⁰ In Arkansas, an “expert judgment” cost study called for publicly funded preschool for all three- and four-year old children from poverty backgrounds. Significantly, the legislature has funded preschool in Arkansas even though the state supreme court overruled the preschool part of the trial court’s remedial order due to the explicit six to 21 school ages stated in the state constitution. Court-appointed special masters praised the legislature for funding 40 percent of the recommended total in the first year, in accordance with a state implementation plan.¹¹

II. Recent Trends in Court Decisions

Since the landmark court decisions in New Jersey, plaintiffs in school funding cases in 10 additional states have articulated claims for high quality preschool for “at-risk” students.¹² The complaint filed in Georgia in 2004, for example, asserts that school “districts have substantial waiting lists for pre-K programs,” so that “many students enter [school] at a significant disadvantage and are unable to avail themselves of the opportunity to obtain an adequate education.”¹³ In Wyoming, plaintiffs are asking the court to order the state to initiate its first-ever publicly funded preschool programs, while in Connecticut and other states with established programs plaintiffs are fighting to extend preschool access to all low-income children, since so many of them still lack access to early-childhood education.¹⁴

North Carolina

In October 2000, trial court Judge Howard Manning ruled in North Carolina’s school funding case that many disadvantaged children were unprepared for school due to the absence of pre-kindergarten opportunities and ordered the state to provide pre-kindergarten programs for all “at-risk” four-year-olds.¹⁵ Although plaintiffs had not included preschool in their original

complaint, they added it at the urging of the judge, who indicated that almost all of the numerous criminal defendants he dealt with in his courtroom did not have high school diplomas and that early intervention was needed. Shortly after this ruling, the legislature and governor initiated the state's More at Four preschool program, geared to low-income students. More at Four first took effect in the 2001-02 school year.

When the case reached the North Carolina Supreme Court in 2004, the court agreed with Judge Manning's holdings that the state was ultimately responsible "to meet the needs of 'at-risk' students in order for such students to avail themselves of their right to the opportunity to obtain a sound basic education,"¹⁶ and that the State must provide services to such children "prior to their enrolling in the public schools."¹⁷ Nevertheless, the court held that the trial court's order mandating pre-kindergarten classes for all "at-risk" prospective enrollees was not supported by a sufficient record. "At this juncture" of the case, the court concluded that such a "narrow" remedial order was "premature" and deferred to the expertise of the legislative and executive branches in matters of education policy to determine what types of services should be provided to at-risk students to prepare them for school.¹⁸

Given this stance from the court, it is worth noting that North Carolina has increased funding for early childhood programs in recent years despite revenue shortfalls in difficult economic times. The state has expanded the More at Four program from serving just over one thousand students the first year to serving over sixteen thousand in the 2005-06 school year. Furthermore, there is no indication that the supreme court's decision has led the legislature to consider alternatives to preschool for low-income children.¹⁹

South Carolina

More recently, South Carolina state circuit court Judge Thomas W. Cooper, Jr., in a decision issued in late December 2005, held that poverty directly causes lower student achievement and that the state constitution imposes an obligation on the state "to create an educational system that overcomes . . . the effects of poverty." Because the state defendants have not provided early childhood intervention programs, the court declared that they "have failed in their constitutional responsibility to provide an opportunity" for a "minimally adequate" education.²⁰

The court described a "debilitating and destructive cycle" of poverty and poor academic achievement for low-income students "until some outside agency or force interrupts the sequence." Based on expert testimony from both plaintiff and defendant witnesses, the court concluded that "it is essential to address the impact of poverty as early as possible in the lives of the children affected by it." Therefore, the court ordered "early childhood intervention at the pre-kindergarten level and continuing through at least grade three" to minimize "the

impact and the effect of poverty on the educational abilities and achievements” of children from poverty backgrounds. ²¹

Massachusetts

The recent trend toward judicial awareness and acceptance of the need for preschool education is not, however, universal. A Massachusetts trial court recently found that "years of research and national studies show, without dispute" that high quality preschool programs offer the best and "only realistic chance" for three- and four-year-old at-risk children to achieve success in school. Although plaintiff districts provided high quality preschool, the court observed, a lack of resources meant that the schools could serve only a fraction of the children who needed to attend.²²

Nevertheless, the state’s Supreme Judicial Court failed to accept the trial court’s recommendations in several areas, including preschool, and stated that whether to provide preschool to at-risk children “is a policy decision for the Legislature.”²³ During the recent economic downturn, the state legislature and governor cut state public school funding, generally, and early childhood education grants specifically. Grants for preschool and other early childhood education programs dropped “from a high of \$114.5 million in FY01 to \$103.4 million in FY02, to \$94.6 million in FY03, and finally, down to \$74.6 million in FY04.”²⁴

III. Conclusion

Recent court decisions indicate a clear, but not universal, trend to include access to high quality preschool services as part of the remedy and as a core constitutional right in education adequacy cases. Courts, like those in North Carolina and South Carolina, which believe that grappling with the effects of poverty is part of a state’s constitutional obligation to provide the opportunity for an adequate education are likely to look to preschool services as one of the primary means for satisfying that obligation. As adequacy cases in process in a number of states move through their trials and appeals, further developments in the right to preschool education bear watching.

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¹ Molly A. Hunter, “[Litigations Challenging Constitutionality of K-12 Funding in the 50 States](#),” and Molly A. Hunter, “[School Funding ‘Adequacy’ Decisions Since 1989](#).”

² Most constitutions do not mention children’s ages, but Wisconsin’s constitution specifies ages four to 20, Nebraska and New Jersey ages five to 21, and Arkansas ages six to 21. Wis. Const. art. X, § 3; Neb. Const. art. VII, § 1; N.J. Const. art. VIII, § 4; Ark. Const. art. XIV, § 1. As a result of a constitutional referendum enacted in 2002, the Florida Constitution now includes a

¹² Arkansas, in *Lake View School District v. Huckabee*, 91 S.W.3d 472 (Ark. 2002); North Carolina, in *Hoke County Board of Education v. State*, 599 S.E.2d 365 (N.C. 2004); Massachusetts, in *Hancock v. Commissioner of Education*, 2004 Mass. Super. LEXIS 118 (Superior Court Apr. 26, 2004), *rev'd on other grounds*, 822 N.E.2d 1134 (Mass. 2005); South Carolina, in *Abbeville County School District v. State*, No. 31-0169 (S.C. Ct. Comm. Pl. Dec.29, 2005); Colorado, in *Lobato v. State*, Plaintiff Complaint (2005); Connecticut, in *Connecticut Coalition for Justice in Education Funding v. Rell*, Plaintiff Complaint (2005); Georgia, in *Consortium for Adequate School Funding v. State*, Plaintiff Complaint (2004); Kentucky, in *Council for Better Education v. Williams*, Plaintiff Amended Complaint (2004); Nebraska, in *Douglas County School District v. Johanns*, Second Amended Complaint (2004) and *Nebraska Coalition for Educational Equity and Adequacy v. Heineman*, Amended Complaint (2004); and, Wyoming, in *Campbell County School District v. State*, No. 129-59 (Wyo. First Jud. Dist. Jan. 31, 2006). For more information on school funding litigation involving preschool, see [Starting at 3](#).

¹³ *Consortium for Adequate School Funding v. State*, Plaintiff Complaint ¶83 (Sept. 14, 2004).

¹⁴ Joan Barron, "[Preschool education becomes issue](#)," *Casper Star-Tribune*, September 11, 2005 (text also available at http://www.schoolfunding.info/resource_center/archive/09-11-05casper_st_preschool.html); *Connecticut Coalition for Justice in Education Funding v. Rell*, Plaintiff Complaint (December 20, 2005), at 19-24.

¹⁵ *Hoke County Bd. of Educ. v. State*, 95 CVS 1158 (Superior Court Oct. 2000), at 36, 43-45.

¹⁶ *Hoke County Bd. of Educ. v. State*, 599 S.E. 2d 365, 392 (N.C. 2004).

¹⁷ *Id.* at 393.

¹⁸ *Id.* at 393-94.

¹⁹ More at Four Pre-Kindergarten Program, "Progress Report to the North Carolina General Assembly" (February 1, 2006), 1, submitted by Office of School Readiness/More at Four Pre-Kindergarten Program, Department of Health and Human Services, Department of Public Instruction, and More at Four Pre-Kindergarten Program Task Force. Ironically, the report indicates that "More at Four is North Carolina's state-funded pre-kindergarten program to prepare at-risk four-year-olds for success in school. Pre-kindergarten is a research-proven strategy for school readiness. Without this opportunity, the young children served by More at Four would enter kindergarten lagging behind their peers." *Id.*

²⁰ *Abbeville County Sch. Dist. v. State*, No. 31-0169 (S.C. Ct. Comm. Pl. Dec.29, 2005) at 157.

²¹ *Id.* at 155, 158, 160. Judge Cooper also observed that "Such early intervention not only makes educational and humanitarian sense, it also makes economic sense. The testimony in this record of experts, educators, and legislators alike is that the dollars spent in early childhood intervention are the most effective expenditures in the educational process." *Id.* at 161.

²² *Hancock v. Commissioner of Education*, 2004 Mass. Super. LEXIS 118 (Mass. Superior Court 2004) at 9; see also Molly A. Hunter, "[Plaintiff Victory in Massachusetts: Court Addresses Cost Studies, Preschool and Accountability](#)" (April 28,2004).

²³ *Hancock v. Commissioner of Education*, 822 N.E.2d 1134, 1156 (Mass.2005).

²⁴ *Hancock v. Commissioner of Education*, 2004 Mass. Super. LEXIS 118 at 295.