

Refocusing School Finance Litigation on At-Risk Children: *Leandro v. State of North Carolina*

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Over the past three decades of school finance litigation, attorneys have focused their lawsuits on the needs of particular types of school districts rather than particular types of children. Lawyers have based their legal complaints on the funding disparities between high-wealth and low-wealth districts rather than differences in needed resources between individual students from privileged and at-risk backgrounds. However, addressing district-to-district inequities might not improve educational opportunities for all students whose socioeconomic background places them at risk of academic failure. Indeed, the United States Supreme Court raised this very concern in its landmark school finance decision *San Antonio Independent School District v. Rodriguez*.¹ The Court noted that “the poorest families are not invariably clustered in the most impecunious school districts.”² Decades later, some legal scholars argue that the school finance movement continues either to ignore or inadvertently miss the goal of improving education for *all* at-risk children.³ Indeed, very few school finance cases have asked courts to target remedies toward immigrant, minority, and poor children *across an entire state* instead of children in particular low-wealth school districts.⁴

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1. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that differentials in per pupil school funding do not violate the Equal Protection Clause of the Fourteenth Amendment).

2. *Id.* at 57.

3. William H. Clune, *New Answers to Hard Questions Posed by Rodriguez: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 CONN. L. REV. 721, 730 (1992). Clune noted that:

Critics of school finance litigation continue to point to the possibility that poor students might predominantly live in urban districts of above-average wealth and would be harmed by a redistribution of state aid toward poorer districts. What occurred was a disjuncture between the alleged constitutional wrong—the low spending and political powerlessness of poor districts—and the responsiveness of the proposed remedy to the group of students most clearly deserving of special protection.

Id.

4. *But see* Thomas Saunders, *Settling Without “Settling”*: *School Finance Litigation and Governance Reform in Maryland*, 22 YALE L. & POL’Y REV. 571, 578 (2004) (noting that the Maryland litigation was brought by the ACLU specifically on behalf of a class of at-risk children in Baltimore).

The attorneys in *Leandro v. State of North Carolina*⁵ did not originally intend to forge a new path. However, over the past ten years, the focus of *Leandro* has evolved from inter-district funding disparities to individual child-based vertical equity, the notion that students with greater needs should be given greater resources.⁶ Specifically, the *Leandro* litigation produced a ruling that all at-risk children across North Carolina are constitutionally entitled to more resources in the form of an extra year of public schooling through pre-kindergarten classes.

The State of North Carolina appealed the trial court's decision to the state's supreme court,⁷ and as this Essay goes to print, the court has not yet ruled on the constitutional right to pre-kindergarten classes for at-risk children. In the meantime, this Essay analyzes the manner in which the *Leandro* litigation has progressed and speculates on how it may spark a new direction in school finance litigation. Part I provides background information on the North Carolina public school system. Part II introduces the individuals and school districts that brought the *Leandro* litigation. It also describes the state's major school finance rulings, including the unanimous supreme court decision in *Leandro v. State* and the four-part decision in the trial court remand, known as *Hoke County v. State*.⁸

Part III analyzes the ways in which the *Leandro* and *Hoke County* rulings place this litigation at the forefront of the school finance reform movement. This Section describes how the *Leandro* plaintiffs successfully utilized the state's standards and accountability program to aid their litigation efforts. It also analyzes the reasons why race did not become a divisive factor in *Leandro*, examines the litigation's evolution toward the concept of vertical equity, and weighs some of the advantages and disadvantages accompanying school finance lawsuits that focus specifically on at-risk students. Part III concludes by predicting a new trend of pre-kindergarten as a remedy in school finance

However, the Maryland attorneys defined their lawsuit class by a combination of at-risk status and geographical district lines. This Essay discusses the advantages and disadvantages of bringing school finance litigation on behalf of at-risk children without regard to geographical district lines. See discussion *infra* Section III.C.

5. 488 S.E.2d 249 (N.C. 1997) (finding that the state constitution guarantees every child the right to receive a "sound basic education").

6. Vertical equity "specifies that differently situated children should be treated differently." Robert Berne & Leanna Stiefel, *Concepts of School Finance Equity: 1970 to the Present, in EQUITY AND ADEQUACY IN EDUCATION FINANCE* 7, 20 (Helen F. Ladd et al. eds., 1999). Specifically, "inputs are 'adjusted' for the costs of educating various groups of children" in order to "indicate the amount of additional resources that are needed . . . to bring some students to given output levels." *Id.*

7. *N.C. Supreme Court Takes Leandro Case*, RALEIGH NEWS & OBSERVER, Mar. 19, 2003, at B8.

8. Judge Howard E. Manning handed down his ruling in four memoranda of decision. See *Hoke County Bd. of Educ. v. State (Hoke County I)*, No. 95 CVS 1158 (N.C. Super. Ct. Oct. 12, 2000) (on file with author); *Hoke County Bd. of Educ. v. State (Hoke County II)*, No. 95 CVS 1158 (N.C. Super. Ct. Oct. 26, 2001) (on file with author); *Hoke County Bd. of Educ. v. State (Hoke County III)*, No. 95 CVS 1158 (N.C. Super. Ct. Mar. 26, 2001) (on file with author); *Hoke County Bd. of Educ. v. State (Hoke County IV)*, No. 95 CVS 1158 (N.C. Super. Ct. Apr. 4, 2002) (on file with author).

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lawsuits in other states.

Part IV assesses what the *Leandro* litigation has accomplished for public school students in North Carolina thus far. It measures the litigation's impact in terms of increased political momentum for certain legislative proposals, equity and adequacy of current public school funds, and innovative expansion of constitutional rights.

I. THE NORTH CAROLINA PUBLIC SCHOOL SYSTEM

A. *Brief Overview of North Carolina's Public Schools*

The North Carolina Public School System is divided into 117 school districts,⁹ the majority of which have coterminous boundaries with the state's 100 counties. Relative to other states, North Carolina's state government covers a large share of public education funding: State money constitutes about 69% of the public school operating funds, local money represents 23%, and federal money comprises slightly less than 8%.¹⁰ These figures do not include capital expenses, however, which North Carolina leaves primarily to local governments to fund. Furthermore, the state's public schools face the challenge of educating a high proportion of poor students compared to the rest of the country: Nationwide, thirty-one percent of all children qualify for free and reduced-price lunch, while in North Carolina, more than thirty-nine percent of children qualify.¹¹

For the past decade, North Carolina's flagship education policy has been the ABCs (Accountability, Basics, and local Control) of Education Act of 1995, which created a standards and accountability program for all public schools.¹² Under this program, the State Board of Education sets annual performance standards for each school in order to measure the growth of student achievement.¹³ The program assesses each school's performance with end-of-grade examinations that are given to students in core subjects, and the State holds individual schools accountable for their students' performance.¹⁴

9. N.C. DEP'T OF PUB. INSTRUCTION, 2002 *STATISTICAL PROFILE* vi (2002), available at www.ncpublicschools.org/fbs/stats/StatProfile02.pdf.

10. *Hoke County I*, slip op. at 54.

11. *Hoke County II*, slip op. at 13.

12. An Act To Implement the Recommendation of the Joint Legislative Education Oversight Committee To Implement the State Board of Education's ABC's Plan in Order To Establish an Accountability Model for the Public Schools To Improve Student Performance and Increase Local Flexibility and Control, and To Make Conforming Changes, 1995 N.C. Sess. Laws 716 (codified as amended in scattered sections of N.C. GEN. STAT. ch. 115C (2003)).

13. N.C. GEN. STAT. § 115C-105.35 to 105.37 (2003).

14. Several consequences may result if student performance is low for two or three consecutive years, for example: each school may have to notify the parents of its students of its low-performing status; the state may assign an assistance team to aid the school in meeting its goals; and if the assistance team fails to improve the school's performance, the state is authorized to dismiss school personnel. See N.C. GEN. STAT. § 115C-105.37A (2003).

According to *Education Week*, a leading national publication, the ABCs program “has gained a national reputation as an effective tool in raising academic standards and improving low-performing schools.”¹⁵ Despite the national praise, however, the program’s results have been mixed. On the one hand, since the inception of the ABCs, the number of public schools ranked “low-performing” has decreased by ninety percent.¹⁶ Moreover, the state’s SAT-takers have improved their performance by forty points over the course of the past decade, as compared to a twenty-one point increase for the nation as a whole.¹⁷ Even with this improvement, however, North Carolina remains tied at forty-seventh on the national SAT state rankings, only a slight improvement on its previous rank of fiftieth.¹⁸ Worse yet, the state has the nation’s second-highest percentage of dropouts among sixteen- to nineteen-year-olds.¹⁹ It remains unclear, then, whether the ABCs program has benefited North Carolina’s children in terms of academic achievement. However, as discussed in Part III, the standards and accountability program has aided the *Leandro* plaintiffs’ litigation strategy.

B. Brief History of Pre-Leandro School Finance Litigation in North Carolina

In 1987, North Carolina courts considered the constitutionality of the state’s school funding system for the first time. In *Britt v. North Carolina State Board of Education*,²⁰ plaintiff Robeson County School District challenged the funding disparities that resulted from the state’s school funding system.²¹ The plaintiff district based its legal claims on the state constitution’s equal protection clause and education clause, the latter of which reads: “The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.”²²

Despite strong textual support for a constitutional right to equality of educational resources,²³ the Court of Appeals of North Carolina held that this

15. Kathleen K. Manzo, *Quality Counts 2002: State Policy Updates*, EDUC. WK., Jan. 10, 2002, at 144-45.

16. Brief for Defendant-Appellants at 10, *Hoke County Bd. of Educ. v. State*, No. COA02-1181 (N.C. Ct. App., filed Feb. 20, 2003) [hereinafter Brief for Defendant-Appellants].

17. *The SAT Story: Once Again, a Glass Half-Full or Half-Empty*, PUB. SCH. FORUM’S FRIDAY REPORTS, Aug. 31, 2001, at 2, available at <http://www.ncforum.org/2001/083101.pdf>.

18. *Id.*

19. Debbie Cenziper, *Schools Cry Out For State’s Help*, CHARLOTTE OBSERVER, Dec. 18, 2001, at B1 (citing 2000 U.S. Census figures).

20. *Britt v. N.C. State Bd. of Educ.*, 357 S.E.2d 432 (N.C. Ct. App. 1987).

21. Robeson County later became a plaintiff in the *Leandro* litigation.

22. N.C. CONST. art. IX, § 2, cl. 1.

23. See Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 320 (1991) (ranking North Carolina’s constitution in the first tier of all states in

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language does not require the state to “provide identical opportunities to each and every student.”²⁴ The court grounded its ruling on the apparent intent of the “equal opportunities” portion of the education clause, which the state’s voters created in a 1970 constitutional amendment. The court wrote:

The voters that adopted [the amendment] were emphasizing that the days of “separate but equal” education in North Carolina were over, and that the people of this State were committed to providing all students with equal access to full participation in our public schools, regardless of race or other classification.²⁵

Consequently, the court ruled that the education clause guaranteed only “equal access” to the state’s schools, not equal opportunities or equal funding within them.²⁶

In the years following *Britt*, North Carolina education advocacy groups began aggressively highlighting the funding inequities across the state. A fledgling education non-profit called the North Carolina Public School Forum began publishing yearly reports that analyzed school funding inequities.²⁷ These reports ranked districts in terms of support for education by evaluating tax effort, which compares a district’s tax rate with its ability to pay.²⁸ The Forum studies showed that despite having relatively small amounts of potential revenue, North Carolina’s poor counties were taxing themselves at much higher rates than wealthy counties. In 1994, the year the *Leandro* litigation began, the ten poorest counties in the state averaged a tax rate of seventy-five cents per \$100 of assessed real estate value, while the wealthiest ten counties averaged fifty-two cents per \$100.²⁹ An earlier Forum report demonstrated that funding and wealth differentials correlated quite strongly with student performance: the average SAT score of students in the top five³⁰ counties in the Forum’s survey of the North Carolina counties’ “ability-to-pay” was more than 120 points higher than that of the five³¹ lowest-ranked counties in the survey.³²

A few years later, the General Assembly responded to public pressure with a program of supplemental funding that was not intended to fully equalize spending among districts, but rather narrow the gap by bringing the lowest-

terms of requiring equality, as it is only one of four state constitutions to “actually [use] the word ‘equality’ in defining the state’s obligation”).

24. *Britt*, 357 S.E.2d at 436.

25. *Id.*

26. *Id.*

27. Interview with Gerry Hancock, founding member of the Public School Forum of North Carolina and Partner at Everett, Gaskins, Hancock & Stevens, L.L.P, in Raleigh, N.C. (Mar. 17, 2003) [hereinafter Hancock Interview].

28. *Id.*

29. PUB. SCH. FORUM OF N.C., LOCAL SCHOOL FINANCE STUDY 5 (1994).

30. Interestingly, three of the top five wealthiest counties—Forsyth, Mecklenburg, and Wake—became plaintiff-intervenors in the *Leandro* litigation.

31. Two of the bottom five counties—Hoke and Robeson—became plaintiffs in *Leandro*.

32. PUB. SCH. FORUM OF N.C., ALL THAT’S WITHIN THEM 6 (1990).

spending districts up to the level of the average-spending districts.³³ However, the supplemental funding project has never received full support. The 1991 General Assembly appropriated only \$6 million for the Low-Wealth Supplemental Fund when estimates placed the cost of full funding at approximately \$200 million.³⁴ After several more years of unsuccessful lobbying efforts, many superintendents and attorneys of low-wealth school districts became frustrated and began to contemplate litigation.³⁵ According to one attorney who was involved at the beginning of the litigation:

It was clear that it would be many, many, many years before it was fully funded, if ever. And in early 1994, several of the counties began talking and came to the conclusion that without litigation they didn't feel they would have the pressure that was necessary to get this issue dealt with properly.³⁶

Thus, in North Carolina, as in many other states, plaintiffs brought school finance litigation because the political process did not produce meaningful reform.

II. *LEANDRO V. STATE*

A. *The Leandro Litigation Begins*

In May of 1994, five low-wealth, rural counties³⁷ filed suit against the State of North Carolina and the State Board of Education, alleging that the state had failed to provide equal and adequate educational opportunities as required by the state constitution and related statutes.³⁸ Plaintiffs' attorneys chose the five plaintiff school districts from among the seventy districts receiving money from the General Assembly's partially-funded equalization program because of the particularly strong interest of the five districts' superintendents, as well as the litigating attorneys' desire to keep the case manageable.³⁹ Pointing to finance

33. See 1991 N.C. Sess. Laws 689, § 201.2(a).

34. Hancock Interview, *supra* note 27; see also Interview with John Dorman, Executive Director, Public School Forum of North Carolina, in Raleigh, N.C. (Mar. 17, 2003) [hereinafter Dorman Interview] ("They created the fund, with a commitment to phase it in over time, and then reneged on their commitment. It was within a year of that that the lawsuit got filed.").

35. E-mail from Robert Spearman, *Leandro* plaintiffs' attorney and Partner at Parker, Poe, Adams & Bernstein, L.L.P., to author (Apr. 2, 2003, 17:30:18 EST) (on file with author) ("Certainly one reason the client districts decided to pursue suit was their frustration with the legislature not fully funding the low wealth program.").

36. Hancock Interview, *supra* note 27.

37. The plaintiffs included the school boards of Cumberland, Hoke, Halifax, Robeson, and Vance counties, as well as children then enrolled in each of those school systems and their parents.

38. Amended Complaint at 2, *Leandro v. State*, No. 94 CVS 520 (N.C. Super. Ct., filed Sept. 28, 1994) [hereinafter Amended Complaint].

39. "The plaintiff school districts emerged based first on the strong leadership of school superintendents in the districts We considered whether additional school districts should or would participate, and made a judgment that adding districts would make the case more complicated without corresponding benefits." E-mail from Robert Tiller, *Leandro* plaintiffs' attorney and Partner at Parker, Poe, Adams & Bernstein, L.L.P. (May 8, 2003, 10:57:40 EST) (on file with author); see also Hancock Interview, *supra* note 27 ("The question was discussed if the consortium as a whole should join the

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inequities resulting from the state's system of public school finance, the plaintiffs made both equity and adequacy arguments as they petitioned the court for declaratory and injunctive relief. The plaintiffs asserted five legal claims against the State: one claim under the equal protection clause of the North Carolina Constitution;⁴⁰ two claims—equity and adequacy—under the education clause;⁴¹ one claim under the “law of the land” or due process clause;⁴² and a statutory claim based on state laws that guarantee certain minimum levels of education.⁴³

Robert Leandro, the litigation's named plaintiff, was then an eighth grader in the Hoke County School System.⁴⁴ He described watching science experiments on video tape because his biology classes had no laboratory equipment,⁴⁵ having to begin each class by copying school materials by hand off of an overhead projection machine because his teachers did not have funds to make photocopies, and being frustrated that some of his school's athletic teams could not play away games because the district did not own sufficient buses.⁴⁶ These problems are not surprising given the size of Hoke County's tax base. When the litigation was filed, Hoke County had an adjusted tax base⁴⁷ per child of \$110,296 and total local spending per pupil of \$467, while Dare County—North Carolina's highest-ranked county in “ability-to-pay”—had an adjusted tax base per child of \$1,059,100 and total local spending per pupil of \$2,410.⁴⁸ Hoke County taxed itself at a higher rate than Dare County, but Hoke was only able to spend one fifth as much as its wealthier counterpart.

In October of 1994, six high-wealth, urban school districts⁴⁹ filed a complaint against the State and successfully intervened as plaintiffs in the *Leandro* litigation. Since several of these districts were among the highest spending in North Carolina, the plaintiff-intervenors did not make claims based

litigation. But that would have made for very cumbersome litigation.”)

40. Amended Complaint, *supra* note 38, at 25 (citing N.C. CONST. art. 1, § 19).

41. *Id.* at 24, 26-27 (citing N.C. CONST. art. IX, § 2, cl. 1 for equity in one claim and for adequacy in the second claim).

42. *Id.* at 27 (citing N.C. CONST. art. 1, § 19, and arguing that “[s]choolchildren of this State are entitled to adequate educational opportunities, which may not be withheld or eliminated except in accordance with due process”).

43. *Id.* at 27-29.

44. Telephone Interview with Robert Leandro, named plaintiff in *Leandro v. State* (Mar. 14, 2003) [hereinafter Leandro Interview].

45. *Id.* He added, “When I got to college, I was especially intimidated by the thought of taking the laboratory sciences because we had almost no lab equipment in my high school.” *Id.*

46. *Id.*

47. Each county's real estate wealth varies depending on how much industry, agricultural land, vacation homes, and primary residences are located within its borders. The adjusted tax base figure describes how much taxable real estate wealth each county has at its disposal.

48. PUB. SCH. FORUM OF N.C., *supra* note 29, at 14-15, 20.

49. The plaintiff-intervenors included the school boards of Asheville, Buncombe, Durham, Forsyth, Mecklenburg, and Wake counties, as well as children who were at the time enrolled in each school system and their parents.

on funding inequities. As the urban districts argued in their brief to the supreme court:

The plaintiffs and plaintiff-intervenors have somewhat different perspectives on this issue. The urban plaintiffs do not believe that district-by-district comparisons of per-pupil funding shed much light on whether students in those school districts are receiving equal educational opportunities. Such comparisons typically do not take into account differences in the districts' student populations (which may significantly affect education costs), external factors affecting the cost of providing educational services (such as land and housing costs), or the availability of federal funds (which tend to equalize the money available to relatively "rich" and relatively "poor" school districts).⁵⁰

The intervenors were thus the first litigants to specifically raise the issue of at-risk children with the North Carolina judiciary.⁵¹ The plaintiff-intervenors also claimed that the State's singling out of certain poor districts to receive supplemental state funds was arbitrary and capricious, and therefore in violation of the state constitution.⁵² While this argument originally threatened the collegial working relationship between the plaintiff parties, both the rural and urban districts eventually unified around a common strategy focusing on funding for at-risk children. Section III.C discusses rural-urban district cooperation as one advantage of lawsuits focused on at-risk children across a state rather than funding differentials among districts.⁵³

B. *The Leandro Decision*

In February of 1995, a trial court judge denied the State's motion to dismiss.⁵⁴ In March of 1996, the North Carolina Court of Appeals reversed the trial court, holding that the state constitution grants only equal access to public schools.⁵⁵ Reversing the appellate court, however, the North Carolina Supreme Court unanimously concluded that the constitution grants children the right to a "sound basic education."⁵⁶ The court explained that an "education that does not serve the purpose of preparing students to participate and compete in the

50. Plaintiff-Intervenor-Appellants' New Brief at 20, *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997) (No. 179PA96) (brief filed July 12, 1996) [hereinafter Plaintiff-Intervenor-Appellants' New Brief].

51. Telephone Interview with Audrey Anderson, plaintiff intervenors' attorney and Partner at Hogan and Hartson, L.L.P. (Apr. 10, 2003) [hereinafter Anderson Interview] ("The whole focus of our complaint was at-risk kids."); see also Plaintiff-Intervenor-Appellants' New Brief, *supra* note 50, at 5 (noting the high number of intervenor schools in which a majority of students were eligible for free or reduced-price lunches, and arguing that "providing an adequate education to these 'at-risk' children is expensive because they often require educational services beyond those required for other children").

52. Plaintiff-Intervenor-Appellants' New Brief, *supra* note 50, at 32 (arguing that the state's school funding system violates the "general and uniform" requirement of the state education clause, as well as the state equal protection clause, because "it arbitrarily distributes supplemental funds to some districts but not to others with comparable or greater financial needs").

53. See *infra* Section III.C.

54. *Leandro v. State*, 468 S.E.2d 543, 543 (N.C. Ct. App. 1996).

55. *Id.* at 549.

56. *Leandro v. State*, 488 S.E.2d 249, 254 (N.C. 1997).

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society in which they live and work is devoid of substance and is constitutionally inadequate.”⁵⁷

The court grounded its ruling in the two provisions of the state constitution that guarantee public education: Article I, § 15 and Article IX § 2.⁵⁸ The court also specifically provided a broad outline⁵⁹ of the essential components of a “sound basic education”:

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.⁶⁰

The supreme court then rejected plaintiffs’ arguments that the constitution requires equality of educational opportunities.⁶¹ The court examined the “equal opportunities” language of the education clause and, relying primarily on a structural argument, concluded that this language could not possibly require equal or substantially equal funding for the state’s schools because Article IX, Section 2, Clause 2 expressly states that local governments may use local revenues to supplement their local school programs.⁶² The court disposed of the

57. *Id.*

58. *Id.* at 255; see also N.C. CONST. art. I, § 15 (“The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.”); N.C. CONST. art. IX, § 2 (“The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.”).

59. Interview with Burley Mitchell, Jr., retired Chief Justice of the North Carolina Supreme Court, in Raleigh, N.C. (Mar. 18, 2003) [hereinafter Mitchell Interview]. When asked how he thought courts should determine the components of an adequate education, Mitchell responded: “You have to state them in more general terms.” Mitchell illustrated this point with a conversation he had with another state’s chief justice:

The chief justice of New Hampshire wrote one of these things, and he asked me, “Did you put anything in there about computers?” And I said, “No I didn’t.” And he said, “Then your decision cannot be any good then because computers are the wave of the future. If you don’t have computers then you don’t have an education.” And I said, “Look, computers are like lead pencils, they are very temporary God knows what will be out there fifty years from now . . . what I said was that children had to be sufficiently conversant with science . . . not that they have to learn any particular type of technology.”

Id.

60. *Leandro*, 488 S.E.2d at 255.

61. *Id.* at 256. However, one justice dissented from this portion of the decision, arguing that the majority assigned no significance to the 1970 addition of the phrase, “wherein equal opportunities shall be provided for all students.” *Id.* at 262 (Orr, J., concurring in part and dissenting in part).

62. *Id.* at 256. This portion of the North Carolina Constitution reads:

The General Assembly may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate. The governing boards of units of local government with financial responsibility for public education may use local revenues to add to or supplement any public school or post-secondary school program.

low-wealth districts' equal protection claim with the same structural argument.⁶³ It also noted that other states have faced problems after courts recognized a right to equal education, and concluded that the North Carolina Constitution could not impose "such an impractical or unattainable goal."⁶⁴ Finally, the court dismissed the plaintiffs' statutory claims, finding that the statutes "at most, reiterate the constitutional requirement that every child in the state have equal access to a sound basic education."⁶⁵

In order to give guidance to the trial court on remand, the supreme court concluded the *Leandro* ruling by suggesting the factors that would determine whether the state had denied children their right to a sound basic education. Those factors were: the "[e]ducational goals and standards adopted by the legislature,"⁶⁶ the "level of performance of the children of the state and its various districts on standard achievement tests,"⁶⁷ and "the level of the state's general educational expenditures and per pupil expenditures."⁶⁸

C. *The Leandro Remand and Hoke County Rulings*

After writing the North Carolina Supreme Court's decision in *Leandro*, Chief Justice Burley Mitchell selected Wake County Superior Court Judge Howard E. Manning, Jr. to hear the case on remand.⁶⁹ Now with the name *Hoke County Board of Education v. State*, the trial began in 1999. Judge Manning bifurcated the case into one trial on the merits of the issues raised by the plaintiff small, rural school districts, and a second trial on the merits of the issues raised by the plaintiff-intervenor large, urban school districts.⁷⁰ All

N.C. CONST. art. IX, § 2, cl. 2.

63. *Leandro*, 488 S.E.2d at 258.

64. *Id.* at 257. Chief Justice Mitchell confirmed during his interview that the court was interested in gleaned lessons from the experiences of other courts in dealing with school finance litigation:

I had a lot of opportunities to talk about the issues among the other chiefs at the national conferences of chief justices. The biggest problem the states have run into with these education decisions has been the vehement reactions of their legislatures when they went in and told them how they had to budget. Tom Phillips, chief justice of Texas at the time I wrote *Leandro*, had had to write three opinions and strike down two or three Texas budgets. . . . [T]hey got caught in the trap of going through item by item and saying, "you have to have x percent of the budget directed to a certain thing." I just made up my mind that we were not going to let that happen unless the legislature absolutely forced us to. So you do it incrementally.

Mitchell Interview, *supra* note 59.

65. *Leandro*, 488 S.E.2d at 259.

66. *Id.* The supreme court also stated that the state's educational standards "will not be determinative." *Id.* For a discussion of the role of legislative standards in school finance cases, see *infra* Section III.A.

67. *Leandro*, 488 S.E.2d at 259. However, the court also stated that test results "may not be treated as absolutely authoritative on this issue." *Id.* at 260.

68. *Id.*

69. Mitchell Interview, *supra* note 59.

70. *Hoke County Bd. of Educ. v. State (Hoke County I)*, No. 95 CVS 1158, slip op. at 6 (N.C. Super. Ct. Oct. 12, 2000) (on file with author).

parties agreed that Hoke County would represent the low-wealth counties.⁷¹ In the end, Judge Manning discarded the plan for a second trial since the attorneys for the plaintiff-intervenors were allowed to participate in discovery, brief the court, direct and cross-examine witnesses, and give closing arguments in the *Hoke County* trial.⁷² Moreover, the court's rulings in the *Hoke County* trial applied to all school districts, regardless of their urban or rural status.⁷³

Before commencing the trial and acting on its own motion, the court raised the matter of the constitutional rights of pre-kindergarten aged children.⁷⁴ Judge Manning asked the plaintiff parties to amend their original complaints "to assert claims on behalf of children of pre-kindergarten age to educational rights under the North Carolina Constitution."⁷⁵ The plaintiffs and plaintiff-intervenors both filed amended complaints alleging the need for pre-kindergarten and other programs in order to provide children living in poverty with the opportunity to receive a "sound basic education."⁷⁶ The State filed a

71. Telephone Interview with Robert Tiller, *Leandro* plaintiffs' attorney and Partner at Parker, Poe, Adams & Bernstein, L.L.P. (Mar. 28, 2003) [hereinafter Tiller Interview] ("We as counsel for plaintiffs thought that Hoke would be a good choice because . . . its economic situation was even more dire than some of the other plaintiffs'. Interestingly, the State also nominated Hoke, perhaps also thinking that its small size would simplify discovery.").

72. *Hoke County I*, slip op. at 6.

73. *Hoke County Bd. of Educ. v. State (Hoke County II)*, No. 95 CVS 1158, slip op. at 84 (N.C. Super. Ct. Oct. 26, 2001) (on file with author) ("Reduced to essentials, the plaintiffs and plaintiff-intervenors have produced clear and convincing evidence that there are at-risk children in Hoke County and throughout North Carolina who are, by virtue of the ABC's accountability system and other measures, not obtaining a sound basic education.").

74. Interview with Howard E. Manning, Jr., Superior Court Judge, Wake County, in Raleigh, N.C. (Mar. 21, 2003) [hereinafter Manning Interview] ("Early childhood education was an issue that wasn't on the table, so I had them amend their complaints."). Judge Manning further explained that the pre-kindergarten idea came to him as a result of experiences with sentencing in criminal cases:

The pre-k idea in my mind came about before I ever heard about this case. I would see every day as a judge all of these kids—most of them black and most of them poor—all selling drugs and all going to jail. And for all of them, highest grade completed in school? Eighth. You see this constant barrage as a judge. I made up my mind that something is not right and you've got to do something with them early.

Id.

75. *Hoke County Bd. of Educ. v. State*, No. 95 CVS 1158, slip op. at 3 (N.C. Super. Ct. Feb. 9, 1999) (on file with author) [hereinafter Order of Feb. 9, 1999].

76. The plaintiffs' amended complaint argued:

Many children living in poverty in plaintiff districts begin public school kindergarten at a severe disadvantage. They do not have the basic skills and knowledge needed for kindergarten and as a foundation for the remainder of elementary and secondary school The plaintiff school districts do not have sufficient resources to provide the prekindergarten and other programs and services needed for a sound basic education.

Id. at 3-4 (quoting Plaintiffs' Second Amendment to the Amended Complaint ¶ 74a, *Hoke County Bd. of Educ. v. State* (No. 95 CVS 1158)). The plaintiff-intervenors' amended complaint argued:

A large number of students in the urban school districts require educational resources and services in addition to those currently funded and available to them if they are to receive the sound basic education required by the North Carolina Constitution. Examples of these educational needs included, but are not limited to: pre-kindergarten programs and services; reduced class sizes; appropriate training for teachers serving students who are mentally, physically, economically or otherwise disadvantaged; dropout prevention programs; enhanced remediation and academic enrichment programs for "at-risk" students; materials and services

motion to dismiss both amendments to the complaints, arguing that, “children who are younger than the statutory minimum age for attending public school have no constitutional right to free public pre-kindergarten schooling.”⁷⁷ Judge Manning denied the State’s motion to dismiss, and instead held:

as a matter of law that under the *Leandro* doctrine and the North Carolina Constitution, the right to an 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 right to early childhood education prior to the child reaching the age of 5 and entering 5 year old kindergarten.⁷⁸

In this initial ruling, Judge Manning put forward perhaps the most significant holding of *Hoke County*.

Later that year, the court held an initial trial that lasted twenty-one business days between September and December of 1999. This trial included twenty-six witnesses for the plaintiff parties, seventeen witnesses for the State, and 670 exhibits.⁷⁹ Issues such as educational standards and testing, social science support for pre-kindergarten, and the efficacy of increased school expenditures all featured prominently in the trial testimony. While the plaintiff parties presented an expert witness who discussed the social science research demonstrating the benefits of pre-kindergarten, the State presented no rebuttal expert on this point.⁸⁰ Instead, the State called Dr. Eric Hanushek, a prominent economist who has testified in several states’ school finance trials regarding his meta-analyses showing that increased educational inputs have had little impact on student achievement.⁸¹

Six months after the conclusion of the trial, Judge Manning issued the first of four memoranda of decision. The Dean of the University of North Carolina Law School has described this series of decisions as “a legal Rorschach test,” in which “contesting parties, activists, public officials and commentators have discovered widely divergent messages and directives in its pages.”⁸² Thus, before describing each memorandum, the following list attempts to state succinctly the major rulings in *Hoke County v. North Carolina*. The court held

appropriate for students with limited proficiency in the English language; and increased counselling and guidance staff [T]he urban school boards lack sufficient resources to serve both their high-needs and regular student populations.

Id. at 4 (citing Plaintiff-Interveners’ Amendment to the Intervening Complaint ¶ 50, *Hoke County Bd. of Educ. v. State* (No. 95 CVS 1158)).

77. Order of Feb. 9, 1999, *supra* note 75, at 5 (citing State’s motion to dismiss).

78. *Id.* at 6-7.

79. *Hoke County Bd. of Educ. v. State* (Hoke County I), No. 95 CVS 1158, slip op. at 68 (N.C. Super. Ct. Oct. 12, 2000) (on file with author).

80. Anderson Interview, *supra* note 51.

81. Dr. Hanushek, Professor of Economics and Public Policy at the University of Rochester and a Senior Fellow at Stanford University’s Hoover Institute, has written extensively on the topic of school finance. See, e.g., Eric A. Hanushek, *When School Finance “Reform” May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423 (1991).

82. Gene R. Nichol, *A Ruling for N.C.’s Education*, RALEIGH NEWS AND OBSERVER, Apr. 21, 2002, available at 2002 WL 11715462.

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that: 1) the minimum level of academic performance under *Leandro* is performance at or above grade level as defined by Level III in the ABCs program;⁸³ 2) “those at-risk children, who are not presently in quality pre-kindergarten educational programs, are being denied their fundamental constitutional right to receive the equal opportunity to a sound basic education”;⁸⁴ 3) the State had failed to meet its constitutional burden to provide a sound basic education to at-risk children throughout North Carolina;⁸⁵ 4) plaintiff parties had failed to meet their burden of showing that at-risk children were not obtaining a sound basic education because of lack of sufficient funding by the State of North Carolina;⁸⁶ 5) the State and individual school districts must first spend existing resources on programs that satisfy *Leandro*’s constitutional mandate, even though doing so would mean that funds currently spent “for any other educational purpose than to meet the constitutional mandate . . . must be reallocated;”⁸⁷ and 6) the State must remedy the constitutional deficiencies for the at-risk children who are not receiving a sound basic education, but left the “nuts and bolts” of the remedy for the legislative and executive branches to determine.⁸⁸

In the first *Hoke County* memorandum of decision, Judge Manning conducted a sweeping survey of the entire North Carolina public school system. Although at this point the case was ostensibly about the Hoke County School District, Judge Manning analyzed each of the following facets of the statewide public education system in order to determine whether they were sufficient to meet *Leandro*’s mandate: 1) curriculum and standard course of study; 2) teacher licensure and certification standards; 3) funding delivery system; and 4) ABCs accountability program. After discussing each aspect in great detail, the trial court ruled that each was constitutionally sound.⁸⁹ The court noted, however, that its ruling did not necessarily mean that at-risk children are actually receiving their constitutional right to a sound basic education,⁹⁰ leaving that inquiry for a later decision.

Judge Manning also analyzed the State’s student performance standards in order to determine what weight they should be given in the court’s constitutional analysis. At trial, the State had contended that the constitutional

83. *Hoke County I*, slip op. at 11.

84. *Hoke County Bd. of Educ. v. State (Hoke County II)*, No. 95 CVS 1158, slip op. at 45 (N.C. Super. Ct. Oct. 26, 2001) (on file with author).

85. *Hoke County Bd. of Educ. v. State (Hoke County IV)*, No. 95 CVS 1158, slip op. at 78 (N.C. Super. Ct. Apr. 4, 2002) (on file with author).

86. *Hoke County Bd. of Educ. v. State (Hoke County III)*, No. 95 CVS 1158, slip op. at 84 (N.C. Super. Ct. Mar. 26, 2001) (on file with author).

87. *Id.* at 4.

88. *Hoke County IV*, slip op. at 111.

89. *Hoke County Bd. of Educ. v. State (Hoke County I)*, No. 95 CVS 1158, slip op. at 120-22 (N.C. Super. Ct. Oct. 12, 2000) (on file with author).

90. *Id.*

standard is so minimal that even children who perform below grade level, as defined by Level II performance on the ABCs program End of Grade (EOG) tests for grades three through eight, have been provided with the opportunity to receive a “sound basic education.”⁹¹ The plaintiff parties had contended that the minimum constitutional standard should be at least grade level (Level III or above).⁹² Relying on the North Carolina Department of Public Instruction’s (DPI) own definitions of Level II and Level III performance,⁹³ Judge Manning ruled for the plaintiff parties: “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 ABC’s and DPI (Level III or above). Academic performance below grade level (Level II) is a constitutionally unacceptable minimum standard”⁹⁴ In making this ruling, the court also rejected the State’s contentions that acquisition of a high school diploma after passing North Carolina’s High School Competency Test should be used to judge whether children are receiving a sound basic education.⁹⁵ Instead, the court reaffirmed that the Level III results on the ABCs program tests would be “highly probative” in its constitutional analysis.⁹⁶

Two weeks later, Judge Manning issued his second installment of *Hoke County v. State*, which focused predominantly on at-risk children and their constitutional rights under *Leandro*. First, Judge Manning identified the factors that constitute the court’s definition of at-risk status: 1) poor health, beginning as early as prenatal and continuing through childhood; 2) poverty; 3) family break-up and instability; 4) low parental education; 5) inadequate or unstable housing; 6) racial/ethnic minority status; 7) lack of English language proficiency; 8) criminal activity in the school or neighborhood; and 9) parental

91. *Id.* at 10.

92. *Id.*

93. Level II performance on EOG tests is below grade level and defined as: “Students performing at this level demonstrate inconsistent mastery of knowledge and skills in these subject areas and are minimally prepared to be successful at the next grade level.” Level III performance on EOG tests is performance at or above grade level and defined as: “Students performing at this level consistently demonstrate mastery of grade level subject matter and skills and are well prepared for the next grade level.” *Id.*

94. *Id.* at 11.

95. *Id.* at 102. The court noted that the State had rejected the idea of requiring students to pass a test that would examine twelfth-grade-level skills in order to receive a high school diploma, and instead tied its high school diploma to a test that examines only eighth-grade-level skills. *Id.*

96. *Id.* at 109. However, the court found:

[T]he 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.

Id. at 98. Instead, the court noted, “The fact that many students fail to demonstrate a satisfactory level of academic achievement within a school, or school system, may provide clear evidence that those students are not receiving the opportunity for a sound basic education.” *Id.*

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unemployment or underemployment.⁹⁷ The court did not specify whether a student must hold only one or a certain number of these criteria in order to classify as at-risk.⁹⁸ The court did, however, reiterate its earlier ruling that “those at-risk children, who are not presently in quality pre-kindergarten educational programs, are being denied their fundamental constitutional right to receive the equal opportunity to a sound basic education.”⁹⁹ The court further noted that its ruling “does not require the State of North Carolina to provide every four (4) year old child with a pre-kindergarten program at state expense.”¹⁰⁰ The court explained its reasoning for limiting the constitutional right to at-risk students:

After examining the evidence and weighing the credibility of the witnesses, the Court is convinced that the most common sense and practical solution to the problem of providing at-risk children with an equal opportunity to obtain a sound basic education is for them to begin their opportunity to receive that education earlier than age (5) five so that those children can reach the end of the third grade able to read, do math, or achieve academic performance at or above grade level (Level III or above). More is needed sooner to give these children a chance to start their education on equal level with their non at-risk counterparts.¹⁰¹

Judge Manning supported the pre-kindergarten ruling by pointing to intuition,¹⁰² the State’s own position on the benefits of pre-kindergarten,¹⁰³ and social science evidence.¹⁰⁴

The court next examined the educational opportunities offered to at-risk children in the representative plaintiff county. The court noted that during the 1998-99 school year, the Hoke County Schools had three pre-kindergarten classrooms with eighteen students in each, for a total of fifty-four slots. However, 348 Hoke pre-kindergarten-aged students qualified as at-risk.¹⁰⁵ According to testimony heard in the trial, expanding the pre-kindergarten program to meet the court’s requirements, in Hoke County alone, would require seventeen additional teachers at a cost of \$1,103,784, plus capital costs for

97. Hoke County Bd. of Educ. v. State (Hoke County II), No. 95 CVS 1158, slip op. at 45 (N.C. Super. Ct. Oct. 26, 2001) (on file with author).

98. *See id.*

99. *Id.* at 45.

100. *Id.* at 46.

101. *Id.* at 21.

102. The ruling explained:

When these children came to kindergarten at age 5, they were at-risk, already behind, not ready to learn and certainly not in a position to take advantage of the opportunity to begin the process to obtain a sound basic education on an equal footing with their fellow five[-]year[-] old students who were not encumbered by outside at-risk factors.

Id. at 26.

103. The State Board chairman, testifying for the State, admitted that it is a “no brainer” that pre-kindergarten education would be a helpful way to address the needs of disadvantaged children. *Id.* at 29.

104. “The studies generally concluded that the pre-school programs provide both long[-]term and short-term positive effects on children’s development and academic achievement.” *Id.* at 32.

105. *Id.* at 38.

classrooms, equipment and supplies.¹⁰⁶ Rather than directly ordering the State to increase funds by that amount, the court left the “nuts and bolts and implementation of the expansion of pre-kindergarten educational programs for at-risk children” up to the legislative and executive branches of government.¹⁰⁷

In March of 2001, Judge Manning issued his third installment of the *Hoke County* decision. After discussing the large number of underachieving students in Hoke County schools,¹⁰⁸ Judge Manning expanded his inquiry to the students of the entire state, finding that “there are two distinct groups of students in North Carolina’s Public Schools—those at-risk and those not at-risk.”¹⁰⁹ In so doing, the court officially shifted the litigation’s emphasis away from the low-wealth versus high-wealth dichotomy that had been the basis of the plaintiffs’ original complaint. The court noted that at-risk children perform just as poorly in the highest spending school districts as they do in the lowest spending districts.¹¹⁰ Judge Manning concluded that “the huge sums of money that the State of North Carolina channels into each [school district] are not being strategically and logically directed and spent in the best manner possible to accomplish the mandate of *Leandro*.”¹¹¹ In the plaintiff parties’ first setback, the court ruled:

[T]he plaintiffs and plaintiff-intervenors have produced clear and convincing evidence that there are at-risk children in Hoke County and throughout North Carolina who are, by virtue of the ABCs accountability system and other measures, not obtaining a sound basic education.

What they have not yet proved . . . is that the failure of at-risk children (the issue of pre-kindergarten aside) to obtain a sound basic education is the result of lack of sufficient funding by the State of North Carolina.¹¹²

The trial court’s holding regarding current funding levels criticized what it deemed “[p]alatial central offices and high salaries for non teaching administrators,”¹¹³ as well as the “frills and whistles” of advanced educational courses for students who are not at-risk.¹¹⁴ Judge Manning suggested that existing funds must be reallocated to offer at-risk children a sound basic education before additional resources could be spent on programs that go above

106. *Id.*

107. *Id.* at 46.

108. *Hoke County Bd. of Educ. v. State (Hoke County III)*, No. 95 CVS 1158, slip op. at 17 (N.C. Super. Ct. Mar. 26, 2001) (on file with author).

109. *Id.* at 68.

110. *Id.* at 78 (“Why do the at-risk children continue to perform so poorly in both the dirt poor counties and the ‘wealthy’ counties . . . ?”).

111. *Id.* at 79.

112. *Id.* at 84.

113. *Id.* at 87 (finding that such offices and salaries “are not constitutionally mandated” and that the “tax money that is spent must first be spent to properly educate the at-risk children that are failing to achieve grade level proficiency”).

114. *Id.* at 82 (“While 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 . . . the Constitutional guarantee of a sound basic education for each child must first be met.”).

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and beyond a sound basic education.¹¹⁵ Having found the total amount of school funding in North Carolina to meet constitutional requirements, the court nevertheless ordered the State to work with the plaintiff parties to “conduct self-examinations of the present allocation of resources” and develop within twelve months a plan that addresses the needs of at-risk students.¹¹⁶

Judge Manning’s third memorandum pleased no one. The plaintiff parties and other education advocates were disappointed that the trial court had not ordered an increase in school funding,¹¹⁷ and the State was displeased with the court’s order regarding the reallocation plan. As one State official said, “We’ll continue to emphasize helping at-risk students . . . but we emphatically reject any notion that it be done at the expense of brighter students”¹¹⁸ The State filed notice of appeal on April 24, 2001,¹¹⁹ but Judge Manning prevented the appeal by suddenly announcing that his first three memoranda of decision had been interlocutory orders.¹²⁰ Manning then deleted the order requiring the State to write a reallocation plan, and he announced plans for ten additional days of evidentiary hearings with the purpose of highlighting low-wealth schools that were achieving strong results for at-risk students.¹²¹

Over a year later, in April 2002, the trial court issued its final memorandum. According to Judge Manning, the additional hearings had demonstrated the benefits to at-risk students of reducing class size, providing tutoring and more “time on task,” and having competent principals and teachers.¹²² Therefore, the court held that the State bears the ultimate responsibility of ensuring that all school districts provide these resources to their at-risk children.¹²³ The court even seemed to soften its position, though only slightly, on the need for additional funds:

The State must step in with an iron hand and get the mess straight. If it takes removing an ineffective Superintendent, Principal, teacher, or group of teachers and

115. *Id.* at 4. The court explained:

[S]chool systems and the State must first put in place programs that provide all children with the equal opportunity to obtain a sound basic education and that if the funding that is appropriated from whatever source is being used for any other educational purpose than to meet the constitutional mandate, then those funds must be reallocated to satisfy the constitution.

Id.

116. *Id.* at 88-89.

117. Dorman Interview, *supra* note 34 (“Most of the educational community is not thrilled with Judge Manning’s ambivalence about whether money matters.”).

118. Hoke County Bd. of Educ. v. State (Hoke County IV), No. 95 CVS 1158, slip op. at 14 (N.C. Super. Ct. Apr. 4, 2002) (on file with author) (quoting RALEIGH NEWS & OBSERVER, Apr. 24, 2001, at 1A).

119. Hoke County Bd. of Educ. v. State, No. 95 CVS 1158, slip op. at 5 (N.C. Super. Ct. May 29, 2001) (on file with author) (Order Amending Memorandum of Decision of Mar. 26, 2001).

120. Manning Interview, *supra* note 74.

121. *Id.*

122. Hoke County IV, slip op. at 29-31.

123. *Id.* at 109-11.

putting effective, competent ones in their place, so be it. If the deficiencies are due to a lack of effective management practices, then it is the State's responsibility to see that effective management practices are put in place.

The State of North Carolina cannot shirk or delegate its ultimate responsibility to provide each and every child in the State with the equal opportunity to obtain a sound basic education, even if it requires the State to spend additional monies to do so.¹²⁴

Despite this language, the court never directly ordered the State to appropriate more money to public schools. Moreover, the court reaffirmed all of the prior rulings from the first three memoranda, including the holding that plaintiffs had failed to show that current school funding levels were constitutionally inadequate.¹²⁵

Several legal observers interpreted this fourth memorandum as a clarification of Judge Manning's position on reallocating resources.¹²⁶ Attorney Anderson, for example, noted that "Judge Manning did a nice job of quelling the perception that the rights of rich kids were against the rights of poor kids."¹²⁷ Indeed, the court specifically addressed the critics of the reallocation suggestion, including some by name, and wrote that their concerns "reflected a fundamental misconception about *Leandro's* guarantee of an equal opportunity to receive a sound basic education to each and every child in the state . . . including the 'best and the brightest.'"¹²⁸ However, even this clarification leaves unanswered questions. After 371 pages in four *Hoke County* memoranda of decision, it remains uncertain exactly how, and with which funds, schools will provide a remedy to the thousands of at-risk children throughout North Carolina who still have no access to pre-kindergarten classes.

In January 2003, the State appealed the *Hoke County* rulings and presented the following three questions for review:

- I. Did the trial court apply the wrong standards for determining when a student has obtained a sound basic education, for determining causation and for determining Defendants' liability?
- II. Did the trial court err when it held that pre-kindergarten programs are constitutionally required for at-risk students?
- III. Is the proper age at which children should be permitted to attend public schools a nonjusticiable political question reserved to the General Assembly?¹²⁹

124. *Id.* at 108.

125. *Id.* at 31 ("None of the credible evidence received at the hearings . . . persuaded the court to change or amend its determinations and findings contained in the first three memoranda of decision.").

126. Dorman Interview, *supra* note 34 (describing the fourth memorandum of decision as a "clarification" and a "retreat"); Hancock Interview, *supra* note 27 ("In the last of the four opinions, Judge Manning clarified that the adequacy standard applied not only to at-risk children but to all children.").

127. Anderson Interview, *supra* note 51 ("There was a political outcry in March 2001, when the State took the decision to mean that all schools would have to cut AP classes. However, Manning says in Part Four that that is not what he meant. He says that everybody has to be able to compete.").

128. *Hoke County IV*, slip op. at 11.

129. Brief for Defendants-Appellants, *supra* note 16, at 1.

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Several months later, the North Carolina Supreme Court granted the case expedited review, thus allowing it to bypass the state court of appeals.¹³⁰ The court held oral arguments in September 2003,¹³¹ but had not issued a ruling as of the time that this Essay went to print. If upheld, the *Hoke County* ruling will situate the North Carolina school finance litigation near the forefront of the school finance reform movement in several respects. Part III of this Essay discusses several of the *Leandro* litigation's more pioneering features.

III. ANALYSIS: *LEANDRO* LITIGATION AS A NATIONAL TRENDSETTER

The *Leandro* litigation offers observers and litigators of school finance cases several important lessons. Section A discusses how the *Leandro* plaintiffs successfully utilized the state's standards and accountability program to aid their litigation efforts. Section B analyzes the reasons why race did not become a divisive factor in the lawsuit. Section C examines the lawsuit's evolution toward the concept of vertical equity, and suggests that school finance attorneys might find important advantages by focusing future lawsuits specifically on at-risk students. Finally, Section D concludes by predicting a new trend of pre-kindergarten as a remedy in school finance cases in other states.

A. *Leandro* and Legislatively-Enacted Education Standards and Testing

The standards-based accountability movement was launched at a 1989 National Education Summit when President George H.W. Bush and the members of the National Governors' Association—led by then-Governor Bill Clinton—agreed to push for a new framework of educational standards that would define and test the baseline of academic achievement for all students. Since then, standards-based accountability has become the most far-reaching education reform movement in recent decades.¹³² Also in 1989, school finance litigation entered its “third wave” when the Kentucky Supreme Court found a right to an *adequate* education, rather than *equal* funding, under the education clause of its constitution.¹³³ Less than a decade later, these two reform movements fully intersected in the *Leandro* litigation. In fact, the North Carolina courts perhaps have relied on state education standards and testing

130. *N.C. Supreme Court Takes Leandro Case*, RALEIGH NEWS & OBSERVER, Mar. 19, 2003, at B8.

131. William L. Holmes, *State Wants High Court To Toss Schools Suit; Ruling Could Undo Reforms Ordered for Poor Systems*, DURHAM HERALD-SUN, Sept. 11, 2003, at A2.

132. As of 2001, all states except for Iowa had adopted some form of standards-based accountability system. Kathryn M. Doherty, *Standards*, EDUC. WK., at <http://www.edweek.com/context/topics/issuespage.cfm?id=55> (last modified Apr. 8, 2004). Indeed, President Clinton's Secretary of Education, Richard W. Riley, commented, “At the end of our term,” standards-based reform “was an irreversible nationwide movement.” Erik W. Robelen, *Secretaries' Day: Agency Heads Mull State of Education*, EDUC. WK., Feb. 27, 2002, at 21.

133. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989).

more heavily than any other state judiciary to date for the purpose of defining and gauging the constitutional right to an adequate education.¹³⁴

A number of legal scholars have argued that state education standards would benefit plaintiffs' efforts in adequacy-oriented school finance reform litigation.¹³⁵ Molly S. McUsic commented that, "Adequacy claims owe their growing strength to the trend . . . of defining explicit educational standards for public schools, commonly in the form of end-of-year tests given to each grade level."¹³⁶ Legislatively-enacted standards allow courts to overcome judicial competency concerns when they are asked by plaintiffs to address the complex issue of what constitutes adequate student achievement.¹³⁷ The *Leandro* litigation demonstrates this phenomenon well. In 1996, the State questioned the competency of judges to determine educational adequacy when it argued to the supreme court that "it is clear that there are no judicially manageable and discoverable standards for determining what an adequate education is, when and to whom it is not being provided, and how a failure to provide it can be remedied."¹³⁸ In response, the plaintiffs cited the State's own efforts at standards-based reform as a reliable standard. In fact, even before the Department of Public Instruction fully developed the ABCs program, the *Leandro* plaintiffs used the future existence of the standards to their advantage, arguing in a brief to the North Carolina Supreme Court:

[A] state commission is currently developing "clearly defined education standards for the public schools of North Carolina" with "the skills and knowledge that high school graduates should possess in order to be competitive in the modern economy." This commission's work, once completed, is likely to be of assistance to

134. See *infra* notes 155-165 and accompanying text (comparing the North Carolina courts' use of a standards and accountability system with that of the New York, Kansas, and Alabama state courts).

135. See, e.g., Michael Heise, *The Courts, Educational Policy, and Unintended Consequences*, 11 CORNELL J.L. & POL'Y 633, 634 (2002) ("The transition of school finance litigation from an equity to an adequacy mooring, initiated in 1989, facilitated an interaction with standards and assessments policy."); see also James S. Liebman, *Implementing Brown in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349, 428 (1990) ("By enacting stricter and more comprehensive minimum educational standards, the states have absolved the courts of some of the difficult tasks that in the past have discouraged them from entering the adequate-education field and have afforded plaintiffs a doctrinally easier, if not yet easy, row to hoe.").

136. Molly S. McUsic, *The Promises and Pitfalls of School Finance Litigation*, in LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 88, 91 (Jay P. Heubert ed., 1999).

137. *Id.* at 90. McUsic contends:

This approach clarifies the legal complaint by relying not on the plaintiff, defendant, or the judge for a definition of 'adequate education,' but on the policy established by education experts and endorsed by the legislature or the state department of education. As a result, the judge is expected to decide not the state's educational policy, but only whether the state is adhering to that policy.

Id. at 91; see also William F. Dietz, Note, *Manageable Adequacy Standards in Education Reform Litigation*, 74 WASH. U. L.Q. 1193, 1223 (1996) ("Existing standards are the most institutionally sound method for courts to enunciate a state's duty without stepping outside their role as interpreter of constitutions.").

138. Brief for Defendant-Appellant at 14, *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997) (No. 179PA96) (brief filed July 12, 1996).

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the trial court in addressing the challenge here.¹³⁹

The North Carolina Supreme Court agreed with the plaintiffs on this issue, noting in the *Leandro* decision that “Educational goals and standards adopted by the legislature are factors which may be considered on remand to the trial court for its determination as to whether any of the state’s children are being denied their right to a sound basic education.”¹⁴⁰

When Chief Justice Mitchell and Judge Manning were asked if the existence of North Carolina’s education standards made the tasks of ruling and writing decisions in this case easier for them, they responded “Absolutely”¹⁴¹ and “Damn Right,”¹⁴² respectively. Mitchell explained that courts gain a sort of democratic legitimacy in their educational adequacy rulings by adopting legislatively-enacted standards:

Courts can look at what the legislatures have done, and do so recognizing that they have had the opportunity to hear from everybody and to thrash it out in open hearings, unconstrained by the case and controversy limitations. It does give the judge some guidelines and, at least, reassurance.¹⁴³

Judge Manning described the standards program as instrumental in his task of gauging constitutional adequacy, commenting that, “The ABCs are a great tool, and without it, I couldn’t have done it. I would have had to have said [to the State], you’ve got to have an accountability system, because we can’t measure your results from what you tell us.”¹⁴⁴ Indeed, Judge Manning’s ruling in *Hoke County* seems to elevate the existence of a standards-based accountability system to the level of a constitutional requirement.¹⁴⁵

Though unsuccessful in *Leandro*, the plaintiff parties’ litigation strategy suggests that standards-based accountability programs might also help address the concerns of judges who look skeptically upon school finance litigation out of concern that increased funding would not lead to increased student achievement.¹⁴⁶ As noted earlier, Dr. Eric Hanushek testified for the State in the *Hoke County* trial about his extensive meta-research that shows no correlation between increased school inputs and outputs.¹⁴⁷ According to

139. Plaintiff-Appellee’s New Brief at 12 n.7, *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997) (No. 179PA96) (brief filed Aug. 23, 1996) (citations omitted).

140. *Leandro v. State*, 488 S.E.2d 249, 259 (N.C. 1997).

141. Mitchell Interview, *supra* note 59.

142. Manning Interview, *supra* note 74.

143. Mitchell Interview, *supra* note 59.

144. Manning Interview, *supra* note 74.

145. “If the ABCs program were not in place, a similar accountability program would, in the Court’s opinion, be required.” *Hoke County Bd. of Educ. v. State (Hoke County I)*, No. 95 CVS 1158, slip op. at 90 (N.C. Super. Ct. Oct. 12, 2000) (on file with author).

146. In fact, the State seems to have conceded this point in its most recent brief, acknowledging, “By tying rewards to student test results, the ABCs provides incentives for local boards to effectively manage resources in their systems to improve academic performance.” Brief for Defendant-Appellants, *supra* note 16, at 9.

147. See *supra* note 81 and accompanying text.

plaintiff-intervenors' attorney Audrey Anderson, who cross-examined Hanushek in the trial:

The accountability system in North Carolina also helped us blunt the force of Hanushek's work. He writes that a big problem with spending additional money is that schools have no incentive to spend it in such a way so as to improve student achievement. He admitted that in North Carolina with the accountability system, schools do have an incentive to spend money so as to improve student achievement, at least to get as many kids as possible to proficiency.¹⁴⁸

In the end, however, Judge Manning apparently did not find the presence of the ABCs program to be a sufficiently compelling safeguard to order increased school funds in this case.¹⁴⁹ This result may reflect the predisposition of this one judge,¹⁵⁰ however, rather than the likelihood that the strategy will be effective in other state courts, where litigators might strengthen their cases by contending that standards-based accountability systems create the context in which court-ordered increases in funding can actually improve student achievement.

The use of state standards in adequacy litigation, however, is not without limits. Education law scholars on both sides of the standards issue have raised concerns about judicial reliance on legislative standards, with some arguing that the standards potentially are set too low to fulfill constitutional mandates and others arguing that the standards potentially are set too high. Several scholars have expressed concern that "allowing [legislative standards] to define or limit the constitutional contours of educational adequacy would render constitutional mandates meaningless."¹⁵¹ Indeed, in response to recent changes in federal education laws, some states have begun to lower the requirements of their standards and accountability systems.¹⁵² If this trend continues, courts may find state standards less reliable for use in constitutional analysis. For these reasons, Chief Justice Mitchell cautioned that courts should not fully hand over the responsibility of enunciating the constitutional right to the legislatures: "I don't think standards are necessarily determinative [of the constitutional issue]. If they are set too low, I think there is still a place for the courts to step in and say we have to do better than that."¹⁵³

148. Anderson Interview, *supra* note 51.

149. Hoke County Bd. of Educ. v. State (Hoke County III), No. 95 CVS 1158, slip op. at 84 (N.C. Super. Ct. Mar. 26, 2001) (on file with author) ("What [plaintiff parties] have not yet proved . . . is that the failure of at-risk children (the issue of pre-kindergarten aside) to obtain a sound basic education is the result of lack of sufficient funding by the State of North Carolina.").

150. Manning Interview, *supra* note 74 ("You're never going to get a blank check from me.").

151. Martha I. Morgan et al., *Establishing Education Program Inadequacy: The Alabama Example*, 28 U. MICH. J.L. REF. 559, 591 (1995).

152. Sam Dillon, *States Are Relaxing Education Standards to Avoid Sanctions*, N.Y. TIMES, May 22, 2003, at A29 (describing the recent Texas decision to reduce the number of questions a student must answer correctly in order to pass the State's achievement test, and noting that "[e]ducators in other states have been making similar decisions as they seek to avoid the penalties that the federal law imposes on schools whose students fare poorly on standardized tests.").

153. Mitchell Interview, *supra* note 59; *see also* Hoke County Bd. of Educ. v. State (Hoke County

While Mitchell's response solves the problem of excessively low legislative standards, it still leaves the complaints of those who note that legislatures might choose to set statutory mandates above constitutional mandates. James S. Liebman raises the question, "Particularly in an era of strict statutory interpretation, are judges likely—and should they be encouraged—to interpret every expression of aspirational educational policy as an enforceable commitment to effectuate that policy?"¹⁵⁴ In the New York school funding litigation, for example, the state's highest court cited this very concern in rejecting the plaintiffs' arguments in favor of using state standards as the constitutional benchmark.¹⁵⁵ In response, litigants in other states will have to convince courts that they are only holding state governments to what the states themselves have defined as educational proficiency. This argument might gain strength as states increasingly place the significant consequences of standards-based accountability programs on individual children.¹⁵⁶ Nineteen states now require students to pass an exit exam in order to earn a high school diploma.¹⁵⁷ In North Carolina, students who do not score Level III or above on their third, fifth, and eighth grade EOG tests risk non-promotion to the next grade.¹⁵⁸ As this "high-stakes testing" trend continues, courts may no longer be able to claim credibly that state education standards constitute only aspirational goals. As Jonathan Sher of the North Carolina Child Advocacy Center argues, "Specific legislative mandates, complete with consequences for children who fail to comply with the mandates, are not the same thing as campaign rhetoric or other expressions of our collective hopes and dreams."¹⁵⁹

While some other state judiciaries have utilized legislatively-enacted education standards in their education decisions, none have used them as boldly

I), No. 95 CVS 1158, slip op. at 115 (N.C. Super. Ct. Oct. 12, 2000) (on file with author) ("There is no credible evidence that the [ABC] standards were set too low as compared to the standards of achievement sufficient to obtain a sound basic education There is one thing for sure, however, the standard of performance now in place *may not be lowered*.").

154. Liebman, *supra* note 135, at 384-85.

155. In 1995, New York's highest court held that because many of the Regents' and Commissioner's standards exceed notions of a minimally adequate or sound basic education—some are also aspirational—prudence should govern utilization of the Regents' standards as benchmarks of educational adequacy. Proof of noncompliance with one or more of the Regents' or Commissioner's standards may not, standing alone, establish a violation of the Education Article.

Campaign for Fiscal Equity, Inc. v. State (CFE I), 86 N.Y.2d 307, 317 (1995). Moreover, ruling again in the same case last year, the New York court reaffirmed its decision to reject the state standards as the constitutional floor. Campaign for Fiscal Equity v. State (CFE II), 801 N.E.2d 326 (2003).

156. *See, e.g.*, ASSOCIATED PRESS, *13,000 Seniors Fail Florida School Test*, SEATTLE TIMES, May 20, 2003, at A5 (describing how thousands of high school seniors will not receive high school diplomas because they failed a newly required state achievement test).

157. Kathryn Doherty & Ronald Skinner, *Quality Counts 2003: Introduction: State of the States*, EDUC. WK., Jan. 9, 2003, at 75.

158. N. C. ADMIN. CODE tit. 16, r. 6D.0502 (LEXIS through Mar. 2004).

159. Interview with Jonathan Sher, Executive Director, North Carolina Child Advocacy Center, in Raleigh, N.C. (Mar. 17, 2003) [hereinafter Sher Interview].

as the North Carolina courts. For example, the Kansas Supreme Court looked to state standards to give meaning to the state constitution's education clause,¹⁶⁰ but it relied only on the legislature's broad goals such as "communication skills necessary to live, learn, and work in a global society" rather than specific content standards and a corresponding testing system.¹⁶¹ Without discussion, the Kansas court held that the State's school funding system satisfied these lofty and imprecise statutory goals.¹⁶² The plaintiffs' loss in the Kansas lawsuit suggests that litigators are more likely to succeed in holding states accountable for their legislatively-enacted education goals when those standards are written with greater specificity.

The *Leandro* plaintiffs' standards-based legal strategy "carve[s] new legal terrain in how they leverage policy in the courtroom."¹⁶³ While the Alabama Supreme Court noted the testimony of an expert who discussed different passing rates in low-wealth and high-wealth school districts,¹⁶⁴ it did not specifically link test results to the trigger of the constitutional violation.¹⁶⁵ In comparison, North Carolina's *Hoke County* ruling utilized test results in more than a merely evidentiary fashion, and essentially allowed the End of Grade test results to define the constitutional floor. Judge Manning not only held that test results are "highly probative" in determining a constitutional violation,¹⁶⁶ he also found that: "A student who is performing below grade level (as defined by Level I or 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."¹⁶⁷ Such a bright-line rule would seem to create the equivalent of a constitutional education malpractice lawsuit for individual students. However, the court later softened its absolute stance on the role of an individual student's

160. "[T]he court will not substitute its judgment of what is 'suitable,' but will utilize as a base the standards enunciated by the legislature and the state department of education." Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170, 1186 (Kan. 1994) (upholding the state's system of school funding).

161. *Id.* at 1187 (internal quotation marks omitted).

162. *Id.*

163. Heise, *supra* note 135, at 641.

164. Opinion of the Justices, 624 So. 2d 107 app. at 123 (Ala. 1993) (reprinting Ala. Coalition for Equity, Inc. v. Hunt, No. CV-90-883-R (Ala. Cir. Ct. Apr. 1, 1993)).

165. *Id.* The Alabama Supreme Court also based its ruling in part on legislatively enacted standards concerning school inputs such as facilities, textbooks and supplies. *Id.* at 134. However, this strategy will not aid school finance litigants elsewhere since the states have almost uniformly refused to adopt such input standards. See William S. Koski, *Educational Opportunity and Accountability in the Era of Standards-Based School Reform*, 12 STAN. L. & POL'Y REV. 301, 318 n.14 (2001) (citing a policy survey that noted that "in most of [the states], opportunity-to-learn standards were not on the policy agenda").

166. *Hoke County Bd. of Educ. v. State (Hoke County I)*, No. 95 CVS 1158, slip op. at 109 (N.C. Super. Ct. Oct. 12, 2000) (on file with author). Indeed, according to a news account of the trial, he told the courtroom, "Now when we come to Hoke County, something's wrong somewhere, if you look at the test results." Dennis Paterson, *Judge Seeks Clarity in Schools Suit*, DURHAM HERALD-SUN, Dec. 18, 1999, at B4.

167. *Hoke County I*, slip op. at 116-17.

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test scores in demonstrating a constitutional violation, suggesting instead that test results should be used to judge the progress of cohorts of students rather than individual students.¹⁶⁸ Nevertheless, if the *Hoke County* ruling on test scores is upheld,¹⁶⁹ it provides the *Leandro* litigants with a persuasive, though not determinative, tool for advocating for more resources for North Carolina's children.

Since North Carolina has been at the forefront of state efforts to develop standards and testing, the state was a logical location for such a strong merging of standards-based reform and adequacy litigation. According to attorney Audrey Anderson:

In North Carolina, they're really ahead of many other states in accountability and testing, so we were able to use that. This is great evidence for us because it's something that the State itself has put into place, and what better standard than what the State has itself determined is necessary to allow students to be productive members of society.¹⁷⁰

Anderson also predicts that "the use of standards in these cases is at the start of the curve. The North Carolina decision is a trendsetter."¹⁷¹ If this trend continues, school finance litigators might successfully expand current notions of educational accountability. As one scholar described the potential phenomenon, "[S]tate education clauses and state standards legislation feed off each other—constitutional guarantees put the muscle behind statutory promises, while statutory promises define the contours of constitutional guarantees."¹⁷² This reciprocal relationship between constitutional rights and legislative standards could lead to a comparable reciprocity between students and their state governments: just as states currently hold students and schools accountable for reaching certain performance standards, students could begin to hold state governments accountable for providing enough funds to allow them to actually reach those standards.

B. *Leandro* Litigation Escapes the Racial Lens

The *Leandro* plaintiffs successfully avoided the racial undertones of school finance claims that have created fierce opposition to efforts to equalize educational opportunities in other states. Polling research in New Jersey and Texas measuring reaction to their school finance lawsuits shows that white

168. *Id.* at 119 ("A school or 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.")

169. The State argued in its brief to the North Carolina Supreme Court that this portion of the *Hoke County* ruling goes beyond the *Leandro* holding that test scores may not be treated as "absolutely authoritative." Brief for Defendant-Appellants, *supra* note 16, at 31 (citations omitted).

170. Anderson Interview, *supra* note 51.

171. *Id.*

172. Koski, *supra* note 165, at 314.

citizens in both states inaccurately perceived school finance reform as primarily benefiting minorities, even when successful litigation would have led to increased funding for their own schools.¹⁷³ Indeed, compared to their more integrated counterparts, minority districts in school finance cases have been significantly less successful in court and, when successful, they have faced more recalcitrance from state legislatures during the remedy-implementation process.¹⁷⁴

This type of racially divisive scenario could have occurred in North Carolina since many of the districts seeking additional funding had disproportionately-high minority student populations.¹⁷⁵ For example, the Hoke County School System is composed of more than seventy percent students of color.¹⁷⁶ However, the *Leandro* litigants appear to have succeeded in neutralizing the race issue. Indeed, of all the individuals interviewed for this case study—including the named plaintiff,¹⁷⁷ litigating attorneys,¹⁷⁸ judges,¹⁷⁹ state legislators,¹⁸⁰ professors,¹⁸¹ and representatives of North Carolina

173. See James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 432 (1999) (citing Douglas S. Reed, *Twenty-Five Years After Rodriguez: School Finance Litigation and the Impact of the New Judicial Federalism*, 32 L. & SOC'Y REV. 175, 209 (1998); Kent L. Tedin, *Self-Interest, Symbolic Values, and the Financial Equalization of the Public Schools*, 56 J. POL. 628 (1994)); see also Melissa C. Carr & Susan H. Furham, *The Politics of School Finance in the 1990s*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE 136, 139 (Helen F. Ladd et al. eds., 1999) ("To the extent that towns and school districts are segregated along racial, ethnic, religious or socioeconomic lines, corresponding prejudices often enter the politics of school finance.").

174. Ryan, *supra* note 173, at 455. Ryan notes that "predominantly minority districts have won only three of the twelve school finance challenges (25%) in which they were plaintiffs. Predominantly white districts, by contrast, have won eleven of fifteen cases (73%)." *Id.* at 433. He further observed that minority districts winning school finance cases have "encountered legislative recalcitrance that exceeds, in both intensity and duration, the legislative resistance that successful white districts have faced." *Id.*

175. See N.C. DEP'T OF PUB. INSTRUCTION, *supra* note 9, at 19 tbl.12. The total public school population in North Carolina was 60.2 percent white and 39.8 percent students of color. In comparison, the total public school population in the eleven plaintiff and plaintiff-intervenor school districts was only 48.7 percent white and 51.3 percent students of color. See *id.* Nevertheless, the plaintiff parties may actually have benefited from a public perception that conflates urban poverty with race. As Anderson suggested, "It was helpful to have the subject district [in the remanded trial] be Hoke County where poverty is not associated in people's minds with race." Anderson Interview, *supra* note 51.

176. See N.C. DEP'T OF PUB. INSTRUCTION, *supra* note 9, at 20 tbl.12.

177. Leandro Interview, *supra* note 44 (responding "No" when asked if he observed any racial undertones in the public reaction to the litigation).

178. Anderson Interview, *supra* note 51 ("I didn't feel there was even a sub-text of race."); Hancock Interview, *supra* note 27 ("I do not think race has played a role in this case, at least not in any way that I have seen."); Tiller Interview, *supra* note 71 ("Race has never been polarizing in this case.").

179. Manning Interview, *supra* note 74 ("This is not a race case. North Carolina is well past all of that. This affects every single child regardless of color."); Mitchell Interview, *supra* note 59 ("I think it's almost unknowable. If race has some part in it, I think it would be impossible to calculate what it is. . . . But this issue does not lend itself to demagoguery the way that racial integration did. Who in America can you get to admit that they believe that kids do not have a right to a sound basic education?").

180. Telephone Interview with Deborah Ross, State Representative and Education Committee member (Mar. 26, 2003) [hereinafter Ross Interview] (responding "No" when asked if she observed any racial undertones in the public reaction to the litigation).

181. Telephone Interview with Ferrel Guillory, Professor and Founder, Program on Southern Politics, Media and Public Life, University of North Carolina at Chapel Hill (Feb. 19, 2003) ("I don't

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education advocacy groups and civil rights organizations¹⁸²—not one felt that race had played an explicit or even underlying role in the public, legislative, or judicial reaction to *Leandro*.

The *Leandro* attorneys' legal and political strategy revolved around income issues rather than race-specific claims, an approach that may explain how they neutralized the race issue when lawsuits in other states did not.¹⁸³ As plaintiffs' attorney Robert Tiller commented, "From the very beginning of this litigation, we presented these issues as problems that crossed racial lines. They broke down principally in terms of haves versus have-nots, rather than blacks versus whites."¹⁸⁴ Indeed, the press release written by the plaintiffs' attorneys on the day the *Leandro* case was filed never once mentions race or racial disparities in educational inputs or achievement.¹⁸⁵ Moreover, unlike litigants in other states, the *Leandro* plaintiffs did not bring a federal claim of racially disparate impact under Title VI of the Civil Rights Act of 1964¹⁸⁶ or seek the co-counsel of civil rights organizations that traditionally advocate for people of color.¹⁸⁷ Several representatives of North Carolina education advocacy and civil rights organizations expressed mild frustration with this strategy, but they also seemed to understand that an increased focus on racial issues might have made the litigation more controversial.¹⁸⁸ Attorney Tiller concluded:

think that the debate over Smart Start or More at Four or even Judge Manning's ruling breaks clearly along racial lines. It's more along the lines of role of government."

182. E-mail from John Dorman, Executive Director, Public School Forum of North Carolina (Feb. 14, 2003, 14:40:09 EST) (on file with author) ("I have not seen this portrayed as a race case, rather it is commonly viewed as a class/income case."); Interview with Gregory Malhoit, Director and attorney, Rural Education Finance Center, in Raleigh, N.C. (Mar. 17, 2003) [hereinafter Malhoit Interview] ("That didn't happen here. Race was not seen as an issue."); see also Interview with Sheria Reid, Attorney, North Carolina Justice Center, in Raleigh, N.C. (Mar. 18, 2003) [hereinafter Reid Interview]; Interview with Gladys Robinson, Education Chair of the North Carolina NAACP, in Chapel Hill, N.C. (Mar. 20, 2003) [hereinafter Robinson Interview].

183. Spearman, *supra* note 36 ("We did not try to cast it as a racial case . . ."); see also Sher Interview, *supra* note 159.

184. Tiller Interview, *supra* note 71.

185. Press Release, Robert W. Spearman & Robert H. Tiller, Plaintiffs' Attorneys (May 25, 1994) (on file with author).

186. See *Campaign for Fiscal Equity v. New York*, 295 A.D.2d. 1, 19 (2002) (overturning the trial court ruling in favor of plaintiffs' Title VI claim in light of *Alexander v. Sandoval*, 532 U.S. 275 (2001) (holding that there exists no private right of action to enforce Title VI regulations)).

187. For example, the Texas litigation, which received an adverse public reaction along racial lines, see *supra* note 173, was brought by the Mexican American Legal Defense and Educational Fund. J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL'Y REV. 607, 626 (1999). With regard to the North Carolina litigation, Dr. Jonathan Sher of the North Carolina Child Advocacy Center observed: "I think one thing that has prevented it from being a racial issue is that there is not a clear black advocate for this. It wasn't brought by the NAACP or equivalent organizations." Sher Interview, *supra* note 159.

188. According to Attorney Sheria Reid of the North Carolina Justice Center, which has filed amicus briefs on behalf of the plaintiffs at various stages of this litigation, "There really weren't any minority organizations [involved in the case] at all. They overlooked the Native American groups, the Hispanic groups, and the NAACP. I do think the plaintiffs were trying to keep it from turning into a case that had anything to do with race." Reid Interview, *supra* note 182. Gladys Robinson, the Education Chair of the North Carolina NAACP, reported that the plaintiff attorneys never contacted her

I suppose we could have done things to focus more on the special problems of African Americans, and that could have had either positive or negative effects. Anyhow, the issue that was at the forefront of our concerns was the problems of schools and students in low-wealth districts. We hoped that addressing those problems would benefit children of all races.¹⁸⁹

The strategy seems to have succeeded thus far. If the state supreme court upholds the pre-kindergarten ruling from *Hoke County*, plaintiffs' attorneys will have won a remedy that benefits at-risk students, who are disproportionately students of color,¹⁹⁰ without suffering the adverse consequences that often result from legal challenges that are framed as addressing minority student issues.

The lack of hyper-segregated school districts in North Carolina provides another possible reason for the neutral racial dynamic in the *Leandro* litigation. In comparison, the plaintiff school districts in New Jersey's *Abbott v. Burke*¹⁹¹ litigation, which the public viewed negatively as a race case,¹⁹² are more strikingly identifiable as minority districts than the majority-minority districts in *Leandro*. The thirty *Abbott* districts currently have a combined student enrollment that is 86.5% students of color and 13.5% white students,¹⁹³ whereas the combined student population of the *Leandro* plaintiff and plaintiff-intervenor counties is 51.3% students of color and 48.7% white students.¹⁹⁴ This thirty-five point gap might explain why the North Carolina litigation escaped public classification as a "race case" while the New Jersey litigation did not. The difference in racial composition is in turn traceable to the size and boundaries of the school districts in each state. The Charlotte-Mecklenburg School District has 106,153 students as a result of its atypically expansive boundaries, which are coterminous with Mecklenburg county boundaries and therefore include students from both the inner-city and surrounding suburban

organization. She speculated that the plaintiffs "may have been afraid of what the association with us might have brought," since many in North Carolina view the NAACP as highly "political" and "aggressive" in North Carolina. Robinson Interview, *supra* note 182. However, despite its lack of an official role in the lawsuit, the North Carolina NAACP took a public stance on the litigation. See Associated Press, *NAACP Urges N.C. Not to Appeal School-Funding Ruling*, CHARLOTTE OBSERVER, Apr. 27, 2002, at B2.

189. Tiller Interview, *supra* note 71.

190. U.S. DEP'T OF EDUC., HIGH STANDARDS FOR ALL STUDENTS: A REPORT FROM THE NATIONAL ASSESSMENT OF TITLE I ON PROGRESS AND CHALLENGES SINCE THE 1994 REAUTHORIZATION 6 (2001) ("Minority students participate [in Title I services for at-risk children] at rates higher than their proportion of the student population.").

191. *Abbott v. Burke* (Abbott I), 495 A.2d 376 (N.J. 1985); *Abbott v. Burke* (Abbott II), 575 A.2d 359 (N.J. 1990); *Abbott v. Burke* (Abbott III), 643 A.2d 575 (N.J. 1994); *Abbott v. Burke* (Abbott IV), 693 A.2d 417 (N.J. 1997); *Abbott v. Burke* (Abbott V), 710 A.2d 450 (N.J. 1998); *Abbott v. Burke* (Abbott VI), 748 A.2d 82 (N.J. 2000); *Abbott v. Burke* (Abbott VII), 751 A.2d 1032 (N.J. 2000); *Abbott v. Burke* (Abbott VIII), 790 A.2d 842 (N.J. 2002).

192. See Ryan, *supra* note 173, at 432-33.

193. See Educ. Law Ctr., *Abbott District Profiles*, at <http://www.edlawcenter.org/ELCPublic/AbbottvBurke/AbbottProfile.htm> (last visited Apr. 15, 2004).

194. See N.C. DEP'T OF PUB. INSTRUCTION, *supra* note 9, at 19-21 tbl.12.

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communities.¹⁹⁵ In contrast, the Newark School District has 42,241 students, all of whom reside in the city itself.¹⁹⁶ Since minority children reside disproportionately within central cities and white children reside disproportionately in outer suburbs,¹⁹⁷ the narrower drawing of school district boundaries helps explain why the Newark schools have 91.4% students of color while Charlotte schools have a comparatively small 55.3%.¹⁹⁸ Since the phenomenon of larger school districts with coterminous county boundaries exists throughout the South,¹⁹⁹ school finance plaintiffs in these states may face smaller chances than their Northern counterparts of encountering racialized public reactions to their efforts to equalize educational opportunities.²⁰⁰

C. Leandro, *Vertical Equity*, and Litigation Classes Defined by At-Risk Status

Over the past decade, the emphasis of the school finance litigation movement has evolved from educational equity to educational adequacy.²⁰¹ Some education law scholars, however, have called for the movement to evolve even further toward *vertical equity*,²⁰² the concept that differently situated children should be treated differently in order to achieve defined levels of outputs.²⁰³ In other words, students with greater needs should be given greater resources. While normatively appealing, few courts have proven willing to find a constitutional mandate for extra resources for the students with the greatest needs.²⁰⁴ Before the *Hoke County* ruling, the New Jersey Supreme Court

195. *Id.*

196. Educ. Law Ctr., *supra* note 193.

197. ERICA FRANKENBERG, CHUNGMEI LEE & GARY ORFIELD, CIVIL RIGHTS PROJECT, HARVARD UNIV., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 5 (2003), available at <http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf>.

198. See Educ. Law Ctr., *supra* note 193; N.C. DEP'T OF PUB. INSTRUCTION, *supra* note 9, at 20 tbl.12.

199. "The largest countywide school districts that contain both city and suburban schools are mostly concentrated in Southern States." FRANKENBERG, LEE & ORFIELD, *supra* note 197.

200. However, the South's current trend of school re-segregation may quickly erase this advantage and cause the public to view cases like *Leandro* as "race cases." See John C. Boger, *Education's Perfect Storm? Racial Resegregation, High Stakes Testing, and School Resource Inequities: The Case of North Carolina*, 81 N.C. L. REV. 1375, 1460 (2003) ("[T]he struggles within southern state legislatures . . . are real, and because of the growing racial segregation, pose the danger of becoming increasingly racialized—especially insofar as increasing segregation of North Carolina schools . . . begin[s] to frame the need for additional resources in racial terms.").

201. "Although the equity paradigm has dominated school finance litigation in the past, there has been a movement in scholarship—and the beginnings of a shift in the litigation—toward an alternative model, one that focuses not on equality but on the substantive right of every student to an adequate education." McUsic, *supra* note 136, at 115-16.

202. See Julie K. Underwood, *School Finance Adequacy As Vertical Equity*, 28 U. MICH. J.L. REF. 493, 517 (1995) ("Children who have greater educational needs should receive greater educational services."); see also, Martha Minow, *School Finance: Does Money Matter?* 28 HARV. J. ON LEGIS. 395, 400 (1991) ("[E]quality and fairness do not mean treating every student identically.")²

203. Berne and Stiefel, *supra* note 6.

204. Several courts have noted that vertical equity is an appropriate policy choice for state legislatures, though not an appropriate constitutional mandate. See, e.g., *Roosevelt Elementary Sch.*

provided the lone exception. The New Jersey court has actually implemented a vertical equity remedy, holding that the needs of students from poor districts required the State to spend even more money than it spent on students from wealthier districts in order to satisfy the state constitution.²⁰⁵ Indeed, the New Jersey decision proved influential in the school finance movement's second vertical equity victory, as Judge Manning cited the *Abbott* ruling in his ruling on the constitutional right to pre-kindergarten for at-risk children.²⁰⁶

In one important respect, the *Hoke County* vertical equity ruling surpasses the *Abbott* ruling. New Jersey's litigation has not created vertical equity across the entire state; instead, the remedy only applies to children in thirty plaintiff districts.²⁰⁷ At-risk children in more than 500 other New Jersey school districts do not benefit from the *Abbott* rights. If a child who is poor or has limited English proficiency happens to live in a New Jersey medium-income school district that does not provide pre-kindergarten, that at-risk child has no constitutional right under *Abbott* to receive the additional resources granted to other at-risk students.²⁰⁸ In such circumstances, the *Abbott* ruling allows for a mismatch between the constitutional wrong and the remedy. As noted earlier, the U.S. Supreme Court raised this very concern in rejecting the plaintiffs' claims in *San Antonio Independent School District v. Rodriguez*:

[T]hese [disadvantaged] groups stand to realize gains in terms of increased per-pupil expenditures only if they reside in districts that presently spend at relatively low levels, *i.e.*, in those districts that would benefit from the redistribution of existing resources. Yet, recent studies have indicated that the poorest families are not invariably clustered in the most impecunious school districts.²⁰⁹

Thirty years later, North Carolina's *Hoke County* ruling solved the mismatch problem. If upheld by the state supreme court, the ruling will guarantee all at-risk children in North Carolina the constitutional right to pre-kindergarten regardless of where they live or the quality of the public schools they attend, thereby shifting to a system based on academic need rather than geographic location. In that sense, North Carolina's ruling sits at the forefront of school finance litigation's fledgling movement toward vertical equity.²¹⁰

Dist. v. Bishop, 877 P.2d 806, 816 (Ariz. 1994) ("We emphasize that a general and uniform school system does not require perfect equality or identity. For example, a system that acknowledges special needs would not run afoul of the uniformity clause."); *see also* Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 397-98 (Tex. 1989) (noting that the State may choose to recognize differences in costs associated with providing an equalized educational opportunity to disadvantaged students).

205. *See* *Abbott v. Burke* (*Abbott V*), 710 A.2d 450 (N.J. 1998) (finding pre-kindergarten services and other remedial programs necessary to provide students in plaintiff districts with a constitutionally adequate education).

206. Order of Feb. 9, 1999, *supra* note 75, at 6 (citing *Abbott V*, 710 A.2d at 462-64 (1998)).

207. Alexandra Greif, *Politics, Practicalities, and Priorities: New Jersey's Experience Implementing the Abbott V Mandate*, 22 YALE L. & POL'Y REV. 615, 626 n.85 (2004).

208. Some low-income rural districts have filed complaints seeking *Abbott* district designation. *Id.*

209. 411 U.S. at 56-57 (1973).

210. *But see* Greif, *supra* note 207, at 625-26 (describing a wide array of additional programs targeted at students in *Abbott* districts). In North Carolina's *Hoke County* ruling, vertical equity for at-

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The North Carolina trial court arrived at vertical equity only by dramatically departing from the initial goals of the litigants in the North Carolina case. Judge Manning found that there are essentially two types of children in North Carolina: those who are at-risk and those who are not.²¹¹ Whereas the plaintiffs' original complaint envisioned an altogether different dichotomy of North Carolina students: those who live in low-wealth districts and those who do not.²¹² Indeed, Robert Leandro acknowledges that he would not have qualified as an at-risk student,²¹³ and therefore, would not have qualified for the constitutional right to pre-kindergarten.

The question, then, for those school finance reform advocates who want to promote vertical equity in education is whether defining a litigant class based on geographic district lines or individual student needs will be more persuasive to courts and legislatures.²¹⁴ The North Carolina litigation provides one piece of anecdotal evidence in favor of the latter option.²¹⁵ In turn, this anecdote warrants a more systematic evaluation of what litigators might gain or lose by focusing their school finance cases on individual student need rather than geography.

One advantage of focusing school finance lawsuits on at-risk children involves aligning the interests of rural and urban communities. Despite early tensions, the *Leandro* plaintiff parties successfully avoided the rural-urban divisions that occurred in the school finance cases in two other Southern states. In both Arkansas and Tennessee, urban districts intervened on the side of the State in school funding lawsuits brought by poor rural districts.²¹⁶ In North Carolina, the lawsuit's initial focus on spending inequities and equalization

risk children is limited to one school input, pre-kindergarten.

211. *Hoke County Bd. of Educ. v. State (Hoke County IV)*, No. 95 CVS 1158, slip op. at 78 (N.C. Super. Ct. Apr. 4, 2002) (on file with author).

212. The plaintiffs originally asserted that "the State system does classify students, based on where they live." Brief for Plaintiff-Appellees at 16, *Leandro v. State*, 468 S.E.2d 543 (N.C. Ct. App. 1996) (No. COA95-321) (brief filed June 19, 1995); cf. Plaintiff-Intervenor-Appellants' New Brief, *supra* note 50, at 21 ("The focus of the inquiry, moreover, should not be on funding disparities among school districts, but on differences in opportunities available to individual students, regardless of where they live and go to school.")

213. "I wasn't specifically an at-risk student based on my economic background and parental background." Leandro Interview, *supra* note 44.

214. Two legal scholars have noted that school finance litigators in adequacy cases face the same choice: "Adequacy is a child-based concept. Conceptually, the unit could be the individual child, but litigators in state school finance cases have thus far used it as a district-level concept." Berne & Stiefel, *supra* note 6, at 22.

215. For Judge Manning, the issue became quite simple: "Are there going to be more resources applied for some children to learn than for other children to learn? And the answer to that is common sense. Of course." Manning Interview, *supra* note 74.

216. *Dupree v. Alma Sch. Dist.*, 651 S.W.2d 90, 91 n.2 (Ark. 1983) (describing the intervention of two urban school districts on the side of the defendant in litigation brought by eleven rural school district plaintiffs); *Tenn. Small Sch. Sys. v. McWherter (Tennessee Small School Systems III)*, 91 S.W.3d 232, 234 n.4 (Tenn. 2002) (describing the intervention of nine urban school districts on the side of the defendant in litigation brought by eight rural school district plaintiffs).

formulas also threatened to pit the rural and urban districts against each other.²¹⁷ One *Leandro* observer noted that the urban districts' "argument about the unconstitutionality of supplemental funds drove a wedge between the unified efforts on the part of all schools in this state and really set a bad tone at the beginning of the litigation."²¹⁸ However, the *Leandro* districts eventually found common ground. Plaintiff-intervenors' attorney Audrey Anderson noted, "It's relatively unusual for there to be in the same suit plaintiffs who are representing both rural and urban districts. There was some of that tension in our case, but we were able to put those differences aside and focus on the needs of at-risk kids."²¹⁹ The plaintiff parties created this consensus only after the North Carolina Supreme Court rejected the plaintiffs' equity arguments and the plaintiff-intervenors' challenge to the supplemental funding.²²⁰ Indeed, some legal scholars have cited the *Leandro* litigation as evidence that adequacy cases are more likely than equity cases to allow urban and rural districts to unite behind a shared strategy to improve education for all children.²²¹

After Judge Manning's trial court proceedings focused all of the plaintiff parties squarely on the topic of at-risk children—whether in rural or urban districts—the plaintiff parties began to make legal arguments in unison. In fact, Judge Manning said that during the trial he saw no substantial difference in their legal arguments:

They were never at odds. In fact, I sat here and reviewed one afternoon the proposed findings of fact. I had them "red, green, and white" the proposed findings of fact. If you disagree, you red line it. If you agree, you place a green line though it. And white meant you thought it was irrelevant. And I only found two lines in disagreement between the plaintiffs and plaintiff-intervenors. I can't remember what they were; they were two little irrelevant facts in the middle of 180 pages. They were lock step with each other.²²²

This confirms attorney Anderson's observation that the plaintiff parties were able to unite around the needs of at-risk students,²²³ and raises the possibility that adequacy litigation centered specifically on those students across an entire state might be more conducive to urban-rural cooperation than adequacy litigation based on geographic distinctions arising from school district lines.

217. Tiller Interview, *supra* note 71 ("We were disappointed by the challenge of the supplemental funding. We thought that their argument was weak legally, as well as inequitable.")

218. Malhoit Interview, *supra* note 182.

219. Anderson Interview, *supra* note 51.

220. Tiller Interview, *supra* note 71 ("After our initial differences with the urban intervenors, we managed to find a lot of common ground. And now our view of the issues is very similar.")

221. Minorini and Sugarman have written that the *Leandro* suit "illustrates the applicability of the adequacy theory to both low-wealth rural districts, as well as high-wealth, high-need urban systems." Paul A. Minorini & Stephen D. Sugarman, *Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm*, in *EQUITY AND ADEQUACY IN EDUCATION FINANCE* 175, 198 (Helen F. Ladd et al. eds., 1999).

222. Manning Interview, *supra* note 74.

223. Anderson Interview, *supra* note 51.

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Perhaps the most significant benefit of focusing litigation on at-risk children derives from the increased likelihood of winning legislative approval of the court-ordered remedy. Remedies that increase funds for only the poorest schools benefit the constituents of a limited number of legislators. By contrast, remedies focused on at-risk children across the entire state have wider legislative appeal because virtually every school district—and consequently every legislative district—has at least some poor, minority, or Limited-English-Proficient students. Thus, legislators representing districts with average-spending or even high-spending schools may be less likely to oppose the school finance remedy since their constituents stand to gain at least some additional state funds. These seemingly small political considerations should not be underestimated, as many commentators have observed that legislative recalcitrance has been the greatest roadblock to the school finance litigation movement.²²⁴

The long and ongoing political popularity of Title I in the U.S. Congress demonstrates how state-level remedies focused on at-risk students might benefit from increased legislative support. Title I dates to the Elementary and Secondary Education Act of 1965²²⁵ and provides funds to schools that have high concentrations of children from low-income families in order to pay the extra costs of educating disadvantaged students. In other words, Title I is the federal government's attempt at vertical equity. The benefits of the program are spread widely, as Title I funds reach 45,000 schools in 13,000 school districts that serve more than 12.5 million children.²²⁶ One commentator for *Education Week* has noted: "To maintain broad political support, money from Title I—the largest federal program for K-12 education—touches every state, nine out of 10 school districts, and six out of 10 public schools. Put another way, the money reaches constituents for every member of Congress."²²⁷ Similarly, a court-ordered plan of pre-kindergarten or other remedial programs for at-risk children would reach the constituents of every member of the state legislature. While this does not guarantee universal support, it does increase the probability that some swing legislators will vote in favor of proposals to implement the school finance litigation remedy.

However, attorneys who focus their school finance lawsuits on at-risk

224. See Michael Heise, *Choosing Equal Educational Opportunity: School Reform, Law, and Public Policy*, 68 U. CHI. L. REV. 1113, 1122 (2001) ("Resistance to judicially mandated or initiated school finance reform, both formal and informal, hinders many successful lawsuits that rely on legislators and governors for implementation at the remedial stage."); Mitchell Interview, *supra* note 59 ("The biggest problems the states have run into with these education decisions has been the vehement reactions of their legislatures when the courts went in and told them how they had to budget.").

225. Pub. L. No. 89-10, 79 STAT. 27 (1965).

226. INDEP. REVIEW PANEL, IMPROVING THE ODDS: A REPORT ON TITLE I FROM THE INDEPENDENT REVIEW PANEL 2 (2001).

227. Erik W. Robelen, *Off Target?*, EDUC. WK., Sept. 5, 2001, at 1.

children also face some opportunity costs. Such lawsuits might forfeit the chance to create systemwide or “whole state” improvements in public schools.²²⁸ A comparison of the *Leandro* litigation in North Carolina and the *Rose*²²⁹ litigation in Kentucky demonstrates this tradeoff. While the adequacy rights enunciated in each case are quite similar,²³⁰ the two states have taken drastically different approaches to defining a remedy. The Kentucky court pointed to evidence that the entire public school system was inadequately funded, noting that Kentucky ranked fortieth nationally in per pupil spending.²³¹ Within a year of the decision, the legislature created a sweeping and comprehensive remedy that added more than one billion dollars to the state public school system.²³² While there exists no guarantee that any other state legislature would prove equally responsive to a systemwide remedial order, plaintiffs that approach the courts with a more narrowly focused demand cannot expect to receive a state-wide remedy.

The Kentucky court concluded that even children in the State’s higher-spending districts were not receiving an adequate education,²³³ and the *Leandro* plaintiffs had reason to hope for a similar result. As Mike Ward, the North Carolina Superintendent of Public Instruction, pointed out after Judge Manning denied a court-ordered increase in statewide funding: “I don’t want any of us to be comfortable with the notion that there are enough dollars in the system—not in a state where the average per pupil expenditure is \$1,000 less than the average for the nation. We need to make a bigger investment in our schools.”²³⁴ According to one legal observer, the “biggest disappointment” of the litigation was the narrowing of the focus to only some children “when this case was brought because the system as a whole was under-funded.”²³⁵ John Dorman of the North Carolina Public School Forum also noted a mismatch between the trial court’s remedy and the school system’s overall inadequacies:

We are under-performing up and down the ladder; it’s not just at-risk kids that aren’t doing well here; it’s also kids in the middle of the pack. I think the idea of taking what little resources there are for kids at the top and giving it to kids at the bottom just doesn’t make any sense.²³⁶

As these complaints demonstrate, focusing litigation on at-risk children may

228. McUsic, *supra* note 136, at 91 (“The whole state remedy is appropriate in circumstances where virtually all the state’s schools are inadequate and underfunded.”).

229. *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989).

230. Indeed, the *Leandro* Court cited the Kentucky decision approvingly. *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997).

231. *Rose*, 790 S.W.2d at 197.

232. Kern Alexander, *The Common School Ideal and the Limits of Legislative Authority: The Kentucky Case*, 28 HARV. J. ON LEGIS. 341, 343 (1991).

233. *Rose*, 790 S.W.2d at 198.

234. David Rice, *N.C. Ordered to Help Schools; Ruling: At-Risk Kids State Responsibility*, WINSTON-SALEM J., Apr. 5, 2002, at 1A.

235. Hancock Interview, *supra* note 27.

236. Dorman Interview, *supra* note 34.

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come at the expense of a broader remedy that increases funding and improves education for all children.²³⁷

Another disadvantage to narrowing a school finance lawsuit's focus to at-risk children involves school districts' willingness to provide financial support for the litigation efforts. In the *Leandro* lawsuit, each of the plaintiff and plaintiff-intervenor counties helped fund the litigation, gambling that their up-front costs would lead to eventual increases in state funding.²³⁸ However, this risk may have appeared less appealing to the low-wealth districts if they had known from the start that the case would only provide a remedy for a subset of their children rather than a large infusion of state funds. According to John Dorman of the Public School Forum: "Most of the educational community is not thrilled with Judge Manning's ambivalence about whether money matters. I think there are a number of [plaintiff and plaintiff-intervenor counties] that have really been soul searching about whether they want to go the distance."²³⁹ By focusing on at-risk children from the start, potential plaintiff districts will face a best-case scenario that involves a smaller return for their money than the best-case scenario of a Kentucky-style whole-state reform. While this calculus may make some districts less enthusiastic about lending financial support to litigation efforts, it will probably not deter all districts. Many potential plaintiff districts will probably realize that Kentucky's billion-dollar remedy is singular in the history of school finance litigation,²⁴⁰ and that a court-imposed remedy focused on at-risk children could still lead to significant amounts of additional state funding.

In summary, these pluses and minuses of school finance litigation focused on at-risk children leave attorneys and their clients with a difficult choice. On the one hand, narrowing the focus could make litigation more difficult if fewer districts are willing to contribute to the up-front costs. Moreover, narrowly focused litigation will not address the systemwide inadequacies in those states that invest too little in public education across the entire state. On the other hand, lawsuits focused on at-risk children allow for the successful cooperation of districts that might otherwise be pitted against each other in both the litigation and legislative politics of school funding. The North Carolina plaintiffs were able to avoid the divisive *rural versus urban* and *low-wealth versus high-wealth* conflicts that proved detrimental to school reform efforts in other states. Most importantly, lawsuits focused on at-risk children promise an increased probability of legislative enactment of a court's remedy and, as

237. As the named-plaintiff's mother has noted, "It started off, we wanted a school activity bus and AP courses. Next thing I know, we're getting preschools." Todd Leskanic, *Low-Wealth Schools Still Waiting*, FAYETTEVILLE OBSERVER, Feb. 11, 2003, at B1.

238. Hancock Interview, *supra* note 27.

239. Dorman Interview, *supra* note 34.

240. Carr and Furham, *supra* note 173, at 156 ("Considering the contentious nature of school finance politics, the Kentucky example appears somewhat miraculous.").

evidenced by the federal experience with Title I, long-term political support to keep funding the remedy long after the court system has stopped actively monitoring the case. Since judicial orders only benefit children to the extent that they are implemented by legislatures, this advantage cannot be underestimated. Lastly, litigation focused on at-risk children might solve the decades-old mismatch between constitutional wrong and remedy. In so doing, the school finance reform movement would ensure that it does not neglect the plight of some of society's most disadvantaged children.

D. Pre-Kindergarten: The Next Trend in School Finance Litigation Remedies?

Regardless of whether litigants choose to frame their cases around at-risk status or geographical district lines, pre-kindergarten may soon play an increasingly prominent role in all types of school finance litigation. First, as pre-kindergarten education becomes more common across America's public schools, school finance litigators are likely to raise questions about which students are being excluded from this important educational experience. Second, to the extent that courts are persuaded by social science research in determining whether or not to grant certain remedies, pre-kindergarten specifically may prove more compelling than additional dollars more generally. Consequently, school finance attorneys may shift their litigation strategies to benefit from the increased chances of courtroom success.

According to a 2000 national policy survey, a "major educational shift in the past five years has been the move by many states to establish a pre-kindergarten program for four-year-olds."²⁴¹ In 1995, Georgia became the first state in the nation to create a universal pre-kindergarten program.²⁴² More recently, Florida voters overwhelmingly approved a 2002 constitutional amendment stipulating that all four-year-olds must receive a free pre-kindergarten education by 2005.²⁴³ However, funding universal pre-kindergarten remains difficult, especially in light of recent budget shortfalls across the state.²⁴⁴ Nevertheless, Steven Barnett, the Director of the National

241. James Gallagher et al., *Study of Education for Four Year Olds: State Initiatives*, Nat'l Ctr. for Early Dev. & Learning, available at http://www.fpg.unc.edu/~ncedl/Pages/project_Summary.cfm?studyid=14 (last visited Apr. 19, 2004); see also Press Release, U.S. Dep't of Educ., New Survey Takes Roll on Prekindergarten in U.S. Public Elementary Schools (Mar. 31, 2003), available at <http://www.ed.gov/news/pressreleases/2003/03/03312003.html> (noting that public elementary schools enrolled approximately 822,000 children in pre-kindergarten classes throughout the country during the 2000-01 academic year).

242. Diane Loupe, *Pre-Kindergarten Program Expanded*, ATLANTA J. & CONST., July 6, 1995, at 1A (quoting the Georgia governor, "Today we become the first state in the country, in fact the first state in this nation's history, to offer pre-k for every 4-year-old who wants it.").

243. Lori Horvitz et al., *Voters Approved Measures That Require Smaller Class Sizes and Free Kindergarten for All 4-Year-Olds*, ORLANDO SENTINEL, Nov. 6, 2002, at A1.

244. Leslie Postal, *Pre-K's Fizzle Out Along With Money*, ORLANDO SENTINEL, April 6, 2003, at B1 (describing how some districts are eliminating or scaling back pre-kindergarten programs despite a constitutional requirement that the programs be fully implemented by 2005).

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Institute for Early Education Research, thinks the fledgling national trend toward greater pre-kindergarten coverage might aid school finance litigators:

Education is expanding into pre-k. You're getting a trend of having near universal coverage of preschool for kids at the top of the income spectrum. As preschool becomes [the norm], I think that brings to the fore questions about who has been left out of what is now considered a common experience.²⁴⁵

While Barnett's equity argument might carry strong political and moral weight in all states, it will only benefit school finance litigators in states that have found a constitutional right to *equal* educational opportunities.²⁴⁶ In states such as North Carolina, where courts have rejected equity but accepted adequacy theories, litigants would have to argue that pre-kindergarten programs are necessary to help students achieve the state's constitutional floor of educational attainment.

The relative strength of social science research in support of pre-kindergarten, as compared to research regarding other school inputs, also lends support to this potential new trend in school finance remedies. For decades, school finance reform efforts have been hampered by the lack of a clear consensus on whether additional money raises educational achievement. As early as the *Rodriguez* litigation in the early 1970s, courts have had ample research on which to rely in denying plaintiffs their requests for additional funds.²⁴⁷ The North Carolina Supreme Court followed this trend, quoting several social science and legal sources in *Leandro* for the proposition that additional money would not necessarily remedy constitutional violations.²⁴⁸ Similarly, the *Hoke County* rulings relied heavily on a few examples of low-wealth schools that have produced proficient test results despite low funds²⁴⁹ and the trial testimony of Dr. Eric Hanushek.²⁵⁰ Although some studies do

245. Telephone Interview with Dr. Steven Barnett, Director, National Institute for Early Education Research, Rutgers University (May 14, 2003) [hereinafter Barnett Interview].

246. See, e.g., *Brigham v. State*, 692 A.2d 384 (Vt. 1997) (holding that the school finance system violated the equal protection and education provisions of the Vermont Constitution, which guarantee substantial equality of educational opportunity).

247. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 23 (1973) (describing the question of whether money matters as "unsettled and disputed," and ruling against the plaintiffs' claim); *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1027 (Colo. 1982) (rejecting plaintiffs' claims and ruling that the "difference in quality between two schools cannot be determined simplistically by examining only the differences in per-pupil expenditures"); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 61 (R.I. 1995) (ruling against plaintiffs' claims and noting that "the school district at issue in [*Missouri v. Jenkins*, 515 U.S. 70 (1995)] illustrates that money alone may never be sufficient to bring about 'learner outcomes' in all students").

248. *Leandro v. State*, 488 S.E.2d 249, 260 (N.C. 1997).

249. The trial court highlighted five low-wealth schools in which achievement on North Carolina's EOG tests was "outstanding" and student populations were over fifty percent African American, Native American, and/or Hispanic, as well as more than seventy percent eligible for free or reduced-price lunch. *Hoke County Bd. of Educ. v. State (Hoke County III)*, No. 95 CVS 1158, slip op. at 85-88 (N.C. Super. Ct. Mar. 26, 2001) (on file with author).

250. *Hoke County Bd. of Educ. v. State (Hoke County I)*, No. 95 CVS 1158, slip op. at 73-74 (N.C. Super. Ct. Oct. 12, 2000) (on file with author).

show a positive correlation between increased expenditures and student achievement,²⁵¹ when presented with conflicting studies, courts have not often favored the research supporting additional funds.²⁵²

In contrast to the studies on school spending, research findings from a spectrum of academics,²⁵³ think tanks,²⁵⁴ government agencies,²⁵⁵ and even one of the twelve Federal Reserve Banks²⁵⁶ have consistently shown strong benefits resulting from pre-kindergarten education. Helen Ladd, a Duke University education economist who served as a consultant for the *Leandro* plaintiffs, compared the relative weights of the social science research:

Increasingly education research is being evaluated on the extent to which it is based on the gold standard approach of an experiment with random assignment of students. The fact that much of the highly cited research on pre-k education is based on such experiments may account for the perception that research is stronger on the value of pre-k²⁵⁷ than of k-12 education where experiments have been fewer and harder to do.

251. See, e.g., Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 HARV. J. ON LEGIS. 465, 488 (1991).

252. But see Opinion of the Justices, 624 So. 2d 107 app. at 140 (Ala. 1993) (reprinting Ala. Coalition for Equity, Inc. v. Hunt, No. CV-90-883-R (Ala. Cir. Ct. Apr. 1, 1993)) (“[T]he Court finds that Dr. Ferguson’s analysis of the relationship between school spending and student achievement . . . is superior in terms of data and research design to that of Dr. Hanushek and, thus, it accepts the view that there is a positive correlation between spending on education and student performance . . .”).

253. See, e.g., W. Steven Barnett, *Long Term Effects of Early Childhood Programs on Cognitive and School Outcomes*, FUTURE OF CHILDREN, Winter 1995, at 25 (reviewing thirty-six studies of model demonstration projects and large-scale public programs to examine their long-term effects on children from low-income families, and finding that high-quality programs can produce large short-term benefits on intelligence quotient and sizable long-term effects on school achievement, grade retention, placement in special education, and social adjustment); see also JANET CURRIE, EARLY CHILDHOOD INTERVENTION PROGRAMS: WHAT DO WE KNOW? (2002), available at http://www.jcpr.org/wpfiles/currie_early_childhood.pdf (recognizing that not all studies have produced consistent evidence in favor of early intervention, but demonstrating that the methodologically superior studies tend to find larger and more significant long-term effects, and showing that the effects of intervention are generally larger for more disadvantaged students); ARTHUR J. REYNOLDS ET AL., AGE 21 COST-BENEFIT ANALYSIS OF THE TITLE I CHICAGO CHILD-PARENT CENTERS (Inst. for Research on Poverty, Discussion Paper No. 1245-02, 2002) (demonstrating that academic benefits from preschool education can yield long-term economic benefits—in terms of savings for the welfare and criminal justice systems—that far outweigh the costs).

254. See, e.g., Educ. Comm’n of the States, Pre-Kindergarten: Selected Research & Readings, at <http://www.ecs.org/html/IssueSection.asp?issueid=184&s=Selected+Research+%26+Readings> (last visited Apr. 19, 2004); Nat’l Ctr. for Early Dev. and Learning, Research, at <http://www.fpg.unc.edu/~NCEDL/PAGES/research.cfm> (last visited Apr. 19, 2004); Nat’l Inst. for Early Educ. Research, Resources, at <http://www.nieer.org/resources> (last visited Apr. 19, 2003).

255. SHARON L. RAMEY ET AL., HEAD START CHILDREN’S ENTRY INTO PUBLIC SCHOOL: A REPORT ON THE NATIONAL HEAD START/PUBLIC EARLY CHILDHOOD TRANSITION DEMONSTRATION (2000), http://www.acf.hhs.gov/programs/core/pubs_reports/hs/transition_study/trans_study.html (contesting the view that the benefits of Head Start “fade out,” and contending instead that a vast majority of Head Start children achieve at the national average after two or three years in public schools).

256. Art Rolnick & Rob Grunewald, Fed. Reserve Bank of Minneapolis, *Early Childhood Development: Economic Development with a High Public Return*, FED. GAZETTE, Mar. 2003, available at <http://minneapolisfed.org/pubs/fedgaz/03-03/earlychild.cfm> (finding that well-focused investments in early childhood development yield high public and private returns).

257. E-mail from Helen Ladd, Professor of Public Policy Studies and Economics, Duke University, to Tico Almeida (May 5, 2003, 15:57:08 EST) (on file with author).

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Dr. Barnett concurred:

I think the research evidence for pre-school is stronger. One of the key differences is that most of the research on *does money matter* was econometric research on natural variation in spending [as opposed to research with a control group]. These natural variation studies almost always violate a host of the assumptions under which you can estimate a valid production function. So that evidence was inherently weak. Whereas with pre-school research, we have had many more randomized trials.²⁵⁸

However, the value of the pre-kindergarten social science research is not without limits. As Dr. Ladd notes, “With respect to pre-school education, the findings imply that high quality, expensive pre-school programs of the type that have been evaluated can be beneficial, but the question arises whether that is the type that will be implemented on a relatively large scale.”²⁵⁹

Despite this limitation, the North Carolina litigation demonstrates how pre-kindergarten findings can convince judges and even defendants in school finance cases. Judge Manning supported his order enunciating the constitutional right of at-risk children to pre-kindergarten education with favorable research conducted by the University of North Carolina’s Child Development Institute.²⁶⁰ Chief Justice Mitchell speculated that the social science might prove persuasive to the North Carolina Supreme Court when it reviews the *Hoke County* ruling:

It’s a question of evidence. If all the evidence indicates, and I think it pretty well does, that the early years of education are when the human brain is most absorbent, then I think the trial court is entirely justified in making a finding to that effect, and then take the next step and say this is an area where it is appropriate for you to begin the remedy of the problem.²⁶¹

Moreover, in a notable omission, the State’s brief to the North Carolina Supreme Court appealing the *Hoke County* ruling does not cite a single study questioning the benefits of pre-kindergarten education to at-risk children.²⁶² To the contrary, the State admits in its brief that “[q]uality pre-kindergarten education can affect academic achievement.”²⁶³ If the appeal had been over a court order for mandatory funding increases, the State’s brief most likely would have included many citations of studies finding that money does not increase academic achievement. Either because the State could not find convincing studies questioning the benefits of pre-kindergarten or because citing such findings would have been politically untenable, the State chose not to argue against the efficacy of pre-kindergarten.

258. Barnett Interview, *supra* 245.

259. Ladd, *supra* note 257.

260. Order of Feb. 9, 1999, *supra* note 75, at 6 (citing FRANK PORTER GRAHAM CTR., THE EFFECTS OF SMART START CHILD CARE ON KINDERGARTEN ENTRY SKILLS 8-9 (1998)).

261. Mitchell Interview, *supra* note 59.

262. Brief for Defendant-Appellants, *supra* note 16. Instead, the State asked that the pre-kindergarten ruling be overruled on separation of powers grounds. *Id.* at 42.

263. *Id.*

However, no amount of supportive social science research will guarantee success for future school finance litigants who focus on pre-kindergarten. In fact, just months after the final ruling in North Carolina's *Hoke County* case, the Arkansas Supreme Court overturned a trial court decision that found a constitutional right to pre-kindergarten.²⁶⁴ According to the Arkansas plaintiff-intervenors, "there was no evidence presented at trial to rebut the testimony of educators and experts that early-childhood education is a necessary component of an education system which reasonably expects to enable significant numbers of students to perform at grade level."²⁶⁵ Accepting this argument, the Arkansas trial court found that "in order to provide our children with an adequate education as required by the Constitution . . . , the State must forthwith provide programs for those children of pre-school age that will allow them to compete academically with their peers."²⁶⁶

However, the Arkansas Supreme Court overruled the trial court, holding that the plain language of the state's education clause did not support a constitutional mandate of pre-kindergarten programs and that the matter was "a public-policy issue for the General Assembly to explore and resolve."²⁶⁷ Thus, the weight of the evidence regarding the efficacy of pre-kindergarten will not always tip the scales on the constitutional question. Indeed, the State of North Carolina's appeal of the *Hoke County* pre-kindergarten ruling is based on arguments similar to the separation of powers reasoning that persuaded the Arkansas Supreme Court to overturn the trial court decision in that state.²⁶⁸ Some observers fear that the *Hoke County* ruling will face the same fate.²⁶⁹

Nevertheless, some litigators and education experts predict a coming trend of pre-kindergarten as a remedy in school finance litigation. As attorney Audrey Anderson, who represented the plaintiff-intervenors in *Leandro*, noted:

The social science evidence in support of quality pre-kindergarten programs is particularly strong, and in addition, educators tend to think it works. If you have conversations with educators across the country, that's one of the first things they will say schools need. And it also makes compelling testimony for the judge. When you have kindergarten teachers on the stand who testify that kids come to their classes who have never held a book or never used a pencil in their entire lives, it's

264. *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 500-01 (2002) (affirming the trial court's decision that the state school funding system was unconstitutional, but overruling the trial court's decision about pre-kindergarten).

265. *Id.* at 501.

266. *Id.* (internal quotation marks omitted).

267. *Id.*

268. See Brief for Defendant-Appellants, *supra* note 16, at 42 ("Quality pre-kindergarten education can affect academic achievement, but the decision to provide pre-kindergarten programs as opposed to other effective educational programs is clearly a nonjusticiable political question reserved to the legislature."). Indeed, the State of North Carolina cites the recent Arkansas Supreme Court decision in making its separation of powers argument. *Id.* at 45.

269. Malhoit Interview, *supra* note 182 ("Arkansas recently ruled that pre-school was not required under its constitution, and there is a fear that our court will pay more attention to that decision than the New Jersey case.").

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very easy for a judge to understand the importance of pre-kindergarten.²⁷⁰

Professor Barnett, who presented his findings about the benefits of pre-kindergarten programs to a national conference of school finance attorneys in the Spring of 2003,²⁷¹ commented, “I did get the sense from some litigators that they were not aware of all the literature on pre-k, and once they were aware, they were more interested in including pre-k in their litigation.”²⁷² If more plaintiffs bring lawsuits for pre-kindergarten, it is perhaps only a matter of time before more courts follow the lead of New Jersey and North Carolina in finding a constitutional right to pre-kindergarten education.

IV. CONCLUSION: ASSESSING THE RESULTS OF *LEANDRO V. STATE*

With a decision still pending before the North Carolina Supreme Court, it remains difficult to assess what school finance litigation will ultimately mean for the children of the state. Nevertheless, this note offers some preliminary reflections of the outcomes of the *Leandro* and *Hoke County* rulings. In terms of political momentum for legislative proposals targeting at-risk children, equity and adequacy of public school funding, and innovative expansion of constitutional rights, *Leandro* has brought potentially positive, but still uncertain, results.

A. *Political Support for Proposals Targeting At-Risk Children*

The *Hoke County* ruling has created political support for legislative proposals targeting North Carolina’s most disadvantaged children. Specifically, the court decisions have benefited the More at Four program, Democratic Governor Easley’s plan to incrementally provide North Carolina’s at-risk four-year-olds with pre-kindergarten.²⁷³ During the summer 2002, the Governor sent what one newspaper called a “sternly worded letter” to all 170 members of the General Assembly, arguing that the school-funding lawsuit had reached a “crisis point” and urging lawmakers to act immediately to include more pre-kindergarten funds in the State’s budget.²⁷⁴ The Governor’s pressure proved

270. Anderson Interview, *supra* note 51.

271. See Advocacy Ctr. for Children’s Educ. Success with Standards, ACCESS Conference: Early Childhood Education Experts Provide Stunning Evidence, at http://www.accessednetwork.org/early_childhood_panel_03.htm (last visited Apr. 19, 2004).

272. Barnett Interview, *supra* note 245.

273. It may strike some readers as odd that a governor who aggressively advocates legislation expanding pre-kindergarten for at-risk children also supports the appeal of the *Hoke County* ruling. The author can think of two possible explanations: first, in a time of budgetary constraints the Governor may prefer to slowly phase in the More at Four program so as not to jeopardize other spending priorities or raise taxes; second, if pre-kindergarten is a constitutional mandate, then the Governor cannot take credit for initiating its implementation. The Governor’s lead education policy advisor was contacted for an interview and chose not to comment while the appeal is pending.

274. Amy Gardner & Todd Silberman, *Easley Demands Quick Action on Lottery*, RALEIGH NEWS & OBSERVER, July 23, 2002, at B1 (Easley argued that “the court order is not going away. We need

partially successful, as the state budget revision approved in September of 2002 expanded the pre-kindergarten program from 1,600 students the year before to a new total of 7,600.²⁷⁵ Although thousands of North Carolina's at-risk children still do not the opportunity to participate in More at Four, the *Hoke County* ruling nevertheless proved helpful to pre-kindergarten advocates. According to a member of the North Carolina General Assembly Education Committee, "One of the justifications the legislature has used to fund More at Four during a time of severe budgetary constraints is that it is court-ordered."²⁷⁶ If upheld, the *Hoke County* ruling might create sufficient political pressure to persuade legislators to finally provide pre-kindergarten classes for all the state's at-risk children.

Recent changes in federal education laws reinforce the *Leandro* trial court's emphasis on the test results of at-risk children, and might create even more momentum for targeting greater resources toward at-risk students. The federal No Child Left Behind Act of 2001 (NCLBA)²⁷⁷ requires states to assess every third through eighth grade student's progress toward state education standards via standardized tests, and schools must make "adequate yearly progress" (AYP) toward meeting their state's own standards.²⁷⁸ The new federal law also requires schools to disaggregate their test data, thus revealing the performance of various subgroups of students—such as students grouped by race and ethnicity, disability, limited English proficiency, or economic disadvantage.²⁷⁹ Unless each subgroup meets its yearly targets, a school can be deemed "in need of improvement" even if the overall academic performance of a particular school as a whole meets or exceeds annual goals.²⁸⁰

The NCLBA and Judge Manning's ruling are both premised on the belief that all or virtually all children can meet state standards.²⁸¹ Together, the

immediate revenue to implement More at Four . . .").

275. Kathleen K. Manzo, *Quality Counts 2003: State Policy Updates*, EDUC. WK., Jan. 9, 2003, at 156.

276. Ross Interview, *supra* note 180; see also Mitchell Interview, *supra* note 59 ("And the legislature, just like legislatures did in the civil rights era, they can say 'the devil made me do it . . . the court ordered me to do it.' It gives them perfect political cover.").

277. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 STAT. 1425.

278. U.S. Dep't of Educ., The No Child Left Behind Act of 2001 (Apr. 7, 2002), available at <http://www.nclb.gov/nclb/overview/intro/execsumm.pdf>.

279. U.S. Dep't of Educ., Stronger Accountability: The Facts About Measuring Progress, at <http://www.nclb.gov/nclb/accountability/ayp/testing.html> (last visited Apr. 15, 2004).

280. U.S. Dep't of Educ., The Facts About State Improvement Lists, at <http://www.nclb.gov/nclb/accountability/state/improvementlists.html> (last visited Apr. 15, 2004).

281. The "adequate-yearly-progress" goals of the NCLB are targeted to have students in every subgroup meeting state standards within twelve years. Press Release, U.S. Dep't of Educ., Paige Outlines Adequate Yearly Progress Provisions (July 24, 2002), available at <http://www.nclb.gov/media/news/072402.html>. Similarly, Judge Manning supported his ruling about Level III with the testimony of a state education expert that "every school in North Carolina is capable of having 90 percent of its students score at proficient levels on [state] tests." *Hoke County Bd. of Educ. v. State* (Hoke County I), No. 95 CVS 1158, slip op. at 119 (N.C. Super. Ct. Oct. 12, 2000) (on file with author).

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federal law and state constitutional ruling may sound an alarm bell about the performance of at-risk children in North Carolina public schools. Plaintiff Intervenor's attorney Anderson noted that, "The North Carolina ABCs had not been disaggregating the data by income. The NCLB requires that states disaggregate by race and by income, so I expect that you're going to be able to show that it's these kids who are not making the standard."²⁸² In September 2003, the North Carolina Department of Public Instruction released the first set of NCLBA results, and a majority of the state's public schools had failed to meet AYP.²⁸³ Since a large number of otherwise adequate schools failed the standard because of the performance of some subgroups,²⁸⁴ some observers believe the NCLBA results could help reinforce Judge Manning's findings about at-risk children and build political pressure to fully implement the pre-kindergarten remedy.²⁸⁵ With both a federal law and a state constitutional mandate focusing attention on at-risk children, North Carolina policymakers may be forced to devote more attention—and perhaps more resources—toward the poor and minority students who currently receive the most meager educational opportunities.

B. Equity and Adequacy in North Carolina School Funding

The *Leandro* litigation has produced mixed results in terms of equalizing public school funding across the state, the plaintiff attorneys' primary concern at the start of the litigation. The threat of litigation prompted the General Assembly to create the Low-Wealth Supplemental Fund in 1991, and since then the legislature has appropriated a total of \$595 million in additional funds for low-wealth schools.²⁸⁶ In the ten lowest-spending counties, including Hoke County, this supplemental funding accounted for an additional \$425 per student during the 2001-02 school year.²⁸⁷ However, the General Assembly has never fully financed the Low-Wealth Fund and, consequently, the most recent study by the North Carolina Public School Forum shows that the current gap between the state's highest-spending and lowest-spending counties is \$1,437 per

282. Anderson Interview, *supra* note 51.

283. Press Release, N.C. Dep't of Pub. Instruction, ABCs Investment Pays Off (Sept. 10, 2003), available at http://www.dpi.state.nc.us/abc_results/results_03/press_release_print.html (reporting that only 46.9% of schools made AYP).

284. *Id.* (reporting that the state's schools combined met 90.5% of the total AYP targets, but because so many schools had a small number of sub-groups that did not meet targets, only 46.9% of schools made AYP).

285. Doman Interview, *supra* note 34 ("It could easily strengthen Judge Manning's argument about at-risk students. Especially since it will show that at-risk students are not doing much better in wealthy districts than in poor ones."); Malhoit Interview, *supra* note 182 ("That would certainly give leverage to proponents of the ruling and proponents of the remedy.").

286. PUB. SCH. FORUM OF N.C., 2002 NORTH CAROLINA LOCAL SCHOOL FINANCE STUDY 3 (2002), available at www.ncforum.org/doclib/publications/collateral/lisf/Finance02.pdf

287. *Id.* at 4.

student, or \$37,362 per twenty-six student classroom.²⁸⁸ Moreover, this spending gap has widened by 45.3% since the North Carolina Supreme Court's 1997 *Leandro* ruling that the state constitution guarantees no right to equal educational resources.²⁸⁹

Though public school funding in North Carolina remains inequitable, the State's overall commitment to education funding has increased. Since the litigation began in 1994, State funding for the public schools has increased by 40%.²⁹⁰ During the course of the litigation, the gap between the average teacher salary in North Carolina and the nation as a whole has been cut in half.²⁹¹ Moreover, Hoke County seems to have benefited disproportionately from the State's increase in funding. While the county's student enrollment increased 10% between the 1993-94 and 1998-99 school years, the State's contribution to Hoke schools has grown by more than fifty percent for that same period.²⁹² Perhaps these trends should be expected with successful adequacy litigation. When the judiciary accepts adequacy arguments but rejects equity arguments, high-wealth districts will continue to widen the gap by spending their own funds on their own schools. However, at the same time, overall state funding will increase and perhaps disproportionately benefit low-wealth districts, or at least the low-wealth districts that served as plaintiffs.

Thus, with increasing inequities, but higher spending overall, the *Leandro* litigation's effect on North Carolina education expenditures has been mixed. However, final judgment is premature. As one member of the Education Committee in the General Assembly has noted, "Nothing of significance is expected to happen with respect to funding issues until after the North Carolina Supreme Court rules for the second time."²⁹³

C. Future Strategy for State Constitutional Innovation

Our nation's public schools too often relegate immigrant, minority, and poor children to the classrooms with the fewest resources. Our schools provide the least opportunities to the at-risk students who need the most help in meeting their potential. For decades, school finance attorneys have worked to address these inequities, and in a fair number of cases they have won state constitutional victories on behalf of public school students. The *Leandro*

288. *Id.* at 1.

289. *Id.*

290. *Hoke County Bd. of Educ. v. State (Hoke County I)*, No. 95 CVS 1158, slip op. at 53 (N.C. Super. Ct. Oct. 12, 2000) (on file with author). However, the late-1990s was a period of expansive budgetary surplus in North Carolina and in many other states. Therefore, the State's expanding education expenditures cannot necessarily be attributed to the school finance litigation.

291. *Id.* at 53-54.

292. *Id.*

293. Ross Interview, *supra* note 180.

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litigators have achieved perhaps the most innovative result in the realm of state constitutional rights. In North Carolina, the constitutional right to pre-kindergarten currently exists for all at-risk children throughout the entire state, though not for middle-income and wealthy children in the same state. This legal development is peculiar, yet progressive. It does not prevent the State from making the policy choice of offering universal pre-kindergarten for all students, but it does constitutionally require the State to address the special needs of at-risk children. Along with the New Jersey ruling, the North Carolina case may mark the commencement of a new stage in school finance reform. Having once argued for equal resources, and later for adequate resources, school finance litigators might now do well to argue for greater resources for the students with the greatest needs. Such a commitment to “vertical equity” would ensure that the school finance reform movement does not inadvertently neglect “the students most clearly deserving of special protection.”²⁹⁴ By choosing a strategy that focuses lawsuits specifically on the education rights of at-risk students across entire states, school finance attorneys can better serve the movement’s original goal of creating equal educational opportunities.

294. Clune, *supra* note 3, at 730.

