

Establishing Universal Access to Prekindergarten as a Constitutional Right



Briefing Guide

A quick look at the key legal and policy arguments, research and analysis that support the case for creating the bedrock of a well-defined right to early education for all.



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The Center for Children’s Initiatives (CCI) and the Center for Educational Equity at Teachers College, Columbia University (CEE) (formerly the Campaign for Educational Equity), have been working in partnership for several years to develop and advance the right to universal pre-K in New York State. Our new white paper, *Establishing Universal Access to Prekindergarten as a Constitutional Right*, which will be published this month makes the case for this right. Our prior work, laid out in two earlier reports, *Making Prekindergarten Truly Universal in New York* and *Securing the Future of New York’s Children* provided the essential elements and steps necessary for New York State to meet the goal of establishing pre-K as a core educational service for all three- and four-year-olds.

ESTABLISHING UNIVERSAL ACCESS TO PREKINDERGARTEN AS A CONSTITUTIONAL RIGHT



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.

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.

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?

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 children.

A wealth of new research and political developments around the country 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.

The case for establishing a right to universal pre-K is offered in three parts:

- The **rationale**, a review of the evidence showing that pre-K can be successfully mounted on a large scale and documenting its educational, social, and economic benefits for children, the educational system, and society at large.
- The **definition** of the constitutional right to universal pre-K that we seek to establish, as well as the essential elements of the educational opportunities that such a right would entail.
- The **legal strategy**, 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, and a review of state laws and policy documents. Building on these precedents, we suggest a legal strategy for establishing universal access to pre-K as a constitutional right.

We base our case on the examination of state constitutions and legal decisions, reviews of state laws and policy documents, research studies, collections of data from 50 states; and communication with program administrators, policymakers, advocates, and researchers around the country. We focus on New York as an example of a state that is particularly ripe for advancing such an initiative.

RATIONALE FOR ESTABLISHING A RIGHT TO UNIVERSAL PRE-K

Strong Research Base Demonstrates That High-Quality Preschool Benefits All Children

Multiple research studies provide evidence 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, and more likely to graduate from high school and go to college. Children who start out behind, the research shows, never catch up, at great expense to themselves, their families, schools, and communities.

New Research Suggests Advantages of Universal Pre-K Over Targeted Programs

Universal pre-K, guaranteed as a right, affords the opportunity for fulfilling the educational rights of diverse learners. It 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.

Universal pre-K creates an inclusive education programs that allow children with disabilities the opportunity at a critical early stage to thrive in the “least restrictive environment,” which is their right as set forth in law more than two decades ago. 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.

Diverse, inclusive early childhood learning environments benefit children from all economic, ethnic, racial backgrounds, as well as children with disabilities and dual language learners. The “peer effect” of diverse classrooms enhances learning, supports diverse learning styles, and may help build important civic skills. Universal pre-K programs also facilitate schools’ ability to meet the legal mandate for serving children with disabilities in the least restrictive environment.

Pre-K More than Pays for Itself in Both the Long and Short Term

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 to as much as seven to ten times the investment for a high-quality universal pre-K program brought to scale. It is now well documented that all children benefit from high-quality pre-K, with children from low-income families showing the greatest gains.

“Given evidence that the foundation for literacy and other achievements is laid down in the early years, before children enter school. Beginning universal educational services at age 5 or 6 seems arbitrary. The American public has long supported the right to a free public education. The question is: when should that right begin.” – NIEER researchers

Political Support for Universal Pre-K Is Growing

A growing number of public education organizations are now calling for public education to begin at three, with the alignment of pre-K to 3rd grade education. The continuing expansion of the concept of public education to meet the changing needs of the American people is not a new phenomenon. Leading education reform advocates argue, as does Ruby Takanishi of the New America Foundation, that early education should be considered a civil and human right for all young children. Other leaders in early education also fully support a universal approach that guarantees that no children are denied access to invaluable preschool services, and that each child have access to the appropriate learning environment and resources, as with other public education opportunities.

Support for pre-K is now bipartisan and strong, with momentum for universal pre-K building among policymakers and the public. The Equity and Excellence



Commission, a federal advisory commission chartered by Congress to advise the Secretary of Education on the disparities in meaningful educational opportunity... concluded that access to high-quality early childhood education “must be a matter of highest National Priority.” New York State’s own Educational Reform Commission made early childhood education its top priority in the same year.

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. 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.

Rights-Based Approach Best Protects Progress and Gains

In spite of this important growth, the last decade has not seen steady progress toward the establishment of pre-K for all children. Economic conditions and fiscal constraints have impeded the path to steady expansion of pre-K in most states, with enrollment slowing or even halting in many places during the Great Recession that began in 2008. In many states, including New York, there are also significant regional variations in access and the size and nature of the investment.

State and local commitments to pre-K for all children are an important sign of public and private recognition of the value of early childhood education. But recent history shows that policy commitments alone are not sufficient. 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.

DEFINING THE RIGHT TO UNIVERSAL PRE-K

Based on the foundations established by existing state and local pre-K policies and court rulings, children’s right to pre-K for a meaningful educational opportunity should entail the following:

1. Free Universal Access

All children regardless of race, religion, socioeconomic status, or other qualifying characteristic must have access to a full-day pre-K program. 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.

2. 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.

3. 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. With voluntary enrollment, fewer families of three-year-olds take advantage of the option; nevertheless, all those who do should be accommodated.

4. 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.

5. 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. The state must also provide the infrastructure and systems support, and local school districts should have a process in place to review the development and implementation of universal full-day pre-K, overseen by a broad local stakeholder group that includes representatives from both the early childhood and public education community.

6. Integration of Funding into the K-12 School Finance System

To ensure it is stable and sustained, pre-K funding for three- and four-year-olds¹⁴ should be integrated into the state’s K-12 school funding formula 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. Allocations should be specifically protected for pre-K as a special phase of education.



THE LEGAL STRATEGY

Recognition of the importance of pre-K for providing all students an adequate education has been growing in the litigations that have challenged state education finance systems in 45 of the 50 states.

From our overview of relevant legal precedents, we draw two major conclusions. First, virtually all of the judges 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, in all of these cases, 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.

Courts in nine states have considered the issue of whether students from low-income households have a constitutional right to pre-K services. This includes:

- Courts in two states (North Carolina and South Carolina) that 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) that have held that pre-K services should 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) that 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, 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. This case is currently on appeal to the Connecticut Supreme Court and plaintiffs are asking for even stronger recognition of the right to pre-K.



THE NEW YORK CONTEXT

New York State elected officials made pre-K an explicit right, starting first in 1997 with the introduction of pre-K as an integral part of education reform. The promise was made again in 2014, this time with a commitment to full-day high-quality pre-K and expanded attention to quality benchmarks. New York’s Board of Regents have already specifically called for early education as a strategy to help children succeed in today’s global economy.

Yet there continue to be wide disparities in access to pre-K within New York State, especially between New York City and the rest of the state. Today, New York City provides access to all four-year-olds and is expanding to three-year-olds, while close to 90,000 four-year-old children in the rest of the state are still without access to full day pre-K. New York City’s Pre-K for All initiative has demonstrated the ability to go to scale but still needs an assured robust funding strategy to secure its long-term future.

In New York’s school-funding adequacy case, *CFE v. State*, the trial court judge provided a broad framework for resource areas that the public schools must provide in order to offer a “sound basic education.” In addition the fact that the preschool years are important for promoting inclusive learning environments, and orienting children toward civic values and civic skills, support the court’s emphasis on the importance of preparing students for civic participation.

Establishing the right to pre-K can ensure that New York adopt mechanisms to guarantee appropriate policy frameworks for strong quality standards, effective curricula, and consistent professional development – and necessary infrastructure investments such as facilities expansion, workforce preparation and compensation, and comprehensive, aligned data systems. All must be in place to guarantee adequate and equitable access to high-quality pre-K programs for all children.

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 funds to implement school-wide early childhood education programs for schools in which 40% of the students are from low-income families.

Title III of ESSA that provides grants to states to support services for English language learners (ELLs), includes all ELLs from age 3 and up, and explicitly authorizes these federal funds to be used for pre-K programs.

- **The federal Individuals with Disabilities Education 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.” (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.”)

- **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.”** 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.

CONCLUSION

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 James E. Ryan, dean of Harvard Graduate School of Education 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.”

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.

As one of those handful of states, 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.

Citations available upon request from Jessica Wolff at wolff@tc.edu or Betty Holcomb at bholcomb@ccinyc.org.



To learn more about our work and to download copies of our reports:

www.ccipolicy.org

www.CenterforEducationalEquity.org

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The Center for Children's Initiatives (CCI) champions the right of all children to start life with the best possible foundation of care, health and learning. Realizing the long term benefits – for children, for families and for our society – CCI works to ensure investments in quality and supports for working families to give all of our children the opportunity for a bright future.



The Center for Educational Equity (CEE) is a nonprofit research and policy center at Teachers College, Columbia University, that seeks to advance the right of all children to meaningful educational opportunity. CEE works to define and secure the full range of resources necessary to guarantee this right to all children, particularly children in poverty and children of color.