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Pre-K at risk: Now the Supreme Court will decide

Pre-K at risk: Now the Supreme Court will decide

By **Sharon McCloskey** - 10/10/2013 - in Law and the Courts Print This Article

For more than ten years, the state of North Carolina acknowledged that poor and disadvantaged children had a constitutional right to a sound basic education, beginning with pre-kindergarten.

And for nearly as many years the state worked to provide these at-risk children opportunities for a jump start on that education, crafting a pre-K program that became the envy of other states.

That changed in 2011, though, when Republican lawmakers in control at the General Assembly arbitrarily capped the number of at-risk children allowed in the pre-K program at 20 percent, effectively saying that only some at-risk four-year-olds had that constitutional right.

The wisdom of that move will be front and center this Tuesday when the state Supreme Court hears arguments in Hoke County v. State, the third iteration of the court's landmark 1997 Leandro decision establishing the right of all children to a sound basic education.

In the current case, the Hoke County school board and others contend that the state violated that right by cutting the number of pre-K seats available to at-risk children.

A trial court agreed in 2011 and ordered the state to provide pre-kindergarten to all eligible at-risk four-year-olds who apply. A year later, a unanimous panel of the Court of Appeals affirmed that order.

The state then took that order to the Supreme Court, where on Tuesday it will tell the justices that, yes, it does have a constitutional obligation to at-risk children, and yes, it committed to meet that obligation by providing them with a pre-kindergarten education.

But after pulling back on that commitment, with no better alternative on the horizon, the state's argument now is simply this: The courts can't tell the state how to meet its obligations to at-risk children. That's the legislature's job.

Evolution of a sound basic education

In 1994, parents and school boards in Hoke County and other low income districts sued the state, alleging that their local funding sources couldn't match those in wealthier districts and left their students with deteriorating buildings, outdated materials and fewer high quality teachers. As a result, they argued, their students had been deprived of their state constitutional right to an adequate education.

Three years later, in Leandro v. State ("Leandro I"), the Supreme Court defined the parameters of that right, holding that the state constitution provides each child with the opportunity for a "sound basic education." Such an education should include at a minimum proficiency in reading, writing, speaking and other subject areas as well as development of skills needed for college and employment, the court held.

Writing for the court then, Chief Justice Burley Mitchell said that "an education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate."

Mitchell sent the case back to the lower court to determine of whether the state had indeed denied children of that basic right.

In the trial that followed, Superior Court Judge Howard E. Manning Jr. looked at Hoke County as a representative case and found that the state had failed to help an inordinate number of at-risk children obtain that sound basic education.

Manning ordered the state to remedy that in part by expanding pre-kindergarten programs to include all at-risk children.

That order then made its way back to the state Supreme Court, which for the second time considered the parameters of the constitutionally guaranteed sound basic education in Hoke County v. State ("Leandro II"). In 2004, the court upheld Manning's finding that at-risk students had been denied their right to a sound basic education, but ruled that mandating pre-kindergarten for all such prospective students was a premature remedy. Rather than dictating a remedy itself, the court left it to the legislative and executive branches to come up with a solution.

Wrote then Justice Robert Orr for a unanimous court:

"While this court assuredly recognizes that gravity of the situation for 'at risk' prospective enrollees in Hoke County and elsewhere, and acknowledges the imperative need for a solution that will prevent existing circumstances from remaining static or spirals further, we are equally convinced that the evidence indicates that the State shares our concerns and, more importantly, that the State has already begun to assume its responsibilities for implementing corrective measures."

The state doubles back

North Carolina had indeed begun "assuming its responsibilities," acknowledging the benefits derived from early childhood education and expanding pre-kindergarten services for at-risk children statewide through its More at Four program. The number of such children in the program grew steadily from 2004 to 2009.

Budget cuts then began leveling off enrollment, and in 2011, the legislature adopted a budget bill that capped the number of at-risk children enrolled in the pre-kindergarten program (renamed "N.C. Pre-K") at 20 percent, meaning that a program which previously served upwards of 35,000 at-risk preschoolers throughout the state would now serve only a fraction of them.

Before that budget bill could take effect, the parties returned to Judge Manning, with the plaintiffs this time challenging the 20 percent cap. Manning again ruled in their favor, finding that the Supreme Court in Leandro II had given the state the opportunity to craft a remedy for its prior failings to at-risk children and that the state had committed to the court that its chosen remedy was the More at Four program.

Manning ordered the state to continue to provide pre-kindergarten to any eligible at-risk 4-year-old who applied, writing that each of those children has the same constitutional right:

> "It is not necessary for the Court to have precise numbers of slots that will no longer by available to at-risk 4-year-olds who are eligible to attend NCPK this up-coming year because this artificial barrier, or any other barrier, to access to prekindergarten for at risk 4-year-olds may not be enforced.
>
> This case is not about numbers and slots. This case has always been about the rights of children. This case is about the individual right of every child to the equal opportunity to obtain a sound basic education. The constitutional right belongs to the child, not the adults. Each at-risk four year old that appears the doors of the NCPK program is a defenseless fragile child whose background of poverty of disability place the child at risk of subsequent academic failure. "

In August 2012, a unanimous three-judge panel of the Court of Appeals upheld Manning's decision, rejecting the state's argument that the courts should refrain from devising methods by which it meets its obligations to at-risk children. The panel held that the Leandro I court gave the state plenty of time to establish its own methods, which the state did through the Pre-K program, and that the state could not now backpedal from that program in a way that diminished the rights of any at-risk children.

Round three

The state once took its case to the Supreme Court, this time to justices with some limited involvement in Leandro history. Only Chief Justice Sarah Parker sat through both earlier decisions; Justices Robert Edmunds and Mark Martin joined her for Leandro II.

But it is a court that, like its predecessors in this case, is inclined to defer to the legislative or executive branches for solutions when it suits its needs.

Ironically, that bent may cut against the state's argument here that the lower courts exceeded their authority in ordering pre-K for any eligible at-risk four-year-old who applies because, as the Court of Appeals noted, deference to the other branches of government has already been paid:

> "It cannot be said that the trial court's order requiring the State to allow the unrestricted enrollment of "at-risk" prospective enrollees to pre-kindergarten programs 'effectively undermine[d] the authority and autonomy of the government's other branches,' since both the executive and legislative branches have evidenced their selection and endorsement of this— and only this—remedy to address the State's institutional failings."

And deference only goes so far.

The state had an admitted obligation to at-risk children and developed its pre-K program to satisfy that obligation. But in 2011, the state pulled back and limited access to pre-K in a way that undermined, not furthered, their constitutional rights.

That step simply forced the court's hand – a scenario that, as hypothesized by Justice Orr back in Leandro II, cries out for court intervention:

> "Certainly when the state fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing recalcitrant state actors to implement it."

Argument at the Supreme Court begins Tuesday, October 15, at 9:30 a.m.

ABOUT THE AUTHOR

Sharon McCloskey

Sharon McCloskey, former *Courts, Law and Democracy Reporter* for N.C. Policy Watch, writes about the courts and decisions that impact North Carolina residents. McCloskey also wrote for *Lawyers Weekly* and practiced law for more than 20 years.

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