

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.

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.