



Overview of Preschool Claim

With increasing frequency, plaintiffs in school finance litigation are including a claim for state-funded preschool as a part of their overall effort to reform the state's education funding system. These claims are supported by research showing that high quality preschool helps all children acquire the skills and knowledge they need to succeed in school. Such claims are generally grounded in education and equal protection rights granted under state constitutions. The highest courts in four states - New Jersey, Arkansas, North Carolina, and Massachusetts - have issued a decision on the state's obligation to fund preschool education. In several other states, including Nebraska, Kentucky, Georgia and Wyoming, a claim for state-funded preschool has been included in a pending school finance case.

Ideally, public education and preschool advocates prefer to reach a consensus with the legislature regarding state support for education programs, without ever resorting to the courts, and often this is the case. For example, since 1998, Oklahoma has expanded funding for its universal preschool program so that in 2003-2004, it served sixty-four percent of all four-year-olds in the state - the highest percentage of preschoolers in the country. In other states as well, notably, West Virginia, the legislature has significantly increased funding for preschool in recent years without the threat of litigation.

School funding cases arise in states in which the legislature has refused to rectify the causes of failing schools, in particular inadequate and inequitable education finance, and parents and educators are left with no alternative but to resort to the courts for a remedy. Notably, in two states with a pending school finance case that includes a claim for preschool funding, Kentucky and Georgia, the legislature funds a preschool program. In fact, Georgia's program alleges to be "universal" for all four-year-olds in the state. However, in neither state does the legislature support the program with enough funding to serve all children who need and want preschool, and not all eligible children are served.

A claim for preschool within school funding litigation will not exist in a vacuum, but will most likely arise in the context of an existing preschool advocacy community. Most states have long-standing formal and informal networks of child advocacy and community childcare providers that have advocated for increased state funding and improved quality standards for preschool. In this sense, litigation is just one part of a broader strategy that can both support and be supported by the state's existing preschool advocacy effort.

Overview of Case Law

The New Jersey Supreme Court's 1998 decision in *Abbott v. Burke*¹ was at the forefront of the trend to include a claim for preschool in school funding litigation. The *Abbott* ruling required the state to implement a high quality preschool program for all three- and four-year-old children residing in the state's highest poverty school districts. In contrast, in *Lake View v. Huckabee* (2002),² the Arkansas Supreme Court declined to direct the state to fund a preschool program and held instead that the decision to fund such a program was within the exclusive domain of the legislature. In *Hoke County Board of Educ. v. State* (2004),³ the North Carolina Supreme Court recognized the state's constitutional duty to prepare disadvantaged preschoolers to succeed in school, yet stopped short of ordering state funding for preschool as a specific remedy, at least at this juncture in the state's school finance litigation. More recently, in *Hancock v. Driscoll* (2005),⁴ the Supreme Judicial Court of Massachusetts (SJC) upheld the constitutionality state's school funding system and, in process, rejected the trial court's recommendation directing the state to fund a high quality preschool program for all children at risk for school failure.

The Arkansas Supreme Court decision in *Lake View*, the North Carolina Supreme Court decision in *Hoke County* and the Massachusetts SJC decision in *Hancock* each reversed a trial court ruling directing the state to fund preschool education. Significantly, in each of these states, a strong trial court directive helped raise the profile of the preschool issue and aided advocates and policy makers in their efforts to secure preschool programs and funding before the state legislature.

From these early decisions on a state's obligation to fund preschool education, it is possible to glean factors that may shape the arguments of plaintiffs and the reasoning of courts. First, a state's legal precedent relating to separation of powers and school funding will influence the outcome of a preschool claim. All state courts express a reluctance to decide education issues, recognizing that state constitutions and statutes empower the legislative and executive branches to determine education policy. Some courts, including Pennsylvania and Illinois, have ruled that school finance issues are within the exclusive province of the legislature and are non-justiciable by the courts. It is unlikely courts in these states will consider a claim for preschool funding. Even in states in which courts have exercised authority to decide school finance issues, some courts may feel constrained by the separation of powers doctrine to limit their ruling to a declaration of unconstitutionality, without issuing a specific remedy. This was the approach taken by the Arkansas Supreme Court in *Lake View*.

Second, a court's willingness to order a state to fund preschool education will also depend on the stage of the school funding litigation. Even if a court is willing to decide a school finance dispute, separation of powers considerations will most likely prevent a court from ordering the state to implement a specific educational program, including preschool, without first giving the legislative and executive branch the opportunity to correct deficiencies in the school funding system. The cases in New Jersey, Arkansas,

North Carolina and Massachusetts were in the remedy phase, with the courts having previously declared the school finance system unconstitutional. In each of these cases, plaintiffs had returned to court alleging the state had not cured the constitutional violations and sought state funding for preschool as a part of the remedy for the state's failure to act. In New Jersey's *Abbott V* case, the Supreme Court had declared the school finance system unconstitutional in three previous rulings before issuing the preschool mandate. In each of these prior decisions, the Court had directed the legislature to remedy the constitutional violations, and had also suggested preschool should be a component of any legislative remedy. The Court issued its preschool directive only after the legislature had repeatedly failed to take appropriate steps to implement an equitable and adequate school finance system. In the *Hoke County* decision, the North Carolina Supreme Court stated that it would not direct the state to fund preschool "[a]t this juncture"⁵ in the litigation, indicating the separation of powers doctrine required that it first grant the other branches of government the opportunity to address the needs of preschoolers. In the *Driscoll* case in Massachusetts, the Supreme Judicial Court found that the state had in fact cured the constitutional deficiencies in the school finance system, and was therefore unwilling to order any remedy.

Third, the language of the education clause in the state constitution will influence a court's ruling on preschool. The education clause in the Arkansas constitution states: "... 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." The Arkansas Supreme Court in *Lake View* interpreted this clause, in particular the phrase "no other interpretation shall be given to it," as granting sole authority to local school districts and the legislative branch to decide to fund a preschool program.⁶ On the other hand, in *Abbott V*, the New Jersey Supreme Court was not deterred by constitutional language requiring the state to fund a public education for children "between the ages five to eighteen." Instead, it grounded its preschool mandate in a combination of state statute, public policy and constitutional interpretation, thereby avoiding an analysis of the language regarding age.⁷ The education clause in the North Carolina constitution does not contain an age limitation, although it does grant the legislature authority to establish the age for school attendance: "The General Assembly shall provide that every child of appropriate age ... shall attend the public schools." By statute, the North Carolina legislature has determined that five-year-olds may attend public schools. The Court in *Hoke County* found the state has a constitutional duty to address the needs of at-risk preschoolers before they start school, even though the legislature has exclusive authority to determine the appropriate age for school attendance.

Fourth, a court's interpretation of the scope and nature of the constitutional right to an education will influence plaintiff's framing of the preschool issue. For example, if the court has equated a constitutionally adequate education with the opportunity to achieve the state learning and curriculum standards, as the courts in New Jersey and North Carolina have, plaintiffs can argue the state has a constitutional obligation to fund preschool in order to prepare all children to achieve the state standards. However, if the courts have taken an equal protection analysis, then plaintiffs must focus on the

disparities in school readiness between at-risk children and their wealthier peers, arguing that state-funded preschool must be offered to make up for these inequities to bring the children to a level playing field.

Fifth, the nature and extent of the trial court record on preschool will impact the ruling. In New Jersey and Massachusetts, plaintiffs presented expert testimony on the research demonstrating the individual and societal benefits of high quality preschool for disadvantaged children. They established a record showing that children in low-wealth school districts begin school far behind their more advantaged peers, and that high quality preschool programs can help close the early achievement gap and contribute to success in school and beyond. The New Jersey Supreme Court in *Abbott V* and the Massachusetts trial court in *Hancock* cited this research evidence to support their rulings in favor of state-funded preschool. While the Massachusetts Supreme Judicial Court overturned the trial court's finding that the school funding system was unconstitutional and, in the process, rejected the lower court's recommended remedies, including state funding for preschool, the trial court's detailed factual findings on preschool remain an example of the manner in which plaintiffs' proofs at trial can influence a favorable ruling.

The plaintiffs in Arkansas and North Carolina, on the other hand, did not present expert witnesses on early childhood education and did not introduce evidence on the extensive body of research showing such programs help redress the early learning gap experienced by disadvantaged students. The lack of evidence on the benefits of high quality preschool may not have been a factor in the Arkansas Supreme Court's ruling in *Lake View*, since the Court rested its decision on a strict interpretation of the language in the education clause, but it may have been a factor in the North Carolina Supreme Court's decision in *Hoke County*. The Court in *Hoke County* specifically found the record supported a finding of the state's constitutional obligation to address the educational needs of disadvantaged preschoolers, but provided "inadequate foundational support"⁸ for preschool as an effective remedy.

New Jersey - *Abbott v. Burke*

New Jersey is the first, and to date, only state in the nation to launch a court-mandated public preschool program. In the 1998 *Abbott v. Burke (Abbott V)*⁹ school funding case, the New Jersey Supreme Court ruled that the state had to provide all three- and four-year-old children in thirty high poverty school districts – now known as the Abbott districts – with a “well-planned, high quality” preschool program, as part of its constitutional obligation to provide every child with a “thorough and efficient” education.¹⁰

Article VIII of New Jersey's constitution specifically guarantees a “thorough and efficient education” to children ages five to eighteen.¹¹ Nonetheless, through a combination of statutory interpretation and constitutional analysis, the Court concluded public preschool programs could be considered as part of the state's constitutional obligation to ensure low-income and disadvantaged children arrive in kindergarten ready to learn and make year-to-year progress through elementary school and beyond.

Two key trends proved central to the *Abbott V* ruling: the standards-based reform movement and new research on early childhood development showing how disadvantaged children could benefit from high quality preschool education.

The New Jersey Supreme Court embraced standards-based reform a year prior to the preschool ruling, in the *Abbott IV* (1997)¹² decision. In that decision, the justices accepted New Jersey's curriculum standards as a way to define a "thorough and efficient" education, as mandated by the state constitution. At the time, the Court noted that with the adoption of such standards, "New Jersey joins a trend in favor of a standards-based approach to the improvement of public education."¹³

The standards framework, in turn, set the stage for the importance of the new research on the power of preschool education. The standards framework assumes that learning is cumulative and children progress in skills and knowledge from year to year. Thus, children entering kindergarten are expected to master the kindergarten standards during their kindergarten year. Indeed, under the Supreme Court's *Abbott IV* ruling, the Constitution requires that they have the opportunity to do so. Accordingly, children must start kindergarten with the skills needed to learn.

The plaintiffs in *Abbott V* presented the Court with early childhood education research showing that many children, most notably those from low-income backgrounds, lack the skills needed to attain the standards. The evidence showed these children begin school up to two years behind their more advantaged peers, especially in verbal and literacy skills. The studies also revealed that a high-quality preschool program could provide those skills and prepare the children to learn. Without intervention during the preschool years, low-income children could remain at a significant disadvantage throughout their public education. Thus, public preschool appeared as a logical and cost-effective remedial action the state could take to give all children access to the constitutionally mandated "thorough and efficient" education.

Conversely, without "well-planned, high quality" preschool, the Court in *Abbott V* concluded that many low-income children would be unable to make the year-to-year progress and meet the new standards that guaranteed an adequate education.

Background to Preschool Mandate

The *Abbott* preschool ruling grew out of thirty years of litigation that challenged New Jersey's system of school finance. Attorneys representing children in New Jersey'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. Plaintiffs alleged the state's finance system failed to provide the poorest districts with the resources necessary for students to get a "thorough and efficient" education under the education clause of the New Jersey constitution.

The first decision in *Robinson v. Cahill*,¹⁴ was issued back in 1973. The New Jersey Supreme Court has since issued fourteen additional decisions relating to school funding and the rights of children in high poverty school districts – four others in *Robinson* and ten more in *Abbott v. Burke*. The *Abbott* cases picked up where *Robinson* left off, focusing on the details of the state’s funding formula, as it evolved under education reform.

The 1998 *Abbott V* decision mandated not only preschool but also other substantial improvements for New Jersey’s urban school districts, including:

- standards-based education driven by state curriculum standards
- whole school reform at the school level
- new and rehabilitated facilities
- needs-based supplemental (at-risk) programs to "wipe out student disadvantages," such as a family support team, social and health services, increased security measures, alternative education programs, school-to-work and college-transition programs, summer school, after-school, supplemental nutrition programs and improved parent participation

The specific directive for preschool had its genesis many years earlier, in the *Abbott II* (1990)¹⁵ decision. In this decision, the Court upheld an administrative law judge’s extensive findings and conclusions that the education offered to children in the *Abbott* districts was grossly inadequate, and therefore, unconstitutional by every measure when compared to the education offered in affluent school districts. One of the key findings was that “[m]any poor children start school with an approximately two-year disadvantage compared to many suburban youngsters. This two-year disadvantage often increases when urban students move through the educational system without receiving special attention.”¹⁶

The Court in *Abbott II* adopted a two-part approach for remediating the constitutional deprivation. First, the Court found that students in low-income school districts were entitled to basic “foundation aid” equal to the amount spent in suburban districts where children were more successful in school. Second, the Court found children in low-income school districts were also entitled to additional aid to meet the “special educational needs ...to address their extreme disadvantages”¹⁷ arising from the conditions of urban poverty. The Court had already defined a “thorough and efficient” education guaranteed by the state Constitution as one that would enable all students to function as citizens and workers in the same society.¹⁸ But low-income students in the impoverished districts experienced such “disadvantages,” the justices found, that the state must provide additional interventions in the form of supplemental programs and services designed to “wipe out” those disadvantages “as much as a school district can.”¹⁹

These supplemental programs, according to the Court, must be based on the needs of the children and their schools, over and above the foundational or regular educational program, and assure that the urban school children can compete with their more advantaged peers upon graduation. The Court left the specific determinations regarding the need for, and cost of, such supplemental programs to the legislature. However, the

Court took notice of the evidence in the trial record on the benefits of preschool education: “an intensive pre-school and all-day kindergarten enrichment program [would help] to reverse the educational disadvantage these children start out with.”²⁰

Four years later, in *Abbott III* (1994),²¹ the Supreme Court once again declared the state’s new school funding law unconstitutional, but did not order a specific remedy in this ruling. The Court did, however, reaffirm the state’s obligation to study and fund programs to address the special needs of at-risk students. In this ruling, the justices also noted that both plaintiff’s and the state’s expert witnesses had identified preschool as a needed supplemental program.²²

In 1996, in response to the *Abbott III* ruling, New Jersey’s legislature passed the Comprehensive Education Improvement and Financing Act (CEIFA),²³ a broad-based attempt to change the state’s method of school finance. CEIFA presented a formula for foundation aid for basic public education. In addition, this law created two funding formulas aimed at addressing the Supreme Court’s concern for programs designed to meet the unique needs of low-income students: Demonstrably Effective Program Aid (DEPA) to provide funds for supplemental programs for at-risk students in grades K-12, and Early Childhood Program Aid (ECPA) to provide funds for full-day kindergarten and preschool programs for low-income three- and four-year-olds.²⁴

In *Abbott IV* (1997),²⁵ the Supreme Court reviewed CEIFA and found it to be constitutional on its face because of the state’s adoption of curriculum standards as the definition of a constitutionally adequate education.²⁶ However, the Court further ruled that CEIFA was unconstitutional as applied to the urban districts, because it failed to provide Abbott districts with sufficient funds to enable students in those districts to meet the new standards. The Court ordered the state to provide additional foundation aid to the Abbott districts, on par with the amount spent in successful suburban school districts.

In addition, the Court found the funding formulas in both DEPA and ECPA were unconstitutional because they were not based on the actual needs of the children in the Abbott districts. That year, the Court also concluded that the situation required the imposition of a court-ordered remedy, following years of inaction by the legislature, to correct the deficiencies and provide every child with the constitutionally mandated “thorough and efficient” education. Accordingly, the Supreme Court remanded the matter to a Superior Court judge to hold an evidentiary hearing and make recommendations for funding the supplemental program and facility needs of the Abbott districts. 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.

The Remand Hearing

During the remedy hearing, both the state and the *Abbott* plaintiffs presented evidence of the need for a preschool program. One of the state’s experts, Dr. Robert E. Slavin of Johns Hopkins University, testified that children who attend full-day preschool beginning

at age three were more likely to have success in school.²⁷ Another state witness, an employee of the department of education, testified that research supported the provision of a half-day program for four-year-old children.

Plaintiffs' expert, Dr. Steven Barnett of Rutgers University, provided extensive testimony on research on the benefits of high quality preschool programs and the components of a high quality program. Based on this research, Dr. Barnett recommended that the state provide a full-day preschool program for all three- and four-year-olds in the Abbott districts.²⁸

A special master appointed by the remand court, Dr. Allan Odden of the University of Wisconsin-Madison, also recommended a full-day program for all three- and four-year olds.²⁹

Both the state and plaintiffs recommended collaboration between the Abbott districts and existing community childcare programs as a way of implementing the preschool program.

The judge handling the remand hearing eventually issued a recommended decision³⁰ to the Supreme Court. He supported a state mandate to fund full-day preschool for all three- and four-year-old children in the Abbott districts,³¹ a recommendation that the Supreme Court modified in part.

Abbott V, the Landmark Ruling

In *Abbott V*, the Supreme Court directed the state to provide “well-planned, high quality” half-day preschool programs for all three- and four-year old children in the Abbott districts. The Court found high quality preschool was part of the educational program needed by children in such districts to achieve a constitutionally adequate education.

Noting “no fundamental disagreement over the importance of pre-school education,”³² the Court directed the state to provide a program for both three- and four-year-olds because “evidence demonstrates that the earlier education begins, the greater the likelihood that students will develop the language skills and the discipline necessary to succeed in school.”³³ The Court mandated a half-day preschool program “as an initial reform,”³⁴ leaving open the possibility that a full-day program would be required, based on the needs of Abbott children and families, once preschool was fully integrated into the Court’s broader directive for whole-school reform in the Abbott districts.³⁵

The Supreme Court grounded its preschool directive in early childhood research, finding that “[e]mpirical evidence strongly supports the essentiality of pre-school education for children in impoverished urban school districts.”³⁶ The Court also recognized the research-based link between high quality preschool education and later success in achieving a constitutionally adequate education, which the Court had equated with attainment of the state’s learning and curriculum standards:

This Court is convinced that pre-school for three- and four-year-olds will have 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 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.³⁷

The Court did not rule that Abbott school children have a constitutional right to preschool based on the education clause, thereby avoiding having to overcome the language in the New Jersey Constitution granting a right to public education to children between the ages of five and eighteen. Rather, the Court based its preschool directive on (1) the Commissioner's recommendation during the remand hearing for high quality preschool for all four-year olds residing in the Abbott districts, together with his authority under CEIFA to restructure curriculum in Abbott districts, and (2) the Legislature's requirement in CEIFA for funds for preschool for four-year-olds in all Abbott districts and three-year-olds in most Abbott districts. 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."³⁸ While resting its decision on the Commissioner's authority and on statutory interpretation, the Court 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."³⁹

The Court's ruling was accompanied by a strong directive to the Commissioner to ensure that all Abbott districts implement half-day preschool for three- and four-year-olds as "expeditiously as possible,"⁴⁰ or by no later than September 1999. To that end, the Court directed the state to adequately fund preschool programs in the Abbott districts and to ensure that transportation and other services, support, and resources related to the preschool program were provided.

Additionally, the Court directed the State to make construction of preschool facilities an important priority to ensure the preschool program would be fully implemented.⁴¹ The Court also recognized the need for the state to use existing childcare programs and facilities by authorizing "cooperation with or the use of existing early childhood and day-care programs in the community,"⁴² as a means of implementing the preschool program.

Enforcement of the *Abbott* Preschool Mandate

In *Abbott VI* (2000),⁴³ plaintiffs returned to the Supreme Court arguing that the state had failed to comply with the Court's directive in *Abbott V* for "well-planned, high quality preschool." Specifically, plaintiffs alleged that the state's use of community childcare centers staffed by uncertified teachers and governed by department of human services daycare standards, as well as its failure to develop developmentally appropriate curriculum guidelines, violated the "high quality" component of the Court's order.

The Court affirmed that only a “high quality” program would satisfy its order. Specifically, 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.”⁴⁴ It acknowledged the state’s need to use existing resources by partnering with community programs already serving three- and four-year-olds, but ordered the state to eliminate disparities in quality between school-based and community programs.

The Supreme Court ordered the department of education to ensure the following components of a high quality program for all Abbott preschool programs: (1) lead teachers with bachelor’s degrees and an early childhood certification (teachers lacking such credentials were granted a four-year grace period to obtain them); and (2) class size of no more than fifteen. Additionally, the Court ordered the department of education to make funding available to local school districts for concerted outreach to expand enrollment in the preschool program.

In support of the enforcement order, 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.⁴⁵

Two years later, in *Abbott VIII* (2002),⁴⁶ plaintiffs again challenged the state’s implementation of the preschool program. In this ruling, the Court ordered the Commissioner of Education to finalize preschool curriculum guidelines; develop district-level plans to boost preschool enrollment whenever it failed to meet the Department’s goals; include Head Start programs in the Abbott preschool program; provide reasonable funds to help Head Start and other community providers meet the high quality standards for the Abbott program, including funds to help raise teacher salaries and retain qualified staff; and base budget decisions on a thorough assessment of children’s actual needs, rather than an arbitrary, predetermined per-pupil amount.

In *Board of Educ. of City of Millville v. NJ Dept. of Educ.* (2005),⁴⁷ the New Jersey Supreme Court reaffirmed the state’s duty to ensure full funding for the Abbott preschool program. The Court ruled that the state could require school districts to reallocate funding from other programs to the preschool 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. In order to direct reallocation of district funds to make up for shortfalls caused by the state’s preschool funding formulas, the Court found

the Commissioner of Education must first prove that the reallocation will not compromise any of the district's educational programs.

Arkansas – *Lake View v. Huckabee* (2002)

In 2002, the Arkansas Supreme Court decided *Lake View v. Huckabee* (*Lake View III*),⁴⁸ which addressed the constitutionality of the state's system of funding public education. In that decision, the Court rejected a claim for state-funded preschool, overturning a lower court decision finding such a program was required by the state constitution. However, the Court did find the state's system for financing public education violated the state constitution's guarantee of an adequate and substantially equal education for every child. In a subsequent proceeding in 2004 in which the Supreme Court reviewed the legislature's compliance with *Lake View III*, the Court reiterated its earlier holding that the constitution did not require state funding for preschool education.⁴⁹ In June 2005, the Supreme Court reopened jurisdiction over the *Lake View* case⁵⁰ in response to plaintiffs' allegation that the legislature had failed to comply with the mandates of the *Lake View III* ruling.

Although the Arkansas Supreme Court declined to direct the legislature to fund preschool as part of a school finance remedy, the Court's *Lake View III* decision influenced the implementation and funding of a significant preschool program. First, as part of its effort to revamp the school funding system to comply with the *Lake View* decision, the Arkansas legislature commissioned a study on the cost of an adequate education, and 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. Second, a well-organized, long-standing coalition of preschool advocates took advantage of the state's efforts to revamp the school finance system to press for state funding for a high quality preschool program. In 2003, in response to this campaign and to the recommendation in the cost study, the legislature enacted the Arkansas Better Chance for School Success Program ("ABC for School Success Program"), an early care and education program for three- and four-year-olds in school districts where at least seventy-five percent of students have scored below proficient on the state assessment exams, or in districts identified as being in academic distress. The ABC for School Success Program is designed to serve children living at or below 200 percent of the poverty level. The General Assembly allocated \$40 million in new funding for the program in FY 2005, and increased funding by an additional \$20 million for FY 2006. When combined with funds previously designated for preschool, the FY 2006 state budget for the ABC for School Success Program totals \$71 million.

Background to *Lake View III* Decision

The education clause in the Arkansas Constitution provides 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."⁵¹ Significantly, the clause specifically allows for the possibility of public funding of preschool education stating that "... the General Assembly and/or public school districts

may spend public funds for the education of persons over twenty-one (21) years of age and under six (6) years of age as may be provided by law, and no other interpretation shall be given to it.”

In 1983, the first landmark case challenging the state’s financing of public education was decided. In *Dupree v. Alma Sch. Dist. No. 30*,⁵² the Arkansas Supreme Court held that the state’s system of allocating funds among school districts violated the state constitution’s guarantee of equal protection as well as its promise of a “general, suitable, efficient system” of education. In that ruling, the justices concluded the state’s school finance system, which was based on local property taxes, had no “rational relationship to the educational needs of the individual districts....”⁵³

In 1992, following the Arkansas legislature’s failure to remedy the constitutional violations found in *Dupree*, the Lake View School District launched a new legal challenge to the constitutionality of the state’s school finance system. Several other low-income school districts joined this new case as third-party intervenors. In 1994, the trial court found the state’s school funding system was still inequitable and inadequate under the education clause in the state Constitution.⁵⁴ The *Lake View* trial court ordered the state to “enact and implement appropriate legislation” to remedy the constitutional violations. After six amended complaints and a failed Agreed Order, the plaintiffs appealed to the Arkansas Supreme Court to enforce the trial court order.

In response, the 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.⁵⁵ One month later, in May 2001, the trial court found the Arkansas school funding system was still inequitable and inadequate,⁵⁶ this time, insisting that the state “must provide substantially equal educational opportunities.” Further, the trial court ruled, such opportunities could not be denied to children simply because they happened to attend a school located “in a poorer part of the state.”

***Lake View* Trial Court Ruling on Preschool**

The trial court also made three specific findings relating to preschool 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.⁵⁷

As a result, 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.”⁵⁸

Despite these findings, it appears from the trial court decision that preschool education was not a central part of the plaintiff’s case at trial. The court reached its preschool ruling based on the general facts set forth above, apparently without any expert testimony on the scientific studies demonstrating the benefits of preschool education for at-risk students, in particular evidence that high quality preschool can help prepare these students to learn and succeed in elementary school and beyond. Nor does it appear the parties introduced specific empirical evidence showing the gap between disadvantaged students and their more advantaged peers coming into kindergarten as a result of the lack of high quality preschool programs for these students. It is also unclear whether the low-income districts placed preschool within the framework of the state’s curriculum and learning standards and argued that without the foundation that preschool education provides, disadvantaged students would not have the opportunity to meet the state standards and obtain a constitutionally adequate education.

Arkansas Supreme Court Decision in *Lake View III*

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.”⁵⁹

The Court also upheld the plaintiff’s claim based on equal protection. Specifically, the Court held that “equal educational opportunity is not being afforded to the school children of this state.”⁶⁰ The disparities in funding among districts led to a shortage of resources in the low-income districts, the justices found, and “there is no legitimate government purpose warranting the discrepancies in curriculum, facilities, equipment, and teacher pay among the school districts.”⁶¹ The Supreme Court gave the Arkansas legislature until January 1, 2004, to remedy the constitutional violations.

On the preschool claim, the plaintiffs argued that since the state already provided some public preschool programs to at-risk children, it was required under the equal protection clause to create equal access to preschool education for all children at risk for school failure. The third-party intervenors from other low-income school districts contended that the state must provide full funding for preschool for all at-risk students as an essential component of its constitutional obligation to provide an adequate education.

Despite its strong ruling requiring the state to provide equal educational opportunity and an adequate education, the Supreme Court rejected the claims for state-funded preschool. The justices determined that the judicial branch in Arkansas cannot “mandate pre-school education as an essential component of an adequate education.”⁶² In so ruling, the Court noted that it was unclear whether the trial court was ordering the state to provide preschool, or merely underscoring the importance of the value and need for such a program. Ultimately, the Court saw the issue of judicial authority as primary, and adopted

a strict interpretation of the state Constitution's education clause.⁶³ This clause authorizes, but does not require, the legislature to fund programs for children under six: "... 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." In ruling that the legislature has exclusive authority to decide to fund a state preschool program, the Court implicitly rejected the intervenors' underlying argument that disadvantaged children could not achieve an adequate education without receiving the foundation of quality state-funded preschool.

The Court also rejected the attempt to link preschool 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."⁶⁴

Appointment of Special Masters to Review Compliance with *Lake View III*

In its ruling in *Lake View III*, the Supreme Court gave the legislature until January 1, 2004 to correct the inadequacies of the state's education system. When the lawmakers failed to act by that deadline, the Supreme Court reopened and reestablished jurisdiction over the *Lake View* case. In February 2004, the Court 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.'"⁶⁵ The justices also insisted the state must "adopt all suitable means to secure to the people the advantages and opportunities of education."⁶⁶

Two months later, on April 2, 2004, the special masters submitted their report to the Supreme Court.⁶⁷ On the issue of state-funded preschool, the special masters 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 preschool for disadvantaged children. The special masters found that the Arkansas legislature, in responding to the Court's directive to define an adequate education, had established as a matter of public policy that preschool education plays an "integral part in providing students an adequate education."

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. This study recommended the state spend \$100 million on a preschool program for all low-income three- and four-year-old children, in order to enable these children to achieve a constitutionally adequate education. "Low-income" was defined in the study as families with an income at or below 200 percent of the state poverty level. The Arkansas Legislature responded to this recommendation by allocating \$40 million for the ABC preschool program.

Arkansas Supreme Court Decision in *Lake View IV*

In June 2004, the Supreme Court issued a decision in *Lake View Sch. Dist. No. 25 v. Huckabee, (Lake View IV)*,⁶⁸ releasing jurisdiction of the *Lake View* case. The Court reviewed the special masters' report, noted the Legislature's "laudable" progress in reforming the school finance system and, without specifically addressing whether the state had achieved a constitutionally adequate system for funding education, released its mandate in the case. Citing the separation of powers doctrine, the Court rejected plaintiff's request that it retain jurisdiction until the system meets the standard established in *Lake View III*. In strong language, however, the Court expressed a "commitment to the goal of an adequate and substantially equal education for all Arkansas students"

On the issue of the state's constitutional obligation to fund preschool education, the Court in *Lakeview IV* specifically rejected the special masters' suggestion that the state must provide preschool for disadvantaged students. The Court reiterated its ruling in *Lakeview III* that the Arkansas legislature has sole authority to determine whether to authorize and fund an early childhood education program, thereby effectively closing the door on a court mandate for state-funded preschool education. Fortunately, the litigation already resulted in the implementation of the ABC for School Success Program, which serves a significant number of disadvantaged preschoolers.

In a brief opinion⁶⁹ issued in June 2005, the Supreme Court reopened jurisdiction and recalled its mandate in *Lake View III*. The Court reappointed the two special masters who had previously reviewed the legislature's 2003 and 2004 enactments to make findings of fact on plaintiffs' allegation that the state's 2005 enactments failed to satisfy the *Lake View III* ruling. The Court gave the special masters until September 1, 2005 to issue a report, unless they need additional time. Acting on the motion of plaintiffs and third party intervenors, the Court rejected the state's argument that plaintiffs must file a new lawsuit. The Court pointed to the need for a speedy resolution of plaintiffs' claims and cited its constitutional duty to ensure that the state meets its "goal of an adequate and substantially equal education for all Arkansas students."

North Carolina – *Hoke County Board of Educ. v. State (Leandro II)* (2004)

In *Hoke County Board of Educ. v. State (Leandro II)* (2004),⁷⁰ the North Carolina Supreme Court reversed a 2000 trial court decision requiring the state to provide preschool education to low-income students at risk of school failure. The Supreme Court agreed with the lower court's finding that the state's efforts towards providing assistance to "at-risk" pre-kindergarten children were constitutionally inadequate. However, it refused to order comprehensive preschool as a remedy, stating there was inadequate foundational support in the trial record for such an order. The Court found "the suggestion that pre-kindergarten is the sole vehicle or, for that matter, a proven effective vehicle...is, at best, premature."⁷¹ Instead, the Court deferred to the expertise of the

legislative and executive branches on public education and left it to them to design appropriate remedial steps for disadvantaged preschoolers.

In response to the trial court order in *Hoke County*, the legislature enacted a statewide preschool program before the Supreme Court's 2004 decision. The program, More-at-Four, funds a high quality prekindergarten program for approximately 11,000 disadvantaged four-year-olds in the state. North Carolina's governor has successfully pushed for expansion of the program each year since its enactment in 2001, citing the litigation in support.

Background to *Hoke County* Decision

Article I of the North Carolina Constitution provides that "the People have a right to the privilege of education."⁷² Article IX states, "The General Assembly shall provide...for a general and uniform system of free public schools...wherein equal opportunities shall be provided for all students."⁷³ The constitution does not contain an age limitation, and in fact requires the General Assembly to provide a public education to "every child of appropriate age."⁷⁴

The *Hoke County* case builds on an earlier challenge to the state's school finance system, *Leandro v. State* (1997).⁷⁵ In *Leandro*, low-income school districts sued the state, charging that children in their districts had been denied an adequate education because the state's system of funding public education failed to provide adequate resources to the low-income districts. Contrary to the plain language of the Constitution, the North Carolina Supreme Court held that the Constitution "does not require that equal educational opportunities be afforded students in all of the school districts in the state."⁷⁶ At the same time, the Court did find that the state was responsible for providing adequate funding and services to ensure that all students receive a "sound basic education."⁷⁷ The Court spelled out a 'sound basic education' as one that would 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.⁷⁸

The Supreme Court remanded the plaintiffs' claim that the state's educational funding system did not provide a sound basic education back to the lower court for trial. The

remand proceeding is known as *Hoke County Board of Education v. State of North Carolina*.

Hoke County Trial Court Ruling on Preschool

The trial court examined the state's education system in light of the *Leandro* mandate, which requires that every North Carolina child have access to a sound basic education. The trial court found, among other things, that:

- (1) the state's curriculum guidelines exceeded the *Leandro* standards for an adequate education, when properly implemented;
- (2) the state's standards for teacher certification were valid and sufficient to ensure qualified teaching;
- (3) the schools' accountability program was appropriate for measuring and improving the academic performance of public school children; and
- (4) the state's tests provided adequate evidence of whether students were receiving a sound basic education.⁷⁹

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

In its original complaint, the plaintiffs limited their case to at-risk children of school age. The trial court raised -- on its own motion -- the issue of the rights of pre-kindergarten age children. Specifically, the court asked whether the constitutional rights enumerated in *Leandro* extended to certain at-risk children before they reach the age of five. The plaintiffs then filed amended complaints alleging the need for pre-kindergarten programs in order to prepare "at-risk" children to be able to take advantage of the opportunity for a sound basic education. The trial court held:

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. . . .⁸⁰

The trial court limited its preschool ruling to at-risk children as necessary to "permit them to take advantage of, and have an equal opportunity to receive, the sound basic education to which they are entitled in North Carolina under its Constitution."⁸¹

Accordingly, the trial court ordered the state to expand pre-kindergarten education for all children who did not arrive in kindergarten ready to learn, and were therefore at risk for school failure. In two subsequent decisions, the trial court again found that the state had failed to provide a sound basic education to at-risk children.⁸²

North Carolina Supreme Court Decision in *Hoke County*

In July 2004, the North Carolina Supreme Court issued a decision in *Hoke County* that affirmed the trial court's finding that the state had violated the fundamental rights of children in the plaintiff school districts by not providing an opportunity to receive a sound basic education.⁸³ On the issue of preschool, however, the Court reversed the trial court ruling.

The Court found that the North Carolina Constitution granted the General Assembly sole authority to establish an appropriate school age, and any trial court ruling infringing on the legislative prerogative was in error. 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: "[w]e 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."⁸⁴

The Court acknowledged the state's constitutional duty to address the needs of disadvantaged preschool children, stating "even the State concedes that "at-risk" prospective enrollees in Hoke County are in need of assistance in order to avail themselves of their right to the opportunity for a sound basic education."⁸⁵ However, the Court refused to impose a specific remedy for the constitutional violation at this time, citing the fact that public education is the shared province of the legislative and executive branches. The Court found that the trial court order requiring pre-kindergarten for all at-risk children was "premature, and its strict enforcement could undermine the state's ability to meet its educational obligations for "at-risk" prospective enrollees by alternative means."⁸⁶ The Court stated that while the judiciary has the power to order remedies when another branch fails to meet its duties, it should do so only when the state has been consistently unable or unwilling to act. Here, the Court noted that the state has begun to take action to address the needs of disadvantaged preschoolers. Therefore, it refused to enforce a specific remedy, instead deferring to the expertise of the other branches to design appropriate corrective action.

In addition to principles of separation of powers, the Court cited "inadequate foundational support"⁸⁷ for the preschool remedy. The fact that the record before the Court did not include expert testimony on the research-based evidence of the effectiveness of preschool education clearly played a part in the Court's decision not to order implementation of a pre-kindergarten program.

The Court found a clear obligation on the part of the state to take meaningful action to prepare "at-risk" children to receive a sound basic education. Accordingly, this decision leaves the door open for plaintiffs to seek preschool as a remedy in future proceedings

should the state fail to adequately address the needs of at-risk preschoolers. Significantly, the litigation has already resulted in the implementation of North Carolina's More at Four pre-kindergarten program, which serves a large segment of the at-risk preschool population.

Massachusetts – *Hancock v. Driscoll* (2005)

In *Hancock v. Driscoll* (2005),⁸⁸ the Supreme Judicial Court (SJC) of Massachusetts upheld the Commonwealth's school funding system, despite finding severe inequities and inadequacies in the system. In a ruling against plaintiff students from low-wealth school districts, the high court found 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* (1993),⁸⁹ which had declared the school finance system unconstitutional. The SJC's decision in *Hancock* rejected the finding of a specially assigned trial court judge that the Commonwealth was failing to provide an adequate education to all Massachusetts children, and the trial court's recommendations that the state revamp the funding formula based on a study of the actual costs of implementing Massachusetts' curriculum frameworks in a manner appropriate for all children and that a high quality preschool program for at-risk three- and four-year-olds be included in the new school funding formula.

Background to *Hancock* Decision

The education clause in 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 ..."⁹⁰ In *McDuffy v. Secretary*, 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."⁹¹ The SJC further found that under the existing school financing system, plaintiffs in the case - children in low-wealth school districts - "are not receiving their constitutional entitlement of an education as intended and mandated by the framers of the Constitution."⁹²

The SJC in *McDuffy* 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. In defining the standard of education to be provided by the Commonwealth, the SJC appeared to adopt the guidelines set forth by the Kentucky Supreme Court in *Rose v. Council for Better Educ., Inc.* (1989).⁹³ The SJC stated, "An educated child must possess 'at least the seven following capabilities: (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 students 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 level 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.” [quoting *Rose v. Council for Better Educ., Inc.*] ⁹⁴

The SJC found the Commonwealth’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. It also determined that the Commonwealth has a responsibility “to defin[e] the specifics and the appropriate means to provide the constitutionally required education,” 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.”⁹⁵

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

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. Specifically, plaintiffs alleged 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*. 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.

The enforcement action was remanded by the SJC to a superior court judge for fact finding and recommendations. The enforcement action is known as *Hancock v. Driscoll*.

Remand Hearing in *Hancock v. Driscoll*

At trial, plaintiffs presented evidence on 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 lack sufficient resources to provide it. Plaintiffs also presented evidence on the causes of the constitutional deficiencies and on proposed remedies. Plaintiffs’ evidence centered on four focus districts that were representative of the nineteen low-wealth districts in which plaintiffs resided.

Plaintiffs included state funding for preschool as a component of the remedial relief requested. Dr. Steven Barnett of the National Institute for Early Education Research testified about the 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.⁹⁶ Dr. Barnett testified about the results of an assessment of incoming kindergarten students in the four focus districts and two wealthy Massachusetts districts.⁹⁷ The assessment showed that children in the low-income districts start school from one year to more than two and a half years behind children in the more affluent districts. Evidence also showed that children in the affluent school districts are more likely to attend a preschool program than those in the low-income focus districts. 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. He provided testimony on the research-based components of a high quality program.⁹⁸

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.⁹⁹ These studies show, in part, that under current funding and governance structures, the quality of district-run preschool programs exceeds that of community childcare centers.

***Hancock* Trial Court Ruling on Preschool**

The specially assigned trial court judge issued her report and recommended decision in April 2004,¹⁰⁰ finding that plaintiffs' school districts were not providing all students with the level of education to which they were entitled under the Massachusetts Constitution. To cure the constitutional deficiencies, the trial court recommended 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.¹⁰¹

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 at least should be considered for coverage. Preschool 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"¹⁰² programs. Specifically, the trial court recommended that the Commonwealth determine the cost of funding a public preschool 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. 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."¹⁰³ According to the

trial court, the program must be “offered free of charge at least to those who are unable to pay.”¹⁰⁴

In reaching its recommendation on preschool, the trial court rejected the Commonwealth’s argument that the constitutional right to an education extends only from kindergarten through twelfth grade. First, the court found the *McDuffy* ruling imposed a duty on the Commonwealth to provide an education at the “public school level,” while neither the ruling nor the constitution itself define or limit that level. Instead, the trial court observed, state statute authorizes the Massachusetts Board of Education to establish the mandatory ages for school attendance. Moreover, each of the focus districts offers a preschool program, each of the curriculum frameworks adopted by the board of education has a pre-kindergarten component, and, to a limited extent, public preschool is included as part of the foundation budget. 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.’”¹⁰⁵

Second, the trial court 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.”¹⁰⁶ Citing 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 court concluded, “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.”¹⁰⁷

The trial court also cited plaintiffs’ evidence on the components of a high quality preschool program – well-educated teachers, adequate compensation for teachers, small class size, strong supervision and high standards for learning and teaching – and found that “[t]he quality of the early childhood education matters.”¹⁰⁸

Supreme Judicial Court Ruling in *Hancock v. Driscoll*

The SJC rejected the finding of the trial court judge that the Commonwealth was failing to meet its duty under the state constitution to provide an adequate education to all Massachusetts children. The high court retreated from its earlier ruling in *McDuffy* that the state constitution required an education that allowed all children the opportunity to acquire the seven capabilities outlined by the Kentucky Supreme Court in *Rose*. Instead, the SJC in *Hancock* ruled that “[i]n *McDuffy* [citations omitted], this court recognized that an ‘educated child’ possesses these ‘capabilities’ [citations omitted], but did not mandate any particular program of public education.”¹⁰⁹ Thus, the SJC relieved the Commonwealth of the duty to provide a system of education that provides all children with the opportunity to achieve the seven capabilities.

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."¹¹⁰ The SJC also recognized that the Commonwealth itself concedes "serious inadequacies in public education remain."¹¹¹ Yet these inadequacies were not constitutionally fatal because of the "comprehensive and systematic overhaul of State financial aid to and oversight of public schools"¹¹² undertaken by the Commonwealth in response to the 1993 decision in *McDuffy*.

The SJC concluded that the Massachusetts Education Reform Act of 1993 "profoundly altered"¹¹³ the Commonwealth's role in education through standardized statewide criteria for funding that increased the state's mandatory assistance to public schools, and by establishing uniform, objective performance and accountability measures for every public school student, teacher, administrator and school in the state. The SJC also found that delays in full implementation of educational improvements were attributable not to "legislative or departmental inaction" but, at least in part, to "severe revenue shortfalls" at the state level.¹¹⁴

One dissenting Justice questioned the Court's failure to examine the cause of the fiscal crisis, which, in this Justice's opinion, stemmed at least in part from the Commonwealth's policy of income tax reductions implemented since 2000.¹¹⁵

Having determined that the Commonwealth was not in violation of the education clause, the SJC 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."¹¹⁶ The SJC singled out the trial court's recommendation that preschool be a "mandated" program in the cost study as an example of impermissible judicial interference, noting that the decision as to which programs best serve the needs of at-risk students "is a policy decision for the Legislature."¹¹⁷ The Court concluded that "[c]ourts are not well positioned to make such decisions."¹¹⁸

The SJC cautioned that the Commonwealth is still open to legal challenge under the education clause if it does not continue on a course of improvement. 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.'¹¹⁹

¹ *Abbott v. Burke* 153 N.J. 480 (1998) (*Abbott V*).

² *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472 (2002) (*Lake View III*).

³ *Hoke County Board of Education v. State*, 599 S.E. 2d 365 (2004).

⁴ *Hancock v. Driscoll*, 443 Mass. 428 (2005).

⁵ *Hoke County Board of Education v. State*, 599 S.E.2d at 394.

⁶ See *Lake View III*, 91 S.W.3d at 501.

⁷ *Abbott V*, 153 N.J. at 505-507.

⁸ *Hoke County Board of Education v. State*, 599 S.E. 2d at 394.

⁹ *Abbott V*, 153 N.J. 480 (1998).

¹⁰ The *Abbott V* ruling applies to approximately twenty-five percent of New Jersey's school children. The decision initially applied to 28 school districts, but the New Jersey Legislature and Commissioner of Education have since expanded the ruling to three additional school districts.

¹¹ N.J. Const., art. 8, § IV, para. 1.

¹² *Abbott v. Burke*, 149 N.J. 145 (1997) (*Abbott IV*).

¹³ *Id.* at 166.

¹⁴ *Robinson v. Cahill*, 62 N.J. 473 (1973) (*Robinson I*).

¹⁵ *Abbott v. Burke*, 119 N.J. 287 (1990) (*Abbott II*).

¹⁶ *Abbott IV*, 149 N.J. at 179, citing Administrative Law Judge decision, NO EDU 5581-88 (OAL 1988), at 28.

¹⁷ *Abbott II*, 119 N.J. at 385.

¹⁸ *Robinson I*, 62 N.J. at 515.

¹⁹ *Abbott II*, 119 N.J. at 369.

²⁰ *Id.* at 373.

²¹ *Abbott v. Burke*, 136 N.J. 444 (1994) (*Abbott III*).

²² *Id.* at 453.

²³ N.J.S.A. 18A: 7F-16.

²⁴ The *Abbott* rulings resulted in expansion of state-funded preschool beyond the 28 *Abbott* districts. ECPA provides state aid for preschool and full-day kindergarten for approximately 100 non-*Abbott*, low-income school districts that meet specific eligibility criteria. The preschool program in the non-*Abbott* districts is governed by different standards than the *Abbott* program and, unlike the *Abbott* program which is intended to serve all children within an *Abbott* district, enrollment in these districts is limited by the amount of state funding appropriated in a given year.

²⁵ *Abbott IV*, 149 N.J. 145 (1997)..

²⁶ *Id.* at 176.

²⁷ See *Abbott V*, 153 N.J. at 504-505, 581 (Appendix I, Decision of Remand Court).

²⁸ *Id.* at 578-582.

²⁹ *Abbott V*, 153 N.J. at 647-648 (Appendix II, Report of Special Master).

³⁰ *Abbott V*, 153 N.J. at 529 (Appendix I, Decision of Remand Court).

³¹ *Id.* at 609.

³² *Abbott V*, 153 N.J. at 503.

³³ *Id.* at 504.

³⁴ *Id.* at 507.

³⁵ In the first year of implementation, most *Abbott* districts documented the need and submitted budgets for full-day preschool. This need was based, in part, on the fact that, due to facilities and space limitations in the public schools, the vast majority of preschoolers were placed in existing community childcare programs, and these programs generally operate on a full-day basis. By 2001, the State, through regulation, began funding a full-day, full-year preschool program for all three- and four-year-old children in the *Abbott* districts. See *Abbott VI*, 163 N.J. at 119.

³⁶ *Abbott V*, 153 N.J. at 503.

³⁷ *Id.* at 506-507.

³⁸ *Id.* at 507.

³⁹ *Id.*

⁴⁰ *Id.* at 508.

⁴¹ *Id.* at 524.

⁴² *Id.* at 508.

⁴³ *Abbott VI*, 163 N.J. 95 (2000).

⁴⁴ *Id.* 163 N.J. at 104.

⁴⁵ *Id.* at 102.

⁴⁶ *Abbott v Burke*, 170 N.J. 537 (2002) (*Abbott VIII*).

⁴⁷ *Board of Educ. of City of Millville v. NJ Dept. of Educ.*, 183 N.J. 264 (2005).

⁴⁸ *Lake View III*, 91 S.W.3d 472 (2002).

⁴⁹ *Lake View Sch. Dist. No. 25 v. Huckabee*, __ S.W.3d __, (2004); 2004 WL 1406270 (Ark. June 18, 2004).

⁵⁰ *Lake View Sch. Dist. No. 25 v. Huckabee*, __ S.W.3d __ (2005), 2005 WL 1358308 (June 9, 2005).

⁵¹ Ark. Const. art. 14, § 1.

⁵² *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90 (1983).

⁵³ *Id.* at 93.

⁵⁴ *Lake View Sch. Dist. No. 25 v. Huckabee*, No. 1992-5318, 1 (Ch. Ct. Pulasky County, Ark. 2d Div., May 25, 2001).

⁵⁵ *Lake View Sch. Dist. No. 25 v. Huckabee*, 10 S.W. 3d 892 (Ark. 2000).

⁵⁶ *Lake View Sch. Dist. No. 25 v. Huckabee*, 1992-5318 (Ch. Ct. Pulasky County, Ark. 2d Div., May 25, 2001).

⁵⁷ *Lake View III*, 91 S.W.3d at 501 (quoting trial court order).

⁵⁸ *Id.*

⁵⁹ *Id.* at 495.

⁶⁰ *Id.* at 500.

⁶¹ *Id.*

⁶² *Id.* at 502.

⁶³ *Id.* at 501-502.

⁶⁴ *Id.* at 501.

⁶⁵ *Lake View Sch. Dist. No. 25 v. Huckabee*, No. 01-836, 2004 WL 213203 (Ark. Feb. 3, 2004).^{*}

⁶⁶ *Id.*

⁶⁷ The special masters' report is available on the website for the Arkansas courts:
<http://courts.state.ar.us/lake%20view/report.pdf>.

⁶⁸ *Lake View Sch. Dist. No. 25 v. Huckabee*, No. 01-836, __ S.W.3d __, 2004 WL 1406270 (Ark. June 18, 2004) (*Lake View IV*).

⁶⁹ *Lake View Sch. Dist. No. 25 v. Huckabee*, __ S.W.3d __ (2005), 2005 WL 1358308 (June 9, 2005).

⁷⁰ *Hoke County Board of Education v. State*, 599 S.E. 2d 365 (2004).

⁷¹ *Id.* at 394.

⁷² N.C. Const. art. I, § 15.

⁷³ N.C. Const. art. IX, § 2.

⁷⁴ N.C. Const. art. IX, § 3.

⁷⁵ *Leandro v. State*, 488 S.E.2d 249 (1997).

⁷⁶ *Id.* at 259.

⁷⁷ *Id.*

⁷⁸ *Id.* at 255.

⁷⁹ *Hoke County Board of Education v. State of North Carolina*, 2000 WL 1639686 (N.C. Super. Oct 12, 2000).

⁸⁰ *Id.* at 6.

⁸¹ *Id.*

⁸² See *Hoke County Bd. of Educ. v. State*, 95 CVS 1158, Orders of March 2001 and April 2002.

⁸³ *Hoke County Board of Educ. v. State of North Carolina*, 599 S.E.2d 365 (2004).

⁸⁴ *Id.* at 392.

⁸⁵ *Id.* at 393.

⁸⁶ *Id.* at 395.

⁸⁷ *Id.* at 394.

⁸⁸ *Hancock v. Driscoll*, 443 Mass. 428 (2005).

⁸⁹ *McDuffy v. Secretary*, 415 Mass. 545 (1993).

⁹⁰ M.G.L.A. Const. Pt. 2, C. 5, § 2.

⁹¹ *McDuffy* at 621.

⁹² *Id.* at 614.

⁹³ *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989).

⁹⁴ *McDuffy v. Secretary*, 415 Mass. at 618.

⁹⁵ *Id.* at 621.
⁹⁶ *Hancock v. Driscoll*, 2004 WL 877984, 137.
⁹⁷ *Id.* at 140.
⁹⁸ *Id.* at 138.
⁹⁹ *Id.* at 138-139.
¹⁰⁰ *Hancock v. Driscoll*, 2004 WL 877984 (April 26, 2004).
¹⁰¹ *Id.* at 145.
¹⁰² *Id.* at 146.
¹⁰³ *Id.* at 146, fn. 221.
¹⁰⁴ *Id.* at 146.
¹⁰⁵ *Id.* at 136.
¹⁰⁶ *Id.* at 137.
¹⁰⁷ *Id.*
¹⁰⁸ *Id.*
¹⁰⁹ *Hancock v. Driscoll*, 443 Mass. at 455.
¹¹⁰ *Id.* at 433.
¹¹¹ *Id.*
¹¹² *Id.* at 455.
¹¹³ *Id.* at 451.
¹¹⁴ *Id.* at 458.
¹¹⁵ *Id.* at 487, fn. 3
¹¹⁶ *Id.* at 460.
¹¹⁷ *Id.*
¹¹⁸ *Id.*
¹¹⁹ *Id.* at 435 (quoting *McDuffy*, 415 Mass. at 620).