

# Establishing Universal Access to Prekindergarten as a Constitutional Right



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## INTRODUCTION

Strong evidence of the benefits of high-quality early childhood education for all children, and of the economic returns for the nation, has led to the rapid expansion of publicly funded prekindergarten (pre-K) in recent years and an explosion of interest among the public and policymakers in how best to increase access to high-quality early learning opportunities. Some states, including New York, identify pre-K as an official part of the public education system and use public education dollars to support pre-K for three- and four-year-olds. New York's elected officials have made pre-K an implicit right, promising, first in 1997 and again in 2014, to provide universal access to all four-year-olds. However, there continue to be wide disparities in access to pre-K within New York State, within other states, and among states. Despite the evidence, only a few states make pre-K available to all who want to participate.



Quality early education, with sustained, appropriate investment in the essential elements documented by research to make a difference for children’s development and learning, can be a game-changer for children, families, communities, public school systems, and society at large. Those essential elements include well-trained and appropriately compensated teachers, high standards, and effective and appropriate assessments. The question that has not yet been answered is how best to make that happen. How can Americans, in all our diverse circumstances, ensure that all children have access to the critical benefits of high-quality early education? Our paper seeks to address this question.

We contend that policy commitments alone, without the bedrock of a well-defined *right* to early education, fall short of meeting that goal. High-quality pre-K must be considered integral and essential to upholding the constitutional right to an “adequate,” “thorough and efficient,” or “sound basic education” that courts in New York and many other states have held to be an entitlement of all students. Pre-K must be considered a right in order to fulfill the remarkable promise of the evidence showing that children with access to high-quality early childhood education are more prepared for school, more likely to be reading and achieving on grade level, more likely to graduate from high school, and more likely to go on to college. In the absence of a right to pre-K, without access to quality early childhood education, many children start out behind, stay behind, and never catch up in public school, at great expense to themselves and their families, schools, and communities.

Using New York State as a model, we describe a legal strategy for establishing a right to pre-K services. We argue that a constitutional right to pre-K is necessary to ensure that states adopt mechanisms to guarantee sufficient, equitable, appropriate, and sustainable funding; appropriate policy frameworks for strong quality standards, effective curricula, and consistent professional development; and necessary infrastructure investments such as facilities expansion, workforce preparation, and comprehensive, aligned data systems. All these elements must be in place to guarantee adequate and equitable access to high-quality pre-K programs for all children.

In 2006, James E. Ryan, then a law professor at the University of Virginia and now the dean of Harvard’s Graduate School of Education, wrote an influential law review article stating that the legal claim for interpreting state constitutions to protect a right of access to preschool, at least for children in poverty, “is quite strong.”<sup>1</sup> He contended even then that “the conditions are ripe for a successful and effective litigation in state courts” and that “successful litigation will have a real impact.”<sup>2</sup> Last year, in light of accumulated evidence and expanded interest in pre-K, Ryan revisited the issue, writing that “As more children enroll in publicly funded pre-K programs, it may become harder for states to say that pre-K is not part of their public education systems. At a certain point, suggesting that only some students are entitled to pre-K could be akin to saying that only some students can attend kindergarten—or third grade.”<sup>3</sup>

Much has happened in the past decade nationally, and in New York State in particular, since Ryan first wrote about a right to pre-K services. The research on the benefits of universal pre-K has expanded, and, in recent years, child development specialists, neuroscientists, and educators, have strengthened the virtual consensus of prior researchers that high-quality preschool education can help ensure that children are ready for success in school and in life. Support for public preschool programs among educators, policymakers, and the public has grown and is accelerating. New cost-benefit studies of expenditures on early childhood education add to the case, projecting positive economic returns to society from investments in pre-K that range from, at the least, two to four times the cost of investment<sup>4</sup> to as much as seven to ten times the investment for a high-quality universal pre-K program brought to scale.<sup>5</sup> It is now well documented that all children benefit from high-quality pre-K, with children from low-income families showing the greatest gains.

A universal approach, guaranteeing pre-K to all children, also better affords the opportunity for fulfilling other educational rights. Universal pre-K creates an education program that allows children with disabilities at a critical early stage the opportunity to

thrive in the “least restrictive environment,” which is their right as set forth in law more than two decades ago.<sup>6</sup> Many states, including New York, have promoted pre-K, among other things, as an opportunity to meet the needs of children with disabilities, by creating the opportunity for inclusive classrooms where they can learn with their typically developing peers.<sup>7</sup> Similarly, universal pre-K, guaranteed as a right, would provide necessary supports early on for dual language learners and could help establish opportunities for multilingual education in our increasingly diverse society. Universal pre-K also provides significant opportunity to create diverse learning environments that can help to enhance social skills and awareness, to better prepare children to function productively as civic participants in an increasingly diverse society and global economy.<sup>8</sup>

The continuing expansion of the concept of public education to meet the changing needs of the American people is not a new phenomenon. Public education in the United States began with the establishment of “poor schools” for “needy” children whose families could not send them to private schools or church schools during the colonial and post-revolutionary period. The idea of universal and free public education gained ground in the 19th century with the recognition of the importance of providing “common” public school for all, where children of the rich and the poor could be educated together. Over the past hundred years, as society has become more complex, and the need for more extensive education for all children has been recognized, public education has evolved from providing universal access only to elementary school, to ensuring full access to high school, and, most recently, to providing virtually universal access to kindergarten.<sup>9</sup> Now, it is time for a major initiative to recognize that pre-K is, in fact, a necessary foundation for public education to prepare every child for success in today’s economy and for the rigors of citizenship in the 21st century.

Sharon Lynn Kagan, professor of Early Childhood and Family Policy at Teachers College, Columbia University, has long argued that full equity and quality in pre-K programming can only be achieved when “early childhood education for three- and four-year-

old children [becomes] a right, comparable to public schooling in America.”<sup>10</sup> Early education expert Ruby Takanishi, a senior research fellow at the New America Foundation, has also argued, “Free universal pre-K should be ... an essential part of our education system.”<sup>11</sup>

Yet public funding for early childhood education to date has remained largely outside the public education system, with services and supports targeted to low-income families. Head Start was the first federal preschool program explicitly recognized as an educational effort that aimed to close the achievement gap. Since the advent of Head Start, the nation has added other public funding aimed at enhancing the learning, care, and development of children under the age of five. These funding streams included the Child Care and Development Block Grant, early intervention, special education, home visitation, and other targeted programs that sprang from the same research that now informs the growing interest in public prekindergarten programs.

These are important programs and sources of funding, but, as many researchers have observed, and early-childhood policy scholar Ajay Chaudry has explained recently, “Current offerings across the U.S. for early childhood education of young children are deeply fragmented and inadequate to supporting the learning potential of all children.”<sup>12</sup> This is, in part, because, “[as] many states and local school districts have been expanding their pre-kindergarten educational services over the last 25 years, they have been building on top of an already inchoate set of services.”<sup>13</sup> This lack of systematic provision of preschool services creates major policy challenges to equity and adequacy.

Currently state pre-K services are offered in most states in both public schools and other early childhood programs in the community. This approach to service delivery provides a range of options for families, in terms of hours, settings, and even cultural, ethnic, and language supports and creates the opportunity for linkages between public education and the early childhood community. New York State even has a mandate for pre-K investment in community-based early childhood programs, as a way to leverage and maximize existing capacity, resources, and expertise dedicated to

supporting early childhood development and learning. This model allows the public education system to add new resources to early childhood education rapidly, and it can and has in several states served as an important pathway for improving compensation and support for the early childhood workforce, a key element in providing quality services for children. The integration of pre-K services with Head Start and other early childhood programs in the community also provide a pathway to address the challenges of fragmentation and inadequacy emphasized by Chaudry.

As we detail in this paper, we believe it is time for a broad, rights-based initiative to establish universal access to pre-K for all three- and four-year-olds as a fundamental part of the free public education to which all children are entitled. Such an initiative could build the public will, resources, and continuing research to realize the full potential benefits of universal pre-K to individual children and to society at large.<sup>14</sup>

In Part I of this paper, we describe the case for establishing a right to universal pre-K. We base our case on an examination of the important recent evidence on the educational, social, and economic benefits of pre-K for all children of eligible age, regardless of socioeconomic status or other qualifying characteristic. In addition, we summarize the significant growth in bipartisan public and political support for universal pre-K in all parts of the United States. In Part II, we define the constitutional right to universal pre-K that we seek to establish, as well as the essential elements of the educational opportunities that it would ensure. In Part III, we present a national overview of the current state of the law on access to pre-K services as a constitutional right, based on an analysis of constitutions and legal decisions in all 50 states, and reviews of state laws and

policy documents. Then, building on these precedents, we set forth a legal strategy for establishing universal access to pre-K as a constitutional right.

We focus on New York as an example of a state that is particularly ripe for advancing such an initiative. The right to preschool in New York State should encompass free, universal access to high-quality full-day pre-K for three- and four-year-olds provided in diverse settings, including public schools as well as early childhood programs in the community, with appropriate standards and equitable funding to all settings to support a quality learning opportunity. In *Campaign for Fiscal Equity v. State of New York*, the Court of Appeals, the state's highest court, defined the right to the "opportunity for a sound basic education" in strong terms, emphasizing that all students are entitled to a "meaningful" educational opportunity.<sup>15</sup> The trial court judge in that case indicated that pre-K might be considered part of the "expanded platform of programs to help at risk students" that are integral to the opportunity for a sound basic education. A future case that marshaled extensive evidence on the importance of pre-K for all might well convince New York judges to declare unequivocally that access to education must begin with preschool if the state is to provide a "meaningful" opportunity for all students to be ready for kindergarten, progress at grade level, and graduate from high school, prepared "to function productively as civic participants."<sup>16</sup> Although developing, initiating, and litigating such a case could take many years, experience with major institutional reform litigations has shown that preparation and filing of such a case can generate substantial attention and move an issue to the top of the political agenda, substantially aiding advocacy efforts long before the case is actually tried and decided.



## **PART I. THE CASE FOR ESTABLISHING A RIGHT TO UNIVERSAL PRE-K**

“[B]eginning universal educational services at age 5 or 6 seems arbitrary,” NIEER researchers Barnett, Brown, and Shore wrote in 2004, “[g]iven evidence that the foundation for literacy and other achievements is laid down in the early years, before children enter school....The American public has long supported the right to a free public education. The question is: when should that right begin?”<sup>17</sup> Experts on children’s academic and social development, early education, and elementary education alike increasingly recognize the critical importance of building a coherent, aligned “P-12” public school system by formally integrating pre-K into public education.<sup>18</sup> In the sections that follow, we describe the wealth of new research and political developments that support the position that pre-K must be accessible to all children at age three as a core part of their right to a free public education.



## **A. Strong Research Base Demonstrates That High-Quality Preschool Benefits All Children and Can Be Successfully Mounted on a Large Scale**

Substantive research on the effects of early childhood education started in the 1960s with the launch of Head Start and subsequent public programs for “disadvantaged” or “at-risk” children. Three landmark studies of public preschool program models that began in the 1970s and 1980s, the Perry Preschool, Chicago Child-Parent Center Early Education Program, and the Abecedarian Project, are still among the most widely cited evidence that high-quality public preschool has substantial life-long benefits and decreases inequality in educational, economic, and social outcomes.<sup>19</sup> These studies tracked the participating children, who were all from low-income families, into adulthood in order to measure the impact of the preschool experience. This extensive longitudinal research provides strong evidence of large and continuing positive effects for the participants, including decreased need for remedial services or grade retention, higher high school graduation rates, an increase in college enrollment, and greater lifetime earnings.<sup>20</sup>

Advances in neuroscience and brain-imaging technology in the 1990s provided a brand-new type of support for early childhood education, offering a window on brain development in the early years and showing why the effects of early childhood education are so striking and long-lasting. Researchers were able to observe the breakneck speed of neural development in the early years and to document that, by age three, 80% of the brain’s capacity is in place, setting the stage for lifelong emotional, social, intellectual, and physical growth.<sup>21</sup> Learning and brain development continue throughout people’s lives; however, brain functioning and skills developed during the critical period of early childhood can “make later learning more efficient.”<sup>22</sup>

These dramatic findings on early childhood development, and their implications for the potential of early childhood education to improve academic outcomes for children, garnered significant public and policymaker attention, spurring additional public investments in

early childhood programs, especially Head Start, in the 1990s. They also led to additional scientific interest and philanthropic investment. Research expanded at major universities, research centers, and public agencies.<sup>23</sup> As a result, the body of literature on the effects of early childhood education has grown steadily. Over the past decade, evidence of benefits of preschool has been vastly strengthened. There is now a virtual consensus on the importance of high-quality early childhood education to ensuring all children are ready for success in school and beyond.<sup>24</sup>

The research has also grown more refined in examining the key elements of early childhood education that make a difference for children’s development and learning, and also examines both large scale universal programs and smaller, targeted efforts. Studies document that children in high-quality preschool programs experience greater developmental and academic gains, and that these gains are more likely to be sustained beyond preschool.<sup>25</sup> A growing number of studies also illuminate the characteristics of preschool programs that produce greater gains. High-quality programs require *both* “structural features of quality,” like smaller class sizes and appropriately compensated teachers with certification in early childhood education, and “process quality features,” that is, rich and positive classroom interactions to scaffold children’s learning, expand their skills, and support their emotional well-being.<sup>26</sup> With the advent of more universal pre-K programs at the state and local level, researchers have also had new opportunities to examine large scale programs and document that high-quality preschool programs can produce positive effects on school readiness for all children, while the largest benefits accrue to children deemed “at risk.”<sup>27</sup>

Recent studies also provide evidence that effective programs can be successfully mounted on a large scale. At the same time, the research also shows that results vary among large-scale programs, underscoring the need for both investment to support all the essential elements of quality pre-K and the need for on-going evaluations of large-scale initiatives. Public pre-K programs in Boston and Tulsa demonstrate “substantial positive effects

on multiple domains of children’s development.”<sup>28</sup> Statewide samples from Arkansas, California, Michigan, New Jersey, New Mexico, Oklahoma, South Carolina, and West Virginia also show results sufficiently strong to conclude that “large scale public pre-K programs can meaningfully affect children’s learning.”<sup>29</sup>

## **B. New Research Base Suggests Advantages of Universal Pre-K Over Targeted Programs**

Historically, public pre-K programs in the United States were established as enrichment programs for children from low-income households and other children thought to be particularly at risk of facing challenges likely to hamper academic achievement. Thus the early landmark studies noted above and most others focused on gains made by economically disadvantaged children who generally have been less successful in school than their more affluent peers. Such targeted approaches limited to providing public preschool to children deemed “at risk” have predominated in the United States for over 50 years.<sup>30</sup> New York is a case in point, launching its first state pre-K program, Experimental Prekindergarten, in 1966, targeted to low-income three- and four-year-olds, soon after the federal Head Start program began. New York launched its first version of universal, rather than targeted, prekindergarten three decades later, in 1997, as a part-day program. Notably, it was adopted as a key education reform, based on the growing research evidence and excitement about public pre-K.

New York was the second state, after Georgia, to move to a universal, program. The case for universal access to pre-K for all children of eligible age, regardless of socioeconomic status or other qualifying characteristics, has been building since the 1990s. That growth has been spurred in part by public campaigns, such as the Pew Charitable Trusts’ decade-long and highly effective effort to promote pre-K for all children.<sup>31</sup> The launch and expansion of universal pre-K programs in the last decade has permitted more extensive and more effective research and evaluation of these efforts to be undertaken. These studies indicate that high-quality universal pre-K provides significant benefits to children

from all socioeconomic groups, while still providing the greatest benefits to children from low-income families and reducing inequality in achievement.<sup>32</sup>

### **1. Improved Access and Greater Academic Benefits for “Targeted” Children**

Universal programs, when established and implemented effectively, offer a richer and more valuable educational experience for more children.<sup>33</sup> Diverse, inclusive early childhood learning environments benefit children from all economic, ethnic, racial backgrounds, as well as children with disabilities and dual language learners.<sup>34</sup> The “peer effect” of diverse classrooms enhances learning, supports diverse learning styles, and may help build important civic skills.<sup>35</sup> Universal pre-K programs also facilitate schools’ ability to meet the legal mandate for serving children with disabilities in the least restrictive environment.

High-quality universal pre-K could reduce the racial achievement gap at kindergarten entry as much as 45% in math for African American children and 78% for Hispanic children, while essentially closing the entire gap in reading for both groups, according to a recent analysis.<sup>36</sup> Achievement gaps between low-income and higher-income children would also narrow: the math gap by 27% and the reading gap by 41%. The study concludes that a “high-quality universal pre-K program is a critical first step toward creating equity in access to early education and ensuring that all children begin kindergarten with an equal opportunity to succeed.”<sup>37</sup>

There is emerging evidence that universal programs are also more likely to boost achievement in the early elementary grades, and that universal pre-K may provide a “double bounce” of improvement through the “spillover” effect of having more pre-K alumni in the kindergarten and the elementary grades.<sup>38</sup> A recent study using data from 36 states found that children from low-income families benefited more from pre-K in states with universal programs than in states with targeted pre-K. These outcomes were attributed to better-educated teachers, lower teacher/student ratios, direct contact with peers from higher SES families, and/or classroom teachers with higher pedagogical expectations as a result of having a larger percentage of

students who had already participated in pre-K.”<sup>39</sup>

Another major benefit of universal programs is that they appear to reach even more at-risk children than targeted efforts. Universal programs appeal to low-income parents who may be unwilling to enroll their children in a program targeted only to children from families living in poverty.<sup>40</sup> Rightly or wrongly, the perception that a program has been created only for poor children stigmatizes the service and impedes efforts to build enrollment. Broad political and public support for targeted efforts may also be limited when the benefits accrue only to children from low-income communities. For example, the targeted program New York State initiated in 1966 peaked at just 19,000 children, whereas, as of 2016, New York’s universal program annually serves nearly 120,000 children in part-day and full-day programs.<sup>41</sup>

Restricting publicly funded pre-K access to children from low-income households also results in racial and economic segregation and runs counter to the notion of common schools that informs our nation’s definition of public education and the state’s guarantee of public education to all children as a constitutional right. Children in poverty and children of color in preschool programs in high-poverty communities are often less likely to have stable, quality instruction because public investments and the learning environment are not as robustly supported.<sup>42</sup> Segregation in the preschool years is particularly harmful because of the developmental stage of these children; they are at a prime age for developing social awareness and social skills. Universal pre-K can provide diverse learning environments with opportunities to experience positive interchanges and develop bonds with a broad and diverse peer group at an early age.<sup>43</sup>

## **2. Improved Access and Greater Academic Benefits for Children from Middle-Income Families**

As policymakers are learning, and most parents already recognize, it is not just children from low-income families who need the benefits from preschool education. While, on average, children from low-income families are most likely to be at risk of struggling academically, “at-risk” children can be found at all socioeconomic levels.

As Barnett and Frede point out, because 80% of all students come from middle and higher income families, many more American students who are struggling academically are *not* poor, and “most very low scoring children are not poor.... Likewise, most children who repeat a grade or drop out of school are not poor.”<sup>44</sup>

The growing opportunity and achievement gaps between the highest income families and the rest of the population indicate the need for public pre-K extends far beyond the usual categories of “at-risk” children currently emphasized in education policy generally and for pre-K in particular. In recent years, the academic achievement gap between children from middle-income families and those from high-income families has grown as large as the more highly publicized gap between children from low-income and middle-income families.<sup>45</sup> Middle-income families are increasingly unable to afford high-quality private preschool programs as the cost of early childhood education escalates and in many areas now rivals the cost of tuition at public colleges. The costs of early education come at a time in family life when parents are still early stages of work and career, and not earning high salaries.<sup>46</sup> In fact, families with median incomes are the least likely to have access to preschool of any kind, as they earn too much to qualify for targeted programs, and too little for private programs—a phenomenon described as the “pre-K pinch” by some experts.<sup>47</sup>

Recent data from studies of large-scale public preschool programs also show that children from middle-income families demonstrated statistically significant academic and developmental gains from participation in quality universal pre-K programs.<sup>48</sup> Studies of universal preschool programs in Europe confirm that children from all socioeconomic backgrounds benefit from high quality preschool education.<sup>49</sup>

## **3. Universal Programs Garner More Public Support and Promote Civic Preparation**

Universal programs tend to engender more public and political support than targeted programs, a factor that is key to ensuring the social capital and political will necessary to sustain equity of access and quality.<sup>50</sup> Barnett, Brown, and Shore write that although universal

programs cost more overall because they cover more children, they also hold potential to yield benefits that more than pay for the investment and just as importantly they “receive greater public support because of the larger, more influential population benefiting from the program. In addition, a universal program will be perceived as more fair and more in keeping with Americans’ views that government has a responsibility to support education for all children.”<sup>51</sup>

Universal pre-K programs also have the advantage of creating the opportunity to bring more diverse groups of children and adults together in integrated and inclusive settings, with important benefits for society at large. As noted above, the interactions in these early years set a foundation for building the knowledge, skills, experiences, and values that Americans need to succeed in this country’s increasingly diverse schooling environments and for capable citizenship in an increasingly diverse society.<sup>52</sup>

This last benefit merits additional emphasis. Preparing students for civic participation is one of the primary purposes of U.S. public education historically. It is an explicit part of the constitutional definition of the right to a sound basic education articulated by the New York Court of Appeals in *CFE v. State of New York*, and the highest state courts in at least 31 other states have similarly emphasized that preparation for capable citizenship is a primary purpose of public education.<sup>53</sup> Universal pre-K programs contribute importantly to fulfilling the civic purposes of education and are consistent with the democratic underpinnings of public education as a whole and the philosophy that common schools would educate “children of the rich and poor together.”<sup>54</sup> This aspect of the right to education and contribution to the vitality of our democracy is more important than ever as our nation grows more diverse, more socioeconomically divided, and more politically polarized.

Children with access to high quality early childhood settings get a head start on civic preparation. As Astuto and Ruck write,

Early childhood settings, such as classrooms, are the first representation of greater society

for young children. Not only does this context function to introduce young children to democratic processes and values, but it also may be the most fundamental context in developing the necessary competencies and skills for future civic development in the polity.<sup>55</sup>

High-quality early education can help to develop the self-regulation, memory, cognitive, and prosocial skills that are considered foundational to preparation for civic engagement.<sup>56</sup>

### **C. Economic Returns from Universal Pre-K Could Be Significant for the Nation**

In longitudinal studies spanning 40 years and new studies covering the past 15 years, economists have calculated substantial short-, medium-, and long-term returns on public investment in high quality early education for children, families, communities, school systems, taxpayers, and society at large. Only a few states and cities have brought such efforts to scale, but the results are promising and show returns ranging from two dollars to four dollars for every dollar invested.<sup>57</sup> Children who receive high quality early childhood programs are less likely to need remedial services, special education, and grade retention, resulting in savings to the public school system.<sup>58</sup> Such children are also likely to have greater school success, higher enrollment rates in college, and higher lifetime earnings as adults.<sup>59</sup> Furthermore, they tend to have better health, and are also less likely to drop out of school, commit crimes, or incur other costs related to the criminal justice system.<sup>60</sup>

Recently RAND senior economist Lynn A. Karoly examined cost and benefits of a wide array of large-scale pre-K programs, both targeted and universal. Karoly estimates that large-scale, moderate- to high-quality programs produce benefits that are in the range of 2-to-1 to 4-to-1 returns.<sup>61</sup> The economic returns vary across states and districts, and are the lowest for low-quality pre-K programs, which are “less likely to generate favorable impacts on shorter- and longer-term outcomes, and therefore less likely to generate positive



net benefits to the public sector or to society, than those of higher quality.”<sup>62</sup>

In the long term, investment in universal pre-K would likely substantially lower costs for K-12 education. Many of the costly services now necessary to provide extra time on task, extra supports, and wraparound services for students who are struggling socially and academically could be reduced or eliminated if these students were to receive a high-quality pre-K education.<sup>63</sup> Moreover, quality early childhood programs, especially free public pre-K, can also attract families to communities, boost real estate returns, make it easier for parents to work and support their families. As a sector of the economy that employs teachers and other support staff, pre-K programs also generate local economic activity, generating an immediate \$1.40 for every \$1 invested.<sup>64</sup>

#### **D. Political Support for Universal Pre-K Is Growing**

Over the past decade and a half, a growing number of policymakers have acknowledged the crucial importance of quality early education and are increasingly engaged in promoting what parents and educators have long known, namely that early education improves children’s futures and is a fundamental part of a quality education. At the federal level, President Obama frequently invoked the value of early childhood education. In his 2013 State of the Union address, he announced an ambitious preschool-for-all proposal.<sup>65</sup> While President Obama’s efforts to convince Congress to establish a major new universal pre-K program did not succeed, early childhood education gained ground on the federal agenda, and the U.S. Department of Education did win support for new federal funding to expand state preschool services, as well as increased investment in systems and infrastructure to support quality early learning through federal preschool development grants and Early Learning Challenge grants.<sup>66</sup> In 2014, the Equity and Excellence Commission, a federal advisory commission chartered by Congress to advise the Secretary of Education on the disparities in meaningful educational opportunities, concluded that access to

high-quality early childhood education “must be a matter of the highest national priority, with a special priority for children in our poorest communities.”<sup>67</sup> In the 2016 presidential campaign, early childhood care and education received attention from both candidates.<sup>68</sup>

At the state level, the bipartisan National Governors Association has made early childhood education a top priority and has served as a resource to governors on policy and implementation strategies for over a decade.<sup>69</sup> Pre-K is an increasingly important issue in gubernatorial elections in both red and blue states.<sup>70</sup> According to the National Women’s Law Center, in 2016, 23 governors (12 Democrats and 11 Republicans) mentioned early childhood education in their State of the State addresses.<sup>71</sup> Current pre-K boosters range from Washington governor Jay Inslee, a Democrat, who recently told an audience of other governors, “Research shows that early childhood education programs have significant and lifelong benefits, including higher high school graduation rates. When children have access to these programs, they develop the cognitive, physical and social competencies that serve as a foundation of success in kindergarten and beyond” to Governor Rick Snyder of Michigan, a Republican, who declared to state business leaders that he was “really proud” of the multi-year expansion of preschool in his state.<sup>72</sup>

State education officials, national teacher organizations, higher education, and other key public education stakeholders and professional groups representing educators, principals, superintendents, have also issued policy statements recognizing the value of early childhood education and the need to establish it as a foundational tier of public education. The Council of Chief State School Officers shifted its support from preschool for at-risk three- and four-year-olds to universal early learning programs in 1999. Its 2016 statement on early childhood education calls for increased “investment to provide quality, voluntary early childhood education for all children” and “commitment to prioritize learning in the early years—birth through third grade—as an essential mechanism for tackling inequity and underachievement.”<sup>73</sup> Dozens of prominent education researchers and early childhood

experts signed an early childhood education consensus letter published in June 2016 that asserted the value of preschool and called for more government funding and support of quality early childhood programs.<sup>74</sup>

### **E. Universal Pre-K Is Official Policy of Growing Number of States and Major U.S. Cities**

In recent years, a growing number of states have declared universal pre-K their official state policy, setting the stage for making pre-K a core and essential educational service. In total, ten states and the District of Columbia have explicitly committed to provide pre-K to all four-year-olds regardless of socioeconomic status or other qualifying characteristic. A referendum in Florida adopted in 2002 added explicit language to the state constitution that requires the state to provide high quality pre-K to all four year olds.<sup>75</sup> Two other states, Georgia<sup>76</sup> and Oklahoma,<sup>77</sup> as well as the District of Columbia,<sup>77</sup> have made universal pre-K their official policy and are also currently close to providing access to pre-K programs to all of their four-year-olds. Connecticut,<sup>79</sup> Illinois,<sup>80</sup> Iowa,<sup>81</sup> Massachusetts,<sup>82</sup> New York,<sup>83</sup> Vermont,<sup>84</sup> and West Virginia,<sup>85</sup> have made universal pre-K their stated policy and are scaling up, though not all are progressing at the same pace. West Virginia is now serving 66% of its four-year-olds.<sup>86</sup> New York, though committed to universal pre-K since 1997, is serving only 63% (if you include both part- and full-day programs) of its four-year-olds statewide as of 2016.<sup>87</sup>

Other states have hybrid policies that are moving beyond programs targeted solely to “at risk” or other special populations. California is steadily expanding pre-K access through a unique approach that offers two years of access to its pre-K (“transitional kindergarten”) program for four-year-olds having their birthdays at certain times of the year. The program has been steadily implemented on a gradual basis over the past three years, first in 2012-13 for children turning five in November, then in 2013-14 for those turning five in October, and this year for all those turning five after September 1.<sup>88</sup> New Jersey provides universal access to high quality preschool for all three- and four-year-

old children regardless of socioeconomic status in the 31 high-need urban school districts that were part of a court-ordered remedy in the *Abbott* case.<sup>89</sup> The state of Michigan has expanded its high-quality Great Start Readiness Program for four-year-olds and changed its eligibility guidelines to include children with family incomes at 300% of poverty in order to provide access to pre-K to more children at risk of being underprepared for kindergarten.<sup>90</sup>

The scope and number of municipal programs in major U.S. cities demonstrates the growing acceptance of pre-K as part of the public education system. A 2017 analysis from CityHealth, an initiative of the de Beaumont Foundation, compares the 40 largest U.S. cities on how well they implement nine key policies that evidence shows improve the lives of communities. Providing universal preschool is one of the nine indicators. CityHealth awarded their highest ranking for access to universal preschool to eight cities: Boston, New York, Baltimore, Charlotte, Nashville, Memphis, Oklahoma City, and Washington, D.C.<sup>91</sup>

Washington, D.C., has a long pioneering history in early childhood education. It was a pilot site for the Head Start program in 1964. In 1972, it became one of the first jurisdictions in the country to offer pre-K for four-year-olds in a public school setting.<sup>92</sup> In 2008, the District adopted a statute that provided for universal pre-K,<sup>93</sup> and it now serves virtually all four-year-olds and 70% of its three-year-olds, providing pre-K in public schools, charter schools, and community-based programs.<sup>94</sup> The program met nine out of ten NIEER quality benchmarks.<sup>95</sup> In 2015, the District spending per child enrolled was \$16,431.<sup>96</sup> “As such, the provision of prekindergarten services to 4-year-olds in the District can be said to be universal, and the District of Columbia has the highest percentages of 3- and 4-year-olds enrolled of all U.S. states and Territories.”<sup>97</sup>

New York City’s recent rapid, successful rollout of its universal full-day “Pre-K for All” program has added additional momentum to the adoption of universal pre-K. Prior to the launch of the new initiative early in 2014, the city enrolled fewer than 20,000 four-year-olds in full-day pre-K.<sup>98</sup> By that September, enrollment



increased to 53,000.<sup>99</sup> In 2015, enrollment in Pre-K for All grew to over 68,000, with significant additional capacity added in community-based early childhood programs. At the beginning of the 2016-17 school year, over 70,400 four-year-olds were enrolled in the city's pre-K program.<sup>100</sup> The rapid, massive scaling up drew significant attention around the country, with New York City's effort being characterized as "an extension of the K-12 school system into an additional year of free, academically rigorous public education and childcare," by the *Atlantic*, which now covers pre-K on a regular basis.<sup>101</sup> The article emphasized the growing acceptance of pre-K as a public good that could and should be "available to every New York 4-year-old, whether their parents are living in a homeless shelter or working at a hedge fund."<sup>102</sup>

## F. Rights-Based Approach Best Protects Progress and Gains

In spite of all of this important growth, the last decade has not seen steady progress toward the establishment of pre-K for all children. Despite increasing political and public support for universal pre-K, the impact of the 2008 recession and fiscal constraints since that time have impeded the expansion of access to pre-K services. Enrollment in state pre-K programs nationwide grew rapidly from the 1990s through the recession of 2008, when expansion then slowed or even halted in most places.<sup>103</sup> Across all public programs, between 2010 and 2015, there was only a 1% increase in the total percentage of four-year-olds served.<sup>104</sup> Though the last couple of years have seen some further expansion, according to the most recent NIEER preschool yearbook, "Over the last decade, enrollment across all state programs at age 4 has risen by only 5 percentage points and enrollment at age 3 by 1.5 percentage points."<sup>105</sup>

There are great regional variations in both the size and nature of the investment in pre-K.<sup>106</sup> The amount invested per child also ranges widely, from state to state, and also within states, as some cities decide to forge ahead even if state policymakers are not yet on board. In 2015-16, per-child spending ranged from more than \$9,000 in Rhode Island to less than \$2,000 in Mississippi. The District of Columbia spends more than \$16,000 per child for its universal pre-K program for three- and four-year-olds.<sup>107</sup> Within many states, per-capita funding on pre-K programs varies significantly in different locales and within different school districts because of differences in local tax wealth, the impact of court orders and other factors. Per-child spending also fluctuates from year to year within any given state.

Many states do not yet fund their pre-K programs adequately to provide the level of quality or the number of hours that research shows are necessary to produce benefits. The 2015 *NIEER State Preschool Yearbook* identifies California, Texas, and Florida—the states that serve the largest number of children and have the highest number of children growing up in poverty—as having among the lowest quality standards in the nation.<sup>108</sup>

In 2014, in New York, the governor, the legislature, and the Board of Regents announced their commitment to expand the long-standing half-day universal pre-K program and to guarantee full funding for full-day pre-K for all four-year-olds throughout the state within five years. They made a public commitment to back the promise with an investment of \$1.5 billion to meet the goal within five years.<sup>109</sup> The impetus for this investment stemmed largely from advocacy for Mayor de Blasio's Pre-K for All Initiative, and state policymakers initially awarded \$340 million as a down payment on that goal, with \$300 million earmarked for New York City in the enacted 2014 budget. Since 2014, the state has continued to allocate \$300 million in full day universal pre-K funds to New York City and \$40 million to districts in the rest of the state. Starting in 2015, the state has also added three-year-olds to the state program and included an additional investment of \$57 million through new competitive grants, awarded to high-need districts as they put forward a plan. New York State also secured a \$25 million federal Preschool Development grant to fund services for four-year-olds. These additional investments bring the total state investment in part-day

and full-day pre-K to more than \$822 million. Yet the pace of investment in full-day pre-K for four-year-olds slowed considerably after 2014, creating a significant imbalance in funding between New York City and the rest of the state. Nearly all of New York State's recent gains in pre-K enrollment have occurred in New York City, where more than 70,000 four-year-olds are enrolled. In the rest of the state, there are less than 20,000 full-day seats, leaving nearly 90,000 four-year-olds outside New York City without full-day pre-K.<sup>110</sup>

States' and cities' policy commitments to provide pre-K for all children are an important sign of political and public recognition of its importance, but the wide variation in the actual implementation of universal pre-K policies indicates that, as in New York, a policy commitment alone is not sufficient to ensure that universal access to quality pre-K is fully implemented or sustained. To guarantee access for all, quality pre-K must be considered an integral part of the school system and a necessary component of the constitutional right to an "adequate," "thorough and efficient" or "sound basic education" that courts in New York and many other states have held to be an entitlement of all students.





## **PART II. DEFINING THE RIGHT TO UNIVERSAL PRE-K**

In the United States, as Michael Rebell has written at length elsewhere, “major social reform generally is accomplished through the establishment and enforcement of legal rights. Americans ‘speak of what is most important to us in terms of rights’.... A ‘right’ is an individual claim that is entitled to preference above other societal goals. If a political position is perceived as a “right,” those asserting it have a potent position for laying claim to societal resources and efforts to support their ends.”<sup>111</sup> As political scientist Jeffrey Henig has put it, “The rights claim can provide leverage as a tool for reframing policy debate and mobilizing public support....”<sup>112</sup> Establishing universal pre-K as a right will enhance public recognition of the importance of pre-K, move its funding and implementation to the top of the political agenda, and enable enforcement of effective implementation by the courts.

New York has established an implicit right to pre-K for all four-year-olds and is moving toward access to all three-year-olds with New York City's new 3K for All commitment. Yet, experience in New York and elsewhere demonstrates that to ensure that the right to pre-K is fully and fairly implemented, and equally accessible to all children, this right must be made explicit. The state must spell out in law the early childhood educational experiences to which children in the state are entitled and the policies and practices that are necessary to ensure stable and sustained resources, and the methods that will be used to enforce that right for all children.

We define the right to preschool as free universal access to high-quality full-day pre-K programs for three- and four-year-olds provided using a mixed delivery system funded and administered through the state's education system. Specifically, children's right to pre-K for a meaningful educational opportunity should entail the following: (1) free appropriate universal access; (2) voluntary enrollment; (3) inclusion of three- and four-year-olds; (4) high-quality programs; (5) a mixed system for service delivery; (6) and integration of funding into the K-12 school finance system. In defining this right, we build on the foundations established by existing state and local pre-K policies and court rulings. Our goal is to extend and guarantee the policies and practices that have been developed to provide access to high-quality pre-K to some children in some places and to ensure access for all children.

### **A. Free Universal Access to Full-Day Pre-K Programs**

*All children, regardless of race, religion, socioeconomic status, or other qualifying characteristic, must have access to a full-day pre-K program.<sup>113</sup> Children's right to preschool must be provided through a universal pre-K program that provides unrestricted access to publicly funded preschool in all school districts without any cost to families.*

Children from all socioeconomic levels receive academic and developmental benefits from preschool, and children at risk of struggling academically, including, but not

limited to, children in poverty, children with disabilities, and dual language learners, especially benefit. A universal approach guarantees that no children are denied access to invaluable preschool services, and that *each* child will have access to the appropriate learning environment and resources, as with other public education opportunities.

To reap the benefits of pre-K, services must be provided on a full school-day basis. Children who attend full-day pre-K are better prepared both academically and behaviorally than those who attend half-day programs.<sup>114</sup> Many states, like New York, that have funded half-day pre-K services in the past are now gearing up to provide services for a full day. As the New Jersey Supreme Court put it, half-day programs provide a suitable "initial reform,"<sup>115</sup> but the full long-term benefits of early education can only be achieved by providing universal access to full-day services.

Universal programs provide a sound basic level of early childhood education to all children, and they must also provide appropriate resources, supports, and services to children with special needs, including dual language learners and students with disabilities. This guarantees that *all* children, whatever their needs, have access to appropriate programs and services, in contrast to targeted programs that require evidence of eligibility and risk excluding children with disabilities, language needs, or other qualifying characteristics who have not yet been identified or formally classified. (Targeted programs also often exclude children who move out of a qualifying category when family incomes change and children whose families fail to fill out eligibility forms or are reluctant to do so for reasons of stigma or fear of revealing their status to public officials.) Universal programs also afford all children regardless of income level, race, cultures, disability, or dual language status, the right to be educated in the inclusive environments that are the hallmark of public education and support the ideals of a democratic nation.

### **B. Voluntary Enrollment**

*While every school district must guarantee access to free*

*high-quality full-day pre-K to all children whose parents choose to enroll them, enrollment of children should be voluntary. Districts must affirmatively disseminate and promote information about the availability and advantages of full-day pre-K, but parents should also be free to decide the extent to which these opportunities meet their children's and their family's needs.*

Virtually all present pre-K statutes and plans allow parents to retain the discretion to decide whether to enroll their children in preschool programs because many parents of young children may have other needs, desires, and options. Nevertheless, the vast majority of parents tend to choose to enroll their children either in publicly available or private preschool programs. With guaranteed universal access to pre-K and experience with high-quality publicly funded programs, public and political attitudes and cultural mores may evolve, as they have in regard to kindergarten. Today, close to 90% of the nation's five-year-olds attend kindergarten, more than 80% of them in full-day programs.<sup>116</sup> Kindergarten attendance is compulsory in 15 states plus District of Columbia. In New York State, 98% of the state's five-year-olds are enrolled in public kindergarten, and all but six of its nearly 700 districts offer it for the full school day.<sup>117</sup> New York State now authorizes New York City and the other four large cities in the state to make kindergarten attendance mandatory<sup>118</sup> and the Regents have recommended that compulsory school attendance begin at age 5 (i.e., kindergarten) statewide.<sup>119</sup>

### **C. Inclusion of Three- and Four-Year-Olds**

*Every district must guarantee access to high-quality full-day pre-K for all three-year-olds and all four-year-olds.<sup>120</sup> With voluntary enrollment, fewer families of three-year-olds take advantage of the option; nevertheless, all those who do should be accommodated.*

Although New York has not yet met its commitment to serve all four-year-olds, strong research findings have documented the importance of two years of quality preschool experience. A study of the Abbott pre-K program in New Jersey, which provides two years of high

quality preschool to all children in priority communities, found much greater benefits for the children who attended from age three.<sup>121</sup> A U.K. study showed that students who attended more than one year of preschool had better academic outcomes years later.<sup>122</sup> Moreover, meta-analyses looking at the impact of two years of preschool find that while all children benefit, it provides a major boost to children from low-income households.<sup>123</sup> New York State added three-year-olds to its pre-K program in 2015, but requires that any district requesting funds to serve three-year-olds have a pre-K program for four-year-olds already in place. New York City and Rochester have achieved universal access for four-year-olds, and both districts are moving to adding three-year-olds. Other districts are choosing to focus on serving a mix of threes and fours. Currently New York State requires that any district have also added relatively small numbers of three-year-olds as funding became available.

### **D. A Mixed System for Service Delivery**

*States should continue to use both public school and community-based programs to provide high-quality pre-K. This approach to service delivery makes the most of existing investments, capacity and expertise in supporting children's learning and healthy development. This strategy also offers families the broadest range of options, including access to extended hours and year-round services for working families and support for linguistic and cultural preferences.*

The use of a mixed system for delivery of pre-K services, engaging both public school and early childhood programs in offering pre-K services that meet quality standards and are subject to public oversight maximizes options for families, especially the capacity to satisfy cultural and linguistic preferences and meet the need for access to extended hours and year-round services for today's families.<sup>124</sup> Current pre-K systems are largely based on such arrangements, and several states, including New York, already mandate the inclusion of community-based early childhood programs in their public pre-K system. Mixed delivery systems support and make use of community assets that often are already in place and they alleviate strain on school systems that



often do not have the space, personnel, and expertise to cover the expanded demand that implementation of a universal system generates.<sup>125</sup>

## E. High-Quality Programs

*States and districts must set and monitor quality standards to guarantee access to high-quality pre-K programs for all children regardless of setting.*

Children in high-quality preschool programs see greater developmental and academic gains than children in lower quality programs.<sup>126</sup> To ensure high-quality care and education, states must set quality standards based on the evidence from the latest research and they must monitor programs to assure the provision of sufficient classroom hours, appropriate class sizes, sufficient teacher qualifications and compensation, evidence-based curricula, adequate facilities, reasonable transportation, and so on.<sup>127</sup> Researchers have identified the essential elements of early childhood programs associated with better educational outcomes for children.<sup>128</sup> High-quality programs guarantee both the structural-quality elements and process-quality features necessary for classroom practices that scaffold children's learning, expand their skills, and support their emotional well-being.<sup>129</sup> The state must monitor and report on compliance with these requirements in all publicly funded programs, whether run by school districts or by community-based organizations.<sup>130</sup>

## F. Integration of Pre-K Funding into the K-12 School Finance System

*To ensure it is stable and sustained, pre-K funding should be integrated into the state's K-12 school funding formulas and should flow to school districts as part of their basic state aid, with pre-K allocations protected for pre-K as a special phase of education. Pre-K allocations must be sufficient for quality programs with per-child costs determined through an objective analysis of the cost of providing high-quality full-day pre-K. Additional weights in K-12 funding for "at risk" students, dual language learners, or students*

*with disabilities, should also apply to similarly situated pre-K students.*

Today, state funding for pre-K generally takes one of three forms: grant funding that is subject to annual legislative appropriations and may or may not be earmarked for the public education system; supplements to the federal Head Start programs; and aid offered through a formula awarded via allocations to school districts and tied to the overall public education budget.<sup>131</sup>

A rights-based approach to universal pre-K requires pre-K to be funded through the state education funding formula, similar to funding for students in any other grade. The Pew Center on the States and the National Institute for Early Education Research (NIEER), organizations that have researched this question extensively, strongly recommend a formula-based approach based. The Pew study concludes, "Tying pre-k and K-12 funding together in a single formula more firmly embeds early learning in the larger education system, which generally enjoys strong fiscal, political and public support and is less vulnerable to budget cuts than programs supported by grants."<sup>132</sup> A recent NIEER analysis similarly found that "use of the school funding formula is associated with greater adequacy and stability in funding," and that "use of the school funding formula in pre-K is associated with (a) higher pre-K funding relative to a state's K-12 per pupil funding, and (b) more stability and growth in real spending per pupil over time."<sup>133</sup>

Grant funding, which must be renewed by the legislature each year, is inherently unstable; it is subject to reduction at any time for economic or political reasons. It, therefore, does not provide school districts the financial stability that they need to establish and maintain quality programs over time. Grant funding also does not accommodate annual changes in enrollment and, for this reason, is fundamentally incompatible with a truly universal approach that provides pre-K access to all children. The federal Head Start program, serves broader purposes, operates separately from the public education system, and has strict eligibility requirements. While many districts collaborate with Head Start in their pre-K programs, supplementing the federal Head Start program alone cannot provide an appropriate direction



for building a viable universal prekindergarten program. It represents only one funding stream, is means-tested and would reach only a limited number of children.

About a third of the states that support pre-K programs currently use a formula approach.<sup>134</sup> The specifics of these vary widely, however. For example, New Jersey's Abbott program offers pre-K funding through a school formula, but sets per-child rates, with separate rates for public school and community-based programs and a supplement to Head Start providers, as a way of leveraging all public investments, capacity, and expertise in supporting pre-K learning opportunities. Some of these funding systems have unrestricted eligibility, while others limit eligibility in a variety of ways.<sup>135</sup> Per-child funding differs from state to state, and some state systems cap the total number of pre-K students they will fund, while others do not.<sup>136</sup>

For a truly universal pre-K program, there must be no limit on the number of children who can enroll in the program; school districts should be authorized to include in their weighted student count each student who is attending a pre-K program in the district. Just as there is no cap on the number of fifth grade or high school students who may be included in the formula, there should be no cap on the number of pre-K children included.

To ensure sufficient funding for high-quality programs, the per-student costs for pre-K should not be determined arbitrarily or be based on available funding, as is the case with many states. Instead, per-child pre-K costs should be determined through objective analysis of the costs of the key elements necessary to provide high-quality pre-K and of the necessary investment in preparation, support and compensation for teachers as well as the infrastructure and technical assistance to support continuous quality improvement and comprehensive services to support children's development.<sup>137</sup>

School districts must be authorized to include in their weighted student count each child attending a pre-K program in the district, as they would for any other grade. If the state's education finance system adds

additional weights for "at risk" students, dual language learners or students with disabilities, those additional weights should also apply to similarly situated pre-K students; likewise, if local school districts are expected to supplement state aid with local funding, the expected local share should also be required in regard to pre-K students.<sup>138</sup> In addition, if the state's basic foundation formula does not cover major cost areas like transportation or capital facilities costs, pre-K student counts should also be included in separate formulas or in categorical grants that are provided by the state to cover these items.

In summary, we believe that explicit recognition of pre-K as an essential part of a sound basic education will facilitate universal access to pre-K and the sustainable financing necessary to assure programs of sufficient quality to produce better outcomes for children. Recognizing pre-K as an essential part of the education system also will provide substantial infrastructure resources for high-quality program implementation, such as systems dedicated to the preparation and support of teachers, child screening, and accountability mechanisms. For these reasons, it is also important that pre-K be administered through the state education system rather than through social services or other state departments, in order to ensure quality, continuity, stability, and accountability.

The history of the expansion of public kindergarten and the movement to offer it to all five-year-olds and fund it like any other grade is also informative for considering the mechanisms for financing pre-K. Although kindergarten was not included in the original 19th-century common-school concept, by 1914, every major city in the United States had established a public kindergarten program. The expansion of kindergarten was integrated into public-school systems in order to promote programmatic coordination between kindergarten and first-grade programs. In the 1980s, the popularity of tax-supported kindergarten in the public schools increased substantially. Today kindergarten is considered the point of school entry and its financing is treated like any other grade.<sup>139</sup>



## PART III. A LEGAL STRATEGY FOR ESTABLISHING PRE-K AS A CONSTITUTIONAL RIGHT

### A. Legal Precedents for a Constitutional Right to Pre-K

Over the past 35 years, litigations challenging the constitutionality of state education finance systems have been filed in 45 of the 50 states. The state courts became the sole forum for reviewing inequities in public education financing after the U.S. Supreme Court ruled in *San Antonio Independent School District v. Rodriguez*<sup>104</sup> that education is not a fundamental interest under the federal constitution. Overall, plaintiffs have prevailed in about 60% of these state court litigations.<sup>143</sup>

In recent years, the state court cases challenging state education finance systems have been called “adequacy” cases because they are based on clauses in almost all of the state constitutions that guarantee all students some basic level of adequate education. Though using different terms, these provisions were incorporated into state constitutions either as part of the 18th-century emphasis on the need to prepare new republican citizens or the mid-19th-century common-school movement, the forerunner of our current public school systems. The contemporary courts have, in essence, revived and given major significance to these long-neglected provisions.

The state defendants in many of these cases have argued that the education clauses should be interpreted to guarantee students only a “minimal” level of education. Significantly, however, the state courts that have closely reviewed students’ needs for education in contemporary society, by and large, have required the state school systems

to provide substantially more than a minimum level of knowledge and skills. These courts have tended to insist that the states provide students an education that will equip them to obtain a decent job in our complex, increasingly technological society and to carry out effectively their responsibilities as citizens in a modern democratic polity.

In focusing on the actual knowledge and skills that students need to function productively in the 21st century, some state courts have recognized that students growing up in poverty need a more comprehensive set of services and resources in order to have a *meaningful* educational opportunity. A number of these courts have, therefore, required the state to provide these students in poverty a range of supplemental services, including after-school and summer programs, school-based health and social services—and preschool services. Language in many of these cases has particularly focused on the importance of access to preschool for these students.

### **1. State Court Precedents on Pre-K**

In recent years, courts in nine states have considered the issue of whether students from low-income households have a constitutional right to pre-K services. Courts in two states (North Carolina and South Carolina) have specifically held that children in poverty have a constitutional right to early childhood services. Courts in three states (New Jersey, New York, and Alaska) have held that pre-K services must be provided to such children as a part of the remedy for the state's failure to provide children from low-income households or children in high-poverty school districts an adequate education. Trial courts in three other states (Arkansas, Colorado, and Massachusetts) ordered similar relief, but their decisions were overturned on appeal (in two of the three states for reasons unrelated to the pre-K issue). Finally, and most recently, in Connecticut, the trial court heard extensive evidence regarding the importance of pre-K and recommended that the legislature consider “high-quality preschool” as part of the solution to problems of constitutionally inadequate instruction in the early elementary years that has resulted in many children in high-poverty school districts being unable to read by the third grade.

#### ***a. North Carolina and South Carolina***

In October 2000, Superior Court Judge Howard Manning ruled in North Carolina's school-funding case that many children from low-income families were unprepared for school due to the absence of prekindergarten opportunities and ordered the state to provide pre-K programs for all “at-risk” four-year-olds.<sup>142</sup> When the case reached the North Carolina Supreme Court in 2004, the court agreed with Judge Manning that the state was ultimately responsible “to meet the needs of ‘at-risk’ students in order for such students to avail themselves of their right to the opportunity to obtain a sound basic education,”<sup>143</sup> and that the state must provide services to such children “prior to their enrolling in the public schools.”<sup>144</sup> The court held, however, that “at this juncture” of the case, a specific remedial order for particular preschool services was “premature,” and it deferred to the expertise of the legislative and executive branches in matters of education policy to determine what types of services should be provided to at-risk students to prepare them for school.<sup>145</sup>

Following the court's ruling, the state implemented a prekindergarten program known as More at Four (MAF) and, as of 2010-11, the program was serving approximately 35,000 at-risk four-year-olds statewide through public schools, private preschools, and Head Start settings. Despite the success of this program, in 2011, responding to budget constraints, the legislature substantially limited the number of at-risk children served. When the issue was brought back before the Superior Court, Judge Manning held that the cap on enrollment of “at-risk” children was unconstitutional.<sup>146</sup> He bluntly stated that it was “the duty of the State to protect each and every one of these at-risk and defenseless children, and to provide them their lawful opportunity, through a quality prekindergarten program, to take advantage of their equal opportunity to obtain a sound basic education as guaranteed by the North Carolina constitution.”<sup>147</sup> Accordingly, the judge ordered the state to remove the cap and not to implement “any other artificial rule” to deny any eligible at-risk four-year-old admission to the pre-K program.<sup>148</sup> This decision was upheld by the North Carolina Court of Appeals,<sup>149</sup>

and the North Carolina Supreme Court ruled a year later that the issue was moot, since the legislature had substantially amended the statute to comply with the lower court orders.<sup>150</sup>

In 2005, South Carolina state circuit court Judge Thomas W. Cooper, Jr., held that the South Carolina constitution's education clause imposed an obligation upon the state "to create an educational system that overcomes, to the extent that is educationally possible, the effects of poverty on the very young,"<sup>151</sup> and to provide "pre-kindergarten and kindergarten, to enable them to begin the educational process in a more equal fashion to those born outside of poverty."<sup>152</sup> The court then ordered the state to provide "early childhood intervention at the pre-kindergarten level and continuing through at least grade three" to minimize "the impact and the effect of poverty on the educational abilities and achievements" of children in poverty.<sup>153</sup> The appeal of this decision was substantially delayed, but, in 2014, the South Carolina Supreme Court issued a ruling that upheld the trial court's decision mandating early childhood education for students from low-income households.<sup>154</sup>

#### ***b. New Jersey, New York, and Alaska***

In order to help remedy that state's failure to provide students in 31 high-poverty urban school districts a "thorough and efficient education" as mandated by the state constitution, the New Jersey Supreme Court in its 1998 decision in *Abbott v. Burke* ordered the state to provide high quality preschool services for all three and four-year-olds in those districts.<sup>155</sup> The court stated that it was "convinced that pre-school for three- and four-year olds would have a significant and substantial positive impact on academic achievement in both early and later school years,<sup>156</sup> because (1) such preschool programs helped "close the gap between the home and school environments and the educational expectations that lead to academic success" and (2) empirical evidence strongly supported the essentiality of preschool education for children in impoverished urban school districts.<sup>157</sup>

Two years later, after the state had failed to comply with its representations to the court regarding the new preschool program, the court declared that "the needs

of at-risk children can be met only by quality preschool programs"; it then spelled out a series of quality requirements, including (1) teacher certification; (2) a maximum student/teacher ratio of 15:1; (3) adoption of substantive educational standards to guide educational programming; (4) clear expectations, necessary supports, and accountability measures to be included in the contracts between the districts and licensed daycare providers; (5) adequate funding; and (6) community-outreach efforts to improve enrollment.<sup>158</sup>

In New York's school-funding-adequacy case, the trial court judge, Justice Leland DeGrasse, listed seven basic resource areas that the public schools must provide "[i]n order to ensure that public schools offer a sound basic education."<sup>159</sup> This list included "an expanded platform of programs to help at risk students by giving them 'more time on task.'<sup>160</sup> The judge specifically found that "[i]nitiatives that have been shown to positively affect student performance in New York City include pre-kindergarten programs..."<sup>161</sup> He further found that

While many of BOE's [the Board of Education's] programs for at risk children have shown to produce positive results, only a fraction of New York City's public school children have access to such programs. The State has mandated that Universal Pre-kindergarten be made available to all eligible children by 2004. However, while this initiative has been well-funded compared to other programs in the expanded platform, it has still lagged behind the amount necessary to ensure that New York City meets the deadline.<sup>162</sup>

The court ordered the State of New York to ensure adequate school funding to provide these and the other essential resources necessary to ensure all students the opportunity for a sound basic education.

In Alaska, the trial court in *Moore v. State* also ordered the state education department to ensure the availability



of preschool services for students from low-income households in poorly performing school districts at the remedial stage of the litigation. The court had initially ruled that preschool education was not an integral part of the public education system that the state must routinely provide throughout the state.<sup>163</sup> As a result of a subsequent evidentiary hearing, however, the court later held that the state was not meeting its constitutional responsibilities, and it criticized the state's failure to consider an array of promising, research-backed remedial measures to address the educational needs of students in these districts, including prekindergarten education.<sup>164</sup> The court found that the state's interventions did not address the significant language-development gap known to exist in the intervention districts, despite its well-documented connection to student's achievement, and that the state had categorically declined to consider an early-education component such as prekindergarten in its interventions.<sup>165</sup> The court further pointed out that its earlier ruling that the education clause of the Alaska constitution does not require prekindergarten to be included as an integral part of the system of public education "was not intended to exempt pre-kindergarten from being considered and used as a case-specific measure to remedy a constitutional violation."<sup>166</sup>

### *c. Arkansas, Colorado, and Massachusetts*

Trial courts in Arkansas, Colorado, and Massachusetts have also held that "at risk" children growing up in poverty must be provided preschool education in order to have a "realistic opportunity to acquire the education" guaranteed by the state constitution,<sup>167</sup> to be in a position "to compete with their peers when they enter school,"<sup>168</sup> and to "achieve successfully in school."<sup>169</sup> These holdings were, however, subsequently overruled by their respective state supreme courts. The Colorado and Massachusetts high courts did not deny the value of preschool education, but they held that, under constitutional separation-of-powers precepts, it is up to the legislature to determine whether and how these services should be provided.<sup>170</sup> The Arkansas Supreme Court did specifically hold that pre-K services were not constitutionally required, but it based that ruling on a specific provision in the constitution that stated that whether or not education should be provided

for students under the age of six was a matter to be determined by the legislature.<sup>171</sup>

The analysis of the pre-K issue by the Massachusetts trial judge Margot Botsford (who was subsequently elevated to become a justice of the Massachusetts Supreme Judicial Court) was particularly insightful. Judge Botsford wrote,

Two propositions were proffered at trial that were undisputed and indeed affirmatively supported by every witness who spoke to the issue, whether on behalf of the plaintiffs or defendants. The first is that high quality early childhood education for three and four-year-old children can make a significant, positive difference in terms of improving a child's school performance and ability to learn and benefit from school thereafter. The second is that this point holds particularly true for children who are at risk for school failure, whether because of poverty, learning disabilities, or limited English proficiency.<sup>172</sup>

The court found that because some children from the plaintiff districts started out so far behind, a situation exacerbated by the lack of adequate early childhood education, "if the constitutionally mandated educational program did not begin until they were five or six, such children might well receive little benefit from it."<sup>173</sup>

The Massachusetts Supreme Judicial Court declined to affirm Judge Botsford's mandatory order because of its belief that the state had demonstrated a "level of responsive, sustained, intense legislative commitment to public education." It noted in particular that, among other things, "the Legislature recently determined to place more emphasis on early childhood education."<sup>174</sup> Although it deferred to the legislature on the assumption that the state would continue "to provide a high quality public education to every child,"<sup>175</sup> it also noted that Judge Botsford's findings were "amply supported" and suggested that the legislature "may well choose to rely on these findings."<sup>176</sup>

#### d. Connecticut

In 2016, Superior Court judge Thomas G. Moukawsher held that major components of Connecticut’s K-12 education system were so “irrational” that they were denying students, especially those in low-wealth districts, their constitutional right to an adequate education. Judge Moukawsher considered extensive evidence regarding pre-K presented by experts representing both parties and issued over 15 pages of detailed findings on this issue.<sup>177</sup> Among other things, he determined that

- There are significant differences in kindergarten readiness between children who have attended preschool and those who have not. Children who have attended preschool are more ready to access the kindergarten curriculum and are less in need of additional instruction to catch them up right from the beginning.
- Gaps in academic performance between groups of students based on income and race—known as achievement gaps—are strongly associated with gaps in early learning experiences and early preparation.
- These achievement gaps persist through subsequent elementary and secondary education. Children who begin behind when they reach kindergarten often remain behind their peers as they continue in school, even if they make progress year-over year.
- Children who enter kindergarten without having had a preschool experience often lack basic skills to function in a classroom, basic academic skills, and basic socioemotional skills. This creates a tremendous challenge for kindergarten teachers to meet the needs of these students as well as the needs of their other students, and has a negative impact on the education for all students.
- It is undisputed that high-quality preschool has been shown to have a large effect on closing these achievement gaps, with a large impact on the gaps at kindergarten entry and a continuing impact in later grades.

The judge ordered the state to develop “rational” plans

within 180 days to overcome major problems in six major areas, including elementary education standards. Although he did not specifically order a remedial plan for pre-K,<sup>178</sup> he did state that it is critical for children to learn to read by third grade, and he recommended that the state consider “high-quality preschool”<sup>179</sup> as part of the solution to this problem. At least at this stage of the proceedings, the judge did not believe it appropriate for the court to order a substantive remedial plan, but the findings of fact that were the basis for this decision clearly indicated that students in poverty are not likely to reach acceptable literacy standards in elementary school without adequate pre-K services.<sup>180</sup>

The federal government has also enacted statutory requirements that provide relevant precedents for a right to access pre-K services. The Elementary and Secondary Education Act (ESEA) (now known as the Every Student Succeeds Act [ESSA]) permits states to use Title I ESEA funds to implement school-wide early childhood education programs for schools in which 40% of the students are from low-income families.<sup>181</sup> Title III of ESSA, which provides grants to states to support services for English language learners (ELLs), includes all ELLs from age 3 and up,<sup>182</sup> and explicitly authorizes these federal funds to be used for pre-K programs.<sup>183</sup>

The federal Individuals with Disabilities Act (IDEA) goes further, explicitly stating that “A free appropriate public education [must be made] available to all children with disabilities residing in the State between the ages of 3 and 21.”<sup>184</sup> The law also specifies, however, that the obligation to provide pre-K services to three and four year olds with disabilities does not apply to the extent that doing so “would be inconsistent with State law or practice...respecting the provision of public education to children in those age ranges.”<sup>185</sup>

These provisions clearly require a state that has implemented a universal pre-K program to provide appropriate publicly- funded preschool services to all three- and four-year-olds with disabilities. In practice, the precedential impact of the federal government’s recognition of the importance of pre-K services for students with disabilities has led many states that have not adopted or fully implemented a universal

pre-K program for non-disabled students, like New York, to declare nevertheless that all students with disabilities in the state are entitled to appropriate pre-K services.<sup>186</sup> Arguably, a school district in these states that provides pre-K services to students with disabilities but not to other students would be in violation of the federal requirement that services to students with disabilities must be provided in “the least restrictive environment,”<sup>187</sup> which normally means in an inclusive classroom that includes mostly non-disabled students.

Federal law also requires that “homeless children have access to public preschool programs, administered by the State educational agency or local educational agency, as provided to other children in the State.”<sup>188</sup> New York State law provides that all three- and four-year-old homeless children who reside in a school district that provides preschool services are entitled to attend the preschool program, even if the program is not universally available to other preschool aged children residing in the district.<sup>189</sup>

## B. Building on the Legal Precedents

From this overview of relevant legal precedents, we draw two major conclusions. First, virtually all of the judges, and members of Congress, concerned with the needs of students from low-income families, English language learners, students with disabilities, and homeless students, who have explicitly considered the pre-K issue have understood its importance for ensuring all students a meaningful educational opportunity. Second, all of the cited courts identified an important link between pre-K education and the constitutional right to an adequate education, whether at the liability or remedy stage. In other words, there is significant and increasing judicial and legislative recognition of the relationship between pre-K and meaningful educational opportunity.

What is also striking from the review of the legal cases to date is that, in all of these instances, pre-K has been a side issue in a complex education-adequacy litigation. Although many courts have now recognized a link between pre-K and educational adequacy, none of them has closely examined the evidence regarding

the educational importance of pre-K and developed a thoroughgoing legal doctrine that could serve as a compelling precedent for other courts to follow and for governors and legislators to respect.

The cases thus far have focused on the importance of pre-K for children from low-income households and communities, and federal legislators have also focused on the needs of students with disabilities, ELLs, and homeless children, but a contemporary court that closely and comprehensively focuses on the evidence regarding pre-K may well go beyond the existing precedents and declare that pre-K for *all* children should be considered a constitutional right.

Virtually all state constitutions require the state to provide an “adequate education,” a “sound basic education,” or a “thorough and efficient education,” and the vast majority of these states do not prescribe any limits for defining the age or the developmental level at which such constitutionally required education should commence.<sup>190</sup> Determining the constitutionally appropriate age range for commencing public education, like determining the constitutionally appropriate content of an adequate education, is a matter that “should be measured with reference to the demands of modern society.”<sup>191</sup> In the 21st century, to ensure an adequate education for all students, the public education system should begin with pre-K to ensure that *all* children are prepared to enter kindergarten and first grade.

Today, a state court that directly and carefully weighs these issues is more likely to consider establishing a strong, broad-based right to pre-K for all than would have a court a decade or more ago. As discussed in the earlier sections of this paper, the extensive research evidence demonstrating the value of early education, the substantial increase in the number of pre-K programs, and the fact that many states have declared universal pre-K to be part of their official education policy has dramatically shifted the weight of the evidence in favor of universal pre-K, and has enhanced the likelihood of judicial interventions being effective. As Ryan has suggested, “As more children enroll in publicly funded pre-K programs, it may become harder for states to say

that pre-K is not part of their public education system.”<sup>192</sup> Indeed, many states now include pre-K in their state learning standards, fund it through their educational budgets, and “include preschool programs as part of the education prescribed at ‘the public school level.’”<sup>193</sup>

Judges’ inclination to articulate new understandings of constitutional rights is clearly influenced by major shifts in social and political attitudes, as reflected in statutes and policies adopted by states throughout the country.<sup>194</sup> Whether a declaration of a new right would be embraced by the public or would engender substantial resistance at the implementation stage are also factors that enter into the judicial decision-making process. As Ryan has noted, the rapidly increasing public support for universal pre-K would be a positive factor on this count:

[G]iven the widespread support for expanding access to preschool, there is little risk that a court ruling would create a significant backlash akin to those created by rulings on such socially divisive issues as abortion and gay rights. At the same time, the support of teachers’ unions, the business community and preschool providers would create a powerful, market-based constituency to support and implement a court-created right to preschool.<sup>195</sup>

### **1. New York State as an Appropriate Venue for a Pre-K Case**

New York State would appear to be the best venue for developing and initiating a new adequacy litigation that would focus exclusively on establishing access to universal pre-K as a constitutional right. New York would be the logical locus for such a suit both because of the legal precedent already established by the *CFE* litigation and because of the state’s strong and longstanding policy commitment to, but failure fully to implement, universal pre-K.

#### ***a. Legal Precedent***

As discussed above, New York is one of the nine states in which the state courts have held that access to pre-K services for “at-risk” students is an important factor in their opportunity to receive a “sound basic education.” The state’s highest court has also defined the right to the “opportunity for a sound basic education” in robust terms, emphasizing that all students are entitled to a “meaningful” educational opportunity.<sup>196</sup> A New York case that marshaled extensive evidence on the importance of pre-K for children regardless of socioeconomic status might well convince New York judges that access to education must begin at age three or four if the state is to provide a “meaningful” opportunity for all students to progress successfully through school at grade level, to graduate from high school, and “to function productively as civic participants.”<sup>197</sup> The court’s emphasis on “functioning productively as civic participants” encompassed not only civic responsibilities like voting and serving on a jury, but also being prepared to participate in the civic life of the community. The research has demonstrated that the importance of preparing students from an early age to function productively in an increasingly diverse society by attending preschools that encourage the attendance of students of all races, ethnicities, and income levels would also be consistent with the Court of Appeals’ concept of civic preparation.<sup>198</sup>

Currently, a case pending in the New York State courts, *New Yorkers for Students’ Educational Rights (NYSER) v. State of New York*, includes allegations regarding the state’s failure to implement its universal pre-K program in Syracuse and certain other school districts outside the City of New York. These are two of several dozen claims the *NYSER* plaintiffs have lodged against the state for its failure fully and properly to implement the constitutional requirement to provide all students the opportunity for a sound basic education.<sup>199</sup> These claims and the full case for establishing a clear constitutional right to quality universal pre-K services to all three- and four-year-olds in the state could be presented in a more focused and effective fashion if they were set forth in a new litigation that focused solely on the pre-K issues, presenting the extensive evidence that supports universal pre-K, explaining the state’s long history



of proclaiming a policy of implementing universal pre-K, and documenting the state's failure actually to implement that stated policy.

***b. Favorable Political and Implementation Setting***

As described earlier, New York State has long been committed to universal pre-K. In 1997, the state legislature adopted a Universal Prekindergarten Program (UPK) that promised to provide access to a quality prekindergarten program for all four-year-olds within five years.<sup>200</sup> In 2006, the Board of Regents expanded the state's vision for early childhood education, calling for a full continuum of early learning services and supports, from the prenatal period to third grade, with prekindergarten for three and four-year-olds as a key anchor and strategic next step.<sup>201</sup> However, this original UPK program never reached its anticipated funding and enrollment levels, many districts never participated, and the program's funding has been on half-day programs, which research and family needs have shown to be insufficient.

In 2014, seeking to fulfill an election campaign pledge, New York City Mayor Bill de Blasio sought to provide high-quality, full-day pre-K services to all four-year-olds in New York City. In response, Governor Andrew Cuomo proposed, and the legislature adopted, a new plan using competitive grants to offer full day pre-K to all four-year-olds throughout the state over the next five years. The state committed \$340 million in additional funding for the 2014-15 school year, \$300 million to immediately implement universal pre-K in New York City and \$40 million for competitive grants for all other districts in the state to allow them to begin to implement the new Statewide Universal Full-Day Prekindergarten Program (Full-Day Universal Pre-K). The legislature also committed to provide a total of \$1.5 billion over five years to support the Full Day Universal Pre-K program. Despite these bold pronouncements and commitments, as of 2016, and a number of school districts in the state still did not offer their students access to a pre-K program.<sup>202</sup>

In recent years, the legislature has also adopted a number of small competitive grant-in-aid programs that have provided funding for a limited number of



school districts. Legislation enacted in the spring of 2017 has consolidated state funding for virtually all of the existing full time and part time grant and formula pre-K programs and has guaranteed all currently participating school districts pre-K funding at the prior year's level to the extent that enrollments remain stable.<sup>203</sup> This development can facilitate a further move to merge all state funding into the K-12 foundation aid system and guarantee necessary funding for pre-K to all school districts, as recommended in the previous section of this report.

Furthermore, in April 2017, Mayor de Blasio propelled the momentum for universal pre-K forward even further with an announcement that the city was now committed to establishing a quality universal pre-K program for all three-year-olds, as well as four-year-olds. This program will start in the fall of 2017 by establishing universal pre-K for three-year-olds in two of the city's community school districts and will eventually expand to all districts by 2021.<sup>204</sup>

The commitment of both New York City and New York State to providing a high-quality, full-day universal pre-K program for all four-year-olds has significant legal implications. It has created expectations throughout the state and has proclaimed to parents and educators that, as one New York City official recently put it, "We see pre-K as a central part of the public education system in New York."<sup>205</sup> Since universal pre-K has been substantially achieved at this point in New York City,

families in all other parts of the state should be entitled to access to similar state-funded services universal pre-K services.

Although we are now entering the fourth year of the state's five-year commitment to implement the Full Day Universal Pre-K program, the state has not increased its level of funding sufficiently to districts around the state to expand programs to meet this target. As of 2017, nearly 90,000 four-year-olds outside of New York City still lacked access to full-day pre-K.<sup>206</sup> Furthermore, the state has not undertaken any cost analysis to determine current pre-K rates per child, including the \$300 million per year that it is providing to New York City for full-day universal pre-K is, in fact, sufficient to provide and maintain quality programs for all of its students.<sup>207</sup>

As noted above, in the 2016-17 enacted budget, state officials agreed to consolidate several pre-K funding streams and move toward a single pre-K program by 2021. In May 2017, state education officials issued guidance on the fiscal implications of this budget agreement.<sup>208</sup> Essentially, state policymakers froze existing pre-K funding levels (as long as districts continue to serve the same number of children), without addressing the failure of the current funding streams to truly provide access to universal pre-K to all of the state's children and without considering the appropriateness of the current rates to meet quality standards or adding support for essential infrastructure, such as transportation, professional development, and facilities.

In short, neither the governor nor the legislature has guaranteed sustained funding for universal pre-K, even for New York City. New York State's failure to carry out its commitment to provide access to full-day universal pre-K throughout the state, and its failure to establish any permanent funding mechanisms to ensure that high-quality programs can be established and maintained in New York City and throughout the state, vividly demonstrate why universal pre-K must be a constitutional right, subject to enforcement by the courts to the extent necessary.

A litigation focused on pre-K in the New York State courts could emphasize two major constitutional

arguments for a right to high-quality full-day universal pre-K for all three- and four-year-olds. First, as discussed above, the Court of Appeals in *CFE* has indicated that pre-K may be constitutionally required for at-risk students as part of their right to an "expanded platform of services." Second, the fact that the preschool years are important for promoting integration and inclusion and orienting children toward civic values and civic skills, are factors that are highly relevant to the court's emphasis on the importance of preparing students for civic participation. That in New York State educators, policymakers, parents, and the public at large already consider access to publicly funded pre-K services to be an important aspect of the public education system in the state adds further credibility to the legal arguments for defining the "sound basic education" guaranteed by Article XI §1 of the state constitution to include universal access to pre-K services.

In addition to this adequacy claim, students from many districts around the state who have been denied access to publicly funded pre-K services years after their peers in New York City and other parts of the state have been enjoying such services, would have a strong discrimination claim under the equal protection clause of Article I §11 of the state constitution. As Ryan put it, "A state required to guarantee equal educational opportunities, and which provides preschool to some but not all children, should have to demonstrate either a compelling state interest or a truly rational basis for failing to serve all children."<sup>209</sup>

The constitutional guarantee of equal protection is intended to keep governmental policymakers from treating differently persons who are in all relevant aspects alike. Denying services to some individuals while making them available to numerous others who are similarly situated is violates the constitutional mandate for equal protection of the laws. New York courts have repeatedly invalidated such discriminatory state actions because, even when race or other types of invidious discrimination are not involved, "a state must demonstrate that the classification is neither capricious nor arbitrary but rests upon some reasonable consideration of difference or policy."<sup>210</sup>

For example, the New York Court of Appeals has held that a statute that denied access to the aged, blind, and disabled to welfare benefits that are provided to all other recipients of social security income benefits constitutes a denial of equal protection. It held that

They are the only persons who are denied State aid because of the administrative costs the State would incur in providing it. While the State may have a legitimate interest in reducing the costs of administering the home relief program, it may not accomplish this result by arbitrarily denying one class of persons access to public funds available to all others.<sup>211</sup>

Children living in many parts of New York State who are being deprived of universal access to pre-K services are in all relevant aspects similar to children who live in New York City all of whom have been provided access to pre-K services for the past two years. That the state would have to expend additional funds to provide these

children access to quality programs is not a relevant factor in a constitutional analysis. These children should not be denied the benefits of pre-K, to which the state has acknowledged they are entitled, because of a “factor which has no significant relation...to the reason for granting the benefit.”<sup>212</sup>

In response to such a suit, the state is likely to argue that judicial intervention would constitute an unwarranted interference with the policy prerogatives of the legislature. That defense would be undermined by the history of the state’s repeated endorsement of the universal pre-K policy and its failure to implement fairly and sufficiently the policy that it has endorsed and adopted. In other words, plaintiffs would be in a position to counter this anticipated defense by arguing that judicial action would merely be supporting a right to high-quality, full-day prekindergarten to which the state itself had assured parents in New York City and throughout the state that they were already entitled.<sup>213</sup>





## CONCLUSION

Today, only a handful of states currently exhibit the political will and leadership necessary to support the establishment high quality preschool programs for all of their young children, and even fewer are actually providing them. Moreover, around the country, access to pre-K programs remains vulnerable to political and economic shifts, even in states where the governor and legislature have committed to delivering universal pre-K. Establishing universal pre-K as a state constitutional right is vital to ensuring quality, equity, and adequacy of access to early childhood education in the United States.

Public education was established in this country in order to provide necessary services to economically disadvantaged children whose families could not afford private school tuition. The common school movement identified the benefits for our nation of educating for all children, together, resulting in our universal system. Today, the well-documented value of universal access to early childhood education necessitates making preschool an integral part of the education system for all children beginning at age three. Articulating this new understanding of the right to education as encompassing pre-K is the best way to assure stable, sustained, adequate funding; high standards of program quality; and equal access to high-quality programs. As Ryan writes, “State legislatures and executive officials have already started down the path of providing access to preschool. Court decisions recognizing a right to preschool should move them further along that path.”<sup>214</sup>



## APPENDIX. QUALITY FRAMEWORK

Drawing on research on best practices, review of quality pre-K programs nationwide, and an analysis of New York State constitutional requirements, we recommend the following regulatory framework and infrastructure investment as necessary to build out and support high-quality programs in all settings.<sup>215</sup> These resources and supports are necessary to create the structural and process quality for effective classroom practice that fosters children’s learning and development.<sup>216</sup>

### ESSENTIAL REGULATIONS FOR HIGH-QUALITY PREKINDERGARTEN

To ensure that all children have access to high-quality prekindergarten as part of the opportunity for a sound basic education, the state must strengthen its current prekindergarten regulations to provide the following essential elements in all programs, including those in both public school and non-public school settings. Cost-based state aid for prekindergarten must provide each school district with sufficient funding to ensure that all standards can be met.

#### **Sufficient Classroom Hours**

All districts should provide access for all children to full-day (six hours and 20 minutes) prekindergarten and kindergarten programs, aligned with the public school day, operating five days a week, on a 180-day schedule. Where needed, extended hours should be provided to meet the needs of children and of working families, primarily by leveraging Head Start, child-care, and other available funding sources.

#### **Appropriate Class Sizes**

All pre-K classes for four-year-olds should have no more than 18 students and those serving three-year-olds should have no more than 15 students, with one teacher and one teaching assistant. In addition, all classes with substantial numbers of students needing more intensive support, including dual language learners, and students with disabilities, should be capped at a maximum of 15 students with one teacher and one teaching assistant.

#### **Sufficient, Well-Qualified, Appropriately-Compensated, Highly Effective Teachers, Administrators, and Other Personnel**

##### ***Instructional Staff***

All pre-K teachers in all settings should have a B-2 instructional certificate or certification for teaching students with disabilities or English language learners valid for service the early childhood grades by 2017. The state should ensure sufficient financial support, including scholarships and loan forgiveness, to help uncertified teachers become certified, but there should be no further extension of the deadline for certification for all teachers.

##### ***Teaching Assistants***

Within five years, all teaching assistants should be required to have at least Level 1 teaching assistant certification. New York should move toward requiring a child development associate (CDA) degree or the equivalent for teaching assistants. The requirement should include a minimum of 12 college credits in early childhood, as well as classroom experience.

##### ***Master Teachers, Coaches, and Mentors***

To create and maintain program quality by supporting classroom teachers and administrators, the state should require that school districts provide programs in all settings a sufficient number of certified, experienced, and appropriately compensated master teachers, coaches, and mentors including, as appropriate, bilingual and inclusion

specialists. The maximum ratio should be one full-time master teacher who supports the work in a maximum of 15 pre-K classrooms.

The state should require that these teachers have the following qualifications:

- A master's degree and B–2 certification;
- Three to five years' experience teaching in general education pre-K programs;
- Experience providing professional development to classroom teachers;
- Experience in implementing developmentally appropriate curricula;
- Experience with performance-based assessments; and
- Master teachers with a specialization in bilingual education should possess bilingual or English as a second language certification and either possess or pursue early childhood certification.
- Master teachers with a specialization in inclusion should possess special education certification and either possess or pursue early childhood certification.

### ***Administrative Staff***

The state should revise its regulations to ensure a sufficient number of well-qualified district-level supervisors and administrators, school and center administrators, and administrative support personnel to coordinate a high-quality pre-K program in all settings.

### ***Professional Development***

Professional development and training specific to pre-K education should be required for all early childhood education administrators, school principals, master teachers, classroom teachers, and teaching assistants in all settings. All teaching staff should receive high quality annual professional development. Such development should focus on topics such as the implementation of high-quality curricula, effective use of child observation and assessment, culturally competent classroom practices, recognition of developmental milestones, identification of possible developmental delays, and effective practices for English language learners and children with disabilities. There should be a sufficient number of substitute teachers to allow full participation of classroom teachers with the goal of ensuring that each staff member can receive a minimum of 40 clock hours of professional development each year.

Professional development should be provided through multiple pathways and should be designed in accordance with an individualized staff development plan built on the identified needs of program staff and the developmental needs of children. Pre-K professional development should also align with professional development for the K-12 education system.

### **A Suitable Developmentally Appropriate, Evidence-Based Curriculum**

The state should provide a set of recommended curricula that are aligned with the New York State Prekindergarten Foundation for the Common Core. The curricula should be developed through a transparent research and approval process. These recommended curricula should be reviewed every two years.

### **An Expanded Platform of Services to Meet the Needs of “At-Risk” Students**

Currently New York State has a limited number of requirements covering areas like nutrition, disability, and ELL screening and for referral for certain social services to pre-K students, but there is no comprehensive platform of services and supports designed to combat potential barriers to participation and learning in pre-K for students from disadvantaged backgrounds. The state should strengthen and expand these regulations and provide sufficient funding to ensure access for all at-risk students in all settings to comprehensive services, including but not limited

to social services, health, mental health, early intervention and response to intervention (RTI) services, nutritional support, and parent/family engagement and support. These services should be tailored to individual child and family needs, with recognition that pre-K programs that serve high-needs communities will need to provide a richer mix of such services than other districts. To the maximum extent possible these services should be provided in the home language of the parent or guardian. Wherever possible, these services should be obtained through coordination with appropriate governmental and community agencies.

### **Appropriate Services for Special Populations**

#### ***Students with Disabilities***

Though the state now requires that all pre-K programs should promote inclusion of children with disabilities, far too many students with disabilities are nevertheless being served in segregated settings. The state must ensure that sufficient and appropriate personnel, materials, and equipment, including specialized master teacher support and access to high-quality related and support services, are in place to meet the needs of children with disabilities and to promote inclusion programs in both public school and community settings.

#### ***Multi-Lingual Learners***

The state should ensure that pre-K programs in all settings have sufficient and appropriate personnel and materials to meet the needs of multi-lingual learner children for bilingual, dual language, and English as a second language opportunities as appropriate. These requirements should include certified bilingual teachers, master teachers, and teacher assistants, expanded training for teachers in all settings, as well as appropriate curriculum and assessments, and coordination with all other relevant school district programs.



### **Appropriate Instrumentalities of Learning**

The state currently requires that pre-K programs have materials and equipment that allow for active and quiet play in indoor and outdoor environments, and opportunities to use a wide variety of information in print and electronic mediums for language development. The regulations also specify that instructional materials and equipment must be arranged in learning centers that promote a balance of individual and small group activities. While these regulations themselves are sufficient to provide appropriate instrumentalities of learning, programs lack sufficient funding and/or appropriate facilities to implement them.

### **A Safe and Supportive Environment for Teaching and Learning**

The state should ensure sufficient and appropriate personnel to provide all children a safe and supportive learning environment. This requires, among other things, a sufficient number of social workers, family workers, and master teachers to support teachers in addressing the needs of children with challenging behaviors or learning difficulties, to engage families in supporting teaching and learning, and to create an environment that is free from bullying.

### **Adequate and Accessible Facilities**

The state should ensure that all pre-K facilities have adequate space to provide suitable and developmentally appropriate learning environments for all children, including adequate barrier-free indoor and outdoor play space to accommodate a variety of gross motor activities that encourage children's physical and social development.

### **Sufficient Family Engagement and Support**

The state should ensure that pre-K programs in all settings are able to support the active engagement of parents and/or guardians in the education of their children in a language they understand. This should include written communication, parent workshops, one-on-one meetings and opportunities for parents to participate in program and school-level decisions. Parents should complete a program evaluation annually to help inform strategies for program improvement. In addition, parents should be provided with sufficient information about quality standards and requirements to make informed decisions about their children. In addition families and children should receive support for a successful transition into pre-K or kindergarten and into the early elementary grades.

### **Appropriate Assessment of Student Progress**

The state must ensure sufficient and appropriate personnel and technology to provide and sustain adequate data systems. This includes ongoing training, and the technical support for assessing student progress and for using this information for continuous improvement of program quality.

## **INFRASTRUCTURE AND SYSTEMS SUPPORT**

Local school districts should have a process in place to review the development and implementation of universal full-day prekindergarten, overseen by a broad local stakeholder group that includes representatives from both the early childhood and public education community. Smaller districts may collaborate or choose to work with a BOCES on planning and implementation to ensure local resources, capacity, and expertise on early childhood education are appropriately engaged to support the effort, meet family needs and assure access to high-quality teachers and learning environments in both public school and non-public school settings. The state should offer technical assistance and support to these local efforts, where appropriate, to encourage learning across the early childhood and public school communities, to promote and disseminate best practices, common expectations, and continuous improvement to support children's learning and success.



State leaders must also create a strong regulatory framework and a plan for providing the infrastructure necessary to support high-quality programs in all settings. This will require the state to make primary investments in the following areas: (a) teacher preparation and support, (b) facilities expansion and improvement, (c) transportation expansion, (d) data systems expansion, (e) technical assistance to promote effective school district collaboration with community-based programs, (f) quality assurance, and (g) ongoing program evaluation. A broad stakeholder group that includes representation from both the early childhood and the public education communities should review this plan.

### **Teacher Preparation and Support**

NYSED should undertake an analysis to identify the number of certified teachers that will be needed by 2017, and it should then develop and implement a plan to ensure that a sufficient number of certified teachers will be available to meet anticipated needs by that date and thereafter. The plan should include:

- funding levels that will support equitable compensation for all personnel, in both school and community settings
- incentives, such as scholarships and loan forgiveness, to help current teachers to upgrade their credentials and to attract new teachers to the field;
- multiple pathways to certification, as with K-12 certification, including intensive summer and weekend classes, articulation between two-year and four-year academic programs, and providing credit for work experience in early childhood classrooms, to enable people from diverse backgrounds to obtain appropriate credentials;
- financial support to higher education institutions to motivate them to establish new credentialing, coaching and mentoring programs; and
- development and sustained support for a network of master teachers to provide professional development to classroom teachers. In addition, the state must ensure that all teachers have appropriate training to work with students with special needs, including English language learners and students with disabilities. In regard to English language learners, this requires recruiting administrative and instructional staff with appropriate linguistic and cultural skills. For students with disabilities, this requires recruiting and training more administrative and instructional staff with expertise in inclusionary programming.

### **Facilities Improvement and Expansion**

The state must expand the number of classrooms designed appropriately to serve three- and four-year-old children. In some communities, this will require the addition of new facilities as well as renovation of existing ones. To do this, the state must undertake a facilities needs for universal pre-K.

### **Transportation Aid**

To implement truly universal pre-K, New York must expand its system of pupil transportation to include three- and four-year-old children comparable to that provided to K-12 students. Buses and other vehicles must meet the current federal safety standards for three and four year olds. This will require amendments to the education law to establish appropriate rules, standards, and specifications, as well as funding to ensure appropriate number of monitors, safety seats, and other child restraints.

### **Data Systems Expansion**

The state must fully implement a pre-K-through-workforce-entry data infrastructure to support instruction, track children's progress, and identify effective strategies for promoting better learning outcomes. The Early Childhood Advisory Council (ECAC) has completed a detailed analysis of data currently available and needed in the early years, which can inform the process and be aligned with the K-12 data system.<sup>217</sup>

### **Technical Assistance to Promote Effective School District Collaboration with Community-Based Programs**

The state must create, and ensure sufficient funding to implement, a technical assistance strategy to promote effective collaboration between school districts and community providers. The strategy should include resources for providing district personnel technical assistance on funding and contractual requirements, assisting districts in providing community programs fiscal and management support and in promoting a smooth transition for children and their families between the preschool and the K-12 public school systems. In addition, the state and school districts must develop coherent strategies for ensuring that extended-day options are available for working families.

The new effort could work through a variety of mechanisms, including BOCES. It might, for example,

- create a team of coordinators to assist districts in promoting effective partnerships, professional development, and best practices;
- sponsor annual statewide meetings on collaboration across systems; and
- establish incentives to spur more effective collaboration between public schools and community programs.

### **Quality Assurance**

The state must fully implement and ensure sufficient funding for a uniform approach to quality assurance for all early education settings. Specifically, the state should take the next steps in implementing a quality rating and improvement system statewide. For pre-K programs, the master teacher system should be a part of this continuous improvement effort.

### **Ongoing Program Evaluation**

New York City has announced that it will undertake an in-depth evaluation of its full-day pre-K program, focusing on the system of supports and child outcomes. Several other districts have undertaken local program assessments, but there have been no formal, statewide evaluations of the 16-year-old UPK program. The state should develop and implement a multidimensional strategy for ongoing evaluation of the effectiveness of its pre-K program. Along with ongoing program review that can assess best practices and provide recommendations for continuous quality improvement, the evaluation strategy should include longitudinal studies of child outcomes.

## NOTES

- <sup>1</sup> Ryan, 2006, p. 53.
- <sup>2</sup> *Id.*
- <sup>3</sup> Ryan, 2016.
- <sup>4</sup> Karoly, 2017.
- <sup>5</sup> Heckman, Moon, Pinto, Savelyev, & Yavitz, 2010; Reynolds, Temple, White, Ou, & Robertson, 2001. See also Center for High Impact Philanthropy (2015) for a helpful overview of this research.
- <sup>6</sup> 20 U.S.C. A. §1412.
- <sup>7</sup> See, e.g., New York State Board of Regents, 2015.
- <sup>8</sup> New York State Board of Regents, 2006.
- <sup>9</sup> Although access to kindergarten is not fully universal in the United States, it is fast becoming so. As of 2014, the most recent year for which national data are available, all but five states required all school districts to provide full-day or half-day kindergarten (NCES, 2014). However, a 2015 study by *Education Week* indicates that even in these five states without a state requirement, nearly all children have access to at least half-day kindergarten programs (Education Week Research Center, 2015). Nationally, the percentage of kindergartners enrolled in full-day programs has nearly tripled, increasing from 28% to 77% between 1977 and 2013 (Child Trends Data Bank, 2015). For an extensive discussion of full-day kindergarten as an essential part of public education in the United States and of state kindergarten policies, see Kauerz, 2010; Vecchiotti, 2010; Workman, 2014.
- <sup>10</sup> Kagan, 2006, p. 29.
- <sup>11</sup> *The 74*, 2016; see also Takanishi, 2016.
- <sup>12</sup> Chaudry, 2017, p. 75.
- <sup>13</sup> *Id.*
- <sup>14</sup> Karoly, 2017, p. 63.
- <sup>15</sup> CFE II, 100 N.Y. 2d at 908.
- <sup>16</sup> CFE v. State of New York, 187 Misc. 2d 1, 76.
- <sup>17</sup> Barnett, Brown, & Shore, 2004.
- <sup>18</sup> See, e.g., Takanishi, 2010.
- <sup>19</sup> See Phillips et al., 2017, p. 19.
- <sup>20</sup> Barnett, 2011; Barnett & Frede, 2010; Ramey & Ramey, 2004; Reynolds, 2000; Schweinhart, Montie, Xiang, Barnett, Belfield, & Nores, 2005; Yoshikawa et al., 2013.
- <sup>21</sup> Shonkoff & Phillips, 2000.
- <sup>22</sup> *Id.*
- <sup>23</sup> Michel, 2011. Examples include the creation of the Center for the Study of Child Care Employment (CSCCE) in 1999 at the University of California-Berkeley; the founding of the National Institute for Early Education Research (NIEER) in 2002 at Rutgers University; the expansion of University of North Carolina's Frank Porter Graham Child Development Institute and of Harvard University Graduate School of Education's early childhood project. Pre-K and early childhood are also an increased focus of long-established public policy think tanks across the political spectrum. They appear among the research priorities at the Brookings Institution, Economic Policy Institute, American Enterprise Institute, Cato Institute, The Heritage Foundation, New America, and the Center for American Progress.
- <sup>24</sup> Phillips et al., 2017.
- <sup>25</sup> Yoshikawa et al., 2013.
- <sup>26</sup> Yoshikawa et al., 2013, p. 6; see also Burchinal et al., 2008; Burchinal, Vandergrift, Pianta, & Mashburn, 2010; Early et al., 2007; Zaslow, Anderson, Redd, Wessel, Tarullo, & Burchinal, 2010.
- <sup>27</sup> The term “at-risk” became popular with the landmark publication of *A Nation at Risk* by the National Commission on Excellence in Education in 1983. It is sometimes used in education policy to designate students who have a higher probability of facing significant challenges to academic achievement. It is used to identify appropriate means of early intervention to prevent school failure—as opposed to previous popular term such as “dropout,” which focused on the very end of students' careers. For a comprehensive analysis of the semantics of the term “at-risk” in educational policy making, see Placier, 1993.

- <sup>28</sup> Yoshikawa et al., 2013, p. 7, specifically, moderate to large effects on language, literacy, and math outcomes, ranging from several months to an entire year of additional learning, relative to comparison group; see also Gormley, Gayer, & Phillips, 2008; Gormley, Gayer, Phillips & Dawson, 2005; Phillips, Gormley, & Lowenstein, 2009; Weiland, Ulvestad, Sachs, & Yoshikawa, 2013; Weiland, & Yoshikawa, 2013; Wong, Cook, Barnett, & Jung, 2008.
- <sup>29</sup> Barnett & Frede, 2010; see also Barnett, Howes, & Jung, 2008; Hustedt et al., 2008; Hustedt et al., 2007; Wong et al., 2008.
- <sup>30</sup> Barnett, 2010; Ladd, 2017.
- <sup>31</sup> Urahn, 2001.
- <sup>32</sup> Barnett, 2010.
- <sup>33</sup> Barnett, 2010; Barnett & Frede, 2010.
- <sup>34</sup> Espinosa, 2013; Justice, Logan, & Lin, 2014; National Academies of Sciences, 2017; Reid, Kagan, Hilton, & Potter, 2015. See also, New York State Education Department, 2016a.
- <sup>35</sup> Astuto & Ruck, 2010; Mashburn, Justice, Downer, & Pianta, 2009; Niedell & Waldfogel, 2008; Reid et al., 2015.
- <sup>36</sup> Friedman-Krauss, Barnett, & Nores, 2016.
- <sup>37</sup> *Id.*
- <sup>38</sup> Barnett & Frede, 2017.
- <sup>39</sup> Cascio, 2017, cited in Gormley 2017.
- <sup>40</sup> Barnett, 2010.
- <sup>41</sup> New York State Education Department, 2016b.
- <sup>42</sup> Ladd, 2017.
- <sup>43</sup> Frankenberg, 2016.
- <sup>44</sup> Barnett & Frede, 2010, p. 28.
- <sup>45</sup> Barnett & Frede, 2010; Chaudry & Datta, 2017.
- <sup>46</sup> Bivens, Garcia, Gould, Weiss, & Wilson, 2016.
- <sup>47</sup> Wat, 2008.
- <sup>48</sup> Gormley, Gayer, & Phillips, 2008; Phillips, Gormley & Lowenstein, 2009; Wong, Cook, Barnett, & Jung, 2008.
- <sup>49</sup> Barnett, 2008, 2010; Biedinger, Becker, & Rohling, 2008; Melhuish, Sylva, Sammons, Siraj-Blatchford, Taggart, & Phan, 2008; Osborn & Milbank, 1987; Waldfogel & Zhai, 2008.
- <sup>50</sup> Gormley, 2016.
- <sup>51</sup> Barnett, Brown & Shore, 2004, p. 4.
- <sup>52</sup> Astuto & Ruck, 2010. Early education provides a strong foundation for success in today’s global economy, as the New York Board of Regents (2006) has formally declared.
- <sup>53</sup> Rebell, in press.
- <sup>54</sup> Cremin, 1980.
- <sup>55</sup> Astuto & Ruck, 2010, p. 253.
- <sup>56</sup> *Id.*
- <sup>57</sup> Belfield, 2004; Garcia, Heckman, Leaf, & Prados, 2016; Heckman, 2008; Heckman & Masterov, 2007; Heckman et al., 2010.
- <sup>58</sup> Schweinhart et al., 2005; Schweinhart, Xiang, Daniel-Echols, Browning, & Wakabayashi, 2012.
- <sup>59</sup> Berrueta-Clement, Barnett, & Weikart, 1985; Schweinhart, Barnes, & Weikart, 1993.
- <sup>60</sup> Garcia et al., 2016.
- <sup>61</sup> Karoly, 2017.
- <sup>62</sup> Karoly, 2017, p. 64.
- <sup>63</sup> State education finance systems generally direct some additional funding to school districts with larger numbers of children from low-income families and English language learners, students who are more likely to start school without the benefits of high-quality preschool, in order to make up for the achievement differences seen starting at kindergarten. This helps close some of the resulting gaps (Jackson, Johnson, & Persico, 2014), but not nearly enough additional resources are currently expended for this purpose. “Public funding for primary and secondary education would need to be much more



highly weighted in favor of children in disadvantaged neighborhoods than is now the case in order to reduce the inequality that has developed by school entry” (Barnett & Frede, 2017).

<sup>64</sup> Calman & Tarr-Whelan, 2005.

<sup>65</sup> Obama, 2013.

<sup>66</sup> Although Donald Trump has proposed eliminating the early childhood development grant and cutting other early childhood programs, these programs have strong support from legislators on both sides of the aisle. *See, e.g.*, Ujifusa, 2017.

<sup>67</sup> U.S. Department of Education Equity and Excellence Commission, 2013.

<sup>68</sup> *See, e.g.*, Office of Hillary Rodham Clinton, n.d.; Sullivan & Costa, 2016.

<sup>69</sup> *See, e.g.*, National Governors Association, 2017.

<sup>70</sup> Grasgreen, 2014.

<sup>71</sup> National Women’s Law Center, 2016.

<sup>72</sup> Covert, 2013; First Five Nebraska, 2017. For a round-up of the growing number of bipartisan statements of support for early childhood education from governors in their state of the state and budget addresses, see <https://www.ecs.org/ec-content/uploads/Governors'-Top-Education-Priorities-2017-State-of-the-State-addresses.pdf> and <https://www.newamerica.org/education-policy/edcentral/2017-state-state-addresses-early-care-and-education/>

<sup>73</sup> Council of Chief State School Officers, 2016, pp. 4, 15.

<sup>74</sup> NIEER, n.d.

<sup>75</sup> The Florida constitution, Article 9, section 1 (b) reads as follows:

Every four-year old child in Florida shall be provided by the State a high quality pre-kindergarten learning opportunity in the form of an early childhood development and education program which shall be voluntary, high quality, free, and delivered according to professionally accepted standards. An early childhood development and education program means an organized program designed to address and enhance each child’s ability to make age appropriate progress in an appropriate range of settings in the development of language and cognitive capabilities and emotional, social, regulatory and moral capacities through education in basic skills and such other skills as the Legislature may determine to be appropriate.

<sup>76</sup> NIEER, 2016(c), p. 69.

<sup>77</sup> Okla. Stat. Anno, Title 70, § 1-114.

<sup>78</sup> D.C. Official Code §§ 38-271.01(6) and (7) (2012 Repl. & 2015 Supp.)).

<sup>79</sup> Connecticut Department of Education, n.d.

<sup>80</sup> NIEER, 2016 (c), p. 76.

<sup>81</sup> Iowa Department of Education, n.d.

<sup>82</sup> M.G.L.A. 15D § 13.

<sup>83</sup> The history of New York’s commitment to universal pre-K, which began with partial funding for half day programs in 1997, is set forth in CCI & CEE (2013) and CCI & CEE (2014).

<sup>84</sup> NIEER, 2016(c), p. 238.

<sup>85</sup> *Id.* at 256.

<sup>86</sup> NIEER, 2017, p. 155.

<sup>87</sup> NIEER, 2017, p. 117.

<sup>88</sup> NIEER, 2017, p. 44.

<sup>89</sup> CCI & CEE, 2013, n. 71.

<sup>90</sup> Michigan Department of Education, n.d.; *see also* Wakabayashi, Lower, & Hardin, 2017.

<sup>91</sup> CityHealth, n.d.

<sup>92</sup> Watson, 2010.

<sup>93</sup> D.C. Official Code §§ 38-271.01(6) and (7).

<sup>94</sup> NIEER, 2016a.

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

<sup>96</sup> NIEER, 2016a.

- <sup>97</sup> *Id.*
- <sup>98</sup> See Office of the Mayor, 2014, p. 4, for data on pre-K enrollment prior to the launch of Pre-K for All. At that time, the city supported full-day pre-K for 19,483 four-year-olds and part-day pre-K for an additional 26,364. In addition, the city supported 12,681 four-year-olds in extended-day (10-12 hour), year-round programs administered by the Administration for Children’s Services, using a funding model that integrated pre-K, child care, and Head Start funding.
- <sup>99</sup> Office of the Mayor of the City of New York, 2015; New York State Education Department, 2016b.
- <sup>100</sup> Office of the Mayor of the City of New York, 2016.
- <sup>101</sup> Goldstein, 2016.
- <sup>102</sup> *Id.*
- <sup>103</sup> Schulman, Blank, & Ewen, 1999; NIEER, 2017.
- <sup>104</sup> NIEER, 2016b.
- <sup>105</sup> NIEER, 2017.
- <sup>106</sup> Barnett & Kasmin, 2016, p. 17. Public programs include Head Start, which is funded by the federal government; state-funded pre-K; preschool special education; and public pre-K programs provided by localities.
- <sup>107</sup> NIEER, 2017, p. 17.
- <sup>108</sup> NIEER, 2016b, p. 8.
- <sup>109</sup> See Center for Children’s Initiatives and Campaign for Educational Equity (2014) for a detailed discussion of this history.
- <sup>110</sup> New York State Education Department, 2016b.
- <sup>111</sup> Rebell, 2011, pp. 52-53 (quoting Alexis de Toqueville and Ronald Dworkin).
- <sup>112</sup> Henig, 2011.
- <sup>113</sup> A necessary corollary of guaranteed full-day prekindergarten programs is guaranteed access to full-day kindergarten for the graduates of these programs. In New York, the Regents have called for reducing the compulsory schooling age to five to ensure that all children attend full-day kindergarten because “In a standards-based environment, it is important that students receive purposeful and explicit instruction, beginning in the early years” (New York Board of Regents, 2006, p. 6).
- <sup>114</sup> Cryan, Sheehan, Wiechel, & Bandy-Hedden, 1992; DeSiato, 2004; Robin, Frede, & Barnett, 2006.
- <sup>115</sup> *Abbott v. Burke*, 710 A.2d 450, 464 (1968).
- <sup>116</sup> National Center for Education Statistics, 2017.
- <sup>117</sup> New York State Education Department, Office of Early Learning, personal communication, December 22, 2016.
- <sup>118</sup> N.Y. Educ. Law §3205.2
- <sup>119</sup> New York State Board of Regents, 2006.
- <sup>120</sup> As mentioned above, all five year olds must have access full-day kindergarten.
- <sup>121</sup> Barnett, Jung, Youn, & Frede, 2013.
- <sup>122</sup> Sammons, Sylva, Melhuish, Siraj, Taggart, Toth, & Smees, 2014.
- <sup>123</sup> Zaslow, Anderson, Redd, Wessel, Tarullo, & Burchinal, 2010.
- <sup>124</sup> Holcomb, 2006.
- <sup>125</sup> Holcomb, 2006; Wat & Gayl, 2009, pp. 4-8.
- <sup>126</sup> Wechsler, Melnick, Maier, & Bishop, 2016; Yoshikawa et al., 2013.
- <sup>127</sup> See appendix for a summary of our recommendations for quality standards for New York State.
- <sup>128</sup> Barnett et al., 2013; Barnett et al., 2016; Mead, 2009; Minervino, 2014; Wechsler et al., 2016. *Strengthening the Pre-K Investment* at [www.ccipolicy.org](http://www.ccipolicy.org) analyzes New York State’s universal prekindergarten effort and makes 11 recommendations, including investment in infrastructure to improve quality and strengthen the state’s mixed delivery system.
- <sup>129</sup> Yoshikawa et al., 2013, p. 6; see also Burchinal et al., 2008; Burchinal, Vandergrift, Pianta, & Mashburn, 2010; Early et al., 2007; Zaslow et al., 2010.
- <sup>130</sup> Schilder & Carolan, 2013.
- <sup>131</sup> Boylan & White, 2010.

- <sup>132</sup> Boylan & White, 2010, p. 6.
- <sup>133</sup> Barnett & Kasmin, 2016, pp. 1, 13. See also Barnett & Husted, 2011.
- <sup>134</sup> Boylan & White, 2010, p. 3. See also, Barnett & Kasmin, 2016, which identifies ten states that provide pre-K funding through the state K-12 funding system.
- <sup>135</sup> Boylan & White, 2010, p. 4. For example, in Oklahoma, all four-year-olds are entitled to attend either half-day or full-day programs in their district of residence free of charge” (70 Okla. St. Ann §18-201) ... “so long as the district has the physical facilities and teaching personnel to accommodate the child” (70 Okla. St. Ann § 1-114).
- <sup>136</sup> For example, in Colorado, the number of children that school districts may accommodate is limited by an annual number of “slots” that are approved by the legislature (Colorado Department of Education, n.d.).
- <sup>137</sup> See Barnett, Weisenfeld, Brown, Squires, & Horowitz, 2016, pp. 2-10 for discussion and chart of state pre-K implementation. See also Phillips et al., 2017, pp. 67-73 on key challenges in scaling up pre-K.
- <sup>138</sup> This, of course, means that local districts must be provided adequate overall state aid so that they need not reallocate funding needed for K-12 programs to support pre-K. Arbitrary restrictions on the ability of school districts to raise local funds, thorough local tax caps or other restrictions, must also be eliminated or additional state aid must be provided to substitute for the loss of such local revenues.
- <sup>139</sup> For a full discussion of the development of kindergarten in this country, see Muelle, 2013, and Workman, 2014. New York is one of only five states that do not require districts to provide kindergarten. Nevertheless, the New York State Education Department reports that all but three of New York’s almost 700 school districts provide full-day kindergarten. The state does require that if kindergarten is available to any students, it must be open to all students. In fact, 98% of all kindergarten children are enrolled in full-day programs in New York.
- <sup>140</sup> 411 U.S. 1 (1973).
- <sup>141</sup> For a detailed overviews and analyses of the state court challenges to state education finance systems, see Rebell, 2009, 2017. For up-to-date current information on the state court litigations, see SchoolFunding.Info, <http://www.schoolfunding.info>.
- <sup>142</sup> *Hoke County Bd. of Educ. v. State*, 95 CVS 1158 (S. Ct., Oct. 2000), at 36, 43-45.
- <sup>143</sup> *Hoke County Bd. of Educ. v. State*, 599 S.E. 2d 365, 392 (N.C. 2004).
- <sup>144</sup> *Id.* at 393.
- <sup>145</sup> *Id.* at 393-94.
- <sup>146</sup> *Hoke County Bd. of Educ. v. State*, Memorandum of Decision, No. 95-CVS-1158, at p. 23 (2011).
- <sup>147</sup> *Id.* at 23-24.
- <sup>148</sup> *Id.* at 24.
- <sup>149</sup> *Hoke County Bd. of Educ. v. State*, 731 S.E.2d 691, 694 (N.C. Ct. App. 2012).
- <sup>150</sup> *Hoke County Bd. of Educ. v. State*, 749 S.E.2d 451, 454-55 (2013).
- <sup>151</sup> *Abbeville County Sch. Dist. v. State*, No. 31-0169 (S.C. Ct. Comm. Pl. Dec. 29, 2005) at 157.
- <sup>152</sup> *Ibid.*
- <sup>153</sup> *Id.* at 155, 158, 160. Judge Cooper also observed that “Such early intervention not only makes educational and humanitarian sense, it also makes economic sense. The testimony in this record of experts, educators, and legislators alike is that the dollars spent in early childhood intervention are the most effective expenditures in the educational process.” *Id.* at 161.
- <sup>154</sup> *Abbeville County Sch. Dist. v. State*, 767 S.E.2d 157 (S.C. 2014). The court also found that while the pre-K program the state had adopted to comply with the trial court decision “appeared to have some moderate success at curing the students’ lack of preparation to begin their formal education,” its “success was tempered by worrisome implementation and execution,” and that the evidence appeared to indicate that the program was “inadequately funded to meet student needs.” *Id.* at 176.
- <sup>155</sup> 710 A.2d 450 (1998).
- <sup>156</sup> *Id.* at 463.
- <sup>157</sup> *Id.* at 462.
- <sup>158</sup> 748 A.2d 82, 87-95 (2000). In 2009, the New Jersey Supreme Court ruled that a new education funding system the state had adopted that, among other things, expanded high quality full-day preschool program to all at-risk three- and four-year olds in the state, met the constitutional requirement to provide all students a “thorough and efficient education. The court also noted that and the state education department had promulgated regulations to ensure continued high quality education in the areas of curriculum, classroom space, teacher certification, performance-based assessment and classroom

quality assessment. *Abbott v. Burke*, 971 A.2d 989 (N.J. 2009). Since 2009, Governor Chris Christie has failed to implement the new statewide system and the New Jersey Supreme Court has ordered continued full funding for pre-K and other services only in the 31 poor urban districts covered by the *Abbott* litigation. *Abbott v. Burke*, 20 A.3d 1018 (N.J. 2011).

<sup>159</sup> *CFE v. State of New York*, 187 Misc. 2d 1, 114-115 (Sup. Ct., N.Y.Co, 2000). The trial courts' delineation of these seven areas was specifically affirmed by the Appellate Division, 295 A.D.2d 1, 9-10 (1st Dep't, 2002) and implicitly affirmed by the Court of Appeals, 100 N.Y.2d 893 (2003).

<sup>160</sup> *Id.* at 115.

<sup>161</sup> *Id.* at 76.

<sup>162</sup> *Id.* at 79.

<sup>163</sup> See Decision and Order, *Moore v. State*, No. 3AN-04-9756, slip op. at 177 (Alaska Super. Ct. June 21, 2007).

<sup>164</sup> Case No. 3AN-04-9756 CI (Superior Court of Alaska, 2009) at 21.

<sup>165</sup> *Id.* at 23.

<sup>166</sup> *Id.* Subsequently, after finding that the state had not satisfactorily complied with its order, the court required the state to file a District Improvement Plan for each of the intervention districts that adequately addresses the problem areas identified in 2009 decision, including attention to prekindergarten and other intensive early learning initiatives. Case No. 3AN-04-9756 Civ. (Superior Court of Alaska, 2010); retrieved from [http://www.educationjustice.org/newsletters/nlej\\_iss17\\_art4\\_refl\\_MooreGleasonOrder.pdf](http://www.educationjustice.org/newsletters/nlej_iss17_art4_refl_MooreGleasonOrder.pdf)

In March 2012, the parties settled the eight-year-old *Moore* case. The settlement provided a one-time appropriation of \$18 million to be distributed to 40 of Alaska's lowest-performing school districts. Among the \$18 million, at least \$6 million would go toward two-year kindergarten programs and literacy programs for prekindergarten aged children. The funding was intended to last for a minimum of three years. See, <http://schoolfunding.info/2015/01/school-funding-cases-in-alaska/>.

<sup>167</sup> *Hancock v. Driscoll*, 2004 WL 877984, at \*158 n.221 (Mass. Super. Ct., 2004).

<sup>168</sup> *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 501 (Ark. 2002).

<sup>169</sup> *Lobato v. State of Colorado*, Case No. 2005CV4794, Dist. Ct., Denver Co, (Dec. 9, 2011) at 178.

<sup>170</sup> *Lobato v. State*, 304 P.3d 113 (CO, 2013); *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134, 1136-37 (Mass. 2005).

<sup>171</sup> *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 501 (Ark. 2002). See also, *Campbell Co. Sch. Dist v. State*, 181 P.3d 43 (Wyo 2008) (holding that constitutional clause limiting state's obligation to provide a "thorough and efficient" education to youth between the ages of six and twenty-one precluded upholding a constitutional right to pre-K, despite the "impressive and essentially unrefuted evidence concerning the positive impact of preschool on the ultimate educational success of students"). Significantly, the special masters subsequently appointed by the Arkansas Supreme Court to enforce their adequacy ruling questioned whether the state could meet its constitutional obligation to provide students the opportunity for a "substantially equal educational opportunity . . . without providing pre-kindergarten for disadvantaged children." Bradley D. Jesson & David Newbern, Special Masters' Report to the Supreme Court of Arkansas (Apr. 2, 2004), <http://courts.state.ar.us/lake%20view/report.pdf>.

<sup>172</sup> *Hancock v. Driscoll*, 2004 WL 877984, at 137.

<sup>173</sup> *Id.* at 137.

<sup>174</sup> *Id.* at 1156-57.

<sup>175</sup> *Id.* at 1157-58.

<sup>176</sup> *Id.* at 1157-58.

<sup>177</sup> *Connecticut Coalition for Justice v. Rell*, Memorandum of Decision, Sept. 7, 2016, Appendix One, Findings, pp. 66-82

<sup>178</sup> *Conn. Coalition v. Rell*, 2016 WL 4922730 (Sept. 7, 2016), p. 33.

<sup>179</sup> *Id.* at 32. See also, *id.* at 22 (citing "the importance of good elementary schools and preschools and their connection to success in secondary school.")

<sup>180</sup> The trial court's order has been stayed, pending a decision on the state's appeal to the Connecticut Supreme Court. Oral argument before the Connecticut Supreme Court took place on September 28, 2017. Litigants in other states are increasingly pressing the issue that access to pre-K services must be deemed a necessary aspect of a constitutionally adequate education, at least for students in poverty. For example, in New Mexico, two cases that recently went to trial on a consolidated basis strongly emphasized pre-K constitutional claims. Plaintiffs in the first case have specifically claimed that the failure to provide pre-K services violates the state constitution. *Martinez v. State of New Mexico*, First Amended Complaint, at ¶ 191; retrieved from [http://www.maldef.org/assets/pdf/2014\\_06\\_12\\_MartinezvNewMexico.pdf](http://www.maldef.org/assets/pdf/2014_06_12_MartinezvNewMexico.pdf). The second



complaint emphasizes the benefits that pre-K programs provide, Second Amended Complaint, retrieved from <http://nmpovertylaw.org/wp-content/uploads/2015/08/Complaint-Yazzie-Second-Amended-Complaint-2015-07-14.pdf>, ¶205, and concludes that the failure to adequately fund these programs denies these students the opportunity to succeed in school. *Id.* at p. 61. A ruling in this case is expected in the fall 2017 or winter 2018.

<sup>181</sup> 20 U.S.C.A §6314.

<sup>182</sup> 20 U.S.C. A. § 7801(20).

<sup>183</sup> 20 U.S.C.A . §6825(a)(1).

<sup>184</sup> 20 U.S.C. A. §1412 (a) (1)(A).

<sup>185</sup> 20 U.S.C.A. §1412 (a) (1)(B), but a school district that provides services to some non-disabled children, even if on a non-universal basis, presumably would have to provide these services to *all* students with disabilities to comply with the law.

<sup>186</sup> N.Y. Educ. Law §4410. *See also*, e.g., Ohio R.C. § 3323.02.

<sup>187</sup> 20 U.S.C.A. § 1412 (a)(5).

<sup>188</sup> 42 U.S.C.A. §11432 (g) (1) (F)(i).

<sup>189</sup> N.Y. Educ. Law §3209.2(c).

<sup>190</sup> *See Hancock v. Driscoll, supra*, note at 136 (“the Constitution does not define the boundaries of public school education...”).

<sup>191</sup> *CFE v. State of New York*, 100 N.Y.2d 893, 905 (2003).

<sup>192</sup> Ryan, 2016.

<sup>193</sup> *Hancock v. Driscoll, supra*, note at 136

<sup>194</sup> *See Balkin*, 2011, pp. 212-214, discussing the impact of changes in public attitudes and state laws on major U.S. Supreme Court decisions regarding the legality of the use of contraceptives in the 1960s and on equal homosexuals in recent years.

<sup>195</sup> Ryan, 2006, pp. 53-54.

<sup>196</sup> *CFE II*, 100 N.Y. 2d at 908.

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

<sup>198</sup> *See Astuto & Ruck*, 2010, 2017.

<sup>199</sup> *See*, NYSER, 2d amended complaint, ¶¶ 105-106, available at [www.nyser.org](http://www.nyser.org).

<sup>200</sup> L. 1997, ch. 436, section 3602e.

<sup>202</sup> New York State Board of Regents, 2006.

<sup>203</sup> NIEER, 2017, p. 118.

<sup>203</sup> L. 2017, Ch. 59.

<sup>204</sup> Taylor, 2017.

<sup>205</sup> Statement of Josh Wallack, Deputy Chancellor of Strategy and Policy for the New York City Department of Education, quoted in Ryan, 2016.

<sup>206</sup> New York State Education Department, 2016b. State education officials calculate the “take-up” rate for four-year-olds for voluntary, universal pre-K as 85% of children attending kindergarten minus children enrolled in special education schools. In 2015-16, that totaled 187,440 four-year-olds statewide, with about 85,941 still without a full-day seat outside of New York City.

<sup>207</sup> The 2014 Full Day Universal Pre-K program provides New York City and those other districts throughout the state that obtain the competitive grants, is \$10,000 per child for programs with certified teachers and \$7,000 per child for programs with uncertified teachers. The high quality programs in New Jersey and in the District of Columbia are funded at a level of approximately \$14,000 per child and \$16,000 per child, respectively (National Institute for Early Education Research, 2016b, p. 66). New York City continues to supplement the state pre-K funding with city tax levy, federal Title I, and other education aid.

<sup>208</sup> *See* guidance posted by New York State Education Department, “NYS Budget—Fiscal Implications for Prekindergarten Grants,” May 19, 2017, posted by the Office of Early Learning at <http://www.p12.nysed.gov/upk/>.

<sup>209</sup> Ryan, *supra* n. at 82.

<sup>210</sup> *Weissman v. Evans*, 56 N.Y. 2d 458, 465 (1982).

- <sup>211</sup> *Lee v. Smith*, 43 N.Y.2d 45, 463 (1977). See also, *Brown v. Wing*, 170 Misc.2d 554 (Sup. Ct., Monroe Co, 1996), aff'd 241 A.D. 2d 956 (4th Dep't (1997); *Weissman*, *supra*.
- <sup>212</sup> *Abrams v. Bronstein*, 33 N.Y.2d 488, 495 (1974).
- <sup>213</sup> Note in this regard that the New Jersey Supreme Court, in holding that students in the Abbott districts were entitled to high quality pre-K services, cited the fact that the state legislature itself had recognized the necessity of such early childhood education by enacting legislation that required early childhood aid to be distributed in certain districts with low-income pupils “for the purpose of providing full day kindergarten and pre-school classes and other early childhood programs and services” (*Abbott v. Burke*, 710 A.2d 450, 463 (N.J.1998)).
- <sup>214</sup> Ryan, 2006, p. 99.
- <sup>215</sup> We have drawn primarily from three sources for our recommendations: (1) the National Institute for Early Education Research (NIEER), (2) New York’s former experimental/targeted pre-K program and current UPK regulations, and (3) regulations and implementation mechanisms that were adopted in New Jersey and have been vital to achieving quality programs in that state. We also made use of the framework for the essential resources of a sound basic education from the *Campaign for Fiscal Equity* decision to provide alignment with K-12 constitutional requirements.
- <sup>216</sup> Rebell, Wolff, Kolben, & Holcomb, 2013, 2014.
- <sup>217</sup> Early Childhood Advisory Council, 2013.

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