Leandro: Constitutional Adequacy in Education and Standards-Based Reforms

by Ann McColl

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The North Carolina Supreme Court in its now-famous *Leandro*[1] decision recognized for the first time a right under the state constitution to a "sound basic education." Three extensive rulings of a state superior court judge have given the first concrete dimensions to this right. This article examines the superior court rulings and looks at the legal aspects of North Carolina's educational future.

The history of this country's school finance litigation provides the broad context for the *Leandro* lawsuit. The narrower framework is the legal concept of "adequacy" and how it has evolved through various courts. The *Leandro* supreme court opinion, most especially the subsequent trial court rulings, adds a model of adequacy that dovetails almost perfectly with standards-based education reform. The trial court rulings also channel broad concepts of adequacy into an intense focus on the needs of at-risk children, including a mandate for preschool programs.

As in other school finance litigation, it is difficult to say when, if ever, the final chapter of *Leandro* will be concluded. More trial court rulings are expected in the lawsuit, and there is always the possibility of appeals. Nonetheless, it is time to begin charting North Carolina's place in school finance litigation and the significant implications for this state in creating specific constitutional mandates for standards-based reforms and interventions for at-risk children.

The Evolution of School Finance Litigation

Nationally, school finance litigation began with an attempt—ultimately unsuccessful—to establish a federal constitutional right to education, and then moved to claims that the laws of the states require "equity" in the provision of public education. The current phase, of which *Leandro* is a prime example, focuses on the "adequacy" of the education that a particular state provides.

Phase I: Federal Constitutional Rights (1960s to early 1970s)

In the first wave of school finance litigation, proponents of a fundamental right to education focused their efforts on the United States Constitution. This was a logical approach, since it would avoid the need for litigating in each of the fifty states, arguing under different state constitutions. However, the United States Supreme Court in *San Antonio v. Rodriguez*[2] foreclosed this possibility, finding that the United States Constitution does not provide a constitutional guarantee of education.

1. Leandro v. State, 346 N.C. 336, 488 S.E.2d 249 (1997).

2. 411 U.S. 45 (1973).

Phase II: State Constitutional Equity Lawsuits (Primarily 1980s)

When federal lawsuits were unsuccessful, litigants turned to state constitutions. Although notions of "equity" and "adequacy" are blurred concepts at best, earlier state cases focused largely on the inequities in funding caused by differing abilities of local communities to support the schools. Equity in this context essentially meant providing equal funds to schools. Texas is a prime example of a state whose funding system was overhauled as the result of a finding of constitutional inequities.[3] By comparison, in Georgia, the state's highest court rejected the equity argument, declaring the state system to be constitutional, even though it recognized that the "equalization of the system is a poor one." [4] The court reasoned that the constitution did not place an explicit duty on the state to equalize educational opportunities. The Georgia court also refused to enter the domain of adequacy disputes, finding that "it is primarily the legislative branch of government which must give content to the term 'adequate.'"[5] In 1988 South Carolina's highest court also had little trouble finding its funding plan constitutional on the basis of equal protection.[6] However, in 1999 the South Carolina court followed other adequacy lawsuits and held that the state constitution does require the state legislature to provide the opportunity for each child to receive a "minimally adequate education." The court remanded the claim for further proceedings.[7]

Phase III: State Constitutional Adequacy Lawsuits (Primarily 1990s)

> [E]ducation is perhaps the most important function of state and local governments. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.
>
> —*Brown v. Board of Education*, cited in Kentucky's landmark opinion, *Rose v. Council for Better Education*

Equity lawsuits appealed to litigants, in part because they were relatively straightforward. The parties sought to compare financial information about the relative abilities of local communities to pay for education and the resulting disparities in the amount of funding directed to school districts. Equal funding arguments were not popular, however, since they necessarily placed a cap on spending at the local level, forcing some communities to do less than they were able and willing to do for their schools.[8] Adequacy arguments provided a reasonable response to this concern. While local communities could always spend more, a state constitutional provision could ensure funding and programs necessary to reach a certain standard of adequacy.

The commonwealth of Kentucky turned to adequacy arguments. Using as its "polestar" the quote from *Brown v. Board of Education*, cited above, the Kentucky Supreme Court focused on equal opportunity and found the entire educational system to be unconstitutional. The court set a standard for adequacy that included seven "capacities" that children should obtain, along with calling for sufficient funding and monitoring of the schools by the state legislature.[9] The executive and legislative branches responded with sweeping educational reforms and new funds for schools. The Kentucky Education Reform Act (KERA) plan has had its proponents and antagonists, but it has unquestionably had a major impact on education in Kentucky. Other courts have followed Kentucky's lead. For example, an Alabama court applied Kentucky's adequacy framework and found the state system to be unconstitutional.[10]

In court opinions like Kentucky's, equity has been transformed from the concept of access to equal resources to access to an equal opportunity. While such equal opportunity arguments were becoming more accepted, litigants continued to make straight financial equity arguments. This may be because adequacy arguments based on equal opportunity have their drawbacks. In upholding the constitutionality of the Florida system, for example, that state's supreme court was clearly concerned about the degree of judicial intervention in adequacy cases. In a 4-3 opinion, the court stated,

> While we stop short of saying "never" appellants have failed to demonstrate in their allegations or in their arguments on appeal, an appropriate standard for

3. Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989); Edgewood Indep. Sch. Dist. v. Meno, 38 Tex. Sup. J. 188, 893 S.W.2d 450 (Tex. 1995).

4. McDaniel v. Thomas, 243 Ga. 632, 285 S.E.2d 156 (1981).

5. *Id.* at 243 Ga. at 644, 285 S.E.2d at 165.

6. Richland County v. Campbell, 294 S.C. 346, 364 S.E.2d 470 (1988).

7. Abbeville County Sch. Dist. v. State, 335 S.C. 58, 515 S.E.2d 535 (1999).

8. *See* Rose v. Council for Better Education, 790 S.W.2d 186 (1989).

9. *Id.*

10. Opinion of The Justices No. 333, 624 So. 2d 107 (Ala. 1993) (advisory opinion on complying with trial court order); Pinto v. Alabama Coalition for Equity, 662 So. 2d 894 (Ala. 1995) (regarding remedy plan); James v. Coalition for Equity, 713 So. 2d 937 (Ala. 1997) (regarding attorney fees).

> determining "adequacy" that would not present a substantial risk of judicial intrusion into the powers and responsibilities assigned to the legislature, both generally (in determining appropriations) and specifically (in providing by law for an adequate and uniform system of education).[11]

Equal opportunity or adequacy arguments also necessarily have state and local school districts pointing fingers at each other concerning who is at fault for not providing the equal opportunity. Has the state provided sufficient resources? Has the school district effectively utilized its resources? How important are financial resources in delivery of the educational program? In a recent New York City constitutional challenge, the trial court rejected the state's narrow analysis of the connection between student performance and spending, in general, and in particular discounted the state's expert testimony that there was little or no connection between student performance and improving teacher quality or facilities or reducing class size. Taking the issue beyond just financial resources, the court also held the state accountable for removing impediments to a sound basic education, even if the impediment was corruption in local governance.[12]

While some states have refused to venture into the adequacy arena, the model has been expanded in other states. For example, New Jersey added significant elements, including requirements that the state fund whole-school reform models and preschool for at-risk children in specified school districts.[13] In speculating on future directions of the adequacy model, Allan Odden, professor, University of Wisconsin–Madison, and Lawrence Picus, professor, University of Southern California stated:

> We suggest that it is entirely possible that some court in the future might require some uniform, minimum but high level of student achievement results. This would be a natural evolution of the adequacy issue, and the ultimate test of whether a comprehensive education program actually could deliver student achievement results.[14]

This time has come with the *Leandro* trial court rulings.

North Carolina's Turn: The *Leandro* Lawsuit

The *Leandro* lawsuit was filed in 1994, well into the phase of adequacy litigation across the country. A group of poor school districts (along with some of the school children attending schools in these districts and their guardians ad litem) initiated the suit, alleging that the state had violated constitutional rights to education. The plaintiff school districts are relatively poor, with relatively few local resources. Several urban school districts (and some of their children and guardians at litem) joined the suit to assert the needs of urban school districts.

Before any evidence was presented, the state contested the nature of the constitutional right to education and the types of claims that could be presented to the court. This initial contest led to the North Carolina Supreme Court's landmark decision in 1997—solidly in the "adequacy" tradition—holding that the state constitution guarantees "every child of this state an opportunity to receive a sound basic education in our public schools."[15] The court rejected an equity argument made by the poor school districts, finding that the North Carolina Constitution does not require equal funding but expressly allows counties to supplement state funds with their own local funds. With some direction given to the trial court on assessing whether the state had met its constitutional obligations, the lawsuit was remanded for trial. After a number of procedural issues were addressed, the trial began in September 1999. Because of the complexity of determining whether students had been afforded a sound basic education, the parties agreed to initially focus on one county—Hoke—as a school district representative of the concerns of the poor school districts that were plaintiffs in the case.

The trial lasted several months. The trial court has issued its rulings in three stages so far, with the first two rulings coming in the fall of 2000, and a third coming in the spring of 2001. The first two installments focused on (1) the constitutionality of the state's education and funding delivery system and (2) the education delivery system as it applies to at-risk students, with an emphasis on prekindergarden programs. The third ruling focused on (3) the measures used to determine whether students are receiving a sound basic education and accountability for use of resources. The court also addressed its finding that students across the state are not receiving a sound basic education. The reason for this—whether lack of resources or other conditions—will be the subject of a later ruling, possibly issued in the spring of 2002.

11. Coalition for Adequacy and Fairness in Sch. Funding v. Chiles, 680 So. 2d 400, 408 (Fla. 1996).

12. Campaign for Fiscal Equity v. State, Index No. 111070/93 (N.Y. 2001).

13. Abbot v. Burke, 153 N.J. 480 710 A.2d 450 (1998).

14. Allan Odden and Lawrence Picus, *School Finance: A Policy Perspective* (Dubuque, Iowa.: McGraw-Hill, 2000), 44.

15. Leandro v. State, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997).

The Ten Major Directions in the Trial Court Rulings

The key issue for the trial court was to determine how to assess the North Carolina Supreme Court's adequacy standard of a "sound basic education." The supreme court had defined this standard, using some of the same "capacities" identified in the Kentucky *Rose* opinion. The elements of a sound basic education, as set out in the *Leandro* supreme court opinion, are as follows:

1. sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society;
2. sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation;
3. sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and
4. sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.[16]

The arguments made by the parties at trial in the superior court reflected the gulf in potential interpretations of the standard imposed by this definition, from the state's focus on "fundamental" to the plaintiff's focus on the ability to compete equally. The trial court has resolved this issue for the moment. In reflecting upon the definition, the trial court stated:

> Let there be no mistake that the Supreme Court has declared that [the] ultimate goal of a child's receiving a sound basic education, regardless of which academic path the child ultimately chooses, is that he or she has been afforded the opportunity to achieve "sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society."[17]

16. *Id.*

17. Hoke County Bd. of Educ. v. State (*Hoke I*), 95 CVS 1158, 154 (2000).

The trial court further defined the parameters of a sound basic education in the 192-page first ruling, the 42-page second ruling, and the 85-page third ruling. The court's holdings and analysis are described below as ten major directions. Each of these is an element of the court's adequacy model.

No. 1

The court will not require a major overhaul of North Carolina's education system or funding system, finding that much of the system meets or exceeds constitutional requirements and that the system provides the flexibility to accommodate any new requirements.

The trial court held that North Carolina's education and finance delivery system is constitutional. In this ruling, the court did not address the constitutionality of the system as it is implemented or the sufficiency of funding. Still, it is an important victory for the state. A more incremental approach lessens the likelihood of protracted litigation. And of great importance to legislators and policymakers, it allows North Carolina to stay the course on key reforms. It does not, however, mean that the system will remain untouched. Rather, the court seems to be willing to possibly modify rather than overhaul the system.

Much of the trial court's reasoning seems to be related to several themes: (1) the court's recognition of the significant progress of the state in building standards-based reform; (2) the court's deference to the executive and legislative branches; and (3) the court's belief that the system is flexible enough to respond to any new requirements.

State's Progress in Reforms

This lawsuit might have had a different outcome if the decision had been rendered soon after the suit was initiated. Between the filing of the suit in 1994 and the issuance of the supreme court opinion in 1997, however, two major reforms were passed by the North Carolina General Assembly: the ABCs accountability program and the Excellent Schools Act. The ABCs included a mandate for accountability through a testing program on basics such as reading and math and established site-based management with added financial flexibility. The Excellent Schools Act mandated higher standards for licensure and created the expectation of significant funding for salaries. These reforms spawned further legislative efforts and the development of additional State Board of Education policies. The trial court

enthusiastically identified a number of these efforts, those shown in Chart 1.

Deference

Deference is another defining feature of the trial court's rulings. As stated by the trial court, citing the supreme court *Leandro* opinion, "This Court is expressly bound to grant every reasonable deference to legislative and executive decision branches when considering whether they have established and are administering a system that provides children of the various school districts of the state a sound basic education."[18]

Deference did not mean that the trial court would shy away from creating an adequacy model or mandating programs. Indeed, the court at times focused on elements not even in dispute between or raised by the parties. But the court was deferential to the legislative and executive branches in reviewing the education and funding system. For example, the trial court stated it "will not substitute its judgment for that of the State Board as to the sufficiency of the minimum score [for licensure exams] and there has not been clear evidence presented that the scores are too low to comply. . ."[19] In identifying the potential "masking effect" that can occur in the ABCs testing program when low scores of a subgroup of students are hidden by high test scores of other students, the court simply stated that the ABCs was a work in progress and heading in the right direction.[20]

Funding Flexibility in the System

The trial court held that the funding delivery system, including funding measures based on average daily membership (ADM), low wealth, small county, and at-risk students "is valid, sound and flexible enough to provide for the delivery of adequate funding to all school systems in North Carolina . . ."[21] The court also noted that "[o]ne of the most impressive and strongest aspects of North Carolina's educational funding delivery system is its flexibility. The system may be easily changed to meet new funding needs and programs in education. So long as this flexibility exists, the structure of the system will remain sound."[22] In the second ruling, the court fully demonstrated its confidence in the flexibility of the funding system, requiring the state to provide preschool for all at-risk four-year-olds.

18. *Id.* at 156.
19. *Id.* at 68–69.
20. *Id.* at 137.
21. *Id.* at 190.
22. Hoke County Bd. of Educ. v. State (*Hoke I*), 95 CVS 1158, 118–19 (2000).

Chart 1

Key Educational Reforms during the Period of the *Leandro* Lawsuit

- Lawsuit filed, 1994
- ABCs Accountability Program, 1996
- Excellent Schools Act, June 1997
- North Carolina Supreme Court opinion, July 1997
- Between 1996–97 and 1999–2000, nearly half of the gap between the average teacher salary in North Carolina and the United States was eliminated.
- North Carolina has the highest number of teachers holding National Board Certification in the nation.
- Since the litigation began in 1994, state funding for public schools has increased by 40 percent.
- Low-wealth supplemental funding increased from $40 to $60 million.
- Funds for at-risk students in 1999–2000 included:
  $52/average daily membership (ADM)
  $286/low-income students
  $163/every student who scored below grade level in grades three through eight.

No. 2

In identifying the critical responsibilities of the state and the means for measuring whether the state had met those responsibilities, the court has significantly limited the scope of potential constitutional issues.

Selecting the constitutional framework is crucial for determining the outcome of whether the system is constitutional. In the first ruling, the trial court identified the following key elements of a constitutional educational delivery system:

1. curriculum and standard course of study;
2. teacher licensure and certification standards;
3. funding delivery system;
4. ABCs accountability system;
5. at-risk students; and
6. sufficiency of funding.

For the first four elements, the court then set out the state's programs in great detail and explained its analysis for determining that the state had met or exceeded its constitutional mandate. In doing so the court

was not so much focused on resolving a dispute between the parties as it was in establishing its own framework for the standard of adequacy. Some of these elements were not disputed or even raised for consideration by the parties. For example, even though the curriculum established by the state's Standard Course of Study was not disputed by the school districts, the court gave an in-depth description of how the curriculum matched the specific language in the supreme court definition of a sound basic education.

By setting out what factors and standards are relevant to determining a sound basic education, the court has also implicitly, and at times explicitly, stated what is not relevant. For example, the court rejected high school diplomas as evidence of a sound basic education, finding that the standard for receiving a high school diploma is too low. And, while the court acknowledged the state's testimony that the Hoke County Schools had access to free staff development from the state, it did not suggest that the state had any obligations to address staff development separate from its teacher licensure program.

There are numerous other potential constitutional issues that are not addressed in the trial court rulings. For example, it is not clear in the rulings whether individuals may sue the state or local school district and seek individualized remedies. Nor is it clear how the constitution and the right to the opportunity for a sound basic education might be applied in different circumstances. For example, other states with adequacy-based constitutional standards have faced litigation on the state constitutional right to a safe school or, on the flip side, the right to remain in school or be provided with educational services during suspensions.[23]

No. 3

The ABCs accountability program is a critical component of the state's constitutional obligations.

The trial court described the testimony of Dr. Jay Robinson, a state witness and former chair of the State Board of Education, that the ABCs "'is by far the best thing we've done to insure that every child gets a good, basic education.'"[24] The court also agreed with Dr. Robinson that the ABCs is "one of the healthiest things the State has ever done."[25] The court went on to find that there was clear and convincing evidence that the ABCs program has improved student performance, continues to provide targeted state assistance, and creates incentives for improvement.[26]

But the court went a step further than Dr. Robinson's testimony or the state's position and declared that the ABCs was not only a beneficial program, but also a constitutionally "valid, appropriate and necessary program."[27] The court stated

> If the ABCs program were not in place, a similar accountability program would, in the Court's opinion, be required so the State, and the public, could have a statewide accountability system to measure educational progress and to assist in measuring whether or not each child is receiving the equal opportunity to obtain a sound basic education as the Constitution requires. [28]

This is a critical ruling for North Carolina in several respects. First, it removes the program from the political arena to a constitutional safety zone. It will allow the state to "stay the course" on this key reform. In other words, although the ABCs may be a work in progress, as noted by the court, the accountability program cannot be stopped. Second, the ruling is important in defining the state's role. Consistent with adequacy models and standards-based reform, the trial court has charged the state with providing assistance and requiring accountability of the local level. Giving this charge constitutional status heightens the state's responsibility to provide assistance and creates more leverage to insist upon accountability. And third, making the ABCs a constitutional requirement gives the court a way to measure whether students are on track for getting a sound basic education. This purpose alone could explain why the court said that the ABCs pro-

23. *See* Phillip Leon M. v. Greenbrier County Bd. of Educ, 199 W. Va. 400, 484 S.E.2d 909 (1996), *modified by* Cathe A. v. Doddridge County Bd. of Educ., 200 W. Va. 521, 490 S.E.2d 340 (1997). The constitutional right to education includes a right to a safe school; the state's constitutional responsibility to provide other state-funded educational opportunities and services to a suspended student must be determined on a case-by-case basis, based upon the unique circumstances of the individual child, including safety concerns for others.

24. *Hoke I* at 137.
25. *Id.* at 123.
26. *Id.* at 141–42.
27. *Id.* at 142.
28. *Id.*

gram was a crucial part of the state's responsibilities. The way in which the ABCs testing program is used to measure constitutional obligations is the subject of the next section.

No. 4

The court aligns constitutional standards with the ABCs by setting grade-level proficiency as a clear benchmark for whether a child is on track to receive a sound basic education.

The trial court tackled a key question early in the first ruling:

> Because the differences between the parties as to what the minimum performance standard of the sound basic education is, or is not, are so extreme, the Court has to first determine what the minimum level of academic achievement is under the *Leandro* standard. Without making this initial determination, there can be no baseline in place for the Court to anchor its review of the North Carolina educational delivery system.[29]

The court then defined the standard:

> The Court has determined that the minimum level of academic performance under *Leandro* is performance at or above grade level performance as defined by the ABCs' and DPI (Department of Public Instruction) (Level III or above). Academic performance below grade level (Level II) is a constitutionally unacceptable minimum standard and the State of North Carolina's argument that academic performance below grade level is sufficient is rejected.[30]

The court also emphasized that the current performance standards cannot be lowered.[31]

The trial court has with this definition taken the adequacy framework developed by other courts through its natural evolution by setting such a clear constitutional standard for performance tied to the state testing program. There are many important implications. First, the definition makes clear that the constitutional standard is targeted at *all* at-risk students, as identified by the state testing program, not a smaller, more seriously at-risk cohort as argued by the state. By equating the standard with grade-level proficiency, it also means that a significant proportion of students are not currently on track as constitutionally required. Depending upon the grade and test, the percentage varies, but it is easily 20 to 30 percent of the overall student population, and it is much higher among certain subgroups of students and in certain localities.[32]

Setting the benchmark for a sound basic education at grade-level proficiency may have other implications for determining whether constitutional requirements are met. By having such a clear measure, the importance of other criteria may be minimized. For example, other indicators of student performance, such as student grades, or "input" variables, such as curriculum or licensure requirements, also may be important but are difficult to reduce to a single measure. Having a specific standard for output also raises the possibility that the standard may become outdated in assessing the much more fluid supreme court definition of the opportunity for a sound basic education. Over time, it is at least possible that grade-level proficiency will not be adequate to enable each child "to compete on an equal basis with others in further formal education or gainful employment in contemporary society."[33]

The wording itself also raises a potential litigation issue: Will setting such a clear benchmark create for students absolute rights to obtaining grade-level proficiency? And since test data can be analyzed at the individual level or for some cohort, might it give rise to a constitutional version of education malpractice lawsuits? Much of the opinion is against such an interpretation: the focus tends to be on an "equal opportunity" to obtain a sound basic education, rather than on absolute obtainment of a certain level of performance. Furthermore, the court seems first to set and then to back off from absolute standards at different points in the opinions. For example, the following seems to set an absolute standard:

> A student who is performing below grade level (as defined by Level I or Level II) is not obtaining a sound basic education under the *Leandro* standard. A student who is performing at grade level or above (as defined by Level III or IV) is obtaining a sound basic education under the *Leandro* standard).[34]

29. Hoke County Bd. of Educ. v. State (*Hoke I*), 95 CVS 1158, 18–19 (2000).

30. *Id.* at 19.

31. *Id.* at 181.

32. 1999–2000 data maintained by the Department of Public Instruction show that the percentage of students in grades 3–8 who are at grade level is 75.3 percent in reading, 80.2 percent in math, and 69.8 percent in both subjects. The trial court cites test data that 40.8 percent of elementary and middle school black students are performing below grade level in reading, math, and writing (Levels I and II). Hoke County Bd. of Educ. v. State (*Hoke II*), 95 CVS 1158, 39 (2000).

33. Leandro v. State, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997).

34. *Hoke I* at 118–19 (text is boldfaced and capitalized in the court opinion).

Yet these excerpts suggest that whether the state has met its constitutional obligations involves a more complicated assessment:

> A school or a school system that has 90% of its children scoring at Level III or above would certainly be found in compliance with *Leandro* even as to the 10% who did not achieve the sound basic education standard.[35]
>
> Because students will learn different things at different times depending on their ability, effort and opportunity to obtain a sound basic education, the fact that a student fails to demonstrate a satisfactory level of academic achievement, e.g., a level of performance that indicates that the student is receiving a sound basic education (performing at grade level or above Level III, or above) does not, in and of itself, prove that the State has failed to provide that student the equal opportunity for a sound basic education or that the opportunity to obtain a sound basic education does not exist in the student's school or school system.[36]
>
> In any event, the growth and gain scores, standing alone, are not an adequate indicator of the quality of education being provided. They are, however, a factor the Court can consider in determining whether or not students are receiving a sound basic education.[37]

The trial court considered other student performance measures. The court set the standard that a "D" grade does not meet the minimal standards for a sound basic education: "A student who achieves a 'D' may pass but that student has not performed at the level expected to obtain a sound basic education."[38] The court also placed great weight on a teacher's determination of grades. It is not clear how grades will be used in concert with test scores, except that it still appears that Level III test scores (grade-level proficiency) is the absolute minimum standard in tested subjects.

No. 5

The state is constitutionally obligated to provide preschool for at-risk four-year-olds; the executive and legislative branches must determine how to implement the program at a reasoned and deliberate pace.

The second ruling of the trial court is largely devoted to setting a constitutional mandate of preschool for at-risk four-year-olds and justifying this mandate. The court states:

> In conclusion, the Court, based on the clear and convincing evidence, finds and concludes as a matter of law that under the North Carolina constitution as interpreted by *Leandro*, the right of each child to an equal opportunity to receive a sound basic education in the public schools is not to be conditioned upon age, but rather upon the need of the particular child, including, if necessary, the equal opportunity of an at-risk child to receive early childhood pre-kindergarten education prior to reaching the age of five and prior to entering five-year-old kindergarten.[39]

This ruling continues the focus of the first ruling on the at-risk child. And much like the first ruling, the mandate is better understood as an element of the adequacy model developed by the court, rather than as a response to issues raised by the parties. In fact, the court upon its own motion raised the issue of prekindergarten education. In addition to citing extensive research on the benefits of early childhood programs, the trial court judge described his own experience at seeing defendants in criminal court who had failed in school or whom the school had failed. The court also noted in the second ruling that 82 percent of the prison population is composed of high school dropouts.[40] The judge was clearly concerned about the implications for the individual and for society when children miss out on a sound basic education. Preschool programs have not traditionally been a part of the adequacy model developed by courts. New Jersey is the only other state with a court mandate to provide preschool as part of a constitutional lawsuit.

As a policy choice, however, preschool is much more common. More than forty states provide some form of publicly funded preschool.[41] Kentucky chose to develop a preschool program as a policy response to the *Rose* court ruling but had not been mandated to do so. Georgia is the only state that has fully implemented a universal program. It serves the second-greatest number of children, with 61,000 four-year-olds enrolled, for a total of 65 percent of all four-year-olds in the state.[42] Texas serves the most children, with 130,000 of three- to four-year-old children who are at-risk enrolled in 1998–99, constituting 20 percent of all three- to four-year-old children in the state and 80 percent of children living in poverty.[43]

In many European countries, providing universal preschool is the norm as illustrated in Chart 2.

35. *Hoke I* at 187–88 (boldfaced in original text).
36. *Hoke I* at 154–55.
37. *Hoke I* at 129.
38. Hoke County Bd. of Educ. v. State (*Hoke I*), 95 CVS 1158, 166 (2000).
39. Hoke County Bd. of Educ. v. State (*Hoke II*), 95 CVS 1158, 42 (2000).
40. *Hoke II* at 2.
41. David Denton, *Prekindergarten and Parent Support Programs in SREB States* (Southern Regional Education Board, 2000).
42. *Id.*
43. *Id.*

Critical Issues in Establishing Public Preschool

The trial court did not prescribe how the state must provide preschool; rather, it explicitly deferred to the legislative and executive branches to work out programmatic issues and implement preschool at a "reasoned and deliberate pace."[44] North Carolina will face many issues that other states have addressed in providing public preschools. Some of the critical programmatic questions are:

- How should at-risk children be identified?
- Who are the eligible providers?
- What is the required length of the school day?
- What standards and assessments will be implemented in regard to personnel, curriculum, and facilities to ensure quality and safety?
- What governmental entities will have authority and responsibility for the programs at the state and local level, and what types of collaboration will be essential between different entities?

For all states, including North Carolina, these questions are viewed through the lenses of the funding available and the capacity at the local level to provide the programs. North Carolina will also consider these issues through a constitutional lens: How can the state determine whether the program is designed and implemented in a manner that ensures that at-risk students will be on track for a sound basic education? North Carolina recently created, through a multi-agency collaboration, a method for assessing the conditions of children entering school and schools' readiness for children entering kindergarten.[45] Assessments have begun under the new program. The state could look to build upon this program by considering constitutional standards in assessing at-risk preschool children and evaluating school capacity.

As North Carolina works to address these issues, it can look to the experiences of other states. For example, on the issue of identifying at-risk children, some states use conditions likely to cause children to be at risk, such as poverty, and others seek to assess deficiencies. The trial court identified an array of factors that could cause a child to be placed at greater risk, although the state is not obligated to incorporate these into its identification of eligible children. These factors are low family income (as measured by free and reduced price lunch), level of parental education, racial and/or ethnic background, and limited English proficiency. The court noted other factors that may also place students at greater risk, including the health status of children, composition of the family (e.g., single parent families), housing status and environment in which the student lives, crime, and whether the parents work. Critical issues for North Carolina, from a constitutional, financial, and capacity perspective, will be the selection of providers, including the categories of eligible providers (e.g., should eligibility be limited to public schools or should there be some combination of schools with community agencies and private child development programs?); the method for disseminating funding; and the means for holding providers accountable for quality programs. The experiences of other states suggest that it is very difficult to fully provide the program within the public schools. In Georgia, approximately 40 percent of the programs are offered by public schools, and 60 percent are offered by

Chart 2

Public Preschool in Selected Countries

France

100% of children ages 3 through 5 attend preschool, most in public programs

Italy

Approximately 92% of children ages 3 through 5 attend preschool, most in public programs

Denmark and Germany

80% of 5-year-olds, 70% of 4-year-olds, 30% of 3-year-olds attend preschool

United Kingdom and the Netherlands

Compulsory schooling at age 5, almost all 4-year-olds attend preschool

Belgium

About 95% of children aged 3–5 attend preschool

Luxembourg

Nearly all 4-year-old children attend preschool

Greece

65–70% of 3-year-olds attend preschool

Spain

More than 90% of 4–5 year-olds attend preschool

United States Public and Private Preschool Enrollment

81% of 5-year-olds, 50% of 4-year-olds, 30% of 3-year-olds attend preschool

44. *Hoke II* at 43.

45. *School Readiness in North Carolina: Strategies for Defining, Measuring, and Promoting Success For All Children*, (SERVE, 2000).

Chart 3

Established Preschool Programs

State	1st Year	Criteria	Funding/ No. Served	Hours/ Day	Eligible Providers
Georgia	1992	4-year-olds, all	$224 million/ 62,500	6.5	Education, community or child care entity
South Carolina	1984	4-year-olds, AR [at-risk], academic deficiencies, ESL	$23.2 million/ 16,500	2.5	School districts receive funds: can contract out
Florida*	1987	3- to 4-year olds, AR [at-risk], 75% of 4-year-olds of working poor, 25% of 3- to 4-year-olds with disabilities, economically disadvantaged 3-year-olds, non-disadvantaged 3-year-old migrant children	$100.3 million/ 30,700	6	School districts receive funds: can contract out
Texas	1984	3- to 4-year olds, AR [at-risk], unable to speak or understand English, educationally disadvantaged, homeless	$216 million/ 130,000	3	Any district with at least 15 eligible 4-year-olds must offer prekindergarten—may provide directly or contract out
Kentucky	1990	4-year-olds, AR [at-risk], eligible for free school lunches, 3- and 4-year-olds with developmental problems or disabilities	$40 million/ 15,500	Half-day	School districts receive funds: can contract out

*Florida also provides prekindergarten programs to approximately 2,500 3- to 4-year-old children of migrant laborers in a separate program at a cost of approximately $3.3 million.

private providers or other agencies. Similarly, in New York, where the law requires that at least 10 percent of a district's prekindergarten funding be contracted out to community agencies, the experience has been that more than half has been contracted to local providers.[46] If North Carolina chooses to take a similar approach, the state constitutional standard will make it even more critical that providers be held accountable for getting at-risk students on track for a sound basic education. Many southern states, including South Carolina, Florida, Texas, and Kentucky provide funding to the local school district, which can then exercise the choice of contracting out to local providers. This approach may help create accountability between outside providers and the local school district.

At a glance, Chart 3 identifies some of the critical choices made by other southern states. Note the clear relationships between funding amounts and the length of the school day.

North Carolina Preschool Profile

While North Carolina can learn from the approaches taken by other states, it also will be taking into account its own unique circumstances. At the top of the list is the state's established birth-through-four-year-old program called "Smart Start" or "Partnership for Children." This program has been established in all counties in the state, with total funding for the 2000–2001 year at $260 million. The authorizing legislation for Smart Start defines the role of the program as follows: "High quality early childhood education and development services"[47] to "ensure that the developmental needs of children are met in order to prepare them to begin school healthy and ready to succeed."[48] The trial court in *Hoke County*

46. "Plans for 'Universal' Preschool Gain Ground in New York State," *Education Week* (Oct. 25, 2000). New York's prekindergarten program is funded with $225 million for this year and expects to serve more than 52,000 children. Priority has been given to high-needs districts and preference goes to low-income children. Remaining slots are by lottery. Funding next year will be $500 million and remain at that level. Districts apply for funding. Each district with a prekindergarten program must form an advisory board.

47. N.C. GEN. STAT. § 143-186.10, 168.11 (hereinafter G.S.).

48. G.S. 143-168.11(b)(3).

Board of Education v. State (*Hoke II*) also noted the broad role of Smart Start:

> Smart Start is not principally a prekindergarten education program. There is no requirement that Smart Start funds be used for educational programs, but there is no prohibition against such use by a particular Smart Start program. The bottom line is that Smart Start is an existing public-private partnership through which programs for early educational intervention for at-risk children could be established and funded.[49]

Out of the $206 million budget for 1999–2000, approximately $15 million was targeted specifically for preschool programs or child subsidies for four-year-olds. The following charts provide a further breakdown of Smart Start funding:

Chart 4

Smart Start Funding Specifically for 4-Year-Olds: 1999–2000

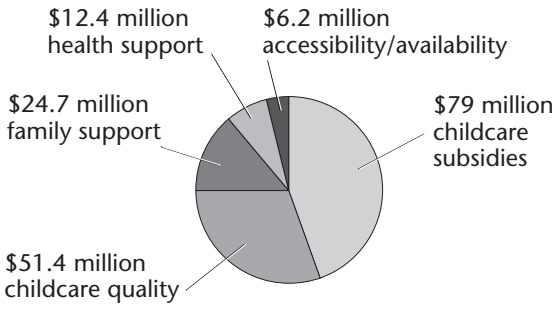
$8.2 million in preschool programs

$6.6 million in child care subsidies for 4-year-olds

(total statewide funding sources 1999–2000: $33.9 million in subsidies for 4-year-olds)

Chart 5

Smart Start Service Allocations (Serving Children Birth through Age 4 and their Families) 1999–2000



$173.65 million: Total Service Allocation

$206 million: Total Budget (includes program evaluation, state and local partnership operation funds)

Currently, almost half of North Carolina's 106,000 four-year-olds attend some type of preschool or regulated childcare program. North Carolina has the nation's highest rate of working mothers: 67 percent of mothers with children younger than six are employed, compared with 60 percent nationally.[50] The specific enrollment figures are as follows:

Chart 6

Four-Year-Olds Enrolled in North Carolina Programs, 2000

Program	Percentage of all 4-Year-Olds	Total Number
Regulated child care centers*	38%	40,469
Public preschool**	8%	8,515
Family child care homes*	2%	2,132

*Source: Division of Child Development, data current as of August 2000

**Source: Department of Public Instruction, 1999–2000

Across the state, public schools have embraced preschool to various degrees. Schools are required by federal law to provide preschool for eligible children with disabilities. But for non-disabled children, no state funds are available for preschool programs and schools must look to using their Title I funds or funds from other sources, including applying for Smart Start funds. For a perspective on existing public preschool programs, compare the number of preschool classes among the largest school districts in the state and the relative size of school districts with the most preschools (Chart 7). Either view reaches the same conclusion: There is little correlation at this time between the size of the school district and the number of preschool programs.

In North Carolina, the Charlotte-Mecklenburg school system has devoted the greatest attention to preschool programs. It allocates almost all of its Title I funds to a program called Bright Beginnings, a literacy-based prekindergarten program primarily for low-income children. The trial court in the *Hoke II* opinion

49. 95 CVS 1158, 28 (2000).

50. "Census: More Mothers Return to Work," *News & Observer*, Oct. 24, 2000.

Chart 7

Comparison of Preschool Classrooms in the Five Largest North Carolina School Districts

School District	Total Final Enrollment 1999	Preschool Classrooms 2000–2001
Charlotte-Mecklenburg	96,439	111
Wake County	90,675	5
Guilford	59,615	27
Cumberland	49,219	33
Winston-Salem/Forsyth	41,752	5

Comparison of Total Enrollment in N.C. School Districts With the Most Preschool Classrooms

School District	Total Final Enrollment 1999	Preschool Classrooms 2000–2001
Charlotte-Mecklenburg	96,439	111
Cumberland	49,219	33
Guilford	59,615	27
Robeson	23,075	24
Nash–Rocky Mount	17,291	19
Vance	7,667	19

described the program and its successes.[51] The Bright Beginnings program has spread to private child development programs in Mecklenburg County with the use of local Smart Start funds.

North Carolina has some important components in place to begin contemplating preschool for all at-risk four-year-olds: birth-through-four programs provided by Smart Start; state and local experience in collaborating on child development issues; consensus on assessing the conditions of children entering kindergarten and school readiness for children; and full-day public kindergarten.

51. Hoke County Bd. of Educ. v. State (*Hoke II*), 95 CVS 1158, 31–33 (2000) .

No. 6

Many students in Hoke County Schools are not receiving a sound basic education based upon the output measures of (1) grade-level proficiency on state tests; (2) dropout rates; and (3) indicators of preparation for work or further education.

The parties in the lawsuit included relatively poor school systems (the plaintiffs) as well as some urban school systems that had more local resources (the plaintiff-intervenors). Because of the complexity of the case, the trial focused on the public schools of Hoke County, a school district that was considered representative of the concerns of the relatively poor school districts. More than one-fourth of the children in Hoke County live in poverty, and nearly two-thirds of the district's students receive free and reduced price meals.[52] The plan was to later consider the needs of the urban districts through a representative urban school district.

Based upon evidence presented about Hoke County Schools, the trial court found that many students were not receiving a sound basic education by examining three output measures: grade-level proficiency, dropout rates, and indicators of preparation for work or further education.

Grade-Level Proficiency

As discussed above, in the first trial court opinion, the court described at length the basis for determining that grade-level proficiency on the state tests was an appropriate standard for assessing whether a student was on track for receiving a sound basic education. In the third ruling, the court applied this standard to review the educational progress of students in Hoke County Schools. The court found that "[o]n every EOC [end of course] and EOG [end of grade] test administered by the State, substantially higher percentages of Hoke students failed to meet the State's standard of adequate performance than did students statewide."[53]

Dropout Rates

The trial court explained the importance of dropout rates in considering whether students had the opportunity for a sound basic education:

52. Hoke County Bd. of Educ. v. State (*Hoke III*), 95 CVS 1158, 9 (2000).

53. *Id.* at 15.

> Students who drop out of school are much less likely to engage successfully in post-secondary education and vocational training. They also are less likely to have sufficient academic and vocational skills to compete on an equal basis with others in the workplace.[54]

The court noted that only 40 percent of ninth-grade students in Hoke County graduated in four years in the mid-1990s. The comparable completion rate for the state was 60 percent.[55] The court concluded that the large number of students who fail to graduate in Hoke County is evidence of children not receiving a sound basic education.[56]

Preparation for Work or Further Education

In regard to preparation for work, the trial court cited a report of the North Carolina Education Standards and Accountability Commission that found that "'the number of jobs for unskilled workers has dropped from a high of 60% in 1950 to a projected 15% in 2000.'"[57] The court went on to say, "[i]t is precisely this transition that the Supreme Court addressed in describing the qualitative components of the sound basic education. Listening to the clickety clack of the looms in a textile mill is a thing of the past in North Carolina."[58] The court outlined evidence of deficiencies described by Hoke County employers, including those in the areas of reading, writing, and math, that made many Hoke County graduates inadequate for jobs. The court said that the disproportionate number of students who are poorly prepared to enter the workforce is evidence of a failure to obtain a sound basic education.

Evidence of preparation to enter the community college and university system is also relevant to whether students are equipped to compete on an equal basis in post-secondary education. The trial court reviewed a series of statistics that provided some insight into how well public school graduates perform in college. Based upon these statistics, the court concluded that a large number of Hoke students were not equipped with a sound basic education. Some of the statistics included in the analysis are reported below.

Chart 8

Experience in the University of North Carolina System: 1997

	HCSS (Hoke County School System)	Statewide
Freshmen in remedial classes	30.7%	15.3%
Freshmen with advanced placement in English	2.1%	11.1%
Freshmen placing in calculus or higher math	6.2%	24.7%
Freshmen average course grade in math	1.6	2.3

No. 7

At-risk students across the state are not receiving a sound basic education; at-risk students fare no better in the "wealthy" districts than they do in the poor districts.

The parties to the case and other observers had expected the court's third ruling to focus on Hoke County exclusively, but the court issued a broader ruling, saying that "the poor academic performance of at-risk populations is too widespread to by-pass and put off for another day."[59] Although evidence in the trial focused only on Hoke County Schools, the court conducted its own extensive analysis that spans more than thirty pages of the eighty-five-page opinion. Using disaggregated student performance scores on state tests from a sampling of school districts across the state, the court found that in many of the various subjects and grades, half or more of at-risk students and minority students scored below grade-level proficiency. Furthermore, the court concluded, "the disparity in local funding seems to make no discernible difference in the academic achievement of the at-risk populations in the individual districts. . . ."[60]

One of the trial court's comparisons was of Hoke County Schools and Charlotte-Mecklenburg Schools,

54. *Id.* at 17
55. *Id.* at 18.
56. Hoke County Bd. of Educ. v. State (*Hoke III*), 95 CVS 1158, 18 (2000).
57. *Id.* at 21.
58. *Id.*
59. *Id.* at 31.
60. *Id.* at 33.

a plaintiff-intervenor in the case. In drawing comparisons between Hoke and Charlotte-Mecklenburg, the trial court noted that while Hoke had 6,056 students and spent $664 per student in local funding, in the same year (1998–99), Charlotte-Mecklenburg had more than 98,000 students and spent $1,910 per student in local funding. The court applied these figures to determine classroom funding of $17,264 per classroom in Hoke and $49,660 per classroom in Charlotte-Mecklenburg. The court concluded that "[f]or this huge amount of extra money per classroom/ADM, common sense would dictate that one would find much better student performance on EOG and EOC scores in [Charlotte-Mecklenburg] than in [Hoke]."[61] Instead, the court's review of disaggregated test scores found comparable levels of grade-level proficiency (with some variation on particular tests or grades) among minority students in the two school systems. Neither Charlotte-Mecklenburg nor the other plaintiff-intervenor school systems have had the opportunity to respond to the court's conclusions.

The decision to shift to a statewide focus will likely have a significant impact on the court's analysis of resources needed to provide a sound basic education. Rather than just considering the unique circumstances in Hoke County, the court may need to consider resources required across the state to meet the constitutional benchmarks of grade-level proficiency, dropout rates, and indicators of preparation for work or further education.

Resources to address grade-level proficiency

The trial court focused on resources needed to raise the performance of at-risk students. These students can be identified best, according to the court, by (1) socioeconomic status, (2) level of parental education, and (3) free and reduced price lunch participation.[62] The court acknowledges that resources required for serving these children may be different from students not at-risk. As the court noted, "[i]n order for them to perform well in school it may take 'more time or different kinds of intervention' and more resources than those needed for children from middle class backgrounds."[63] In the second ruling, the court identified interventions, in addition to prekindergarten, that are likely to be successful in working with at-risk students: reducing class size, tutoring, more time on task, and competent and well trained teachers with updated professional development.[64]

Some of these strategies, such as tutoring, focus exclusively on at-risk children. As such, the resources are fairly targeted. The court notes at least two strategies, however, that are broader reforms: reduction in class size and updated professional development. Does this mean that resources allocated effectively toward these functions are included within the constitutional mandate? If so, then the constitutional benefits can be extended to more than the at-risk student population. The implementation of broader reforms must be designed carefully, however, to ensure that at-risk students benefit as much as possible. For example, the Tennessee Student-Teacher Achievement Ratio (STAR) experiment demonstrates that reduced class size can be of particular benefit to at-risk students.[65] However, California's experience in implementing class size reduction demonstrates that at-risk students may receive less of the benefit if the plan does not take into account the availability of classrooms and the quality of teachers at the schools to which they are assigned.[66]

The strategies identified by the court are all implemented at the local level. Does the state also have a role in delivering services or programs to benefit at-risk children and their families? For example, within the North Carolina Department of Public Instruction, the ABCs program is the state's most important vehicle for providing assistance to schools in improving educational opportunities for at-risk students. The most extensive state assistance is currently offered to low-performing schools. While this may be an effective strategy for reaching larger concentrations of at-risk students, it may not reach at-risk students who attend schools where the overall population meets performance standards. Resources could be devoted to expand the ABCs to include disaggregated data in the accountability model and to provide for assistance to schools that have achievement gaps with their at-risk populations.

61. Hoke County Bd. of Educ. v. State (*Hoke III*), 95 CVS 1158, 38 (2000).

62. *Id.* at 64–65.

63. *Id.* at 71.

64. Hoke County Bd. of Educ. v. State (*Hoke II*), 95 CVS 1158, 16–17 (2000).

65. John Folger, ed. "Project STAR and Class Size Policy." *Peabody Journal of Education*, 67(1) (1992); Alan B. Krueger, "Reassessing the View that American Schools Are Broken," *Federal Reserve Bank of New York Economic Policy Review*, 29–43 (March 1998). Both studies also are discussed in Odden and Picus, note 14, at 305.

66. B. Stecher, G. Bohrnstedt, M. Kirst, J. McRobbie, and T. Williams, "Class-Size Reduction in California: A Story of Hope, Promise, and Unintended Consequences," *Phi Delta Kappan*, 82(9) (2001), 670–74.

Agencies serving at-risk children and their families also play an important part in serving at-risk children and meeting constitutional educational standards. As noted by the court in the *Hoke III* decision,

> Unfortunately, way too many of North Carolina's children are brought into this world and, through no fault of their own, plunged into "home" environments void of intellectual stimulation, discipline, respect for others and from which they arrive at the schoolhouse destined for academic failure. This is not the fault of the public schools and yet, the public schools have no choice but to shoulder the burdens of these at-risk children and are expected to provide them with the equal opportunity to obtain a sound basic education.[67]

The state has already implemented initiatives to address home environments. For example, in 2000 the General Assembly appropriated $250,000 to the Department of Health and Human Services for funding pilot projects that would assist families with children performing below grade level.[68]

Resources to address dropout prevention

The trial court noted that early intervention could make a difference in dropout rates. The court implied that the State Board of Education is in agreement with this notion, citing evidence that the State Board had found in 1994 that a wide range of programs were needed in school systems.[69] In assessing sufficiency of funds, the court could consider resources allocated toward dropout prevention programs at the local and state levels.

At the local level, it is unclear what resources or funds are devoted specifically to dropout prevention. As a result of responses to requests in recent years from school districts for more flexibility with their budgets, dropout prevention funds are now included in an at-risk allotment that may also be used for summer school, remediation, and alternative schools.

Retaining students at a particular grade level also affects the number of students who graduate on time or graduate at all. A report submitted to the State Board of Education found that summer schools were successful in helping about half of the students not promoted at the end of the school year to be promoted after the summer.[70] Summer school programs are also cost effective. For example, the report found that 32,023 students were promoted as a result of attending summer school in 1994–95. These summer programs cost $40 million. By comparison, if those students were not promoted, it would cost about $150 million for them to repeat the grade not passed.[71] Even though they are effective, these programs have been in decline and nonpromotions are going up. When summer school funds were collapsed into the broader category of at-risk funds, the funds were directed to other programs to assist at-risk students.

The ability of the state to assist schools with dropout programs declined in the mid-1990s when the General Assembly substantially reduced funding to the Department of Public Instruction. The dropout prevention services staff was reduced from eight consultants to two, who also have other responsibilities outside of the dropout prevention efforts. In addition, federal and state regulations require data on dropout rates. After managing these reporting functions, staff have little time available for program support.[72]

Resources to prepare students for work or further education

Resources required to reduce or eliminate the need for remedial education would seem to be well within the parameters set by the *Hoke* trial court. It is less clear what other efforts are included within the constitutional right to a sound basic education. In its first ruling, the trial court said that the Standard Course of Study "must provide those students with an equal opportunity to take the high school courses that will be required, at a minimum, for admission to college in the University of North Carolina System."[73] In its third ruling, the court said, "[t]he State Constitution does not require that children be provided a prep school education, nor that children be provided the courses and experiences to enable them to go to Yale or Harvard."[74]

Could resources be applied to help students go beyond the minimum standards for admission and yet keep within the constitutional mandate as defined by the supreme court? For example, a report prepared for the State Board of Education on closing the racial achievement gap cited various studies that found that students who took advanced placement courses

67. *Hoke III* at 69–70.

68. SL 2000-67, sec. 11.4A.

69. *Hoke III* at 19.

70. Engin M. Konanc, *Completion Rate Trends 1989–90 Through 1999–2000*. (Raleigh: North Carolina Department of Public Instruction, Statistical Brief No. 16, 2001), 10.

71. *Id*. at 11.

72. Telephone Interview with Jackie Colbert, Assistant Director for the Division of School Improvement, N.C. Department of Public Instruction, May 15, 2001.

73. Hoke County Bd. of Educ. v. State (*Hoke I*), 95 CVS 1158, 53 (2000).

74. Hoke County Bd. of Educ. v. State (*Hoke III*), 95 CVS 1158, 77 (2000).

performed much better in college than those who had just taken the college prerequisite courses. The report recommends ensuring that all students take Algebra 1 before entering the ninth grade. It also recommends exploring various strategies for increasing minority student participation in gifted programs and advanced courses.[75]

No. 8

The quality of principals and teachers is the key to higher student performance.

In describing successes at five schools, the court noted, "[i]f these wonderful educators can achieve success with at-risk children on a shoe-string there is no absolutely no excuse for other schools, especially wealthy schools, not to achieve at-risk student success with leadership and proper strategic allocation of resources."[76] One example of a successful school was introduced into evidence by way of the deposition of a principal from Hoke County Schools. To find other examples, the court went beyond evidence presented at trial to a newspaper account that included descriptions of four successful schools. The trial court identified specific indicators of strong leadership from these five examples, including rearranging the instructional schedule to provide two more hours of instruction per day;[77] using teacher teams in the middle school;[78] and reallocating an assistant principal position and teacher assistant positions to reduce class size.[79]

The emphasis on quality extends beyond these five schools. The court concluded in the first *Hoke* ruling that "the entire curriculum contained in and provided by the Standard Course of Study meets and exceeds the *Leandro* standards so long as the curriculum is being properly implemented and taught by competent and qualified teachers."[80] Similarly, the court noted in the third ruling that "[f]or the not at-risk group of children, those achieving at Level III and above and being taught by competent certified teachers, the equal opportunity to obtain a sound basic education as defined by *Leandro* is being met regardless of where the children are in school."[81]

In the first ruling, the court found the state's standards for licensing, certifying, and employing teachers to be constitutionally sufficient.[82] The court also noted with approval a number of programs put in place by the state to increase the availability and qualifications of educators, including the Teaching Fellows program, Prospective Teacher Scholarship Loan, Principal Fellows program, Model Teacher Consortium, and participation in the National Board Certification program.[83]

Resources for providing quality educators

The question still persists, however, as to what resources must be devoted to ensure that all students are taught by competent and certified teachers and all schools led by well-trained principals. Studies often point to a serious problem of at-risk students being taught by the least qualified teachers.[84] One recent report received by the State Board of Education also documents that many teachers lack the skills to appropriately assess minority children, resulting in underrepresentations of minorities in advanced courses.[85] Yet another recent report submitted to the State Board identifies the fact that many teachers lack a broad range of instructional strategies, leading to overclassifications of minorities with behavioral disabilities.[86] Numerous state and local roles—and the effective use of resources—may need to be further examined to address these kinds of issues.

One critical state and local responsibility is teacher training. Studies have found teacher training to be more

75. William Darity, Jr., Domini Castellino, and Karolyn Tyson. *Increasing Opportunity to Learn via Access to Rigorous Courses and Programs: One Strategy for Closing the Achievement Gap for At-Risk and Ethnic Minority Students* (Raleigh: Report submitted to the State Board of Education, May 2001).

76. *Hoke III* at 80.

77. *Id.* (describing a tactic used by Darlene Clark, principal of West Hoke Middle School, Hoke County Schools).

78. *Id.* (describing a tactic used by Darlene Clark, principal of West Hoke Middle School, Hoke County Schools).

79. *Hoke III* at 81 (describing a tactic used by Sue Sisson, principal of Kingswood Elementary School, Wake County Schools).

80. Hoke County Bd. of Educ. v. State (*Hoke I*), 95 CVS 1158, 59 (2000).

81. *Hoke III* at 72.

82. *Hoke I* at 79.

83. *Id.* at 76–77.

84. Christopher Jencks and Meredith Phillips, eds. *The Black-White Test Score Gap*. (Brookings Institution Press, 1998), 10. Jencks and Phillips also cite Michael Bozer, Alan Krueger, and Shari Wolkon. "Race and School Quality since *Brown v. Board of Education*." *Brookings Papers on Economic Activity* (*Microeconomics*) (1992), *299.*

85. *See* Darity, Castellino, and Tyson, note 69.

86. Thomas W. Farmer, *The Identification and Delivery of Services to Youth with Behavioral and Emotional Disabilities in North Carolina: Implications for Understanding and Improving the Achievement Gap.* (Raleigh: A report submitted to the N.C. Department of Public Instruction, the Commission on Improving the Academic Achievement of Minority and At-Risk Students and the Joint Legislative Education Oversight Committee, 2001), 44–46.

important than class size reduction in raising student performance.[87] Certain state funds can be used at the local level for staff development. In addition, the state provides a staff development allotment, 75 percent of which must be distributed at the school level to be used in accordance with the school's "school improvement plan."[88] The court could examine the effectiveness and sufficiency of these resources.

The court could also assess the state role and resources required in providing training that is targeted at developing skills needed to deliver a sound basic education—especially as measured by the trial court's benchmarks of grade-level proficiency, dropout/graduation, and preparation for work or further education. The state argued in the lawsuit that the Hoke County school system could have made better use of free staff development from the Department of Public Instruction's Student Accountability Services.[89] Given the downsizing experienced by the department, it is not clear whether the department currently has the capacity to provide this free staff development statewide. In addition to professional development opportunities, the court could address the state's role through the university and community college system to provide degree programs that will equip graduates with the skills needed to successfully provide a sound basic education.

No. 9

Facilities are not a significant issue in whether students receive a sound basic education.

During the trial, the plaintiffs offered evidence that "in numerous respects most Hoke County school facilities fail to satisfy the state's Facilities Guidelines or are in other respects inadequate." [90] According to their proposed findings of fact, the plaintiffs had submitted documents showing that "the classrooms in Upchurch Elementary, a school constructed for African-American students in the 1940s and 50s, were rated by DPI in 1993 as suitable for use only for five years or less."[91] Other evidence presented by the plaintiffs included a document stating that a 1937 school building used as an alternative school had been rated by DPI as "below short range . . . phase out of use."[92]

The trial court was not persuaded by this evidence. Instead, after reporting its own observations of the schools based upon a visit to the school district, the court concluded that the Hoke school system "has a satisfactory blend of older schools and modern schools, similar to school systems all across the State of North Carolina."[93] Perhaps more to the point, the trial court expressed the opinion that "It's not the building—It's what takes place inside that really matters."[94]

Resources for facilities

Based upon its findings, the court apparently would not find any constitutional deficiencies in funding for facilities for Hoke County Schools. It is not clear, however, whether the court's declarations apply statewide. For example, what if school systems were to demonstrate the negative effects of school overcrowding or cite specific health hazards, such as air quality, or identify buildings that do not meet standards for accommodations of individuals with disabilities? Inadequate facilities could also have a direct impact on a school's ability to implement reforms such as class size reduction. The constitutional parameters for these issues may still need exploration.

No. 10

Local school districts must use all available resources first to provide all children with an equal opportunity to receive a sound basic education.

In the informal oral arguments conducted on August 18, 2000, the trial court asked the parties to respond to a hypothetical: If there was a known constitutional deficiency, must a local board use its funds first to correct the deficiency before allocating resources to programs not related to providing a sound basic education? The lawyers for the poor school systems and urban school systems said yes. In the first court ruling, this hypothetical is translated to a strict evidentiary burden for the poor and urban school districts. The court said,

> It is not the State's burden to show whether the funds allotted for any particular purpose are sufficient. Rather, plaintiffs have the burden to prove by clear

87. Odden and Picus, note 14, 308.

88. G.S. 115C-105.30.

89. Hoke County Bd. of Educ. v. State (*Hoke I*), 95 CVS 1158, 110 (2000); Defendant's Proposed Findings, no. 1154 (citations omitted).

90. Plaintiff's Proposed Findings of Fact and Conclusions of Law, no. 419 (citations omitted).

91. *Plaintiff's Proposed Findings*, no. 424.

92. *Id.*

93. Hoke County Bd. of Educ. v. State (*Hoke III*), 95 CVS 1158, 4 (2000).

94. *Id.* at 3.

> evidence that a particular educational program is a necessary component of the opportunity for a sound basic education; that the program is not provided; and that all available financial resources—State, federal and local—have been exhausted to prove other programs necessary to provide the children with an equal opportunity to obtain a sound basic education.[95]

In the first ruling, the court then went a step further in establishing a general mandate for local school districts:

> The requirement that all children in every county have an equal opportunity to receive a sound basic education mandates that the funds appropriated and applied from whatever source, be first used to satisfy the equal opportunity to receive a sound basic education mandate before funds are spent on programs not mandated by the constitutional threshold set forth in *Leandro*.[96]

This bold mandate is made more significant by the fact that the constitutional deficiencies are now so clear. After all, the burden is slight if the constitutional standard is vague and difficult to tie to particular school activities. But the impact is great when school districts can easily assess whether students are at grade-level proficiency and whether they are on track for a sound basic education.

It is fundamental that constitutional requirements have priority in funding over policy choices of the state. In the third ruling, the court applied this principle to make clear the state's requirements for funding a sound basic education:

> All funds must be used first to provide the opportunity for a sound basic education to all students, including at-risk students. Funds from educational programs not related to the constitutional right must be reallocated if necessary in order to provide all students with the opportunity for a sound basic education.[97]

The trial court elaborated, "[w]hile there is no restriction on high-level electives, modern dance, advanced computer courses and multiple foreign language courses being taught or paid for by tax dollars in the public schools, the constitutional guarantee of a sound basic education for each child must first be met."[98]

As noted by the court, the state had also argued for this standard in determining the sufficiency of funding. The state had proposed that "plaintiffs have the burden to prove by clear evidence that a particular educational program is a necessary component of the opportunity for a sound basic education; that the program is not provided; and that all available financial resources—State, federal and local—have been exhausted to provide other programs necessary to provide the opportunity to obtain a sound basic education. Otherwise, there is no basis to complain that a particular State allotment is insufficient."[99]

This constitutional standard is the premise for the court's examination of whether funds have been sufficiently allocated at the state and local level toward providing a sound basic education. The court explained that "[t]he plaintiffs and plaintiff-intervenors have produced clear and convincing evidence that there are at-risk children who are not obtaining a sound basic education. What they have not yet proved by clear and convincing credible evidence is that the failure is the result of lack of sufficient funding by the State."[100] Put another way, the trial court stated, "[t]he court is, however, convinced that neither the State nor all of its LEAs are strategically allocating available resources to see that at-risk children have the equal opportunity to obtain a sound basic education."[101]

Since the court doubts that resources have been allocated wisely at either the state or local level, it may further explore resource allocation practices at both levels.

State Allocation of Resources

The inquiry into the state's allocation of resources could include funds that are allocated to local school districts as well as funds retained at the state level for education and related services. The state uses three types of allotments to fund public schools: position allotments, dollar allotments, and categorical allotments. Several questions can be asked about this practice:

- Do the allotments direct sufficient funds toward at-risk students?
- Do the allotments provide the kind of flexibility needed at the local level?
- Is the state able to hold the local level accountable for using funds for providing a sound basic education?

95. Hoke County Bd. of Educ. v. State (*Hoke I*), 95 CVS 1158, 82 (2000).

96. *Id.*

97. *Hoke III* at 77.

98. *Id.* This echoes the court's finding in the first ruling: "[t]he requirement that all children in every county have an equal opportunity to receive a sound basic education mandates that the funds appropriated and applied from whatever source, be first used to satisfy the equal opportunity to receive a sound basic education mandate before funds are spent on programs not mandated by the constitutional threshold set forth in *Leandro*." *Hoke I* at 82.

99. Defendant's Proposed Findings of Fact and Conclusions of Law, no. 708 (citations omitted).

100. *Id.*

101. *Hoke III* at 79.

An examination of funds retained at the state level should explore the following questions:

- After the significant cuts in the department in the mid-1990s, is the Department of Public Instruction (DPI) able to provide the type of assistance and accountability program necessary to meet constitutional mandates? Are resources being used wisely by DPI and are they sufficient?
- How are resources and funds used by other state agencies to provide services to at-risk children and their families? Are the funds used wisely and are they sufficient?
- What funds are allocated to state college or university departments of education or other departments with significant responsibilities for training teachers and administrators? Are the funds being used wisely and are they sufficient to help produce the type of leadership described by the court as necessary to help at-risk students achieve?

Local Allocation of Resources

Targeting resources to reach particular outcomes is complex. In this instance, allocating resources at the local level to achieve the constitutional standard of a sound basic education raises the following issues:

- Do school systems and schools have sufficient budget flexibility and do they know how to use the flexibility?
- Will resource allocation strategies that are effective in one school setting be effective in another setting?
- At what decision-making level are resource allocation decisions most effectively made?
- Is it a matter of resource reallocation or additional resources?

Budget Flexibility

A publication provided to school districts by the State Department of Public Instruction offers guidance on how to use flexibility in allocating state funds. For example, the publication cites a practice from an elementary school:

> Another elementary school uses teacher assistants only at the kindergarten level. The remaining teacher assistant positions were converted to certified teachers. Half-time certified teachers work as primary reading teachers at the first and second grade. These same teachers then work at an hourly rate in the afternoon individually with Level 1 and 2 students. The positions are further stretched and the program has continuity because the hourly teachers are the same as the primary reading teachers. (Teachers do not receive benefits as long as they are working under 30 hours a week.)[102]

In the *Hoke* trial, the state focused on this type of flexibility in asserting that the school system could have better used its resources. At the trial the state identified and listed twenty-six opportunities where, it argued, the Hoke County Schools could have better used funds for other resources to provide a sound basic education. The state wanted the court to find that "[n]o evidence has been offered that more funding would improve student performance more than implementation of the foregoing practices."[103] The court's move to a statewide focus also puts the state's list in a new light. Could these strategies for resource reallocation be implemented across the state to improve student performance, with or without new resources? Some of the items on the state's list include the following (HCSS standing for Hoke County School System):

- HCSS could rearrange teacher schedules to provide tutoring before, during, and after school.[104]
- HCSS could increase the length of the school day to increase instructional time or teacher planning time or staff development time.[105]
- HCSS could assign its most experienced and able principals to lower-performing schools, just as it did with Darlene Clark.[106]
- HCSS could concentrate the assignment of teacher assistants in schools or classes with the highest numbers of low-performing students.[107]
- HCSS could assign its most experienced and able teachers to lower-performing schools and students.[108]
- HCSS could concentrate materials and supplies in schools or classes with the highest numbers of low-performing students.[109]
- HCSS could review disaggregated student EOG and EOC scores to determine which students, schools, or classes are not meeting reasonable growth standards and allocate resources to those students.[110]

102. *Student Accountability Standards: Funding Your School Initiatives* (Raleigh: N.C. Department of Public Instruction, no date), 4.
103. *Defendant's Proposed Findings*, no. 1179.
104. *Defendant's Proposed Findings*, no. 1155.
105. *Defendants Proposed Findings*, no. 1156.
106. *Defendant's Proposed Findings*, no. 1160.
107. *Defendant's Proposed Findings*, no. 1162.
108. Defendant's Pleadings, no. 1161 (citations omitted).
109. Defendant's Pleadings, no. 1164 (citations omitted).
110. Defendant's Pleadings, no. 1177 (citations omitted).

- HCSS could reduce class size in core academic courses by increasing class size in nonacademic courses.[111]

Replicability

Another vehicle for identifying effective use of resources is to examine what has been done in model schools in North Carolina, including those identified by the court in the third *Hoke* ruling. In the hearings held in the fall of 2001, the court focused on these schools to answer the question of whether funds are sufficient. The critical question will be whether the strategies can be replicated or whether there are unique circumstances, including extraordinary leadership, that are critical to the success of these strategies.

Another approach would be to focus on reallocation of resources in order to adopt whole-school reform models. Research supports that these models can be successfully replicated so long as the required resources and training are available to properly implement the program.[112] Leadership is also important in order to build commitment to the model and to ensure that appropriate resources are available and utilized.

Decision-Making Level

Whole-school reforms provide an opportunity to examine issues concerning the importance of the decision-making level in the making of resource reallocation decisions. Even though whole-school reform models can be successfully replicated, a process that requires schools to adopt these models can be plagued with implementation problems. For example, in New Jersey, thirty years of school finance litigation resulted in the state's highest appellate court requiring the state to fund whole-school reform models for the thirty property-poor school districts included in the lawsuit at issue. The concept is fundamentally the same as that expressed by the trial court in the third *Hoke* ruling—that budgets should be built around implementing models proven to be successful. The program requires principals to submit to the state a site-based budget based upon choosing one of the whole-school reform models, such as Roots and Wings or Success for All. Significant problems have been encountered in the process because principals were not knowledgeable about the requirements and differences in the models, nor were they given adequate training to develop skills necessary to create effective budgets. Because the focus shifted to the school level, New Jersey's governance structure also changed, placing communication directly between the school and the state department and putting the school district on the sidelines, even though it continued to have the legal responsibility for the budget.[113]

Reallocation or Additional Resources

As contemplated by the *Hoke* trial court, a key issue underlying resource reallocation is whether reallocation is sufficient or whether, after allocating current resources as effectively as possible, additional funds are still needed in order to provide a sound basic education. An example from the lawsuit is the use of low-wealth funds, a separate allotment of state funds for qualifying school districts. The state asserted in its proposed findings of fact that Hoke misused its 1998–99 low-wealth funds of about $1.6 million by spending approximately 25 percent of the funds on clerical assistants. The state proposed that Hoke should have used its low-wealth funds to remedy any deficiencies identified by the school district.[114] With Hoke's 1999–2000 low-wealth funds at about $2 million, the state made these separate proposed findings:

> 266. However, in 1999–00 HCSS's low-wealth funding alone increased by $367,000, but HCSS used none of that increased funding to increase its teacher supplements. Using that increased funding and nothing else, HCSS could have increased the salary supplements for its 420 teachers by nearly $875 each without using a penny of local funds. [citations omitted]
>
> 789. Moreover, 1999–00 low-wealth funding for HCSS increased by $367,000, from $1,627,000 to $1,994,000. HCSS presented no persuasive evidence that this money could not provide its necessary supplies. [citations omitted]
>
> 1166. HCSS could spend all of its low-wealth supplement funds for additional teachers or for supplies and materials instead of spending 25% of that money for clerical assistants. [citations omitted]

Hoke could not possibly have implemented all of these suggestions, since the proposed findings conflict with each other. Even if reallocating their low-wealth funds would have better met some of Hoke's needs for teacher supplements, additional teachers, and materials and supplies, it does not appear that all of the needs

111. Defendants Pleadings, no. 1172 (citations omitted).

112. Allen R. Odden and Lawrence O. Picus, *School Finance: A Policy Perspective* (Dubuque, Iowa: McGraw-Hill, 2000), 332–33.

113. Bari Analt and Margaret Goertz, *Implementing Whole School Reform in New Jersey: Year Two*. (New Brunswick, NJ: Rutgers, The State University of New Jersey, Edward J. Bloustein School of Planning and Public Policy, 2001).

114. Defendant's Proposed Findings of Fact and Conclusions of Law, no. 30, Summary (citations omitted).

could have been met by reallocation of low-wealth funds alone.

Future Directions of *Leandro*

Leandro has moved from a lawsuit to address the funding needs of poor school districts and urban school districts to a statewide issue of addressing the constitutionally deficient education of at-risk students. It has narrowed its focus from a broad constitutional standard of a sound basic education defined by the supreme court to targeted benchmarks of grade-level proficiency, dropout rates, and indicators of preparation for work or further education. The trial court is not just examining the sheer adequacy of resources but is also looking at how resources are being used. The state's role has expanded from merely creating a system of education and providing funds, to a more comprehensive role that includes setting accountability standards and providing assistance in meeting those standards.

This many twists and turns is particularly interesting, given that when the supreme court articulated the definition of a sound basic education in 1997, it said that it did so "with some trepidation."[115] The supreme court acknowledged that "[s]ubstantial problems have been experienced in those states in which the courts have held that the state constitution guaranteed the right to a sound basic education."[116] But as these changes suggest, the trial court has boldly applied the definition, even noting at one point that "[t]he Court raises these questions [about use of funds by 'wealthier' LEAs] and makes its observation fully aware that it has 'gored' the sacred educational establishment ox by doing so."[117]

There may be more twists and turns as the court determines whether the state has provided sufficient resources to school districts to provide a sound, basic education. In order to provide the court with additional information necessary to make this determination, the court initially required the parties to develop a plan within twelve months that would strategically allocate resources toward providing a sound basic education.[118] This requirement was imposed on the state, the plaintiff school districts, five relatively poor school districts, and the plaintiff-intervenors, six urban school districts that have relatively more local resources. A fairly rapid series of legal and policy maneuvers ensued.[119] Then, within two months of having issued this third trial court ruling, the trial court decided it could more expeditiously resolve the matter and chose to eliminate the plan requirement and place the court back in the position of gathering evidence regarding the issue of sufficient funding.[120] The court chose to pursue this task by hearing from principals of successful schools and their superintendents. The hearings were completed in October 2001. The court will rule on the sufficiency of funding after it has had time to review the briefs and transcripts from the hearings. Its determination will have a profound influence on the direction of *Leandro*. ■

115. Leandro v. State, 346 N.C. 336, 354, 488 S.E.2d 249, 259 (1997).

116. *Id.* at 346 N.C. 350, 488 S.E.2d at 257.

117. Hoke County Bd. of Educ. v. State (*Hoke III*), 95 CVS 1158, 75 (2000).

118. The state appealed the ruling on April 24. On April 25, Judge Manning denied the state's Motion to Stay, pending the outcome of the appeal.

119. First, the state responded to the plan requirement by appealing the ruling and seeking a stay that would have the effect of putting the plan requirement on hold until the appeal was heard. In addition to pursuing these legal strategies, Governor Mike Easley also established a commission to consider educational issues necessary to provide all children with a "competitive, superior education." The court of appeals denied the request for a stay. Whether the court and commission will operate on parallel tracks or approach different issues remains to be seen.

120. Order amending memorandum of decision of March 26, 2001, entered May 29, 2001.