

# High Quality Pre-Kindergarten as the First Step in Educational Adequacy: Using the Courts to Expand Access to State Pre-K Programs

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## I. Introduction

The educational and lifetime benefits of high quality early childhood education are well established in research<sup>1</sup> and widely accepted. The nation's leading education organizations support expanding publicly-funded pre-kindergarten,<sup>2</sup> thirty-eight states<sup>3</sup> and the District of Columbia<sup>4</sup> fund pre-kindergarten to varying degrees, and in 2006, twenty-three governors and the mayor of the District of Columbia proposed to increase pre-kindergarten funding.<sup>5</sup> Despite this broad embrace of the merits of pre-kindergarten and the growth in the number of children served in state-funded programs since 2001,<sup>6</sup> program quality, funding, and access vary tremendously from state to state<sup>7</sup> and not nearly enough children are served. In 2005, only approximately seventeen percent of four-year-olds and three percent of three-year-olds nationwide enrolled in a state-funded pre-kindergarten program<sup>8</sup> and many of these children were in programs that lacked the quality needed to yield positive educational results.<sup>9</sup>

Education finance litigation is one promising avenue for expanding access to state-funded, high quality pre-kindergarten, especially for disadvantaged students. Since 1998, school funding lawsuits have resulted in hundreds of millions of new state pre-kindergarten dollars, tens of thousands of additional children served each year, and significant, measurable gains for these children.<sup>10</sup> Given these extraordinary outcomes, education finance attorneys and their clients ought to include a pre-kindergarten claim in every case.

Beginning in the early 1970s and continuing through today, litigation has been a key strategy of parents, educators, and education advocates seeking to remedy inequitable and inadequate public education funding. Over the past thirty-seven years, school finance lawsuits have been filed in forty-five states, with state courts declaring the funding scheme unconstitutional in the majority of these cases.<sup>11</sup> Plaintiffs have maintained that their state's school finance system fails to provide the resources needed to guarantee all schoolchildren an adequate level of education and equal educational opportunity.<sup>12</sup> They have grounded their challenges in the federal and

state equal protection clauses<sup>13</sup> and the state constitutions' education articles.<sup>14</sup>

In recent years, the focus of school funding litigation has expanded to include not only additional and more equitable resources, but also distribution of resources in a manner that ensures all students the opportunity to meet educational standards established by the legislative and executive branches.<sup>15</sup> This more precise goal reflects the merging of school funding litigation with the standards-based reform movement. Since the 1990s, efforts to improve student learning and achievement centered on the development and implementation of rigorous curriculum standards and systems of assessment and accountability aimed at measuring students' progress toward meeting the standards.<sup>16</sup>

Closing academic achievement gaps—the disparities in educational achievement that exist by race, ethnicity, and socioeconomic status—is one of the purported goals of the standards movement.<sup>17</sup> As evidence of the gaps, policy makers, educators, and researchers point to differences in standardized tests scores, grade point averages, placement in advanced high school courses, and high school graduation rates between white and minority students and between high-income and less affluent students.<sup>18</sup> The federal and state governments propose to equalize educational outcomes for all students through a variety of K-12 education reform measures, but uniform curriculum standards and systems of accountability are the most widely adopted reforms.<sup>19</sup> Every state now has in place curriculum standards and statewide assessments to measure student progress in meeting the standards.<sup>20</sup>

The federal No Child Left Behind Act of 2001 (NCLB), the stated purpose of which is to ensure “all children a fair, equal, and significant opportunity to obtain a high quality education,”<sup>21</sup> requires states receiving federal education aid to employ standards-based assessments in elementary, middle, and high school.<sup>22</sup> Schools are held accountable for raising both overall scores and scores for racial and ethnic subgroups, English language learners, low-income students, and students with disabilities.<sup>23</sup>

There is hardly unanimity of agreement on the efficacy of standards- and test-based accountability for improving academic achievement and narrowing

achievement gaps.<sup>24</sup> At the least, it is unlikely that standards alone, without adequate resources and support for schools, communities, and families, will improve outcomes for low-income and minority students. Nonetheless, standards and assessments are the predominant education improvement measures, and plaintiffs in school funding cases have adapted their legal claims to these initiatives by demanding resources sufficient to provide all students an equal opportunity to master the state's learning standards.<sup>25</sup>

Here is where pre-kindergarten comes in. Research shows that if all students are to have an equal opportunity to succeed in school, education reform cannot wait until children enter the K-12 education system.<sup>26</sup> Researchers have documented significant differences by race, ethnicity, and socioeconomic status (SES) in children's cognitive skills before they enter kindergarten.<sup>27</sup> Studies show that "the average cognitive score of children in the highest SES group are [sixty percent] above the scores of the lowest SES group";<sup>28</sup> the "average math achievement is [twenty-one percent] lower for blacks than for whites, and [nineteen percent] lower for Hispanics."<sup>29</sup> "Race and ethnicity are closely associated with SES," with "[thirty-four percent] of black children and [twenty-nine percent] of Hispanic children [] in the lowest quintile of SES compared with only [nine percent] of white children";<sup>30</sup> and socioeconomic status is more strongly related to early cognitive skills than any other factor, including race and ethnicity.<sup>31</sup> This evidence strongly suggests that efforts to reduce achievement gaps must start with eliminating the differences in skills and knowledge of children entering kindergarten and first grade.

Early childhood research establishes that high quality pre-kindergarten can improve school readiness and academic performance, especially for children from low-income families and with other risk factors associated with school failure.<sup>32</sup> Studies show that disadvantaged children who attend a high quality program perform better throughout elementary and secondary school when compared to children who did not attend a program, with fewer referrals to special education, fewer incidences of grade repetition, and greater high school graduation rates.<sup>33</sup> Moreover, the benefits of high quality pre-kindergarten carry over into adulthood.<sup>34</sup> Participants in such programs are more likely to be employed, own a home, and have less involvement in the criminal justice system when compared to non-participants.<sup>35</sup> Studies also show a high economic return from public investment in pre-kindergarten.<sup>36</sup>

Emerging research shows that middle-income children also can benefit from pre-kindergarten, since they too experience achievement gaps and problems of school failure.<sup>37</sup> Children from low-income

families enter school with greater educational deficits than middle-income children, but middle-income children also experience significant learning gaps and risk of school failure when compared to their high-income peers.<sup>38</sup> In fact, cognitive assessments at the start of school show that children at the median income level are as far behind children in the top income quintile as poor children are behind the median income child.<sup>39</sup> Middle-income children are also at high risk of school failure, with a one in ten rate of grade retention and school dropout for children from the middle sixty percent of the income distribution.<sup>40</sup> Studies suggest that pre-kindergarten can have positive impacts on middle-income children's school readiness skills.<sup>41</sup> For example, an evaluation of Oklahoma's universal pre-kindergarten program found substantial gains for all children, although gains were largest for minority and lower-income children.<sup>42</sup> A five-state study of high quality pre-kindergarten programs in Michigan, New Jersey, Oklahoma, South Carolina, and West Virginia similarly found significant gains in early language, literacy, and mathematical development for all children participating in the programs, regardless of ethnicity or economic background.<sup>43</sup>

Most pre-kindergarten age children in the United States receive non-parental care before they arrive at kindergarten<sup>44</sup> and forty-three percent of these children attend a center-based program,<sup>45</sup> yet many are in settings that lack the quality necessary to develop the cognitive and emotional skills needed for school success.<sup>46</sup> Even in state-funded pre-kindergarten programs, there are large disparities in quality. For example, seventeen states require pre-kindergarten teachers to have a four-year-college degree, yet twenty-one states do not mandate a bachelor's degree; furthermore, twenty-eight states limit class size to twenty children or less, but ten states have no limit at all.<sup>47</sup> As would be expected, research shows that higher quality programs yield the greatest gains in school readiness skills and lifetime benefit, while programs with lower quality standards show far less of an effect.<sup>48</sup>

The powerful research demonstrating that high quality pre-kindergarten prepares children to succeed in school and beyond has impelled plaintiffs in school finance cases to include a claim for pre-kindergarten funding in their demand for increased public education funding.<sup>49</sup> Plaintiffs make the case that high quality pre-kindergarten is a necessary "at-risk" educational program for economically disadvantaged students that the state must fund as a part of its duty to provide a constitutional system of education.<sup>50</sup> After all, if students are not prepared to learn when they enter kindergarten and first grade, how will they ever master the state's curriculum

standards and achieve the other goals of public education? In some recent cases, plaintiffs go one step further to claim that pre-kindergarten should be funded similar to K–12 as a component of the state’s basic education program.<sup>51</sup> Claims of this nature are strengthened by the research documenting the needs of middle-income children.

To date, five state courts, including four high courts, have issued decisions on pre-kindergarten funding,<sup>52</sup> and claims for this funding are now part of eleven pending cases.<sup>53</sup> School funding litigation has emerged as a significant strategy for increasing access to high quality, state-funded pre-kindergarten programs.

This article examines the merits of pursuing a claim for pre-kindergarten funding in school finance litigation from the perspective of those who wish to expand access to state-funded early childhood education. Specifically, the article makes the case that high quality pre-kindergarten is the essential first step in a constitutionally adequate education, especially for students who, due to socioeconomic factors, are at-risk for school failure. Part II of the article provides an overview of school finance litigation and the evolving equity and adequacy theories that support plaintiffs’ legal claims. Part III then discusses how the standards-based reform movement strengthens plaintiffs’ lawsuits by providing a discernable measure of a constitutionally adequate education and how pre-kindergarten fits within the standards and adequacy frameworks. Part IV details the five state court decisions issued to date on the state’s obligation to fund early childhood education as a part of its duty to provide a constitutionally adequate education. Attention is given to plaintiffs’ reliance on the compelling research showing that many children start school at a significant disadvantage when compared to their more affluent peers and that high quality pre-kindergarten helps close gaps in educational achievement. Finally, Part V discusses the successful outcome of pre-kindergarten litigation, specifically how state legislatures have expanded funding for pre-kindergarten in response to school finance lawsuits.

## II. A Brief History of School Finance Litigation

Each state has a different formula and method for funding public education, but “almost all rely on a mixture of state and local funding, with localities funding” a majority of their contribution “through property tax revenues.”<sup>54</sup> Reliance on local revenue, however, means that the amount of the education funding available to a particular community will depend largely on local property wealth.<sup>55</sup> States

have attempted to correct funding disparities with various equalization formulas, but in most states the amount of education funding still varies widely from school district to school district, with property-rich districts having far more resources than property-poor districts.<sup>56</sup> Consequently, methods of financing public education have a disproportionately negative impact on the quality of education in economically-isolated, low-income urban and rural school districts. School finance lawsuits aim to correct this imbalance.

Historically, discussion of school finance litigation assumes three phases or waves of legal theory advanced by plaintiffs.<sup>57</sup> While these so-called waves are not as discrete in reality as in academia,<sup>58</sup> the categorizations are commonly used and provide background to the claim for state pre-kindergarten funding within the cases.

The first wave of school finance litigation focused on the Equal Protection Clause of the United States Constitution, which had been successfully relied upon in *Brown v. Board of Education*<sup>59</sup> to invalidate school segregation based on race.<sup>60</sup> This wave began in 1971 with *Serrano v. Priest*.<sup>61</sup> The plaintiffs in *Serrano* challenged California’s reliance on local property taxes to fund education, a system that resulted in vast per-pupil funding disparities throughout the state, under the federal Equal Protection Clause.<sup>62</sup> The California Supreme Court found that education is a fundamental right<sup>63</sup> and wealth is a suspect classification.<sup>64</sup> Applying strict scrutiny, the court ruled that local control of education was not a compelling interest justifying differential treatment in education resources.<sup>65</sup>

The decision in *Serrano* signaled the movement to reform disproportionate school finance systems through the courts.<sup>66</sup> Two years later, however, in *San Antonio Independent School District v. Rodriguez*, the United States Supreme Court effectively closed the door on plaintiffs’ use of the Federal Constitution and federal courts to remedy such imbalances.<sup>67</sup> The plaintiffs in *Rodriguez* challenged the educational disparities that resulted from Texas’s reliance on revenue generated from local property taxes to fund the public education system.<sup>68</sup> The Supreme Court held that wealth is not a suspect classification under the Federal Constitution and that education, although one of the most important state services, is not within the limited category of rights recognized as guaranteed by the Constitution.<sup>69</sup> Decisions regarding state taxes and public education were, according to the Court, fundamentally state issues.<sup>70</sup> Applying a rational basis standard to the plaintiffs’ challenge, the Court found that local control of public education justified the school funding system<sup>71</sup> and that inter-district

funding inequalities based on local property wealth were not a violation of the federal Equal Protection Clause.<sup>72</sup> Following the *Rodriguez* decision, any challenge to a state's scheme for financing public education had to be brought in state court, under state law.

The second wave of school finance litigation also challenged educational disparities based on an equity theory, but legal claims were rooted in *state* constitutional guarantees of equal protection.<sup>73</sup> In *Robinson v. Cahill*, cited by commentators as the first case in the second wave,<sup>74</sup> the New Jersey Supreme Court found that the state's reliance on local property taxes to fund public education had a disproportionate impact on students in low-wealth districts, thereby violating the state constitution's mandate that the legislature provide a thorough and efficient system of free public schools.<sup>75</sup> The *Robinson* decision successfully used the equity approach in state court while relying on the education clause as the source of the right to equal educational opportunity.<sup>76</sup> In contrast, subsequent second wave cases were rooted primarily in state equal protection guarantees, although some also raised equity claims under the education clause.<sup>77</sup>

Second wave cases yielded mixed results, with about one-half of school funding cases between 1973 and 1989 brought under an equity theory upholding the finance system, despite spending disparities.<sup>78</sup> For example, the Oregon Supreme Court, in *Olsen v. State*, upheld per-pupil spending inequalities between school districts in spite of a constitutional provision for a uniform and general system of schools.<sup>79</sup> Both the New Jersey and the Oregon courts employed a balancing test between the interest in educational opportunity and the interest in preserving local control over education.<sup>80</sup> However, in contrast to the New Jersey court's decision in *Robinson*, the Oregon Supreme Court found the state's interest in local control of schools to be greater than its interest in equal educational opportunity.<sup>81</sup>

The third wave of litigation, from 1989 through today, grew out of the resistance of some courts to the demand for equalization of resources.<sup>82</sup> Cases in the third wave are grounded in state constitution education clauses, which uniformly place the duty to provide a public education system on state government.<sup>83</sup> These cases challenge the school finance system not because some districts are able to spend more money than others, but because funding is insufficient to finance an adequate level of education.<sup>84</sup> Adequacy cases assert that the education clause guarantees a level of funding sufficient to provide a certain minimum level of education to all children in the state.<sup>85</sup> This minimum level is broadly defined as an education that prepares students to

function in society, both as workers and participants in a democracy.<sup>86</sup> Thus, the adequacy theory requires courts to undertake a more substantive interpretation of the education clause rather than focusing on equal distribution of education resources.

The Kentucky Supreme Court's 1989 decision in *Rose v. Council for Better Education* is cited as the start of the adequacy movement.<sup>87</sup> The court in *Rose* found all Kentucky schools, even those in wealthy districts, inadequately funded when compared to accepted national standards.<sup>88</sup> The court invalidated the state's school finance system and declared the entire public school system inadequate and unconstitutional.<sup>89</sup> Significantly, the court articulated broad guidelines in the form of the seven capabilities all children must be given the opportunity to achieve in order for the education system to meet the goal of adequacy.<sup>90</sup> The Kentucky legislature responded to the court's ruling by passing the Kentucky Education Reform Act, a national model of education reform legislation.<sup>91</sup> The *Rose* decision opened the door to a wider expanse of relief available to plaintiffs under an adequacy theory.

### III. The Pre-Kindergarten and Education Adequacy Nexus

Following the *Rose* decision, other state courts adopted the seven capabilities or similar education standards as the equivalent of a constitutionally adequate education.<sup>92</sup> As education reform spurred implementation of state curriculum standards and assessment systems, however, courts began moving beyond broad education goals as outlined in *Rose* and instead equated a constitutionally adequate system of education as one that, at least in part, provides all students the opportunity to master the state's standards.<sup>93</sup> The relief sought by plaintiffs has evolved to match this goal, with most cases now including claims for both an increased per-pupil foundation amount aligned with achievement of the state curriculum standards and increased at-risk program aid to enable schools to provide the services and programs needed by students who, because of socioeconomic status, limited English proficiency, and other special needs, face a host of obstacles that interfere with learning that standards.<sup>94</sup>

The standards framework sets the stage for plaintiffs to make the case for the essentiality of high quality pre-kindergarten. The framework assumes that learning is cumulative and children progress in skills and knowledge from year to year.<sup>95</sup> Children entering kindergarten are expected to master the kindergarten curriculum standards in preparation for first grade where they master the first grade standards, and so on through the grades.<sup>96</sup> It follows,

then, that if children are to master the skills and acquire the knowledge set by the standards, they must begin school with the skills and knowledge needed to progress from year to year. Research shows, however, that many children lacking early learning skills when they enter kindergarten start school behind and stay behind.<sup>97</sup> From the outset, these children do not have an equal opportunity to an education that satisfies constitutional requirements. Because research also shows that high quality pre-kindergarten can help level the playing field by providing children, most notably those from low-income backgrounds, with necessary school readiness skills,<sup>98</sup> state funding for these programs must be a central part of a constitutionally adequate system of education.

The recognition by several courts that the concept of educational adequacy will evolve over time, depending on educational research and social context, further supports including pre-kindergarten in a state system of education.<sup>99</sup> Research on school readiness gaps and the benefits of high quality pre-kindergarten is now widely accepted.<sup>100</sup> Studies also show that the majority of pre-kindergarten-age children spend at least a part of their day in non-parental care, but most are not in settings that promote early learning skills.<sup>101</sup> Since it is now known that young children, especially those from disadvantaged backgrounds, reap educational benefits from high quality pre-kindergarten, without which many will not succeed in school, lawyers can make the case that an education system that excludes pre-kindergarten is constitutionally inadequate.

## IV. The Courts and Pre-Kindergarten

New Jersey was at the forefront of the movement to include pre-kindergarten in school finance litigation. In the 1998 *Abbott v. Burke* (*Abbott V*) ruling, the New Jersey Supreme Court directed the state to provide a high quality pre-kindergarten program to all three- and four-year-old children residing in the state's lowest-income school districts.<sup>102</sup> The court found that the state's constitutional duty to provide a "thorough and efficient" education for all children<sup>103</sup> encompassed the provision of high quality pre-kindergarten to help disadvantaged children overcome the effects of poverty on educational achievement.<sup>104</sup>

The North Carolina Supreme Court articulated a similar state duty in the 2004 decision in *Hoke County Board of Education v. State*, but with a different result.<sup>105</sup> The court found that the constitution's mandate for a "sound basic education" for each child imposed a state duty to prepare

disadvantaged pre-kindergarteners to succeed in school<sup>106</sup> but, unlike the New Jersey Supreme Court, it stopped short of ordering a pre-kindergarten program as a specific remedy.<sup>107</sup> Instead, the North Carolina Supreme Court left it to the legislative and executive branches to determine which programs were needed to ensure that low-income pre-kindergarteners had an equal opportunity to learn.<sup>108</sup> In a 2005 decision along the same lines, the trial court in *Abbeville County School District v. State* found that South Carolina's low-income schoolchildren were being denied their state constitutional right to a "minimally adequate education" because of the state's failure to fund early childhood intervention programs designed to remediate the impact of poverty on children's educational success.<sup>109</sup>

Plaintiff victories on the pre-kindergarten front have not been unanimous, although, arguably, neither of the two adverse decisions supports a broad limit on judicial authority to direct a pre-kindergarten remedy. In *Lake View v. Huckabee* (*Lake View III*), a 2002 decision, the Arkansas Supreme Court overruled a trial court decision directing the state to fund a pre-kindergarten program.<sup>110</sup> The court's decision was based on language unique to the Arkansas Constitution, which specifically vests in the state legislature and local school boards the authority to implement educational programs for children under the age of six.<sup>111</sup> The court found that the language deprived it of authority to consider a pre-kindergarten remedy.<sup>112</sup> In 2005, the Massachusetts Supreme Judicial Court, in *Hancock v. Driscoll*, reversed the trial court's recommendation that the state fund a pre-kindergarten program for all children at risk for school failure as a remedy for the unconstitutional funding scheme.<sup>113</sup> The court found that the finance system was constitutional, thereby rejecting all of the trial court's recommended remedies, including pre-kindergarten.<sup>114</sup>

### 1. *Abbott v. Burke*

In the 1998 landmark *Abbott V* decision, the New Jersey Supreme Court directed the state to implement and fully fund a series of remedial measures to address decades of under-funding and neglect of the state's low-income, urban school districts, now known as the Abbott districts.<sup>115</sup> High quality pre-kindergarten for all three- and four-year-old children in the Abbott districts was among the remedies ordered by the court, even though the New Jersey Constitution's guarantee of a "thorough and efficient" education only reaches children between the ages of five and eighteen.<sup>116</sup> In two subsequent rulings, *Abbott VI* and *Abbott VIII*, the New Jersey

Supreme Court expounded upon the state's obligation to provide the pre-kindergarten program, dictating uniform program quality standards, the method of calculating state funding, and requirements for reaching full enrollment of all eligible children.<sup>117</sup> The *Abbott* pre-kindergarten rulings are by far the most comprehensive and directive of any court ruling on the state's obligation to provide early childhood education. Other state courts have found a state duty to prepare disadvantaged preschoolers to succeed in the public education system,<sup>118</sup> but none have gone so far as to mandate a high quality program for all eligible children.<sup>119</sup>

The *Abbott V* remedial order grew out of twenty-five years of litigation that challenged New Jersey's system of school financing.<sup>120</sup> Beginning with *Robinson v. Cahill (Robinson I)* in 1973, attorneys representing children in the state's lowest-income school districts charged that the state's use of property taxes to pay for public education created enormous inequities, with inner-city schools starved for adequate resources to educate their students.<sup>121</sup> The *Abbott* case focused not only on fiscal inequity in per-pupil funding but also on the quality of the educational programs and outcomes resulting from the inequality.<sup>122</sup>

The New Jersey pre-kindergarten remedy had its genesis in the constitutional framework established by the New Jersey Supreme Court in the 1990 *Abbott II* decision.<sup>123</sup> The court in *Abbott II* upheld an administrative law judge's extensive findings regarding the gross inadequacies of the education offered to students in the state's poor, urban school districts.<sup>124</sup> The court found that the education provided to students in low-income areas was unconstitutional by every measure when compared to the education offered in affluent, successful school districts.<sup>125</sup> The court adopted a two-part approach for remedying the constitutional violation.<sup>126</sup> First, the court held that students in low-income school districts were entitled to basic "foundation aid" equal to the amount spent in successful suburban school districts.<sup>127</sup> Second, the court found that children in low-income school districts were entitled to additional aid to meet the "special educational needs ... [and] extreme disadvantages" arising from the conditions of urban poverty.<sup>128</sup> In order for students in impoverished urban communities to receive the thorough and efficient education guaranteed by the state constitution—an education that enables all students to function as citizens and workers in the same society<sup>129</sup>—the state must provide additional interventions in the form of supplemental programs and services designed to "wipe out their disadvantages as much as a school district can."<sup>130</sup> The court based its approach on its conviction that

"traditional and prevailing educational programs in these poorer urban schools were not designed to meet and are not sufficiently addressing the pervasive array of problems that inhibit the education of poorer urban children."<sup>131</sup> The court concluded that "[u]nless a new approach is taken, these schools—even if adequately funded—will not provide a thorough and efficient education."<sup>132</sup>

The court left the specific determinations regarding the need for, and cost of, such supplemental programs to the legislature.<sup>133</sup> It did, however, cite the National Governor Association's recommendation that all disadvantaged children should have access to a successful preschool program,<sup>134</sup> and noted that "an intensive pre-school and all-day kindergarten enrichment program [would help] to reverse the educational disadvantage these children start out with."<sup>135</sup>

In 1994, four years after the *Abbott II* ruling, the New Jersey Supreme Court issued the *Abbott III* decision declaring the state's revised school funding law unconstitutional.<sup>136</sup> The court invalidated the law based on its failure to provide adequate and equitable per-pupil foundation aid and additional funding to meet the special educational needs of students in the impoverished school districts.<sup>137</sup> The court once again refrained from ordering a specific remedy but reaffirmed the state's obligation to study and fund programs to address the special needs of disadvantaged students.<sup>138</sup> In its discussion of supplemental programs, the court noted that both the plaintiffs' and the state's expert witnesses identified pre-kindergarten as a needed supplemental program.<sup>139</sup>

In the 1997 *Abbott IV* decision, the New Jersey Supreme Court once again faced an unconstitutional education funding scheme.<sup>140</sup> By this point, however, the court was no longer willing to merely instruct the legislature to cure the constitutional deficiencies.<sup>141</sup> Instead, the court initiated a process to determine appropriate remedies for the state's longstanding constitutional violation.<sup>142</sup> The court also signaled that pre-kindergarten would likely be one of the remedies.<sup>143</sup>

*Abbott IV* involved the court's review of the Comprehensive Education Improvement and Financing Act of 1996 (CEIFA),<sup>144</sup> the legislature's response to *Abbott III*.<sup>145</sup> CEIFA presented a formula for basic public education foundation aid and two funding formulas aimed at addressing the New Jersey Supreme Court's directive for programs designed to meet the unique needs of low-income students: (1) Demonstrably Effective Program Aid (DEPA) to provide supplemental program funding for at-risk students in grades K-12 and (2) Early Childhood Program Aid (ECPA) to fund full-day kindergarten

and pre-kindergarten programs for low-income three- and four-year-olds.<sup>146</sup>

The court ruled that the foundation formula in CEIFA was facially constitutional because it equated the state's recently adopted curriculum standards with the substantive definition of a constitutionally adequate education<sup>147</sup> but unconstitutional as applied to the Abbott districts because it failed to provide sufficient funds to enable students in those districts to meet the new standards.<sup>148</sup> To remedy the disconnect between the legislature's own determination of constitutional adequacy and the funding it provided to urban districts, the court in *Abbott IV* issued an unprecedented remedy requiring the state to provide the Abbott districts with foundation aid on par with per-pupil spending in the state's successful suburban school districts.<sup>149</sup> The court also found that the funding formulas in both DEPA and ECPA were unconstitutional because they were not based on the actual needs of the children in the low-income, urban school districts.<sup>150</sup>

The court concluded that the legislature's continued failure to address the Abbott schoolchildren's unique educational needs required a court remedy.<sup>151</sup> Therefore, the court directed the state to study the special educational needs of children in the Abbott districts, identify supplemental programs to address those needs, and develop a plan to implement those programs.<sup>152</sup> The court then remanded the *Abbott* case to a Superior Court judge to hold an evidentiary hearing and make recommendations for funding the Abbott districts' supplemental program and facility needs.<sup>153</sup>

The *Abbott* plaintiffs urged the Superior Court to recommend to the Supreme Court a pre-kindergarten program for all three- and four-year-olds in the Abbott districts with the following components: full-day, year-round school; a class size of fifteen students; a certified early childhood teacher and one teacher's assistant for each class; an extended day program; health and social services; collaboration with Head Start and other community-based early childhood providers; extensive professional development and supervision; and district preschool councils.<sup>154</sup> Both the *Abbott* plaintiffs and the state presented evidence during the remand hearing of the need for a pre-kindergarten program.<sup>155</sup>

The plaintiffs' expert, Dr. Steven Barnett of Rutgers University, testified that disadvantaged children often enter school lacking the language and literacy skills that are prerequisites to literacy and that high quality pre-kindergarten can help close school readiness gaps.<sup>156</sup> Dr. Barnett also testified about the research findings of two longitudinal studies of intensive pre-kindergarten programs, the Perry Preschool Program and the Abecedarian

Program.<sup>157</sup> The Perry Preschool study followed low-income, African American children who were randomly assigned to an intensive preschool program in Ypsilanti, Michigan at ages three and four.<sup>158</sup> Two certified teachers taught pre-kindergarten classes of twelve children in the morning and conducted home visits in the afternoon.<sup>159</sup> Dr. Barnett testified that research following the program participants through age twenty-seven showed that they had fewer referrals to special education, increased high school graduation rates, more economic success as adults, and less involvement in delinquency and crime when compared to non-participants.<sup>160</sup> The Abecedarian program, located in North Carolina, provided full-day, year-round childcare with an educational focus on low-income, mostly African-American children ages four months to five years old.<sup>161</sup> Dr. Barnett testified that the Abecedarian study showed that through age seventeen, program participants experienced not only greater gains in achievement and social behavior, but also permanent gains in IQ scores.<sup>162</sup> He further made the case that high quality pre-kindergarten would yield significant educational and societal cost-savings in the long run.<sup>163</sup> Dr. Barnett testified about a cost-benefit analysis he conducted of thirty-eight early childhood programs that examined IQ, achievement, and academic success as measured by special education placement, grade retention, and high school graduation. Based on this analysis, Dr. Barnett found that the economic return on preschool education exceeded "the average rate of return on investments in the stock market over the last [thirty] years."<sup>164</sup>

In addition to the plaintiffs' expert, several other individuals gave testimony recommending pre-kindergarten programs. A Special Master appointed by the superior court, Dr. Allan Odden of the University of Wisconsin-Madison, supported the plaintiffs' position and recommended a full-day pre-kindergarten program for all three- and four-year-olds.<sup>165</sup> Dr. Robert E. Slavin of Johns Hopkins University, one of the state's experts, testified that children who attend full-day pre-kindergarten beginning at age three were more likely to have success in school.<sup>166</sup> The state, by contrast, argued that the needs of the Abbott schoolchildren could be met by a half-day program for four-year-olds.<sup>167</sup> The Superior Court judge issued an extensive decision on recommended remedies<sup>168</sup> that included state funding for full-day pre-kindergarten for all three- and four-year-old children in the Abbott districts.<sup>169</sup>

The court in *Abbott V* considered the record and recommendations from the Superior Court and directed the state to implement several groundbreaking education reforms to assure educational adequacy to children residing in the

Abbott districts.<sup>170</sup> The reforms included “well-planned, high quality” pre-kindergarten for all three- and four-year-olds, full-day kindergarten, standards-based education driven by state curriculum standards, new and rehabilitated facilities, and needs-based supplemental programs to “wipe out student disadvantages.”<sup>171</sup> All of these reforms, the court found, were necessary to help students in the Abbott districts overcome the effects of poverty on educational achievement and receive the thorough and efficient education guaranteed by the state constitution.<sup>172</sup>

The court noted “no fundamental disagreement over the importance of pre-school education.”<sup>173</sup> It grounded its directive for programs for all three- and four-year-olds in the Abbott districts on the early childhood research presented in the remand proceedings:

Empirical evidence strongly supports the essentiality of pre-school education for children in impoverished urban school districts. That evidence demonstrates that the earlier education begins, the greater the likelihood that students will develop language skills and the discipline necessary to succeed in school. A review of two major studies on pre-school cited by the parties ... also reveals that there is a strong correlation between the intensity and duration of pre-school and later educational progress and achievement.<sup>174</sup>

The court also relied on the findings in a 1996 Carnegie Task Force report on learning in the primary grades, which recommended that high quality early learning opportunities be made universally available to all children ages three to five.<sup>175</sup> The court referred to the Task Force’s finding that one-third of children entering elementary school lack basic school readiness skills due, in part, to the scarcity of high quality early care and education programs in poor communities.<sup>176</sup>

The court recognized the research-based link between high quality pre-kindergarten education and a constitutionally adequate education, which, according to the court, is one that allows attainment of the state’s learning and curriculum standards:<sup>177</sup>

This Court is convinced that pre-school for three- and four-year-olds will have a significant and substantial positive impact on academic achievement in both early and later school years. As the experts described, the long-term benefits amply justify this investment. Also, the evidence strongly supports the conclusion that, in the poor urban school districts, the earlier children start pre-school, the better prepared they are to face the challenges of kindergarten and first grade. *It is this year-to-year improvement that is a critical*

*condition for the attainment of a thorough and efficient education once a child enters regular public school.*<sup>178</sup>

Notably, the court did not rule that Abbott schoolchildren have a constitutional right to pre-kindergarten, perhaps wanting to avoid the constitutional language granting the right to a thorough and efficient education to children between the ages of five and eighteen. Instead, the court based its pre-kindergarten directive on two considerations: (a) the Commissioner of the Department of Education’s recommendation during the remand hearing for “[w]ell-planned, high quality” pre-kindergarten for all four-year-olds residing in the Abbott districts, together with his authority under CEIFA to restructure curriculum in Abbott districts and (b) the legislature’s requirement in CEIFA for pre-kindergarten funds for four-year-olds in all Abbott districts and three-year-olds in most Abbott districts.<sup>179</sup> The court characterized that statutory requirement as “a clear indication that the Legislature understood and endorsed the strong empirical link between early education and later educational achievement.”<sup>180</sup> Although the court rested its pre-kindergarten ruling on the commissioner’s authority and statutory interpretation, it nonetheless found that “because the absence of such early educational intervention deleteriously undermines educational performance once the child enters public school, the provision of pre-school education also has strong constitutional underpinning.”<sup>181</sup>

The court issued specific directives to the state to ensure full implementation and availability of the pre-kindergarten program to every three- and four-year-old in the Abbott districts.<sup>182</sup> It instructed the commissioner to make the program available to all children in the Abbott districts as “expeditiously as possible,” or by no later than September, 1999.<sup>183</sup> It also required the state to adequately fund the pre-kindergarten program and ensure that transportation and other services, support, and resources related to the program were provided.<sup>184</sup> Further, the court instructed the state to prioritize construction of pre-kindergarten facilities to ensure full enrollment in the program.<sup>185</sup> Finally, the court authorized “cooperation with or the use of existing early childhood and day-care programs in the community” in order to allow the state to implement the pre-kindergarten program as expeditiously as possible.<sup>186</sup>

Two years later, in *Abbott VI*, the New Jersey Supreme Court reaffirmed its commitment to high quality pre-kindergarten for the Abbott schoolchildren.<sup>187</sup> The plaintiffs returned to court on an enforcement action alleging that the state was failing to comply with the mandate in *Abbott V* for “well-planned, high quality” pre-kindergarten.<sup>188</sup>

They alleged that the state's use of community childcare centers staffed by uncertified teachers and governed by Department of Human Services childcare standards, as well as its failure to develop developmentally appropriate curriculum guidelines, violated the "high quality" component of the *Abbott V* pre-kindergarten ruling.<sup>189</sup>

The court in *Abbott VI* confirmed that only a "high quality" program would satisfy the state's duty to the Abbott schoolchildren.<sup>190</sup> The court accepted "a core understanding" put forward by the plaintiffs "that the needs of at-risk children can be met only by quality preschool programs."<sup>191</sup> The court acknowledged the need for, and benefits of, Abbott school districts contracting with community childcare programs to deliver the Abbott pre-kindergarten program<sup>192</sup> but ordered the state to eliminate disparities in quality between school-based and community programs.<sup>193</sup> The court stated:

The record in *Abbott V* overwhelmingly demonstrated that substantive, quality early-childhood education does make a difference, and that poor urban youngsters do better academically when they have participated in enriched preschool programs from an early age. Our constitution requires a thorough and efficient education for all of our children because we believe that educated citizens are better able to participate fully in the economic and communal life of the society in which we all live. Quality preschool, whole school reform, adequate, secure school buildings in which to learn, health and social services, and other programs as needed—those are the elements of a commitment to the Abbott children, to their future.<sup>194</sup>

The court ordered the department of education to ensure the following components of a high quality program for all Abbott pre-kindergarten programs, whether in a school district or a community-based program: (1) lead teachers with a bachelor's degree and an early childhood certification and (2) class size of no more than fifteen.<sup>195</sup> The court also directed the department to issue developmentally appropriate pre-kindergarten curriculum standards that would apply to all Abbott programs.<sup>196</sup> Finally, concerned about under-enrollment in the pre-kindergarten program, the court ordered the Department of Education to make funding available to Abbott districts for concerted outreach to families of pre-kindergarteners.<sup>197</sup>

In 2002, the *Abbott* plaintiffs again challenged the state's implementation of the pre-kindergarten program.<sup>198</sup> In *Abbott VIII*, the New Jersey Supreme Court found, for the second time, that the state's implementation of the program was insufficient to meet the needs of the Abbott schoolchildren.<sup>199</sup> The

court ordered the Commissioner of the Department of Education to: finalize pre-kindergarten curriculum guidelines; develop district-level plans to boost pre-kindergarten enrollment whenever the district failed to meet the department's enrollment goals (set at ninety percent of the eligible universe by the 2003-2004 school year); approve contingency facilities plans for districts that lack enough permanent classroom space to serve every child who wants to enroll; include Head Start programs in the Abbott pre-kindergarten program so that children enrolled in Head Start receive the benefits of the high quality Abbott program; provide reasonable funds to help Head Start and community-based childcare providers meet the high quality standards for the Abbott program, including funds to help raise teacher salaries and retain qualified staff; and base program budgets on a thorough assessment of the actual costs of delivering the pre-kindergarten program according to the Abbott quality standards, rather than an arbitrary, predetermined per-pupil amount.<sup>200</sup>

## 2. *Hoke County Board of Education v. State (Leandro II)*

In *Hoke County Board of Education v. State (Leandro II)*, the North Carolina Supreme Court found that the state has a constitutional duty to prepare at-risk pre-kindergarten-age children<sup>201</sup> to avail themselves of the opportunity for the "sound basic education" required by the North Carolina Constitution.<sup>202</sup> The court reversed a 2000 trial court decision ordering the specific remedy of state funding for pre-kindergarten for at-risk children, finding inadequate factual support in the record to sustain this remedy.<sup>203</sup> The court agreed with the lower court's finding that the state's efforts towards at-risk pre-kindergarteners were constitutionally inadequate but, citing the separation of powers doctrine, the court granted the legislative and executive branches the opportunity to design an appropriate remedy.<sup>204</sup>

The *Leandro II* case built upon an earlier challenge to the state's school finance system, *Leandro v. State (Leandro I)*.<sup>205</sup> In *Leandro I*, low-income school districts argued that their students were denied an adequate education under the state constitution because the state's school funding system failed to provide adequate resources to the low-income districts.<sup>206</sup> The North Carolina Constitution requires the state to provide "for a general and uniform system of free public schools ... wherein equal opportunities shall be provided for all students."<sup>207</sup> The North Carolina Supreme Court in *Leandro I* held that this constitutional language imposed a state duty to provide adequate funding and services to ensure all students a "sound basic

education.”<sup>208</sup> The court defined “sound basic education” as one that will provide the student with at least:

(1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student’s community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.<sup>209</sup>

The court remanded the case for trial on the plaintiffs’ claim that the state’s education funding system failed to provide a sound basic education to children in the low-income school districts.<sup>210</sup> This remand proceeding is known as *Hoke County Board of Education v. State*.<sup>211</sup>

Applying the *Leandro* standard for a sound basic education, the *Hoke* trial court upheld the constitutionality of the state education system in almost all regards, finding that the state’s curriculum guidelines, when properly implemented, exceeded the *Leandro* standards for an adequate education; the state’s standards for teacher certification were valid and sufficient to ensure qualified teaching; the school accountability program was appropriate for measuring and improving the academic performance of public school children; and the state’s assessments provided adequate evidence of whether students were receiving a sound basic education.<sup>212</sup>

When it came to at-risk children, however, the trial court came to different conclusions.<sup>213</sup> The court found that those students were not provided with a sound basic education because they did not have access to the same resources as their peers in more affluent districts.<sup>214</sup> The trial court ordered the state to ensure that such students be given competent teachers “with high expectations,” sufficient funding, and early intervention.<sup>215</sup>

The trial court raised, on its own motion, the rights of pre-kindergarteners and whether the constitutional rights enumerated in *Leandro I* extended to at-risk children before they reach the age of five.<sup>216</sup> The North Carolina Constitution does not set an age limitation for public education, but it explicitly requires that “the General Assembly shall

provide that every child of appropriate age ... shall attend the public schools.”<sup>217</sup> The North Carolina General Assembly had enacted legislation requiring mandatory school attendance for seven-year-olds and providing that five-year-olds may attend school.<sup>218</sup> Notwithstanding the General Assembly’s determination, the trial court held that the constitutional right to an education extended to children before the age of five:

Under the North Carolina Constitution as interpreted by *Leandro*, the right of each child to ... a sound basic education ... is not to be conditioned upon age, but rather upon the need of the particular child, including, if necessary, early childhood pre-kindergarten education prior to reaching the age of five and prior to entering five-year[-]old kindergarten.<sup>219</sup>

For evidence, the plaintiffs presented the national research on the school readiness gaps experienced by disadvantaged pre-kindergarteners and the educational benefits of high quality pre-kindergarten.<sup>220</sup> They introduced a publication of the North Carolina Department of Human Resources that summarized this research.<sup>221</sup> Plaintiffs’ early childhood expert, Dr. Ellen Peisner-Feinberg of the Frank Porter Graham Child Development Center (FPG) at the University of North Carolina, testified about the findings of a major national study conducted by FPG, the Carolina Abecedarian Project.<sup>222</sup> She described how this project provided an intensive pre-kindergarten program to low-income children and compared them over a number of years to a similar group of children who did not receive early intervention.<sup>223</sup> According to Dr. Peisner-Feinberg, the Abecedarian Project found that after three years in school, low-income children who received intensive pre-kindergarten intervention scored significantly higher on standardized tests in reading and math than those who did not participate in an early intervention program; furthermore, those advantages persisted through ten years of school.<sup>224</sup> Dr. Peisner-Feinberg testified that the most recent findings of the study trace participants through age twenty-one and report significant long-term effects on cognitive performance as measured on achievement tests and IQ scores.<sup>225</sup> She also testified about FPG’s research showing that the quality of public school pre-kindergarten programs in North Carolina was generally good and produced school readiness gains for children.<sup>226</sup> However, public school programs serve only a fraction of the disadvantaged children who need pre-kindergarten.<sup>227</sup> Dr. Peisner-Feinberg testified that many community childcare centers do not provide the high quality program required for gains in young children’s cognitive development.<sup>228</sup>

The state did not dispute the plaintiffs' evidence on pre-kindergarten.<sup>229</sup> The trial court noted that witnesses for all of the parties agreed that high quality pre-kindergarten programs are "an effective means of increasing the performance of low-income and otherwise at-risk students."<sup>230</sup> In fact, the State Board of Education Chairman testified that it is a "no brainer" that pre-kindergarten would help address the needs of disadvantaged students.<sup>231</sup>

The trial court stated that the evidence also showed:

Many Hoke County kindergarten students have not been exposed to colors [or] print, or had experiences outside of their front yards, a lack of exposure which detracts from their ability to relate to, or comprehend and learn what is expected in kindergarten. Since kindergarten is a building block for success in the first grade, the at-risk five-year[-]old child is behind from the first day that child enters kindergarten as compared with the child's non-poverty counterparts.<sup>232</sup>

The court found that "effective and appropriate pre-school programs can materially assist at-risk children to be able to come to kindergarten and be able to have an equal opportunity to receive a sound basic education from the start."<sup>233</sup> It noted that state education officials supported public pre-kindergarten for at-risk students since 1993 and that the legislature authorized pre-kindergarten in the public schools but the programs were not adequately funded.<sup>234</sup> On the basis of this state policy and the overwhelming evidence on the need for high quality pre-kindergarten, the court ordered the state to expand pre-kindergarten programs to all children who were at risk for school failure.<sup>235</sup>

In *Leandro II*, the North Carolina Supreme Court affirmed the trial court's finding that the state had violated the fundamental rights of children in low-income school districts by not providing an opportunity to receive a sound basic education but reversed the trial court's directive that the state fund a pre-kindergarten program.<sup>236</sup> The court was constrained by the separation of powers doctrine, finding that the North Carolina Constitution granted the General Assembly sole authority to establish an appropriate school age<sup>237</sup> and that any trial court ruling infringing on the legislative prerogative was in error.<sup>238</sup> Notwithstanding the legislature's exclusive authority, however, the court ruled that the state has a constitutional obligation to address the needs of at-risk children prior to the time they enter school:

We conclude that because the evidence presented showed that "at-risk" students in Hoke County were being denied their right to an opportunity to obtain a sound basic education, the trial court properly admitted

additional evidence intended to show that preemptive action on the part of the state should target those children about to enroll, recognizing that preemptive action affecting such children prior to their entering the public schools might well be far more cost effective than waiting until they are actually in the educational system.<sup>239</sup>

Nonetheless, the court was not convinced that the trial evidence justified intrusion into the legislative and executive domains, finding "inadequate factual support" for the pre-kindergarten remedy.<sup>240</sup> The court determined that "the suggestion that pre-kindergarten is the sole vehicle or, for that matter, a proven effective vehicle ... is, at best, premature."<sup>241</sup> Because the trial court order was premature, "its strict enforcement could undermine the state's ability to meet its educational obligations for 'at-risk' prospective enrollees by alternative means."<sup>242</sup> The court stated that the judiciary has the power to order remedies when another branch fails to meet its duties but should do so only when the state has been consistently unable or unwilling to act: "such specific court-imposed remedies are rare, and strike this Court as inappropriate at this juncture of the instant case."<sup>243</sup> The court noted that the state had already started to develop programs to address the needs of disadvantaged pre-kindergarteners and that it "shares our concerns and, more importantly, [it] has already begun to assume its responsibilities for implementing corrective measures."<sup>244</sup>

The court in *Leandro II* found that the state violated its duty to prepare disadvantaged pre-kindergarteners to succeed in school but felt constrained to leave it to the legislature to devise a remedy, at least for the present.<sup>245</sup> The court's ruling leaves the door open for a specific pre-kindergarten remedy in any future court proceedings, depending on the sufficiency of the legislature's response to the *Leandro II* ruling and the strength of the evidence presented by plaintiffs on the benefits of pre-kindergarten in comparison to other interventions.

### 3. *Abbeville v. State*

In a 2005 decision, the trial court in *Abbeville County School District v. State* ruled that the state denied South Carolina's schoolchildren their right to an education under the state constitution because it failed to provide them with early childhood intervention programs "designed to address the impact of poverty on [their] educational abilities and achievements."<sup>246</sup>

The *Abbeville* case originated in 1993 when plaintiffs—largely rural school districts with a high percentage of low-income students and parents and students from these districts—brought an action

against the state seeking a declaratory judgment that the state's system of school funding violated the state constitution's education clause, the state and federal constitutions' equal protection clauses, and the state Education Finance Act.<sup>247</sup> In a 1999 ruling, the South Carolina Supreme Court held that the plaintiffs failed to state a cognizable equal protection claim and that the state statute did not create a private cause of action.<sup>248</sup> However, the court found that the plaintiffs did state a claim under the education clause and remanded the case for trial.<sup>249</sup> The 2005 trial court decision is the outcome of that remand.<sup>250</sup>

The education clause in the South Carolina Constitution states that "[t]he General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State and shall establish, organize, and support such other public institutions of learning, as may be desirable."<sup>251</sup> The South Carolina Supreme Court in *Abbeville* interpreted this clause to "require[ ] the General Assembly to provide the opportunity for each child to receive a minimally adequate education."<sup>252</sup> The court defined a minimally adequate education as one that includes:

[P]roviding students adequate and safe facilities in which they have the opportunity to acquire: 1) the ability to read, write, and speak the English language, and knowledge of mathematics and physical science; 2) a fundamental knowledge of economic, social, and political systems, and of history and governmental processes; and 3) academic and vocational skills.<sup>253</sup>

On remand, the trial court found that "'[m]inimal adequacy' is a very low standard, which by definition does not require the best policies and practices."<sup>254</sup> With the exception of early childhood programs, the trial court ruled that the state provided sufficient funding to meet this constitutional standard and dismissed plaintiffs' claims for increased education resources, an improved teacher licensure system, greater funding for teacher retention, and better school facilities.<sup>255</sup>

Regarding the educational needs of pre-kindergarteners, the trial court found that "[s]tudents entering school from low-income families consistently demonstrate fewer cognitive, language and social skills than children from non-poverty families."<sup>256</sup> The court cited the state's own early childhood expert, Dr. Herb Walberg, who testified that low-income children are behind in the abilities they need to succeed in school before school even begins.<sup>257</sup> The court stated:

The child born to poverty whose cognitive abilities have been largely formed by the age of six in a setting devoid of the printed word, the life blood of literacy, and other stabilizing

influences necessary for normal development, is already behind before he or she receives the first word of instruction in a formal educational setting . . . [these children] start school unprepared and continue to fall further and further behind.<sup>258</sup>

The court accepted the "virtually undisputed" testimony of experts and educators that effective early childhood intervention, especially for low-income children, can make a difference in educational abilities and help close the achievement gap.<sup>259</sup> The court cited the testimony of Dr. Guthrie, the state's witness, who testified that "[h]igh quality preschool for students from lower income backgrounds has significant long-term impacts . . . on student academic achievement, as well as other desired social and community outcomes."<sup>260</sup>

The trial court discussed numerous state statutes creating early childhood education programs.<sup>261</sup> The court found that the state legislature was well aware of the critical importance of early childhood development yet despite this recognition, the state continued to cut funding for early childhood programs.<sup>262</sup> As a consequence, plaintiff school districts are only able to serve less than half of eligible children in their pre-kindergarten programs.<sup>263</sup>

Without specifically directing the state to fund a pre-kindergarten program, the trial court ruled that the education clause in the South Carolina Constitution imposes an obligation on the legislature to "create an educational system that overcomes, to the extent that is educationally possible, the effects of poverty on the very young . . . to enable them to begin the educational process in a more equal fashion to those born outside of poverty."<sup>264</sup> The court concluded:

The goal of pre-kindergarten is to prepare students to come to kindergarten with the skills and knowledge to be able to obtain the benefits of kindergarten and early elementary education. For children at-risk, effective early childhood intervention from pre-kindergarten through grade [three] is essential to ensure such children the opportunity to receive a minimally adequate education.<sup>265</sup>

#### 4. *Lake View v. Huckabee*

In *Lake View III*, the Arkansas Supreme Court found the state's system for financing public education violated the state constitution's guarantee of "an adequate and substantially equal education" for every child<sup>266</sup> but strictly read the constitution to overturn a lower court ruling requiring the state to fund a pre-kindergarten program as a part of this constitutional duty.<sup>267</sup>

The education article in the Arkansas Constitution provides, in part, that “the State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education.”<sup>268</sup> In 1992, the Lake View School District launched *Lake View v. Huckabee*, a constitutional challenge to the state’s school finance scheme.<sup>269</sup> The low-income school district alleged that the state legislature failed to remedy constitutional violations identified by the Arkansas Supreme Court in a 1983 school funding case, *Dupree v. Alma School District No. 30*.<sup>270</sup> The court in *Dupree* found that the lack of a rational relationship between the state’s reliance on local property taxes to fund public education and the educational needs of individual school districts violated the state equal protection provision and education clause.<sup>271</sup>

In 1994, the *Lake View* trial court found the state’s school funding system inequitable under the state equal protection clause and inadequate under the education article.<sup>272</sup> The trial court ordered the state to enact and implement appropriate legislation to remedy the constitutional violations.<sup>273</sup> After six amended complaints and a failed Agreed Order, the plaintiffs appealed to the Arkansas Supreme Court to enforce the trial court order.<sup>274</sup> The Arkansas Supreme Court remanded the case back to the trial court, directing the lower court to hold a factual hearing to determine whether the state had yet complied with the initial order to eliminate constitutional violations.<sup>275</sup>

On remand, the trial court found that the Arkansas school funding system was still inequitable and inadequate, this time insisting that the state “must provide substantially equal educational opportunities.”<sup>276</sup> Further, the trial court ruled that such opportunities could not be denied to children simply because they happened to attend a school located “in a poorer part of the state.”<sup>277</sup>

The trial court also made three specific findings relating to pre-kindergarten education, facts that “were uncontroverted at trial.”

- (1) A substantial number of children are entering kindergarten and first grade significantly behind their peers;
- (2) Those children that enter the first grades needing remediation will have a difficult time performing at grade level by the third grade; and
- (3) If a student cannot perform at grade level, especially in reading, by the third grade, then he/she is unlikely ever to do so.<sup>278</sup>

The trial judge concluded that “the state must forthwith provide programs for those children of pre-school age that will allow them to compete

academically with their peers” in order to “provide our children with an adequate education as required by the Constitution.”<sup>279</sup>

In the *Lake View III* decision, the Arkansas Supreme Court invalidated the state’s method of funding public education, finding that reliance on property taxes did not allow the state to fulfill “its constitutional duty to provide the children of [the] state with a general, suitable, and efficient school funding system.”<sup>280</sup> The court also upheld the plaintiffs’ claim based on equal protection, finding that “equal educational opportunity is not being afforded to the school children of this state.”<sup>281</sup> The justices found that the disparities in funding among districts led to a shortage of resources in the low-income districts and that “there is no legitimate government purpose warranting the discrepancies in curriculum, facilities, equipment, and teacher pay among the school districts.”<sup>282</sup>

Despite these strong rulings requiring the state to provide equal educational opportunity and an adequate education, the Arkansas Supreme Court rejected the claims for state-funded pre-kindergarten.<sup>283</sup> Plaintiffs argued that because the state already provided some public pre-kindergarten programs to at-risk children, the equal protection clause required the state to create equal access to preschool education for all children at risk for school failure.<sup>284</sup> Other low-income school districts participating in the case as third-party intervenors<sup>285</sup> contended that the state is incapable of providing a constitutionally adequate education for children beginning at age six unless it first offers a pre-kindergarten program that enables children to develop the skills needed to succeed in school.<sup>286</sup> The court noted that it was unclear whether the trial court was ordering the state to provide a pre-kindergarten program or merely underscoring the value and need for such a program.<sup>287</sup> Regardless of the trial court’s intent, the justices found that the judicial branch in Arkansas cannot “mandate pre-school education as an essential component of an adequate education.”<sup>288</sup>

Ultimately, the Arkansas Supreme Court saw the issue of judicial authority as primary and adopted a strict interpretation of the state constitution’s education clause.<sup>289</sup> This clause authorizes, but does not require, the legislature to fund programs for children under six: “[T]he General Assembly and/or public school districts may spend public funds for the education of persons . . . under six (6) years of age, as may be provided by law, and no other interpretation shall be given to it.”<sup>290</sup> The court gave particular weight to the language requiring a legislative enactment authorizing a pre-kindergarten program and rejected the intervenors’ underlying argument that disadvantaged children could not achieve an

adequate education without receiving the foundation of quality state-funded pre-kindergarten.<sup>291</sup> The court also rejected the attempt to link pre-kindergarten to the constitutional right to equal protection, ruling that the implementation of preschool programs “is a public-policy issue for the General Assembly to explore and resolve.”<sup>292</sup>

At the conclusion of *Lake View III*, the Arkansas Supreme Court gave the legislature until January 1, 2004, to correct the inadequacies it had identified in the state’s education system.<sup>293</sup> When the lawmakers failed to act by that deadline, the court reopened and reestablished jurisdiction over the *Lake View* case and appointed two Special Masters to “examine and evaluate legislative and executive action taken since November 12, 2002,” to “comply with this court’s order and the constitutional mandate that the state ‘maintain a general, suitable and efficient system of free public schools’ and ‘adopt all suitable means to secure to the people the advantages and opportunities of education’”<sup>294</sup>

The Special Masters’ Report acknowledged the Arkansas Supreme Court’s decision in *Lake View III* to dismiss the pre-kindergarten claim due to lack of judicial authority, yet at the same time questioned whether the state could meet the goal of *Lake View III* and offer “a substantially equal educational opportunity” to all its citizens without providing pre-kindergarten for disadvantaged children.<sup>295</sup> They found that the Arkansas legislature, in responding to the court’s directive to define an adequate education, established as a matter of public policy that pre-kindergarten education plays an “integral part in providing students an adequate education.”<sup>296</sup>

The Special Masters also referred to a study commissioned by the Arkansas legislature following the *Lake View III* decision to help the state determine the cost of an adequate education.<sup>297</sup> This study recommended the state spend \$100 million on a pre-kindergarten program for all low-income three- and four-year-old children in order to enable these children to achieve a constitutionally adequate education.<sup>298</sup> The study defined “low-income” families as families with an income at or below 200% of the state poverty level.<sup>299</sup> The Arkansas legislature responded to this recommendation by allocating \$40 million for the Arkansas Better Chance pre-kindergarten program.<sup>300</sup>

In June 2004, the Arkansas Supreme Court issued a decision in *Lake View V* releasing jurisdiction of the *Lake View* case.<sup>301</sup> The court reviewed the Special Masters’ Report, noted the legislature’s “laudable” progress in reforming the school finance system, and released its mandate in the case.<sup>302</sup> On the issue of the state’s constitutional obligation to fund pre-kindergarten education, the

court in *Lakeview V* rejected the Special Masters’ suggestion that the state must provide pre-kindergarten for disadvantaged students.<sup>303</sup> The court reiterated its ruling from *Lakeview III* that the Arkansas Constitution vested in the legislature sole authority to determine whether to authorize and fund an early childhood education program, stating that “[t]he people have spoken on this issue, and this court will not second-guess the people. We conclude, as we did in *Lake View III*, that early-childhood education, apart from legislative enactment, is not mandated by the Arkansas Constitution.”<sup>304</sup>

## 5. *Hancock v. Driscoll*

In *Hancock v. Driscoll*, the Supreme Judicial Court of Massachusetts (SJC) overturned a trial court decision recommending that the Commonwealth of Massachusetts fund a high quality pre-kindergarten program for all at-risk three- and four-year-olds.<sup>305</sup> The pre-kindergarten remedy was rejected by the SJC in a ruling that reversed all aspects of the trial court’s decision and upheld the Commonwealth’s school funding system, despite finding severe inequities and inadequacies in the system.<sup>306</sup> The SJC’s ruling against plaintiff students from low-wealth school districts determined that the Commonwealth was meeting its duty under the education clause in the state constitution by making significant progress in education reform since the SJC’s earlier ruling in *McDuffy v. Secretary of Executive Office of Education*, which declared the school finance system unconstitutional.<sup>307</sup>

The education clause of the Massachusetts Constitution states:

Wisdom and knowledge ... being necessary for the preservation of [the people’s] rights and liberties; and as these depend on spreading the opportunities and advantages of education ... it shall be the duty of the legislatures and magistrates ... to cherish the interests of literature and the sciences, and all seminaries of them ... especially the ... public schools and grammar schools in the towns ... .<sup>308</sup>

In *McDuffy*, the SJC ruled that this constitutional language imposed “an enforceable duty” on the part of the executive and legislative branches “to provide education in the public schools for the children there enrolled, whether they be rich or poor and without regard to the fiscal capacity of the community or district in which such children live.”<sup>309</sup>

The court held that all children in Massachusetts have the right to an education that will equip them to fulfill their responsibilities and enjoy their rights as productive, participating citizens in a democratic government.<sup>310</sup> The SJC found the state’s system of school finance, which depended on local tax revenue

to fund public schools, failed to provide this level of education in low-wealth districts.<sup>311</sup> It also determined that the state has a responsibility “to defin[e] the specifics and the appropriate means to provide the constitutionally required education”<sup>312</sup> and “to take such steps as may be required in each instance effectively to devise a plan and sources of funds sufficient to meet the constitutional mandate.”<sup>313</sup>

The legislature responded to the *McDuffy* decision by enacting the Education Reform Act of 1993 (ERA),<sup>314</sup> which established a foundation budget for each district to be phased in over a seven-year period.<sup>315</sup> The ERA also mandated the adoption of the Massachusetts Curriculum Frameworks, which provide learning standards for all students in all core subject areas.<sup>316</sup>

In 1999, the *McDuffy* plaintiffs filed a motion for further relief alleging that the Commonwealth failed to take appropriate legislative action to rectify the constitutional deficiencies in the school funding system.<sup>317</sup> Specifically, the plaintiffs alleged that the foundation budget amounts established in the ERA failed to provide funding sufficient for a constitutionally adequate education, as defined by the SJC in *McDuffy*.<sup>318</sup> The plaintiffs also claimed that without the resources needed for implementation, the Massachusetts Curriculum Frameworks, standing alone, failed to satisfy the SJC’s requirements for a constitutionally adequate education.<sup>319</sup> The enforcement action, known as *Hancock v. Driscoll*, was remanded by the SJC to a specially assigned superior court judge for a fact-finding report and recommendations.<sup>320</sup>

At trial, plaintiffs introduced extensive evidence to support their claim that students in low-income school districts were not receiving the level of education to which they were entitled under the Massachusetts Constitution because the schools they attended lacked sufficient resources to provide it.<sup>321</sup> As a matter of judicial economy, plaintiffs’ evidence consisted of facts in four plaintiff school districts, or focus districts.<sup>322</sup> Plaintiffs presented evidence on the cases of the constitutional deficiencies and proposed remedies.<sup>323</sup> They included state funding for preschool as a component of remedial relief.<sup>324</sup>

Dr. Steven Barnett of the National Institute for Early Education Research, who also served as the early childhood education expert in *Abbott v. Burke*,<sup>325</sup> testified about the national research on the benefits of high quality preschool for disadvantaged children, including evidence that such programs can help close the early achievement gap and lead to later success in school and beyond.<sup>326</sup> Dr. Barnett presented evidence on the results of an assessment of incoming kindergarten students in four of the plaintiff

low-income school districts and two wealthy Massachusetts districts.<sup>327</sup> The assessment showed that children in the low-income districts start school from one year to more than two and one-half years behind children in the more affluent districts.<sup>328</sup> Evidence also showed that children in the affluent school districts were more likely to attend a preschool program than those in the low-income districts.<sup>329</sup> Dr. Barnett testified that in order for preschool to make a difference and prepare children to learn in kindergarten, it has to be high quality.<sup>330</sup> He provided testimony on the research-based components of a high quality program.<sup>331</sup>

Dr. Nancy Marshall, Associate Director of the Center for Research on Women at Wellesley College, testified about two studies on the quality of preschool programs in Massachusetts.<sup>332</sup> These studies show, in part, that under current funding and governance structures, the quality of district-run preschool programs far exceeds that of community childcare centers.<sup>333</sup>

The trial court found that the plaintiff school districts were not providing all students with the level of education to which they were entitled under the Massachusetts Constitution.<sup>334</sup> To cure the constitutional deficiencies, the trial court recommended that the SJC direct the Commonwealth to: (1) determine the actual cost of allowing all children in the focus districts the opportunity to acquire the *McDuffy* capabilities, which the court equated with the cost of implementing the Massachusetts Curriculum Frameworks for all of the districts’ children; (2) determine the costs of bringing about meaningful improvement in the capacity of local districts to effectively implement the necessary educational programs; and (3) implement the funding and administrative changes that result from these cost determinations.<sup>335</sup>

The trial court also recommended that the SJC provide guidance to the Commonwealth on the types of program areas that either must be covered in the cost determinations or should at least be considered for coverage.<sup>336</sup> Pre-kindergarten education, along with special education, adequate school facilities, and all seven of the curriculum frameworks, was on the trial court’s list of “must be covered” programs.<sup>337</sup> Specifically, the trial court recommended that the Commonwealth determine the cost of funding a public pre-kindergarten program for all “at-risk” three- and four-year-old children, defined by the court as children eligible for the federal free or reduced lunch program, children with disabilities, and children with limited English proficiency.<sup>338</sup> The trial court found that “the only way to give many children in these categories a realistic opportunity to acquire the education for which the Massachusetts

Constitution provides is to offer them a quality preschool program and thus provision for such a program must be mandated.”<sup>339</sup> According to the trial court, the program must be “offered free of charge at least to those who are unable to pay.”<sup>340</sup>

The trial court rejected the state’s argument that the constitutional right to an education extends only from kindergarten through twelfth grade.<sup>341</sup> The court found that the *McDuffy* ruling imposed a duty on the Commonwealth to provide an education at the “public school level,” and neither the ruling nor the constitution itself defined or limited that level.<sup>342</sup> Instead, the trial court observed that the state statute authorizes the Massachusetts Board of Education to establish the mandatory ages for school attendance.<sup>343</sup> Moreover, each of the focus districts offers a preschool program, each of the curriculum frameworks adopted by the board of education had a pre-kindergarten component, and, to a limited extent, public preschool was included as part of the foundation budget.<sup>344</sup> Based on these factors, the trial court concluded “that the Commonwealth does in fact include preschool programs as part of the education prescribed at ‘the public school level.’”<sup>345</sup>

The trial court also found that “the core of the constitutional obligation defined in *McDuffy* is the duty to educate ‘all’ children in order to prepare them to be informed, participating citizens.”<sup>346</sup> Persuaded by plaintiffs’ evidence demonstrating that children in the plaintiffs’ school districts start kindergarten far behind their more advantaged peers and that high quality preschool programs can help close this early achievement gap and contribute to school success, the trial court concluded that “if high quality preschool programs are not provided, the Commonwealth will not be in a position to fulfill its obligation to educate all the children ... because at least some of these children start out so far behind, a situation exacerbated by the lack of adequate early childhood education.”<sup>347</sup>

The trial court also accepted plaintiffs’ evidence on the components of a high quality pre-kindergarten program—well-educated teachers, adequate teacher compensation, small class size, strong supervision, and high standards for learning and teaching—and found that “[t]he quality of the early childhood education matters.”<sup>348</sup>

The SJC rejected the trial court finding that the Commonwealth was failing to meet its duty under the state constitution to provide an adequate education to all Massachusetts children.<sup>349</sup> The SJC acknowledged the trial judge’s “thoughtful and detailed” factual findings and “share[d] the judge’s concern that sharp disparities in the educational opportunities, and the performance, of some Massachusetts public school students persists.”<sup>350</sup> The justices also recognized that

the state itself concedes that “serious inadequacies in public education remain.”<sup>351</sup> Yet these inadequacies were not constitutionally fatal because of the “comprehensive and systematic overhaul of State financial aid to and oversight of public schools” established in the Massachusetts ERA in response to the 1993 decision in *McDuffy*.<sup>352</sup>

Once the SJC determined that the Commonwealth was not in violation of the education clause, it declined to uphold the trial judge’s recommendation for a cost study, finding that it would divert attention from educational reform and that any study “is rife with policy choices that are properly the Legislature’s domain.”<sup>353</sup> The SJC singled out the trial court’s recommendation that pre-kindergarten be a “mandated” program in the cost study as an example of impermissible judicial interference, noting that a decision regarding which programs best serve the needs of at-risk students “is a policy decision for the Legislature.”<sup>354</sup> The court concluded that “[c]ourts are not well positioned to make such decisions.”<sup>355</sup>

The SJC cited the language of the education provision in the Massachusetts Constitution of 1780 to support its holding, noting that it required only that “it shall be the duty of the legislatures and magistrates ... to cherish the interests of literature and the sciences, and all seminaries of them ... especially the ... public schools and grammar schools in the towns ... .”<sup>356</sup> The SJC found that the provision “provide[s] greater flexibility to the Legislature concerning educational strategy than more directive provisions contained in the constitutions of other States.”<sup>357</sup> The court cited New Jersey’s education article as an example of a more modern and directive education provision.<sup>358</sup>

## V. The Legislative Response: Expanding Access to High Quality Pre-K

A court can direct a state to remedy a constitutional deficiency in its education system, but ultimately the other branches of government are left to develop, implement, and fund education programs aimed at curing constitutional violations. To varying degrees, the five education finance cases profiled in this article succeeded in prompting the legislature to develop or expand state pre-kindergarten programs.<sup>359</sup> This is the case even in Arkansas and Massachusetts, where the courts of last resort overturned trial court decisions directing state pre-kindergarten funding.<sup>360</sup>

## 1. New Jersey

In New Jersey, rapidly expanded enrollment, high quality standards, and promising educational outcomes are the results of the New Jersey Supreme Court's pre-kindergarten rulings in the *Abbott* case.<sup>361</sup>

All three- and four-year-olds residing in an Abbott school district are eligible to enroll in the Abbott Preschool Program, regardless of income or parental status.<sup>362</sup> In the 2005–2006 school year, 40,500 preschoolers enrolled, representing approximately seventy-four percent of the eligible universe in the thirty-one Abbott districts.<sup>363</sup> As a gauge of the extent of growth, only 5,000 children enrolled in 1998–1999, the first year of program implementation following the *Abbott V* ruling.<sup>364</sup> The state's investment in the program is significant, with \$445 million allocated in 2005–2006 for an average per-pupil amount of \$10,783.<sup>365</sup>

The Abbott Preschool Program is delivered through the public schools and through school district contracts with community childcare and Head Start programs willing and able to meet program quality standards.<sup>366</sup> Abbott school districts are required to offer a “full-day, full-year” preschool program, 6 hours a day, 180 days per year.<sup>367</sup> Districts also must offer “wraparound” services that allow programs to operate up to ten hours a day, as well as summer and holiday hours.<sup>368</sup> The Abbott Preschool Program quality standards are among the highest in the country.<sup>369</sup> Classrooms operate with a maximum size of fifteen children and are staffed by a certified early childhood teacher and a teacher's assistant.<sup>370</sup> School districts must offer transportation, health and other related services, as needed, and provide a developmentally appropriate curriculum aligned with the New Jersey's early learning curriculum standards.<sup>371</sup>

No doubt the New Jersey Supreme Court's resolve to enforce the *Abbott V* pre-kindergarten mandate compelled the state to accelerate expansion and implement high quality standards. The *Abbott V* ruling unambiguously declared a state duty to provide a high quality pre-kindergarten program to all three- and four-year-olds in the Abbott districts,<sup>372</sup> yet the state's initial attempt at program implementation lacked uniform quality standards and plans to enroll all eligible children.<sup>373</sup> If there was any doubt about the scope and nature of the state's duty, the New Jersey Supreme Court clarified the obligation in *Abbott VI*, when it specified the state's obligations to: offer a pre-kindergarten program with classrooms of fifteen children and a certified early childhood teacher; equalize quality across district and community pre-kindergarten programs; and undertake concerted family outreach to maximize

enrollment.<sup>374</sup> The court again refined the state's duty in *Abbott VIII*, when it ordered the state to: develop district-level plans to boost pre-kindergarten enrollment; approve pre-kindergarten contingency facilities plans; include Head Start programs in the Abbott pre-kindergarten program; provide funds to help Head Start and community-based pre-kindergarten providers meet the Abbott program's high quality standards; and base program budgets on the actual costs of delivering the high quality pre-kindergarten program.<sup>375</sup>

The State of New Jersey has come to embrace the Abbott Preschool Program, as evidenced by a 2006 joint legislative committee report touting the program's success and recommending its expansion to an additional seventy-seven low-income school districts serving thousands more children.<sup>376</sup> Research by the National Institute for Early Education Research and by the New Jersey Department of Education establishes that the program is having a significant impact on the school readiness skills of children in the Abbott districts, including increased early language, literacy, and math skills.<sup>377</sup> Moreover, the results of New Jersey's fourth grade assessment indicate that the achievement gap between children in the Abbott and non-Abbott school districts is closing at grade four, a result that will inevitably lend political support to the Abbott Preschool Program.<sup>378</sup>

## 2. North Carolina

North Carolina's pre-kindergarten program for at-risk children, More at Four, was enacted in 2001,<sup>379</sup> less than one year after the *Hoke County* trial court order directing the state to offer a pre-kindergarten program for at-risk four-year-olds.<sup>380</sup> The legislature allocated \$6.4 million for each year of the 2002–2003 biennium with the goal of serving 1,500 of the state's economically disadvantaged four-year-olds each year.<sup>381</sup> Similar to the Abbott Preschool Program, More at Four grew tremendously in the first few years of operation, expanding from 1,621 state-funded slots in the 2001–2002 school year to 18,655 slots in 2006–2007.<sup>382</sup> The program currently serves approximately thirty-one percent of eligible children and fifteen percent of four-year-olds in the state.<sup>383</sup>

More at Four programs are operated through public school districts, childcare centers, and Head Start agencies.<sup>384</sup> Non-public school providers must have a four- or five-star license under North Carolina's childcare licensing standards or be a three-star program working toward four.<sup>385</sup> All programs must meet the same highly ranked program standards,<sup>386</sup> which include a maximum class size of eighteen with a 1:9 staff-child ratio, a lead teacher

with a Birth to Kindergarten license, an assistant teacher with a two-year Child Development Associate credential, and research-based, developmentally appropriate curricula.<sup>387</sup> More at Four is open to all at-risk four-year-olds in the state whose family income is at or below seventy-five percent of the state median income, although programs may serve up to twenty percent of children who exceed the income limit based on disability or chronic health problems, limited English proficiency, or developmental delays.<sup>388</sup> The state funds approximately one-half of program costs, leaving it to pre-kindergarten providers to secure the remaining funding.<sup>389</sup> State per child spending in 2005 equaled \$4,058.<sup>390</sup> Children's enrollment in More at Four is dependent on willing participation by counties<sup>391</sup> and, in turn, available programs and slots.

More at Four's rapid growth can be credited to not only the *Hoke County* trial court ruling but also North Carolina Governor Mike Easley's commitment to the program. Governor Easley twice invoked extraordinary executive powers to force the legislature to allocate additional state funding to More at Four, citing the *Leandro* litigation as the basis for his action.<sup>392</sup> First, in July 2002, after the legislature failed to ratify a budget in time for schools to plan for the start of the new school year, Governor Easley signed an executive order authorizing the director of the More at Four program to recruit and hire new teachers.<sup>393</sup> The new hires were needed to staff classrooms that would be added to the pre-kindergarten program with funds Governor Easley requested in his budget.<sup>394</sup> Governor Easley resorted to executive authority based on his assessment that the state's noncompliance with the *Hoke County* trial court directive had "reached a crisis point."<sup>395</sup>

The North Carolina Supreme Court ultimately overturned the trial court's directive for state-funded pre-kindergarten in 2004, although it charged the state with the constitutional duty to prepare at-risk pre-kindergarteners to succeed in the public schools.<sup>396</sup> The More at Four program was well under way at this point<sup>397</sup> and continues as the state's strategy for fulfilling this duty. In 2005, Governor Easley signed a second executive order authorizing education spending for More at Four without legislative approval.<sup>398</sup> He cited as justification not only the legislature's failure to agree on a budget in time for the coming school year, but also a pending hearing before the trial court on the state's compliance with the Supreme Court's order in *Leandro II* to address the educational needs of at-risk students.<sup>399</sup> In 2006, Governor Easley championed a state lottery program to generate extra revenue for the public education system,<sup>400</sup> with a substantial portion

earmarked for pre-kindergarten programs for at-risk four-year-olds.<sup>401</sup>

### 3. South Carolina

The South Carolina legislature responded to the 2005 *Abbeville* trial court decision by enacting the South Carolina Child Development Education Pilot Program, a two-year pilot program that aims to provide full-day, four-year-old kindergarten to at-risk children in the eight plaintiff school districts that served as exemplar districts at the trial.<sup>402</sup> Legislation establishing the program, which took effect in the 2006–2007 school year, provides \$3,077 per child and allows for expansion to the remaining twenty-eight plaintiff school districts as funds allow.<sup>403</sup> Because the legislature allocated just \$23.3 million per year to the program,<sup>404</sup> expansion is not likely at this point. Former South Carolina Superintendent of Education Inez Tenenbaum presented the legislature with a considerably larger sum needed to cure the constitutional violation found by the trial court: \$10,000 per child for pre-kindergarten and ancillary services for all at-risk four-year-olds in the state, with a total program cost of \$288 million.<sup>405</sup> In contrast to political dynamics in North Carolina, South Carolina Governor Mark Sanford did not take the lead on implementing the trial court order and it was up to the legislature to take the initiative.<sup>406</sup>

Curiously, the legislature embarked on the two-year pilot program even though South Carolina had already operated the Half-Day Developmental Program for at-risk pre-kindergarteners since 1984. This program, known as 4K, served approximately thirty percent of four-year-olds in the state in 2005 with a state contribution of \$1,575 per child.<sup>407</sup> Program quality standards require a lead teacher with an early childhood certification and a maximum class size of twenty with a 1:10 teacher-student ratio.<sup>408</sup> Research by the National Institute for Early Education Research shows that the 4K program has positive impacts, significantly increasing children's early literacy skills at the start of kindergarten.<sup>409</sup> Funding for the 4K program is distributed to public school districts, which are allowed to contract with community childcare providers,<sup>410</sup> whereas pilot program funding is distributed to both school districts and, to a lesser extent, community providers.<sup>411</sup> Additionally, the 4K program provides a half day of pre-kindergarten while the pilot program provides a full day.<sup>412</sup>

### 4. Arkansas

Arkansas's pre-kindergarten program, Arkansas Better Chance for School Success (ABC Program),<sup>413</sup> got its inspiration, in large part, from the *Lake View*

litigation. The Arkansas Supreme Court set the pre-kindergarten program in motion in *Lake View III* at the same time it reversed the trial court directive for state-funded pre-kindergarten.<sup>414</sup> The court declared the school finance system unconstitutional and chastised the Department of Education for failing to conduct a study of an adequate education in Arkansas.<sup>415</sup> As part of its effort to revamp the school funding system to comply with *Lake View III*, the Arkansas legislature commissioned a study on the cost of an adequate education.<sup>416</sup> This study, prepared by a panel of experts, recommended that the state allocate \$100 million to implement a preschool program for all children at risk for school failure.<sup>417</sup> A well-organized, long-standing coalition of early care and education advocates took advantage of the recommendations of the cost study and the state's efforts to revamp the school finance system in order to press for state funding for a high quality pre-kindergarten program.<sup>418</sup>

In 2003, in response to this campaign and the recommendation in the cost study, the legislature enacted the ABC Program, an early care and education program for three- and four-year-olds in school districts where at least seventy-five percent of students score below proficient on the state assessment exams or in districts identified as being in academic distress.<sup>419</sup> The program is designed to serve children living at or below 200% of the poverty level.<sup>420</sup> The General Assembly allocated \$40 million in new funding for the program in the 2005 fiscal year and increased funding by an additional \$20 million for the 2006 fiscal year.<sup>421</sup> When combined with funds previously designated for preschool, the 2006 fiscal year state budget for the ABC Program totaled \$71 million.<sup>422</sup> This commitment of funds allowed Arkansas to enroll 9,316 three- and four-year-olds in the ABC Program in 2005, double the state pre-kindergarten enrollment in 2004.<sup>423</sup> The program was flat-funded at \$71 million in fiscal year 2007,<sup>424</sup> but newly elected Governor Mike Beebe's proposed budget for fiscal years 2008 and 2009 calls for an increase in ABC Program funding by an additional \$40 million.<sup>425</sup>

The ABC Program has been rated as one of the nation's highest quality pre-kindergarten programs.<sup>426</sup> Class size is limited to twenty children with a 1:20 staff-child ratio.<sup>427</sup> The program offers comprehensive curriculum standards and supports for children and families.<sup>428</sup> The majority of lead teachers possess a bachelor's degree and specialized training in early childhood education.<sup>429</sup> Research shows that the ABC Program quality standards are paying off for Arkansas's young children.<sup>430</sup> A 2007 study by the National Institute for Early Education Research found that the program has statistically

significant impacts on participants' early language, literacy, and mathematical development.<sup>431</sup>

Notably, the *Lake View* case continues to influence pre-kindergarten expansion in Arkansas. In response to the Arkansas Supreme Court's 2005 decision reopening jurisdiction of the case and instructing the legislature to solve an apparent education funding shortage,<sup>432</sup> the legislature contracted with the same school finance experts who performed the 2003 education adequacy study to "recalibrate" the cost of an adequate education.<sup>433</sup> The 2006 recalibration study lauds enactment of the ABC Program and urges the legislature to fully fund the program to serve all eligible children, stating that the "state will experience both long- and short-term student performance gains for those early investments."<sup>434</sup> Moreover, the authors of the study suggest that the state should consider expanding the program to eventually serve all pre-kindergarteners in the state.<sup>435</sup>

## 5. Massachusetts

Massachusetts has not had the same level of success as other states with respect to the outcome of litigation on pre-kindergarten funding, although there have been recent developments in the direction of expanding access to a high quality program.<sup>436</sup> Since 1993, the state has operated Community Partnerships for Children (CPC), a grant program that provides children of working families with subsidies for early care and education programs in public school and community childcare settings.<sup>437</sup> Community councils are established under CPC to work collaboratively with local programs to develop a local system of early care and education.<sup>438</sup> Recent state budget cuts resulted in reductions in services provided by CPC councils: in 2002, Massachusetts served twelve percent of its four-year-olds in the CPC program but by 2005, only eight percent of four-year-olds were served.<sup>439</sup>

In 2004, state pre-kindergarten advocates successfully lobbied for legislation creating the Department of Early Education and Care (Department) and a policy and oversight board, the Board of Early Education and Care (Board).<sup>440</sup> The Board is charged with "oversee[ing] the development and implementation of a program of voluntary, universally accessible[,] high quality early childhood education to all preschool-aged children in the [C]ommonwealth."<sup>441</sup> According to pre-kindergarten advocates, the trial court's April 2004 decision in *Hancock v. Driscoll*, recommending that the state fund a high quality pre-kindergarten program for at-risk children,<sup>442</sup> was an important factor in legislators' consideration of the new Department and

Board.<sup>443</sup> In August 2006, Governor Mitt Romney vetoed a bill that would have established a voluntary, universally accessible, high quality pre-kindergarten program for all three- and four-year-olds in Massachusetts, although he did approve an appropriation of \$4.6 million in the fiscal year 2007 budget to establish universal pre-kindergarten pilot projects.<sup>444</sup>

## VI. Conclusion

It would be a mistake to think of high quality pre-kindergarten as a magic bullet capable of remedying the effects of poverty and the shortcomings of an education system built on long-standing racial and class segregation and the neglect of schools in low-income urban and rural communities. Children entering inadequately funded schools with poorly trained teachers, unsafe and overcrowded classrooms, and poorly developed curricula will be challenged to achieve long-term academic success regardless of their early childhood experiences. Nevertheless, pre-kindergarten holds great promise as a key strategy in reducing academic achievement gaps based on race, ethnicity, and socioeconomic status and must be an integral part of educational reform efforts. Rigorous scientific studies have established the educational benefits of high quality pre-kindergarten, including reducing the school readiness gap by significantly increasing early reading and math skills for children entering the K–12 education system,<sup>445</sup> decreased grade repetition,<sup>446</sup> less referral to special education,<sup>447</sup> increased high school graduation rates,<sup>448</sup> and greater enrollment in post secondary schools.<sup>449</sup> Research indicates that unless steps are taken to reduce learning gaps before children enter kindergarten and first grade, they may never catch up and the benefits of other educational reforms may not be realized.<sup>450</sup> Plaintiffs in school finance cases have achieved favorable court rulings on pre-kindergarten funding<sup>451</sup> and litigation, even when not fully successful, has spurred legislative enactments creating and expanding pre-kindergarten programs.<sup>452</sup> For these reasons, funding for high quality pre-kindergarten ought to be included in school finance litigation as the crucial first step in a constitutionally adequate public education system.

## Endnotes

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<sup>1</sup> See, e.g., W. Steven Barnett & Clive Belfield, *Early Childhood Development and Social Mobility*, 16 *FUTURE CHILD*. 73, 80–86 (summarizing the research on the short- and long-term effects of early childhood programs on child development and adult outcomes).

<sup>2</sup> See, e.g., Michael Resnick, *The Time Has Come for Voluntary Pre-K for All*, *SCH. BOARD NEWS*, Dec. 26, 2006, at 2 (stating that voluntary pre-kindergarten opportunities for all three- and four-year-olds is "essential for our national commitment to individual opportunity and our country's global success"), available at [http://www.nsba.org/site/doc\\_sbn.asp?TrackID=&SID=1&DID=39722&CID=1998&VID=58](http://www.nsba.org/site/doc_sbn.asp?TrackID=&SID=1&DID=39722&CID=1998&VID=58); NAT'L ASS'N OF ELEMENTARY SCH. PRINCIPALS, *LEADING EARLY CHILDHOOD LEARNING COMMUNITIES: WHAT PRINCIPALS SHOULD KNOW AND BE ABLE TO DO 7* (2005) (urging principals to advocate for free universal prekindergarten programs staffed with qualified, certified, and well-paid early childhood teachers and specialists); Council of Chief State School Officers, *Building a Cadre of Champions*, [http://www.ccsso.org/projects/Early\\_Childhood\\_and\\_Family\\_Education/Projects/2973.cfm](http://www.ccsso.org/projects/Early_Childhood_and_Family_Education/Projects/2973.cfm) (last visited Mar. 12, 2007) (explaining CCSSO's plan to educate and serve chief school officers to advocate for voluntary, universal pre-kindergarten for all three- and four-year-olds); NAT'L EDUC. ASS'N, *NEA ON PRE-KINDERGARTEN AND KINDERGARTEN 6* (2004) (advocating for voluntary, publicly funded, high quality, universal pre-kindergarten programs for all three- and four-year-old children whose parents choose to enroll them), available at <http://www.nea.org/earlychildhood/images/prekinder.pdf>; AM. FED'N OF TEACHERS, *WHERE WE STAND: EARLY CHILDHOOD EDUCATION 11* (2003) (supporting high quality early childhood programs accessible to all children beginning at age three, free for low-income children, and affordable to

all), available at <http://www.aft.org/pubsreports/downloads/teachers/EarlyChildRes.pdf>.

<sup>3</sup> W. STEVEN BARNETT ET AL., THE STATE OF PRESCHOOL: 2005 STATE PRESCHOOL YEARBOOK 13 (2005) [hereinafter BARNETT ET AL., PRESCHOOL YEARBOOK].

<sup>4</sup> D.C. MUN. REGS. tit. 5, § 2004 (1977).

<sup>5</sup> Pre-K Now, Leadership Matters: Governors' Pre-K Proposals Fiscal Year 2007 1 (2006) [hereinafter Pre-K Now, Leadership Matters], available at [http://www.preknow.org/documents/LeadershipReport\\_May2006.pdf](http://www.preknow.org/documents/LeadershipReport_May2006.pdf). See also Nat'l Governors Ass'n Task Force on Sch. Readiness, Building the Foundation for Bright Futures 9 (2005) (recommending that states expand high quality, voluntary pre-kindergarten opportunities for three- and four-year-olds as a strategy for increasing children's school readiness).

<sup>6</sup> BARNETT ET AL., PRESCHOOL YEARBOOK, *supra* note 3, at 11–12.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 8, 13. During this same period, eleven percent of four-year-olds were served in the federal Head Start program and six percent attended preschool special education programs, bringing the percentage of four-year-olds served in a publicly funded pre-kindergarten program to thirty-five. *Id.* at 8.

<sup>9</sup> *Id.* at 14.

<sup>10</sup> See *infra* Parts III & IV.

<sup>11</sup> MOLLY A. HUNTER, NAT'L ACCESS NETWORK, EQUITY AND ADEQUACY SCHOOL FUNDING COURT DECISIONS (Sept. 18, 2006), available at <http://www.schoolfunding.info/litigation/equityandadequacytable.pdf>. Plaintiffs have prevailed in twenty-six of these forty-five school finance cases. *Id.*

<sup>12</sup> Avidan Y. Cover, *Is "Adequacy" a More "Political Question" Than "Equality?"*: The Effect of Standards Based Education on Judicial Standards for Education Finance, 11 CORNELL J.L. & PUB. POL'Y 403, 404 (2002). See generally Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 104–16 (1995) (providing an overview of school finance legal claims); Michael Heise, *State Constitutions, School Finance Litigation, and the Third Wave: From Equality to Adequacy*, 68 TEMP. L. REV. 1151, 1151 (1995) (discussing the waves of school finance litigation and the shift from equity to adequacy theory) [hereinafter Heise, *State Constitutions*].

<sup>13</sup> Almost all state constitutions provide a measure of equal protection of laws, although most state constitutions do not have an explicit equal protection clause. Courts have instead applied an equal protection analysis to other equality provisions in states' constitutions. See Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1196 (1985).

<sup>14</sup> Every state constitution contains an education article directing the state to maintain, at a minimum, a

system of free public schools for its citizens. Cover, *supra* note 12, at 404–05; Compare William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1661 (1989) (arguing that Mississippi's constitution does not mandate a system of public education), with Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 311 (1991) (arguing that Mississippi's constitution does mandate a system of public education).

<sup>15</sup> See *infra* Part II.

<sup>16</sup> The standards movement originated at the 1989 Education Summit between President George H.W. Bush and the nation's governors. Richard F. Elmore, *Change and Improvement in Education Reform, in A NATION REFORMED?: AMERICAN EDUCATION 20 YEARS AFTER A NATION AT RISK* 23–38 (David T. Gordon ed., Harvard Education Press 2003). The meeting concluded with the adoption of six national goals to achieve by the year 2000, including that all students would master "challenging subject matter in the core academic subjects." U.S. DEP'T OF EDUC., PROGRESS OF EDUCATION IN THE UNITED STATES OF AMERICA: 1990 THROUGH 1994, PART III EDUCATION REFORM 1990–1994, MAJOR ISSUES AND TRENDS: GOALS 1–3 (1995), available at <http://www.ed.gov/pubs/Prog95/index.html>.

In 1994, Congress adopted President Bill Clinton's education initiative, Goals 2000: Educate America Act, which provided funding to states and school districts to develop content standards and assessments for reading and math at three grade levels. Pub. L. No. 103–227, 108 Stat. 125 (1994) (codified at 20 U.S.C. § 5801 *et seq.* (1997)). The 1994 Improving America's Schools Act urged states to hold schools receiving Title 1 funds accountable for student performance. Pub. L. No. 103–382, 108 Stat. 3518 (1994) (codified at 20 U.S.C. §§ 6301–6514 (1997)). Then, 2001 amendments to the federal Elementary and Secondary Education Act of 1965 (ESEA), known as the No Child Left Behind Act of 2001 (NCLB), established a statewide accountability system to "ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education ... ." 20 U.S.C. § 6301 (2002).

States receiving federal funding to improve public elementary and secondary education pursuant to 20 U.S.C. § 6302 must satisfy NCLB's requirements, 20 U.S.C. § 6311, and fulfill its purpose:

[T]o ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments ... by ... ensuring that high-quality academic assessments, accountability systems, teacher preparation and training, curriculum, and instructional materials are aligned

with challenging State academic standards so that students, teachers, parents, and administrators can measure progress against common expectations for student academic achievement . . . .

See *id.* § 6301(a)(1).

<sup>17</sup> NANCY KOBER, CTR. ON EDUC. POLICY, *IT TAKES MORE THAN TESTING: CLOSING THE ACHIEVEMENT GAP 10* (2001).

<sup>18</sup> See, e.g., Suzanne Weiss, Educ. Comm'n of the States, *Closing the Achievement Gap: Lagging Achievement of Disadvantaged Students Remains a Critical Problem*, 4 PROGRESS EDUC. REFORM, Mar. 2003, at 1, available at <http://www.ecs.org/clearinghouse/43/00/4300.pdf>; Anne Rogers Poliakoff, *Closing the Gap: An Overview*, 44 ASCD INFOBRIEF (Ass'n for Supervision and Curriculum Dev., Alexandria, Va.), Jan. 2006, available at <http://www.ascd.org>; Dale Whittington, *The Achievement Gap: Should We Rely on SAT Scores to Tell Us Anything About It?*, 12 EDUC. POL'Y ANALYSIS ARCHIVES, Apr. 5, 2004, <http://epaa.asu.edu/epaa/v12n12/> (last visited Mar. 12, 2007).

<sup>19</sup> Educ. Comm'n of the States, *Setting the Standard: Will Higher Expectations Improve Student Achievement?*, 1 PROGRESS EDUC. REFORM, Jan.–Feb. 2000, at 2, available at <http://www.ecs.org/clearinghouse/16/50/1650.pdf>.

<sup>20</sup> KOBER, *supra* note 17, at 15.

<sup>21</sup> 20 U.S.C. § 6301.

<sup>22</sup> *Id.* § 6302.

<sup>23</sup> *Id.* § 6301(2)(c). For a discussion of the full requirements and purposes of NCLB, see 20 U.S.C. § 6301.

<sup>24</sup> See, e.g., David Berliner, *Our Impoverished View of Educational Reform*, 108 TCHRS. C. REC. 949, 950–51 (2006); RICHARD ROTHSTEIN, *CLASS AND SCHOOLS: USING SOCIAL, ECONOMIC, AND EDUCATIONAL REFORM TO CLOSE THE BLACK-WHITE ACHIEVEMENT GAP 5–7* (The Economic Policy Institute & Teachers College, Columbia Univ. 2004).

<sup>25</sup> Enrich, *supra* note 12, at 104–16.

<sup>26</sup> See, e.g., RON HASKINS & CECILIA ROUSE, *THE FUTURE OF CHILDREN, POLICY BRIEF: CLOSING ACHIEVEMENT GAPS 1* (Spring 2005) (citing data from the Early Childhood Longitudinal Study, Kindergarten Cohort (ELCS-K), a nationally representative sample of nearly 23,000 kindergarten children, showing that black and Hispanic children score substantially lower than white children at the beginning of kindergarten on math and reading achievement; also citing research showing that gaps persist or grow as minority children advance from grade to grade); VALERIE E. LEE & DAVID T. BURKAM, *INEQUALITY AT THE STARTING GATE: SOCIAL BACKGROUND DIFFERENCES IN ACHIEVEMENT AS CHILDREN BEGIN SCHOOL 2*, 17–18 (2002) (using data from ELCS-K to show differences in cognitive development at entry to kindergarten between

disadvantaged children and their wealthier peers and by racial and ethnic groups).

<sup>27</sup> HASKINS & ROUSE, *supra* note 26, at 1–2; LEE & BURKAM, *supra* note 26, at 2.

<sup>28</sup> LEE & BURKAM, *supra* note 26, at 2.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> See, e.g., Barnett & Belfield, *supra* note 1 (arguing that programs such as Head Start are specifically designed to “improve children’s cognitive, social, emotional, and physical development”).

<sup>33</sup> *Id.* at 83–86.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* There is no credible research disproving the research findings on school readiness gaps and the benefits of early childhood research; therefore, this article assumes the validity of this research.

<sup>36</sup> James Heckman & Dimitriy Masterov, *The Productivity Argument for Investing in Young Children 28–32* (Comm. for Econ. Dev., Working Paper No. 5, 2004), available at [http://www.ced.org/docs/report/report\\_ivk\\_heckman\\_2004.pdf](http://www.ced.org/docs/report/report_ivk_heckman_2004.pdf).

<sup>37</sup> W. Steven Barnett, Kristy Brown & Rima Shore, *The Universal v. Targeted Debate: Should The United States Have Pre-K For All?*, 6 PRESCHOOL POL'Y MATTERS 1, 1 (2004).

<sup>38</sup> LEE & BURKAM, *supra* note 26, at 60–61.

<sup>39</sup> Barnett, Brown & Shore, *supra* note 37, at 5–6.

<sup>40</sup> U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, *DROPOUT RATES IN THE UNITED STATES: 1995 43–45* (1997).

<sup>41</sup> See Barnett & Belfield, *supra* note 1, at 82–83 (reporting that children in universal programs gained school readiness skills, although gains were largest for poor children).

<sup>42</sup> William Gormley et al., *The Effects of Universal Pre-K on Cognitive Development*, 41 DEV. PSYCHOL. 872, 880–82 (2005).

<sup>43</sup> W. STEVEN BARNETT ET AL., *THE EFFECTS OF STATE PREKINDERGARTEN PROGRAMS ON YOUNG CHILDREN'S SCHOOL READINESS IN FIVE STATES 2*, 13–14 (2005) [hereinafter BARNETT ET AL., *EFFECTS OF STATE PREKINDERGARTEN*].

<sup>44</sup> Barnett, Brown & Shore, *supra* note 37, at 3.

<sup>45</sup> *Id.*

<sup>46</sup> BARNETT ET AL., *EFFECTS OF STATE PREKINDERGARTEN, supra* note 43, at 15.

<sup>47</sup> BARNETT ET AL., *PRESCHOOL YEARBOOK, supra* note 3, at 15.

<sup>48</sup> Barnett & Belfield, *supra* note 1, at 80–87.

<sup>49</sup> Through my work at the Education Law Center, I have been involved—either directly or indirectly—with all eleven pending school finance cases that include a claim for pre-kindergarten funding: **Alaska**: Moore v. State, No. 3AN-04-9756 Civ. (Alaska Super. Ct. filed Aug. 9, 2004) (no final trial court order); **Arizona**: Crane Elementary Sch. Dist. v. State, No. 1 CA-CV 04-

0076 (Ariz. Ct. App. Nov. 22, 2006) (upholding motion to dismiss), *petition for cert. filed* (Dec. 18, 2006), CV-06-0417-PR; **Colorado:** Lobato v. State, No. 05 CV 4794 (Colo. Dist. Ct. Mar. 2, 2006) (granting motion to dismiss), *appeal docketed*, No. 06 CA 733 (Colo. Ct. App.); **Connecticut:** Conn. Coal. for Justice in Educ. Funding v. Rell, No. X09-HHD-CV-05-4019406 (Conn. Super. Ct. filed Nov. 21, 2005) (no final trial court order); **Georgia:** Consortium for Adequate Sch. Funding v. State, No. 2004 CV 91004 (Ga. Super. Ct. filed Sept. 14, 2004) (no final trial court order); **Indiana:** Bonner v. Daniels, No. 49D010604PL016414 (Ind. Super. Ct. Jan. 29, 2007) (granting motion to dismiss), *appeal docketed*, No. 49 A 02-0702-CV-00188 (Ind. Ct. App.); **Kentucky:** Young v. Williams, Nos. 03-CI-00055 and 03-CI-01152 (Ky. Cir. Ct. Feb. 13, 2007) (granting defendants' motion for summary judgment), *motion for reconsideration filed*; **Nebraska:** Douglas County Sch. Dist. v. Heineman, No. 1028-017 (Neb. Dist. Ct. filed June 30, 2003) (no final trial court order); Neb. Coal. for Educ. Equity and Adequacy v. Heineman, No. CI 04-3346 (Neb. Dist. Ct. Oct. 5, 2005) (granting motion to dismiss), *appeal docketed*, No. S-05-1357 (Neb.); **South Dakota:** S.D. Coal. of Schs. v. State, No. 06-244 (S.D. Dist. Ct. filed June 21, 2006) (no final trial court order); **Wyoming:** State v. Campbell County Sch. Dist., No. 129-59 (Wyo. Dist. Ct. Feb. 10, 2006) (granting partial summary judgment dismissing pre-kindergarten claim), *appeal docketed*, No. 06-74 (Wyo.). All of the original pleadings for these cases are on file with the author. See also Starting at 3: Securing Access to Preschool Education, Case Law/Litigation: Pending Litigation, [http://www.startingat3.org/case\\_law/index.html](http://www.startingat3.org/case_law/index.html) (last visited Mar. 22, 2007).

<sup>50</sup> **Alaska:** Moore, No. 3AN-04-9756 Civ.; **Arizona:** Crane Elementary Sch. Dist., No. 1 CA-CV 04-0076; **Colorado:** Lobato, No. 05 CV 4794; **Connecticut:** Rell, No. X09-HHD-CV-05-4019406; **Georgia:** Consortium for Adequate Sch. Funding, No. 2004 CV 91004; **Indiana:** Bonner, No. 49D010604PL016414; **Kentucky:** Young, Nos. 03-CI-00055 and 03-CI-01152; **Nebraska:** Heineman, No. 1028-017; **South Dakota:** S.D. Coal. of Schs., No. 06-244; **Wyoming:** Campbell County Sch. Dist., No. 129-59.

<sup>51</sup> Rell, No. X09-HHD-CV-05-4019406; Campbell County Sch. Dist., No. 129-59.

<sup>52</sup> Abbott v. Burke (*Abbott V*), 710 A.2d 450, 473 (N.J. 1998); Hoke County Bd. of Educ. v. State (*Leandro II*), 599 S.E.2d 365, 373, 395 (N.C. 2004); Lake View Sch. Dist. No. 25 v. Huckabee (*Lake View III*), 91 S.W.3d 472, 502 (Ark. 2002); Hancock v. Driscoll, 822 N.E.2d 1134, 1136-37 (Mass. 2005); Abbeville County Sch. Dist. v. State, No. 93-CP-31-0169, at 162 (N.C. Ct. of C.P. Dec. 29, 2005), available at <http://www.scschoolcase.com/Abbeville-County-Order.pdf>.

<sup>53</sup> **Alaska:** Moore, No. 3AN-04-9756 Civ.; **Arizona:** Crane Elementary Sch. Dist., No. 1 CA-CV 04-0076;

**Colorado:** Lobato, No. 05 CV 4794; **Connecticut:** Rell, No. X09-HHD-CV-05-4019406; **Georgia:** Consortium for Adequate Sch. Funding, No. 2004 CV 91004; **Indiana:** Bonner, No. 49D010604PL016414; **Kentucky:** Young, Nos. 03-CI-00055 and 03-CI-01152; **Nebraska:** Heineman, No. 1028-017; **South Dakota:** S.D. Coal. of Schs., No. 06-244; **Wyoming:** Campbell County Sch. Dist., No. 129-59.

<sup>54</sup> James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2058 (2002); see generally ALLEN ODDEN, IMPROVING STATE SCHOOL FINANCE SYSTEMS: NEW REALITIES CREATE NEED TO RE-ENGINEER SCHOOL FINANCE STRUCTURES, CONSORTIUM FOR POLICY RESEARCH IN EDUC. 2 (1999) (discussing the inequities in distribution when education funds are based on property taxes), available at <http://www.cpre.org/Publications/op-04.pdf>.

<sup>55</sup> ODDEN, *supra* note 54, at 2–10; Enrich, *supra* note 12, at 104–05.

<sup>56</sup> ODDEN, *supra* note 54, at 5–10.

<sup>57</sup> A complete history of finance litigation is beyond the scope of this article. For an overview of the cases, see Enrich, *supra* note 12, at 104–16.

<sup>58</sup> The shift in litigation strategy has not been so clear-cut. Plaintiffs typically bring multiple claims and meld the different waves of legal theory, i.e., equity and adequacy. See, e.g., Lake View Sch. Dist. No. 25 v. Huckabee (*Lake View III*), 91 S.W.3d 472, 502 (Ark. 2002), *cert. denied* 538 U.S. 1035 (2003); Montoy v. State (*Montoy I*), 62 P.3d 228, 230 (Kan. 2003); Campbell County Sch. Dist. v. State (*Campbell I*), 907 P.2d 1238, 1243–44 (Wyo. 1995). Moreover, some early cases brought during the equity wave were grounded in adequacy theory, while some cases brought far into the adequacy wave focused solely on equity theory. Compare Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 94 (Wash. 1978); Pauley v. Kelly, 255 S.E.2d 859, 877 (W. Va. 1979), with Matanuska-Susitna Borough Sch. Dist. v. State, 931 P.2d 391, 394 (Alaska 1997); Sch. Admin. Dist. No. 1 v. Comm'r, 659 A.2d 854, 856 (Me. 1995); Tenn. Small Sch. Systems v. McWherter (*Small Schools I*), 851 S.W.2d 139, 140 (Tenn. 1993); Brigham v. State, 692 A.2d 384, 386–87 (Vt. 1997).

<sup>59</sup> Brown v. Bd. of Educ., 347 U.S. 483, 488 (1954).

<sup>60</sup> Heise, *State Constitutions*, *supra* note 12, at 1152.

<sup>61</sup> Serrano v. Priest, 487 P.2d 1241, 1244 (Cal. 1971).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 1248–49.

<sup>64</sup> *Id.* at 1257.

<sup>65</sup> *Id.* at 2350.

<sup>66</sup> Heise, *State Constitutions*, *supra* note 12, at 1155.

<sup>67</sup> San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 62 (1973).

<sup>68</sup> *Id.* at 4–5, 9–10.

<sup>69</sup> *Id.* at 28–30, 35.

<sup>70</sup> *Id.* at 36, 40.

<sup>71</sup> *Id.* at 62.

<sup>72</sup> *Id.*

<sup>73</sup> Heise, *State Constitutions*, *supra* note 12, at 1152.

<sup>74</sup> *Id.*

<sup>75</sup> *Robinson v. Cahill (Robinson I)*, 303 A.2d 273, 295, 297 (N.J. 1973).

<sup>76</sup> Heise, *State Constitutions*, *supra* note 12, at 1159.

<sup>77</sup> *Id.* at 1157, 1161.

<sup>78</sup> See Michael Heise, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 GA. L. REV. 543, 576 (1998) [hereinafter Heise, *An Empirical Perspective*].

<sup>79</sup> *Olsen v. State*, 554 P.2d 139, 148–49 (Or. 1976).

<sup>80</sup> Heise, *State Constitutions*, *supra* note 12, at 1161; *Robinson I*, 303 A.2d at 282; *Olsen*, 554 P.2d at 145.

<sup>81</sup> Compare *Robinson I*, 303 A.2d at 297 (finding the New Jersey financing system unconstitutional because it did not meet the New Jersey state constitutional obligation to provide a thorough and efficient system of education), with *Olsen*, 554 P.2d at 145, 147–49 (finding the Oregon financing system constitutional and noting both Oregon’s tradition of local control over education and the lack of total educational deprivation to any student under the Oregon financing system).

<sup>82</sup> Heise, *State Constitutions*, *supra* note 12, at 1163.

<sup>83</sup> Cover, *supra* note 12, at 404; Thro, *supra* note 14, at 1661.

<sup>84</sup> Heise, *State Constitutions*, *supra* note 12, at 1164.

<sup>85</sup> *Id.* at 1162–63.

<sup>86</sup> *Leandro v. State (Leandro I)*, 488 S.E.2d 249, 255 (N.C. 1997) (“[A] sound basic education” under the state constitution is one that “enable[s] the student to function in a complex and rapidly changing society”); *Vincent v. Voight*, 614 N.W.2d 388, 396–97 (Wis. 2000) (“An equal opportunity for a sound basic education is one that will equip students for their roles as citizens and enable them to succeed economically and personally.”); *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 330–32 (N.Y. 2003) (holding that the constitutional mandate for a system of “sound basic” education must provide “the opportunity for a meaningful high school education, one which prepares [students] to function productively as civic participants”); *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 787 (Tex. 2005) (stating that Texas children must be provided “access to a quality education that enables them to achieve their potential and fully participate now and in the future in the social, economic, and educational opportunities of our state and nation”).

Some state courts articulated a definition of a constitutionally adequate education while school funding cases were, in theory, still in the second wave of litigation. See, e.g., *Robinson I*, 303 A.2d at 295, *cert. denied, sub nom.* (defining a “thorough and efficient” education under the education clause as “that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market”);

*Dickey v. Robinson*, 414 U.S. 976 (1973); *Seattle Sch. Dist. No. 1 v. State (Seattle I)*, 585 P.2d 71, 94 (Wash. 1978) (finding that the state constitution “embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today’s market as well as in the market place of ideas”); *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979) (defining a “thorough and efficient system of schools” under the state constitution as one that “develops ... the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically”).

<sup>87</sup> Heise, *State Constitutions*, *supra* note 12, at 1163.

<sup>88</sup> *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 198 (Ky. 1989).

<sup>89</sup> *Id.* at 197–98.

<sup>90</sup> Kentucky Supreme Court’s guidelines:

[A]n efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

*Id.* at 212.

<sup>91</sup> Heise, *State Constitutions*, *supra* note 12, at 1164.

<sup>92</sup> See, e.g., *Lake View Sch. Dist. No. 25 v. Huckabee (Lake View III)*, 91 S.W.3d 472, 487–88 (Ark. 2002) (adopting the seven capabilities); *McDuffy v. Sec’y of Executive Office of Educ.*, 615 N.E.2d 516, 618–19 (Mass. 1993) (adopting the seven capabilities); *Claremont Sch. Dist. v. Governor (Claremont II)*, 703 A.2d 1353, 1359 (N.H. 1997) (adopting the seven capabilities); *Leandro v. State (Leandro I)*, 488 S.E.2d 249, 255 (N.C. 1997) (citing *Rose*, 790 S.W.2d at 212, but adopting a slightly different set of standards).

<sup>93</sup> See, e.g., *Hull v. Albrecht (Albrecht I)*, 950 P.2d 1141, 1145 (Ariz. 1997) (“[A] constitutionally adequate system will make available to all districts financing sufficient to provide facilities and equipment necessary

and appropriate to enable students to master the educational goals set by the legislature ... .”); *Montoy v. State (Montoy II)*, 102 P.3d 1160, 1164 (Kan. 2005) (noting that the state’s school performance accreditation system, which is “based upon improvement in performance that reflects high academic standards and is measurable,” and its standards for individual and school performance levels comprise the legislature’s determination of a constitutionally “suitable” education system) (quoting KAN. STAT. ANN. § 72-6539(a)); *Columbia Falls Elem. Sch. Dist. 6 v. State*, 109 P.3d 257, 312 (Mont. 2005) (“Unless funding relates to needs such as academic standards ... and performance standards, then the funding is not related to the cornerstones of a quality education.”); *Abbott v. Burke (Abbott IV)*, 693 A.2d 417, 432 (N.J. 1997) (noting that the state’s curriculum standards “embody the substantive content of a thorough and efficient education”); *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 787 (Tex. 2005) (an adequate public education system is one that is “reasonably able to provide” students with a “meaningful opportunity to acquire the essential knowledge and skills reflected in ... curriculum requirements”) (emphasis in original) (citing district court decision); *Campbell County Sch. Dist. v. State (Campbell II)*, 907 P.2d 1238, 1279 (Wyo. 1995) (“[A] quality education will include ... . [i]ntegrated, substantially uniform substantive curriculum ... meaningful standards for course content and knowledge attainment ... . [and] [t]imely and meaningful assessment of all students’ progress in core curriculum ... and core skills ... .”).

<sup>94</sup> See, e.g., *Abbott IV*, 693 A.2d at 427–34; *Campbell II*, 907 P.2d at 1279; *Montoy II*, 102 P.3d at 1163–64; *Neeley*, 176 S.W.3d at 787–88. See also the following pending cases: *Moore v. State*, No. 3AN-04-9756 Civ. (Alaska Super. Ct. Filed Aug. 9, 2004) (no final trial court order); *Lobato v. State*, No. 05 CV 4794 (Colo. Dist. Ct. March 2, 2006) (granting motion to dismiss), *appeal docketed*, No. 06 CA 733 (Colo. Ct. App.); *Conn. Coal. for Justice in Educ. Funding v. Rell*, No. X09-HHD-CV-05-4019406 (Conn. Super. Ct. filed Nov. 21, 2005) (no final trial court order); *Consortium for Adequate Sch. Funding v. State*, No. 2004 CV 91004 (Ga. Super. Ct. filed Sept. 14, 2004) (no final trial court order); *Douglas County Sch. Dist. v. Heineman*, No. 1028-017 (Neb. Dist. Ct. June 30, 2003); *Neb. Coal. for Educ. Equity and Adequacy v. Heineman*, No. CI 04-3346 (Neb. Dist. Ct. Oct. 5, 2005) (granting motion to dismiss), *appeal docketed*, No. S-05-1357 (Neb.); *S.D. Coal. of Schs. v. State*, No. 06-244 (S.D. Dist. Ct. filed June 21, 2006) (no final trial court order).

<sup>95</sup> See, e.g., ELENA BODROVA ET AL., A FRAMEWORK FOR EARLY LITERACY INSTRUCTION (2000), available at <http://www.mcrel.org/standards-benchmarks/> (providing an electronic compendium of content standards and benchmarks for K-12 education).

<sup>96</sup> *Id.*

<sup>97</sup> See HASKINS & ROUSE, *supra* note 26; see also LEE & BURKAM, *supra* note 26.

<sup>98</sup> See Barnett & Belfield, *supra* note 1, at 80–86.

<sup>99</sup> See, e.g., *Montoy v. State*, 102 P.3d 1160, 1163 (Kan. 2005) (noting that the definition of a “suitable” education under the Kansas Constitution “is not stagnant but requires constant monitoring,” and accepting the trial court’s “findings regarding the various statutory and societal changes which occurred after [the court’s earlier decision]”); *McDuffy v. Sec’y of Executive Office of Educ.*, 615 N.E.2d 516, 555 (Mass. 1993) (“The content of the duty to educate which the Constitution places on the Commonwealth necessarily will evolve together with our society.”); *Abbott v. Burke (Abbott II)*, 575 A.2d 359, 367 (N.J. 1990) (“[W]hat a thorough and efficient education consists of is a continually changing concept.”); *Robinson v. Cahill (Robinson V)*, 355 A.2d 129, 133 (N.J. 1976) (finding “a perceptive recognition” on the part of the legislature of the “constantly evolving” nature of education, and noting that “what seems sufficient today may be proved inadequate tomorrow”); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 94 (Wash. 1978) (finding that the education clause must be interpreted “in accordance with the demands of modern society or it will be in constant danger of becoming atrophied and, in fact, may even lose its original meaning”); *Campbell County Sch. Dist. v. State (Campbell II)*, 907 P.2d 1238, 1279 (Wyo. 1995) (“The definition of a proper education is not static and necessarily will change.”).

<sup>100</sup> See Barnett & Belfield, *supra* note 1; see also PRE-K NOW, LEADERSHIP MATTERS, *supra* note 5.

<sup>101</sup> See Barnett, Brown & Shore, *supra* note 37, at 3; see also BARNETT ET AL., EFFECTS OF STATE PREKINDERGARTEN, *supra* note 43, at 15; BARNETT ET AL., PRESCHOOL YEARBOOK, *supra* note 3, at 15.

<sup>102</sup> *Abbott v. Burke (Abbott V)*, 710 A.2d 450, 473 (N.J. 1998).

<sup>103</sup> N.J. CONST., art. 8, § IV (“The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.”).

<sup>104</sup> *Abbott V*, 710 A.2d at 463–64.

<sup>105</sup> *Hoke County Bd. of Educ. v. State (Leandro II)*, 599 S.E.2d 365, 373, 395 (N.C. 2004).

<sup>106</sup> *Id.* at 373 (citing *Leandro v. State (Leandro I)*, 488 S.E.2d 249, 261 (N.C. 1997)).

<sup>107</sup> *Id.* at 373, 391, 395.

<sup>108</sup> *Id.*

<sup>109</sup> *Abbeville County Sch. Dist. v. State*, No. 93-CP-31-0169, at 162 (N.C. Ct. of C.P. Dec. 29, 2005), available at <http://www.scschoolcase.com/Abbeville-County-Order.pdf>. As of April 5, 2007, the trial court has not ruled on the parties’ April 3, 2006, cross motions to amend or alter the judgment, and any appeal

to the South Carolina Supreme Court has been held in abeyance.

<sup>110</sup> *Lake View Sch. Dist. No. 25 v. Huckabee (Lake View III)*, 91 S.W.3d 472, 502 (Ark. 2002).

<sup>111</sup> *Id.* at 501–02. The Arkansas state constitution provides that “the General Assembly and/or public school districts may spend public funds for the education of persons ... under six (6) years of age, as may be provided by law, and no other interpretation shall be given to it.” ARK. CONST. art. 14, § 1 (emphasis added).

<sup>112</sup> *Lake View III*, 91 S.W.3d at 502.

<sup>113</sup> *Hancock v. Driscoll*, 822 N.E.2d 1134, 1136–37 (Mass. 2005).

<sup>114</sup> *Id.* at 1139; see also *id.* at 1156 n.34 (detailing the trial court’s recommendations).

<sup>115</sup> *Abbott v. Burke (Abbott V)*, 710 A.2d 450, 455 (N.J. 1998). The *Abbott* decisions initially applied to twenty-eight school districts, but the New Jersey legislature and the Commissioner of Education expanded the court’s remedies to three additional low-income school districts. N.J. ADMIN. CODE § 6A:10A-1.2 (2007) (defining “Abbott school district”). *Abbott v. Burke (Abbott II)*, 575 A.2d 359, 387 (N.J. 1990); *Abbott v. Burke (Abbott VII)*, 751 A.2d 1032, 1034–35 (N.J. 2000). The thirty-one *Abbott* school districts comprise approximately twenty-five percent of New Jersey’s schoolchildren. Joint Legislative Committee on Public School Funding Reform, *Public School Funding in New Jersey*, slide 25 (Aug. 10, 2006), [http://www.njleg.state.nj.us/PropertyTaxSession/OPI/jcs\\_f\\_presentation\\_files/frame.htm](http://www.njleg.state.nj.us/PropertyTaxSession/OPI/jcs_f_presentation_files/frame.htm) (last visited Apr. 1, 2007).

<sup>116</sup> N.J. CONST. art. 8, § IV (“The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.”).

<sup>117</sup> *Abbott v. Burke (Abbott VI)*, 748 A.2d 82, 88, 90–91 (N.J. 2000); *Abbott v. Burke (Abbott VIII)*, 790 A.2d 842, 851–52, 855 (N.J. 2002).

<sup>118</sup> *Hoke County Bd. of Educ. v. State (Leandro II)*, 599 S.E.2d 365, 373, 395 (N.C. 2004); *Abbeville County Sch. Dist. v. State*, No. 93-CP-31-0169, at 162 (S.C. Ct. of C.P. Dec. 29, 2005).

<sup>119</sup> *Leandro II*, 599 S.E.2d at 373, 395; *Abbeville County Sch. Dist.*, No. 93-CP-31-0169, at 162.

<sup>120</sup> See *Abbott V*, 710 A.2d at 455–57.

<sup>121</sup> *Robinson v. Cahill (Robinson I)*, 303 A.2d 273, 276–77 (N.J. 1973).

<sup>122</sup> *Abbott v. Burke (Abbott II)*, 575 A.2d 359, 394–401 (N.J. 1990).

<sup>123</sup> *Id.* at 394–97.

<sup>124</sup> *Id.* at 384.

<sup>125</sup> *Id.* at 394–97.

<sup>126</sup> *Id.* at 408.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 403.

<sup>130</sup> *Id.* at 400.

<sup>131</sup> *Id.* at 363.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 408–09.

<sup>134</sup> *Id.* at 402 n.37.

<sup>135</sup> *Id.* at 402. One of the key facts upheld by the court in *Abbott II* was the administrative law judge’s finding that “[m]any poor children start school with an approximately two-year disadvantage compared to many suburban youngsters [and t]his two-year disadvantage often increases when urban students move through the educational system ... .” *Abbott v. Burke (Abbott IV)*, 693 A.2d 417, 434 (N.J. 1997) (citing Administrative Law Judge decision, NO EDU 5581–88 (OAL 1988), at 28).

<sup>136</sup> *Abbott v. Burke (Abbott III)*, 643 A.2d 575, 576 (N.J. 1994).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 579–80.

<sup>139</sup> *Id.* at 579.

<sup>140</sup> *Abbott IV*, 683 A.2d at 421.

<sup>141</sup> See generally, *id.* (citing the court’s school finance decisions from 1976 to 1994 in which it refrained from imposing a remedy for an unconstitutional education finance scheme and stating that “in light of the constitutional rights at stake, the persistence and depth of the constitutional deprivation, and in the absence of any real prospect for genuine educational improvement in the most needy districts, that approach is no longer an option”).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 436.

<sup>144</sup> N.J. STAT. Ann. § 18A: 7F-16 (2000).

<sup>145</sup> *Abbott IV*, 693 A.2d at 425.

<sup>146</sup> *Id.* at 435.

<sup>147</sup> *Id.* at 432.

<sup>148</sup> *Id.* at 433.

<sup>149</sup> *Id.* at 439.

<sup>150</sup> *Id.* at 435.

<sup>151</sup> *Id.* at 443.

<sup>152</sup> *Id.* at 444.

<sup>153</sup> *Id.* at 456–57.

<sup>154</sup> *Abbott v. Burke (Abbott V)*, 710 A.2d 450, 500 (N.J. 1998).

<sup>155</sup> *Id.* at 462, 499–500.

<sup>156</sup> *Id.* at 499.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* The most recent findings of the research on the Perry Preschool Program show that at age forty, the long-term benefits have continued to serve program participants. LAWRENCE J. SCHWEINHART ET AL., *LIFETIME EFFECTS: THE HIGH/SCOPE PERRY PRESCHOOL STUDY THROUGH AGE 40 74–86* (High/Scope Press 2005). Participants had median annual incomes approximately \$5,000 higher, were far

more likely to have a savings account and own their own home, and had significantly fewer arrests than nonparticipants. *Id.* at 73–76, 85.

<sup>161</sup> *Abbott V*, 710 A.2d at 499.

<sup>162</sup> *Id.* at 499–500. Recent findings from the Abecedarian study show program participants have higher cognitive test scores from toddler years to age twenty-one, more years of education, and a higher college attendance rate when compared to non-participants. Frances A. Campbell et al., *Early Childhood Education: Young Adult Outcomes from the Abecedarian Project*, 6 APPLIED DEV. SCI. 42, 47–48, 51 (2005).

<sup>163</sup> *Abbott V*, 710 A.2d at 499–500.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 532–33 (Appendix II, Report of Special Master).

<sup>166</sup> *Id.* at 462, 500 (Appendix I, Decision of Remand Court).

<sup>167</sup> *Id.* at 488.

<sup>168</sup> *Id.* at 474 (Appendix I, Decision of Remand Court).

<sup>169</sup> *Id.* at 513–14.

<sup>170</sup> *Id.* at 473–74.

<sup>171</sup> *Id.* at 462. Supplemental programs requiring state funding included family support teams, social and health services, increased school security measures, alternative education programs, school-to-work and college-transition programs, summer school and after-school programs, supplemental nutrition programs, improved parent participation, and other programs based on the particularized need of the Abbott districts. *Id.* at 458, 465–67, 471.

<sup>172</sup> *Id.* at 474.

<sup>173</sup> *Id.* at 462.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> See *Abbott v. Burke (Abbott IV)*, 693 A.2d 417, 428 (N.J. 1997).

<sup>178</sup> *Abbott V*, 710 A.2d at 463–64 (emphasis added).

<sup>179</sup> *Id.* at 462–63.

<sup>180</sup> *Id.* at 464.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 472.

<sup>186</sup> *Id.* at 464. The court mandated a half-day pre-kindergarten program “as an initial reform,” leaving open the possibility that a full-day program would be required, based on the particularized needs of Abbott children and families, once pre-kindergarten was fully integrated into the court’s broader directive for whole-school reform in the Abbott districts. *Id.* In the first year of implementation, most Abbott districts documented the need and submitted budgets for full-day pre-kindergarten. Plaintiffs’ Brief in Support of Motion in

Aid to Litigants Rights, *Abbott v. Burke (Abbott VI)* 748 A.2d 82 (N.J. 2000), available at <http://www.edlawcenter.org/ELCPublic/AbbottvBurke/AbbottBriefs/Brief7Motion.htm>. By 2001, the state, through regulation, began funding a full-day, full-year pre-kindergarten program for all three- and four-year-old children in the Abbott districts. See *Abbott VI*, 748 A.2d at 95; N.J. ADMIN. CODE § 6A:10A-2.2(a) (2007) (“The district board of education shall offer a full-day, full-year preschool program to all eligible children.”); N.J. ADMIN. CODE § 6A:10A-2.1(a) (2007) (providing that children in the Abbott school districts are eligible for pre-kindergarten beginning at age three).

<sup>187</sup> *Abbott VI*, 748 A.2d at 85.

<sup>188</sup> *Id.* at 88.

<sup>189</sup> *Id.* at 87–88, 90.

<sup>190</sup> *Id.* at 87.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 90.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 85.

<sup>195</sup> *Id.* at 91–92. Teachers lacking these credentials were granted a four-year grace period to obtain them. *Id.* at 91.

<sup>196</sup> *Id.* at 88.

<sup>197</sup> *Id.* at 95.

<sup>198</sup> *Abbott v. Burke (Abbott VIII)*, 790 A.2d 842, 844–45 (N.J. 2002).

<sup>199</sup> *Id.* at 847.

<sup>200</sup> *Id.* at 849–54, 856. In *Board of Education v. New Jersey Department of Education*, the New Jersey Supreme Court reaffirmed the state’s duty to ensure full funding for the Abbott pre-kindergarten program. *Bd. of Educ. of City of Millville v. N.J. Dep’t of Educ.*, 872 A.2d 1052, 1062 (N.J. 2005). The court ruled that the state could require school districts to reallocate funding from other programs to the pre-kindergarten program *only* if the state assumed responsibility for making up shortfalls in other programs, unless it could demonstrate availability of district funds not needed by the other programs. *Id.* In order to direct reallocation of district funds to make up for shortfalls caused by the state’s pre-kindergarten funding formulas, the court found that the Commissioner of Education must first prove that the reallocation will not compromise any of the district’s educational programs. *Id.* Following the *Millville* case, there have been no subsequent court decisions respecting implementation of the Abbott pre-kindergarten program.

<sup>201</sup> The court defined “at-risk” students as “those who, due to circumstances such as an unstable home life, poor socioeconomic background, and other factors, enter or continue in school from a disadvantaged standpoint, at least in relation to other students who are not burdened with such circumstances.” *Hoke County Bd. of Educ. v. State (Leandro II)*, 599 S.E.2d 365, 387 (N.C. 2004).

<sup>202</sup> *Id.* at 392.

- <sup>203</sup> *Id.* at 393.
- <sup>204</sup> *Id.* at 394–95.
- <sup>205</sup> *Leandro v. State (Leandro I)*, 488 S.E.2d 249, 252 (N.C. 1997).
- <sup>206</sup> *Id.*
- <sup>207</sup> N.C. CONST. art. IX, § 2.
- <sup>208</sup> *Leandro I*, 488 S.E.2d at 255. The North Carolina Supreme Court also found that the state constitution “does not require that equal educational opportunities be afforded students in all of the school districts in the state.” *Id.* at 257.
- <sup>209</sup> *Id.* at 255 (citing *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989) and *Pauley v. Kelly*, 255 S.E.2d 859, 877 (1979)).
- <sup>210</sup> *Id.* at 261.
- <sup>211</sup> *Hoke County Bd. of Educ. v. State (Hoke County)*, No. 95CVS1158, 2000 WL 1639686 (N.C. Super. Ct. Oct. 12, 2000).
- <sup>212</sup> *Id.* at \*91–92.
- <sup>213</sup> *Id.* at \*102.
- <sup>214</sup> *Id.* at \*100–01.
- <sup>215</sup> *Id.* at \*101.
- <sup>216</sup> *Id.* at \*102.
- <sup>217</sup> N.C. Const. art. IX, § 3.
- <sup>218</sup> *Hoke County Bd. of Educ. v. State (Leandro II)*, 599 S.E.2d 365, 391 (N.C. 2004) (citing N.C. GEN. STAT. §§ 115C-364, -378 (2003)).
- <sup>219</sup> *Hoke County*, 2000 WL 1639686, at \*113.
- <sup>220</sup> Plaintiffs’ Proposed Findings of Fact and Conclusions of Law at 184–85, *Hoke County Bd. of Educ. v. State*, No. 95CVS1158 (N.C. Super. Ct. 2000) [hereinafter Plaintiffs’ Proposed Findings].
- <sup>221</sup> *Hoke County*, 2000 WL 1639686, at \*106.
- <sup>222</sup> *Id.* at \*107.
- <sup>223</sup> Plaintiffs’ Proposed Findings, *supra* note 220, at 186–87.
- <sup>224</sup> *Id.* at 187; *see also Hoke County*, 2000 WL 1639686, at \*107 (finding that large scale studies of pre-kindergarten, including the Abecedarian study, found “both long-term and short-term positive effects on children’s development and academic achievement”).
- <sup>225</sup> Plaintiffs’ Proposed Findings, *supra* note 220, at 187.
- <sup>226</sup> *Hoke County*, 2000 WL 1639686, at \*107, 109.
- <sup>227</sup> *See id.* at \*110 (noting that the Hoke County School Administrators calculate it would take some seventeen additional teachers at an annual cost of \$1,103,784, plus capital costs for classrooms, equipment, and supplies, in order to expand the existing pre-kindergarten program).
- <sup>228</sup> Plaintiffs’ Proposed Findings, *supra* note 220, at 190.
- <sup>229</sup> *Hoke County*, 2000 WL 1639686, at \*106.
- <sup>230</sup> *Id.*
- <sup>231</sup> *Id.*
- <sup>232</sup> *Id.* at \*101.
- <sup>233</sup> *Id.* at \*107.
- <sup>234</sup> *Id.* at \*107–08.
- <sup>235</sup> *Id.* at \*112–13. In two subsequent decisions, the trial court affirmed its finding that the state had failed to provide a sound basic education to at-risk children. *Starting at 3: Securing Access to Preschool Education*, North Carolina: State Preschool Program, [http://www.startingat3.org/state\\_laws/StatelawNCdetail.htm](http://www.startingat3.org/state_laws/StatelawNCdetail.htm) (last visited Mar. 8, 2007) (citing *Hoke County Bd. of Educ. v. State*, 95 CVS 1158, Orders of Mar. 2001 and Apr. 2002).
- <sup>236</sup> *Hoke County Bd. of Educ. v. State (Leandro II)*, 599 S.E.2d 365, 392 (N.C. 2004).
- <sup>237</sup> N.C. CONST. art. IX, § 3.
- <sup>238</sup> *Leandro II*, 599 S.E.2d at 391–92 (2004).
- <sup>239</sup> *Id.* at 392.
- <sup>240</sup> *Id.* at 394.
- <sup>241</sup> *Id.*
- <sup>242</sup> *Id.* at 395.
- <sup>243</sup> *Id.* at 393.
- <sup>244</sup> *Id.* at 394.
- <sup>245</sup> *Id.* at 394–95.
- <sup>246</sup> *Abbeville County Sch. Dist. v. State*, No. 93-CP-31-0169, at 162 (S.C. Ct. of C.P. Dec. 29, 2005), available at <http://www.scschoolcase.com/Abbeville-County-Order.pdf>.
- <sup>247</sup> *Id.* at 3.
- <sup>248</sup> *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535, 538–39 (S.C. 1999).
- <sup>249</sup> *Id.* at 541.
- <sup>250</sup> *Abbeville County Sch. Dist.*, No. 93-CP-31-0109, at 1.
- <sup>251</sup> S.C. CONST. art. XI, § 3.
- <sup>252</sup> *Abbeville County Sch. Dist.*, 515 S.E.2d at 540.
- <sup>253</sup> *Id.*
- <sup>254</sup> *Abbeville County Sch. Dist.*, No. 93-CP-31-0109, at 18.
- <sup>255</sup> *Id.* at 161–62.
- <sup>256</sup> *Id.* at 163.
- <sup>257</sup> *Id.* at 157.
- <sup>258</sup> *Id.* at 160–61, 166.
- <sup>259</sup> *Id.* at 160, 163, 166–67.
- <sup>260</sup> *Id.* at 167. The court also noted: “[E]arly 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.
- <sup>261</sup> *Id.* at 164–66.
- <sup>262</sup> *Id.* at 164, 166.
- <sup>263</sup> *Id.* at 166.
- <sup>264</sup> *Id.* at 157.
- <sup>265</sup> *Id.* at 167.
- <sup>266</sup> *Lake View Sch. Dist. No. 25 v. Huckabee (Lake View III)*, 91 S.W.3d 472, 495, 500 (Ark. 2002).
- <sup>267</sup> *Id.* at 502.
- <sup>268</sup> ARK. CONST. art. 14, § 1.

<sup>269</sup> Lake View Sch. Dist. No. 25 v. Huckabee (*Lake View II*), 10 S.W.3d 892, 893 (Ark. 2000) (setting forth the procedural history of the case).

<sup>270</sup> Dupree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 91 (Ark. 1983) (holding that the state's system of allocating funds among school districts violated the state constitution's guarantee of equal protection and its promise under the education clause of a "general, suitable, efficient system" of education).

<sup>271</sup> *Id.* at 93.

<sup>272</sup> *Lake View II*, 10 S.W.3d at 894 (2000) (summarizing trial court's findings).

<sup>273</sup> *Id.* at 895–96 (discussing trial court orders).

<sup>274</sup> *Id.* at 893–900 (setting forth the procedural history of the case up until 2000).

<sup>275</sup> *Id.* at 900.

<sup>276</sup> Lake View Sch. Dist. No. 25 v. Huckabee, No. 1992-5318 (Ch. Ct. Pulasky County, Ark. 2d Div., May 25, 2001), available at <http://www.cfequity.org/ar5-25dec.html>.

<sup>277</sup> *Id.*

<sup>278</sup> Lake View v. Huckabee (*Lake View III*), 91 S.W.3d 472, 501 (Ark. 2002) (quoting trial court order). The trial court did not specify the expert testimony or other evidence that supported its findings respecting the need for pre-kindergarten.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 495.

<sup>281</sup> *Id.* at 500.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 502.

<sup>284</sup> *Id.* at 500–01.

<sup>285</sup> *Id.* at 479.

<sup>286</sup> *Id.* at 501.

<sup>287</sup> *Id.* at 502.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* at 501–02.

<sup>290</sup> *Id.* at 501; ARK. CONST. art. 14, § 1 (emphasis added).

<sup>291</sup> *Lake View III*, 91 S.W.3d at 501.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 511.

<sup>294</sup> Lake View Sch. Dist. No. 25 v. Huckabee (*Lake View IV*), 144 S.W.3d 741, 742 (Ark. 2004) *per curiam order* (quoting ARK. CONST. art. 14, § 1).

<sup>295</sup> Special Masters' Report from Bradley D. Jesson & David Newbern, Special Masters, to Supreme Court of Arkansas No. 01-836 at 10 (2004), available at <http://courts.state.ar.us/lake%20view/report.pdf> [hereinafter Jesson & Newbern, Special Masters' Report].

<sup>296</sup> *Id.* at app. Question 2 at 13.

<sup>297</sup> *Id.* at 10.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* See also Lake View Sch. Dist. No. 25 v. Huckabee (*Lake View V*), 189 S.W.3d 1, 3 (Ark. 2004); S.B. 55, 84th Gen. Assemb., 2d Extraordinary Sess. § 1

(Ark. 2003) (appropriating \$40,000,000 to expand the Arkansas Better Chance for School Success Program).

<sup>301</sup> *Lake View V*, 189 S.W.3d at 17.

<sup>302</sup> *Id.* at 5.

<sup>303</sup> *Id.* at 13.

<sup>304</sup> *Id.* In 2005, the Arkansas Supreme Court granted plaintiffs' motion to reopen the case and reappointed the Special Masters to make findings of fact on plaintiffs' allegation that the legislature had retreated from its 2004 legislative commitments to comply with *Lake View III* during the 2005 legislative session. Lake View Sch. Dist. No. 25 v. Huckabee, No. 01-836, 2005 WL 3436660, at \*1 (Ark. Dec. 15, 2005). The Special Masters filed their report in October 2005, and in December 2005, the court agreed with the Special Masters that the state was not providing an adequate education to all Arkansas children. *Id.* at \*11. The court gave the legislature until December 1, 2006, to address the constitutional deficiencies of the school funding system. *Id.* The day before that deadline, the court reappointed the Special Masters and extended the deadline another 180 days. Lakeview v. Huckabee, No. 01-836, 2006 WL 3456468 (Ark. Nov. 30, 2006).

<sup>305</sup> Hancock v. Driscoll, 822 N.E.2d 1134, 1136–37 (Mass. 2005).

<sup>306</sup> *Id.* at 1140.

<sup>307</sup> McDuffy v. Sec'y of Executive Office of Educ., 615 N.E.2d 516, 557 (Mass. 1993).

<sup>308</sup> MASS. CONST. pt. 2, ch.5, § 2.

<sup>309</sup> *McDuffy*, 615 N.E.2d at 555.

<sup>310</sup> *Id.* at 548. In defining the precise standard of education to be provided by the state, the SJC adopted the guidelines set forth by the Kentucky Supreme Court in *Rose v. Council for Better Education, Inc.* *Id.* at 554 (citing *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 204 (Ky. 1989)).

<sup>311</sup> *McDuffy*, 615 N.E.2d at 554.

<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at 555–56.

<sup>314</sup> Hancock v. Driscoll, 822 N.E.2d 1134, 1137 (Mass. 2005); MASS. GEN. LAWS ch. 69, § 1 (2007); Massachusetts Education Reform Act of 1993, MASS. GEN. LAWS ch. 71 (1993) (MASS. H.B. 1000, signed into law on June 18, 1993).

<sup>315</sup> *Hancock*, 822 N.E.2d at 1142; MASS. GEN. LAWS ch. 70, § 2 (2007).

<sup>316</sup> *Hancock*, 822 N.E.2d at 1142; MASS. GEN. LAWS ch. 69, § 1E (2007).

<sup>317</sup> *Hancock*, 822 N.E.2d at 1145.

<sup>318</sup> *Id.*

<sup>319</sup> Hancock *ex rel.* Hancock v. Driscoll, No. 02-2978, 2004 WL 877984, at \*129 (Mass. Super. Ct. Apr. 26, 2004).

<sup>320</sup> *Hancock*, 822 N.E.2d at 1145.

<sup>321</sup> Hancock *ex rel.* Hancock, 2004 WL 877984, at \*21-118.

<sup>322</sup> *Id.* at \*4. Nineteen plaintiffs from nineteen different school districts filed the motion for further relief. *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> *Id.* at \*136.

<sup>325</sup> See *supra* Part IV.1.

<sup>326</sup> *Hancock ex rel. Hancock*, 2004 WL 877984, at \*137.

<sup>327</sup> *Id.* at \*140.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* at \*139–40.

<sup>330</sup> *Id.* at \*140–41.

<sup>331</sup> *Id.* at \*138 (noting that these components include “well[-]educated teachers, adequate compensation for teachers, small classes, strong supervision, and high standards for learning and teaching. Of these, the educational preparation of the teacher is the key ingredient”).

<sup>332</sup> *Id.* at \*138–39.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.* at \*129, \*143.

<sup>335</sup> *Id.* at \*145; *Hancock v. Driscoll*, 822 N.E.2d 1134, 1145–46 (Mass. 2005).

<sup>336</sup> *Hancock ex rel. Hancock*, 2004 WL 877984, at \*145.

<sup>337</sup> *Id.* at \*146.

<sup>338</sup> *Id.*

<sup>339</sup> *Id.* at \*146 n.221.

<sup>340</sup> *Id.* at \*146.

<sup>341</sup> *Id.* at \*137.

<sup>342</sup> *Id.* at \*136.

<sup>343</sup> *Id.*; MASS. GEN. LAWS ch. 69, § 1B (2007).

<sup>344</sup> *Hancock ex rel. Hancock*, 2004 WL 877984, at \*136.

<sup>345</sup> *Id.*

<sup>346</sup> *Id.* at \*137.

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> *Hancock v. Driscoll*, 822 N.E.2d 1134, 1139 (Mass. 2005).

<sup>350</sup> *Id.* at 1138.

<sup>351</sup> *Id.* at 1139.

<sup>352</sup> *Id.* at 1154.

<sup>353</sup> *Id.* at 1156.

<sup>354</sup> *Id.*

<sup>355</sup> *Id.* at 1157. The SJC cautioned that the state is still open to legal challenge under the education clause if it does not continue on a course of improvement. *Id.* at 1139–40. The opinion noted that “‘the content of the duty to educate ... will evolve together with our society,’ and that the education clause must be interpreted ‘in accordance with the demands of modern society or it will be in constant danger of becoming atrophied and, in fact, may even lose its meaning.’” *Id.* at 1140 (quoting *McDuffy v. Sec’y of Executive Office of Educ.*, 615 N.E.2d 516, 548 (Mass. 1993)).

<sup>356</sup> MASS. CONST. pt. 2, ch. 5, § 2.

<sup>357</sup> *Hancock*, 822 N.E.2d at 1154 n.30.

<sup>358</sup> *Id.*

<sup>359</sup> *Lake View Sch. Dist. No. 25 v. Huckabee (Lake View III)*, 91 S.W.3d 472, 502 (Ark. 2002); *Hancock v. Driscoll*, 822 N.E.2d 1134, 1136–37 (Mass. 2005); *Abbott v. Burke (Abbott V)*, 710 A.2d 450, 455 (N.J. 1998); *Hoke County Bd. of Educ. v. State (Leandro II)*, 599 S.E.2d 365, 373, 395 (N.C. 2004); *Abbeville County Sch. Dist. v. State*, No. 93-CP-31-0169, at \*162 (N.C. Ct. of C.P. Dec. 29, 2005), available at <http://www.scschoolcase.com/Abbeville-County-Order.pdf>.

<sup>360</sup> *Lake View III*, 91 S.W.3d at 502; *Hancock*, 822 N.E.2d at 1136–37.

<sup>361</sup> N.J. DEP’T OF EDUC., END OF YEAR REPORT: 2005–2006 1–4 (2006), available at <http://www.nj.gov/njded/ece/research/eoyr0506.pdf> [hereinafter N.J. END OF YEAR REPORT] (reporting progress and challenges in the Abbott Preschool Program); N.J. ADMIN. CODE § 6A:10A-2.1(a) (2007) (“The New Jersey Supreme Court mandated in *Abbott V* that all children resident in New Jersey’s Abbott school districts be given the opportunity of a high-quality preschool education beginning at age three ...”).

<sup>362</sup> N.J. ADMIN. CODE § 6A:10A-2.2(a)(1) (2007).

<sup>363</sup> N.J. END OF YEAR REPORT, *supra* note 361, at 2. See also N.J. DEP’T OF EDUC., ABBOTT PRESCHOOL PROGRAM IMPLEMENTATION 9 (2006) (noting that “one-quarter of New Jersey’s children live in the Abbott districts”), available at [http://www.nj.gov/njded/ece/dap/imp\\_guidelines.pdf](http://www.nj.gov/njded/ece/dap/imp_guidelines.pdf).

<sup>364</sup> *Id.* at 3.

<sup>365</sup> *Id.* at 1.

<sup>366</sup> N.J. ADMIN. CODE §§ 6A:10A-2.2(a)–(b) (2007). Community providers are subject to school district and state oversight. *Id.* §§ 2.2(a)(8), 2.2(d), 2.2(f), 2.2(g) & 2.3(j). Nearly seventy percent of all Abbott preschoolers are enrolled in programs outside the public schools. ASS’N FOR CHILDREN OF N.J. & EDUC. LAW CTR., ABBOTT PRESCHOOL FACILITIES: WHERE WE ARE AND WHAT NEEDS TO BE DONE (2003) available at <http://www.acnj.org/main.asp?uri=1003&di=211.htm&dt=0&chi=2>.

<sup>367</sup> N.J. ADMIN. CODE § 6A:10A-1.2; *Id.* § 6A:10A-2.2.

<sup>368</sup> *Id.* § 6A:10A-1.2.

<sup>369</sup> BARNETT ET AL., PRESCHOOL YEARBOOK, *supra* note 3, at 7, 104.

<sup>370</sup> N.J. ADMIN. CODE § 6A:10A-2.1(a).

<sup>371</sup> *Id.*; N.J. ADMIN. CODE § 6A:10A-2.2(a)(5).

<sup>372</sup> *Abbott v. Burke (Abbott V)*, 710 A.2d 450, 464 (N.J. 1998).

<sup>373</sup> *Abbott v. Burke (Abbott VI)*, 748 A.2d 82, 87–90 (N.J. 2000); *Abbott v. Burke (Abbott VIII)*, 790 A.2d 842, 844–45 (N.J. 2002).

<sup>374</sup> *Abbott VI*, 748 A.2d at 88, 91–92, 95.

<sup>375</sup> *Abbott VIII*, 790 A.2d at 849–54, 856.

<sup>376</sup> STAFF OF N.J. SPEC. SESS. JOINT LEGIS. COMM., PUBLIC SCHOOL FUNDING REFORM 112–115 (Comm.

Rep. Nov. 15, 2006), available at [http://www.startingat3.org/test/news/Sa3news\\_061116\\_CommitteeFinalReport.pdf](http://www.startingat3.org/test/news/Sa3news_061116_CommitteeFinalReport.pdf).

<sup>377</sup> CYNTHIA LAMY, W. STEVEN BARNETT & KWANGHEE JUNG, THE EFFECTS OF NEW JERSEY'S ABBOTT PRESCHOOL PROGRAM ON YOUNG CHILDREN'S SCHOOL READINESS 8-12 (2005), available at <http://nieer.org/resources/research/multistate/nj.pdf>; CYNTHIA ESPOSITO LAMY ET AL., GIANT STEPS FOR THE LITTLEST CHILDREN: PROGRESS IN THE SIXTH YEAR OF THE ABBOTT PRESCHOOL PROGRAM 12-13 (2005), available at <http://www.state.nj.us/njded/ece/abbott/giantsteps/giantsteps.pdf>.

<sup>378</sup> EDUC. LAW CTR., THE ABBOTT DISTRICTS IN 2005-2006: PROGRESS AND CHALLENGES 4 (2006), available at [http://www.edlawcenter.org/ELCPublic/elcnews\\_060313\\_AbbottIndicatorsReport\\_2005\\_06.pdf](http://www.edlawcenter.org/ELCPublic/elcnews_060313_AbbottIndicatorsReport_2005_06.pdf).

The percentage of general education fourth grade students in Abbott elementary schools scoring at least "proficient" on the language arts literacy test rose from sixty percent in 2000-01 to seventy-seven percent in 2004-05. *Id.* at 4. During the same time period, proficiency levels barely changed in the other poor districts and in all non-Abbott districts as a whole. *Id.* Abbott elementary students' math skills also substantially improved: thirty-six percent scored at least "proficient" in 1998-99 compared to seventy-two percent in 2004-05. *Id.* During the same time period, proficiency levels improved from fifty-six to eighty percent in the other poor districts and from sixty-six to eighty-six percent in the state as a whole. *Id.*

<sup>379</sup> Kathleen Kennedy Manzo, *State Targets Neediest Students and Schools*, 21 EDUC. WK. 28, 28 (2001) [hereinafter Manzo, *State Targets*].

<sup>380</sup> Hoke County Bd. of Educ. v. State (*Hoke County*), No. 95CVS1158, 2000 WL 1639686, at 113 (N.C. Super. Ct. Oct. 12, 2000).

<sup>381</sup> Manzo, *State Targets*, *supra* note 379, at 28.

<sup>382</sup> N.C. Office of Sch. Readiness, *More at Four* Pre-kindergarten Program: Fact Sheet 2 (2006), [http://www.governor.state.nc.us/Office/Education/\\_pdf/M4Handout-Overview.pdf](http://www.governor.state.nc.us/Office/Education/_pdf/M4Handout-Overview.pdf) (last visited Apr. 1, 2007).

<sup>383</sup> See *id.* at 1-2.

<sup>384</sup> Current Operations and Capital Improvements Appropriations Act, N.C. Sess. Laws 2006-66, § 10.67(b) (2006); N.C. OFFICE OF SCHOOL READINESS, *MORE AT FOUR* PRE-KINDERGARTEN PROGRAM: PROGRAM GUIDELINES AND REQUIREMENTS § 3.A (2006) [hereinafter PROGRAM GUIDELINES], available at [http://www.governor.state.nc.us/Office/Education/\\_pdf/ProgramGuidelines.pdf](http://www.governor.state.nc.us/Office/Education/_pdf/ProgramGuidelines.pdf).

<sup>385</sup> PROGRAM GUIDELINES, *supra* note 384, at § 4.A.

<sup>386</sup> BARNETT ET AL., PRESCHOOL YEARBOOK, *supra* note 3, at 7, 115.

<sup>387</sup> PROGRAM GUIDELINES, *supra* note 384, at §§ 5.E, 6.C, 6.E & 5.D.

<sup>388</sup> N.C. Sess. Laws 2006-66, § 10.67(e); PROGRAM GUIDELINES, *supra* note 384, at § 3.A.

<sup>389</sup> N.C. Sess. Laws 2006-66, § 10.67(b)(10); PROGRAM GUIDELINES, *supra* note 384, at § 3.A.

<sup>390</sup> BARNETT ET AL., PRESCHOOL YEARBOOK, *supra* note 3, at 115.

<sup>391</sup> N.C. Sess. Laws 2006-66, § 10.67(b).

<sup>392</sup> See *infra* notes 393 and 398.

<sup>393</sup> N.C. Exec. Order No. 24, Accelerating Teacher Recruitment and Hiring for *More at Four* and Class Size Reduction in Light of Judicial Requirements, Budget Developments, and Impending School Openings (Jul. 24, 2002) [hereinafter N.C. Exec. Order No. 24].

<sup>394</sup> Kathleen Kennedy Manzo, *Funding for N.C. Executive Order Snagged in Budget Battle*, 21 EDUC. WK. 22, 22 (2002).

<sup>395</sup> N.C. Exec. Order No. 24, *supra* note 393.

<sup>396</sup> Hoke County Bd. of Educ. v. State (*Leandro II*), 599 S.E.2d 365, 391, 395 (N.C. 2004).

<sup>397</sup> See Manzo, *State Targets*, *supra* note 379, at 28.

<sup>398</sup> N.C. Exec. Order No. 80, Accelerating Teacher and Other Personnel Recruitment and the Implementation of Needed Academic Support Programs for At-Risk Children in Light of Judicial Mandates, Budget Developments, and Impending School Openings (Jul. 20, 2005) [hereinafter N.C. Exec. Order No. 80].

<sup>399</sup> *Id.* (stating that *More at Four* is among the state programs that "are fundamental to addressing the needs of at-risk students [and] eliminating the achievement gap").

<sup>400</sup> PRE-K NOW, LEADERSHIP MATTERS, *supra* note 5, at 4.

<sup>401</sup> N.C. GEN. STAT. § 18C-164(c) (2005).

<sup>402</sup> H.B. 4810, pt. 1B, § 1.75, Gen. Assemb., 116th Sess. (S.C. 2006).

<sup>403</sup> *Id.* at § 1.75(A) & (K).

<sup>404</sup> PRE-K NOW, VOTES COUNT: LEGISLATIVE ACTION ON PRE-K FISCAL YEAR 2007 19 (2006) [hereinafter PRE-K NOW, VOTES COUNT], available at [http://preknow.org/documents/LegislativeReport\\_Oct2006.pdf](http://preknow.org/documents/LegislativeReport_Oct2006.pdf).

<sup>405</sup> Nat'l Inst. for Early Educ. Research, *South Carolina Forges Ahead, Obstacles and All*, 4 PRESCHOOL MATTERS 3, 7 (2006).

<sup>406</sup> PRE-K NOW, VOTES COUNT, *supra* note 404, at 7.

<sup>407</sup> BARNETT ET AL., PRESCHOOL YEARBOOK, *supra* note 3, at 134-35.

<sup>408</sup> 43 S.C. Code Regs. § 264.1(IV)(C).

<sup>409</sup> LAMY, BARNETT & JUNG, *supra* note 377, at 11-12.

<sup>410</sup> S.C. CODE ANN. REGS. 43-264.1(V)(C) (2007).

<sup>411</sup> S.C. H.B. 4810, pt. 1B, § 1.75(B).

<sup>412</sup> S.C. CODE ANN. REGS. 43-264.1(IV)(B) ("The classroom program [for 4K] shall operate five days a week (or the equivalent) for at least 2 1/2 hours of instructional time ... ."); S.C. H.B. 4810, pt. 1B, § 1.75(E) (stating that pilot program providers shall "offer a full day, center-based program with 6.5 hours of instruction daily for 180 school days . . .").

<sup>413</sup> ARK. CODE R. § 6-45-101 *et seq.*

<sup>414</sup> *Lake View v. State (Lake View III)*, 91 S.W.3d 472, 501 (Ark. 2000).

<sup>415</sup> *Id.* at 495.

<sup>416</sup> Jesson & Newbern, Special Masters' Report, *supra* note 295.

<sup>417</sup> *Id.*

<sup>418</sup> Paul Kelly, Senior Policy Analyst, Ark. Advocates for Children and Families, Address at the Education Adequacy Conference, Washington, D.C. (Jun. 14, 2005) (author was the program moderator for the conference and attended the address).

<sup>419</sup> ARK. CODE R. § 6-45-104(a)(2).

<sup>420</sup> *Id.* § 6-45-108(a)(1).

<sup>421</sup> PRE-K NOW, VOTES COUNT, *supra* note 406, at 13.

<sup>422</sup> *Id.*

<sup>423</sup> BARNETT ET AL., PRESCHOOL YEARBOOK, *supra* note 3, at 14–15.

<sup>424</sup> PRE-K NOW, VOTES COUNT, *supra* note 406, at 13.

<sup>425</sup> Jason Wiest, *Beebe's Budget Proposal Unveiled*, ARK. NEWS BUREAU, Jan. 18, 2007, available at <http://www.arkansasnews.com/archive/2007/01/18/News/339680.html>.

<sup>426</sup> BARNETT ET AL., PRESCHOOL YEARBOOK, *supra* note 3, at 15, 47. The ABC Program is one of six top-ranked state pre-kindergarten programs in the nation, meeting nine out of ten National Institute for Early Education Research quality standards. *Id.* at 15. See also Press Release, Nat'l Inst. for Early Educ. Research, Arkansas Better Chance Program Meets Nine Out of Ten Quality Standard Benchmarks (Nov. 7, 2006) [hereinafter NIEER Press Release], available at <http://nieer.org/mediacenter/index.php?PressID=66> (explaining that the *State of Preschool: 2005 Preschool Yearbook* mistakenly reported the ABC Program as meeting ten out of ten quality benchmarks). The ABC Program fails to require lead teachers with a bachelor's degree and specialized training in early childhood education, one of the strongest predictors of quality on the NIEER scale. *Id.*

<sup>427</sup> 5-24-1 ARK. CODE R. § 10 (2006).

<sup>428</sup> *Id.* §§ 13–15.

<sup>429</sup> See NIEER Press Release, *supra* note 426.

<sup>430</sup> JASON T. HUSTEDT ET AL., NAT'L INST. FOR EARLY EDUC. RESEARCH, THE EFFECTS OF THE ARKANSAS BETTER CHANCE PROGRAM ON YOUNG CHILDREN'S SCHOOL READINESS 8–14 (2007).

<sup>431</sup> *Id.*

<sup>432</sup> *Lake View Sch. Dist. No. 25 v. Huckabee*, No. 01-836, 2005 WL 3436660, at \*1, 11 (Ark. Dec. 15, 2005).

<sup>433</sup> ALLAN ODDEN, LAWRENCE O. PICUS & MICHAEL GOETZ, RECALIBRATING THE ARKANSAS SCHOOL FUNDING STRUCTURE 1–2 (2006), available at [http://www.arsba.org/Assests/PDFS/Picus&Oden\\_RecalibratingARSchoolFunding\\_Final.pdf](http://www.arsba.org/Assests/PDFS/Picus&Oden_RecalibratingARSchoolFunding_Final.pdf).

<sup>434</sup> *Id.* at 17.

<sup>435</sup> *Id.*

<sup>436</sup> An Act Establishing a Department of Early Education and Care, 2004 Mass. Legis. Serv. ch. 205

(West) (establishing a new Board and Department of Early Education and Care); PRE-K NOW, LEADERSHIP MATTERS, *supra* note 5, at 15 (reporting that Massachusetts allocated \$4.6 million in fiscal year 2007 for a universal pre-kindergarten pilot program).

<sup>437</sup> MASS. GEN. LAWS ch. 15, § 54 (2007).

<sup>438</sup> *Id.* § 54(c).

<sup>439</sup> BARNETT ET AL., PRESCHOOL YEARBOOK, *supra* note 3, at 84. Funding for the CPC program was cut by nearly one-third between fiscal years 2001 and 2005. *Id.*

<sup>440</sup> 2004 Mass. Legis. Serv. ch. 205 (West) (codified at MASS. GEN. LAWS ANN. ch. 15D, §§ 2 & 3); see Amy Kershaw, Research and Policy Director, Mass. Strategies for Children, Address at the Education Adequacy Conference, Washington, D.C. (June 14, 2005) (author was the program moderator for the conference and attended the address).

<sup>441</sup> MASS. GEN. LAWS ch. 15D, § 3(a).

<sup>442</sup> *Hancock ex rel. Hancock v. Driscoll*, No. 02-2978, 2004 WL 877984, at \*129 (Mass. Super. Ct. Apr. 26, 2004).

<sup>443</sup> Kershaw, *supra* note 440.

<sup>444</sup> PRE-K NOW, VOTES COUNT, *supra* note 406, at 15.

<sup>445</sup> Barnett & Belfield, *supra* note 1, at 81–82.

<sup>446</sup> *Id.* at 84 (summarizing research on effects of early childhood education on education).

<sup>447</sup> *Id.*

<sup>448</sup> *Id.*

<sup>449</sup> *Id.*

<sup>450</sup> See, e.g., Meredith Phillips, James Crouse & John Ralph, *Does the Black-White Test Score Gap Widen After Children Enter School?*, in THE BLACK-WHITE TEST SCORE GAP 232, 248 (Christopher Jencks & Meredith Phillips eds., 1998) (showing that half the gap between Blacks and Whites at high school exit is attributable to the gap at school entry).

<sup>451</sup> See *supra* Part IV.

<sup>452</sup> See *supra* Part V.