Coates' Canons Blog: Legislature May Not Deny Eligible At-Risk Kids Access to State Pre-Kindergarten Program

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On August 21, 2012, a unanimous panel of the North Carolina Court of Appeals held that the State may not deny any eligible at-risk four year old admission to its Pre-Kindergarten (formerly More at Four) program. On its face, this court holding imposes a substantial, and potentially expensive, new obligation. The case is ***Hoke County Board of Education v. State of North Carolina, No. COA11-1545 (Aug. 21, 2012)***. It is the latest ruling in the long-running *Leandro* litigation over constitutional rights to public education in North Carolina. (The litigation began in May 1994. To date, it has resulted in multiple trial court decisions and two North Carolina Supreme Court opinions– ***Leandro v. State, 346 N.C. 336, 488 S.E.2d 249 (1997) (Leandro I)*** and ***Hoke County Board of Education v. State, 358 N.C. 605, 599 S.E.2d 365 (2004) (Leandro II)***.)

This blog summarizes the opinion and briefly discusses its implications for the State and for counties.

More at Four Program

In 2001 the General Assembly implemented the "More at Four," pre-kindergarten program for at-risk children. The program was designed to provide an educational experience for at-risk four-year-old children to enhance their school readiness. More at Four was established partly in response to the *Leandro* litigation. The program was administered at the local level—through a combination of public schools, Head Start programs, and certain private, licensed child care centers. Eligibility for the program was based on family income level and certain other individual risk factors. Children from families with annual incomes at or below 75 percent of the state median income (SMI) level were eligible. Additionally, children from families with incomes above 75 percent of SMI could participate if they satisfied at least one other risk factor, such as having a developmental delay, a chronic health condition, an identified disability, or limited English proficiency. Automatic eligibility was granted to children with a parent serving active military duty or whose parent(s) had been seriously injured or killed while on active duty.

Funding for More at Four came mainly from State general fund appropriations and lottery proceeds, supplemented by some federal and local monies. The program was never funded at a level to accommodate all eligible children, though. The program had rules for allocating slots among eligible at-risk four year olds.

2011 Changes to More at Four Program

In 2011, the General Assembly made significant changes to the More at Four program. It cut funding by approximately 20 percent, transferred administration of the program from the Department of Public Instruction to the Department of Health and Human Services (DHHS), and changed the name to the North Carolina Pre-Kindergarten program (NCPK). The legislature also changed the eligibility requirements. **Section 10.7 of S.L. 2011-145** specified that the NCPK program "serve at-risk children regardless of income," but it capped the number of at-risk four-year-olds who could be served by the program at 20 percent of the total enrollment. It further imposed a co-payment on parents of non-at-risk children. The payment was scaled based on family size and ranged from 8 to 10 percent of gross family income.

Judge Manning's Order

Judge Howard Manning, a superior court judge in Wake County, has presided over the *Leandro* litigation since 1997. In May 2011, before the enactment of the 2011 legislative changes, plaintiffs in *Leandro* sought a hearing in front of Judge

Manning to address how the proposed changes would affect at-risk children's rights to a "sound basic education" (the constitutional standard enumerated in *Leandro I*). The changes became law before the hearing was held.

After the hearing Judge Manning issued an order which enjoined the State from enforcing any portion of the new legislation that "limits, restricts, bars, or otherwise interferes, in any manner, with the admission of all eligible at-risk four year olds that apply to the prekindergarten program, including but not limited to the 20% cap restriction . . . ." The order went further, though. It prohibited the State from denying "any eligible at-risk four year old admission to the North Carolina Pre-Kindergarten Program (NCPK)" and mandated that the State "provide the quality services of the NCPK to any eligible at-risk four year old that applies." Finally, the order specified that "the State of North Carolina shall not implement, apply, or enforce any other artificial rule, barrier, or regulation to deny any eligible at-risk four year old admission to the prekindergarten, NCPK." So Judge Manning's order not only struck down the new restrictions imposed by the 2011 legislation, it also appeared to impose a much greater obligation with respect to at-risk prekindergarten children than the State had been meeting even before the 2011 changes. The State appealed.

Court of Appeals Decision

On appeal, the State argued (among other things) that Judge Manning had exceeded his authority in ordering pre-kindergarten services for all at-risk four year olds in North Carolina. Specifically, the State claimed that (1) there is no constitutional duty to provide pre-kindergarten services; (2) pre-kindergarten services are not a necessary remedy to provide a "sound basic education;" and (3) the court lacked jurisdiction to mandate pre-kindergarten services on a *state-wide* basis. Looking to *Leandro II* for guidance, the court of appeals rejected these arguments.

In *Leandro II*, the supreme court held that the State must adequately "meet the needs of 'at-risk' students in order for such students to avail themselves of their right to the opportunity to obtain a sound basic education." At the time *Leandro II* was decided, in 2004, the court determined that the "State['s] efforts towards providing remedial aid to 'at-risk' prospective [public school] enrollees were inadequate." Nonetheless, the *Leandro II* court refused to direct the State to provide pre-kindergarten classes for all of the State's "at-risk" prospective enrollees or even all of Hoke County's prospective enrollees. (By agreement of the parties the *Leandro* case had proceeded based on evidence about Hoke County as a representative of all poor, rural districts in the lawsuit.) Indicating that at-risk children did not have a constitutional right to prekindergarten programs, the court left it up to the legislative and executive branches to choose an appropriate remedy.

The court of appeals distinguished the current issues about the prekindergarten program from those in *Leandro II*. Eight years have passed since *Leandro II*—sufficient time, according to the court, for the State to fashion a remedy. And, in contrast to *Leandro II*, this time Judge Manning was not dictating the trial court's own remedy; instead, Manning now was evaluating a program of the State's own choosing to determine if it was constitutionally sufficient. The court of appeals agreed with Judge Manning that it was not.

According to the court,

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

The court of appeals also held that the trial court did not exceed its authority in ordering unrestricted admission of "at-risk" prospective enrollees to NCPK on a statewide basis. The court's analysis on this issue is limited. It acknowledged that there is language in *Leandro II* suggesting that the order should only apply to Hoke County. The court insinuates, however, that because the State offered evidence of NCPK's implementation and efficacy on a statewide basis, Judge Manning did not exceed his authority in mandating access to existing NCPK programs across the State.

Finally, the court determined that in affirming Judge Manning's order, it was not now imposing on the State a "permanent or everlasting solution to the problem." It emphasized that the State is free to take another approach to address the problem (or abandon its efforts altogether if the problem ceases to exist). The court clearly believes that some judicial oversight over this process is necessary, though. It specified that if the State modifies or eliminates its prekindergarten program it "should be done by means of a motion filed with the trial court setting forth the basis for and manner of any proposed modification."

Potential Implications

What does the court of appeals' decision mean for the State and for counties?

There are at least five courses of action that the State, and specifically the General Assembly, might take in response to the court's decision.

(1) Appeal Decision to North Carolina Supreme Court

Legislative leaders have indicated that they will appeal to the North Carolina Supreme Court. Thus, the court of appeals' opinion may not be the final word.

(2) Take No Further Action

Even if the court of appeals' decision stands, the General Assembly may choose to do nothing in response to the court order. The legislature significantly changed the challenged legislation in 2012. The changes were made after the case was argued before the court of appeals but before the decision was issued. Specifically, **S.L. 2012-13** eliminated the 20 percent enrollment cap for at-risk four-year-olds. It also authorized the Division of Child Development and Early Education (within DHHS) to establish income eligibility requirements for children from families earning no more than 75 percent of SMI, and it allowed for up to 20 percent of enrollees to exceed this income threshold if other designated risk factors are present. Finally, the legislature eliminated the co-payment requirement.

The legislature may determine that the 2012 changes eliminated the constitutionally-prohibited barriers to participation in the program by at-risk children. (**S.L. 2012-13** appears to largely codify the eligibility requirements that were used to allot slots to the More at Four program before the 2011 restrictions were implemented.)

The court of appeals acknowledged the 2012 legislation in its opinion. In fact, based on the 2012 act, it dismissed as moot the State's claim that the trial court improperly enjoined the enforcement of the 2011 legislation. It did not consider the other issues raised by the plaintiffs moot, though. That is because Judge Manning's order addresses more than just the 2011 legislative changes. While the order does not mandate that the state enroll every at-risk four year old in NCPK, it appears to require that every four-year-old who is deemed to be "at-risk" be given the opportunity to participate in the program. This holding potentially will necessitate a significant expansion of the program, even beyond the pre-2011 enrollment levels, to accommodate all eligible children. (Recall that prior to 2011, not all eligible four-year-olds actually could participate in the program due to funding constraints.)

The court of appeals opinion is a bit vague on this issue. Although the court never specifically addresses funding issues, its holding strongly suggests that the lack of full funding to accommodate all eligible "at-risk" four year olds is constitutionally deficient. The court clearly was aware of the 2012 legislative changes. If the court believed that Judge Manning's order only applied only to the restrictions enacted by the 2011 legislation that were subsequently repealed, it could have considered the issue moot. Instead, the opinion appears to leave the State with only two options—(1) fully fund the NCPK program to accommodate all eligible "at-risk" children, or (2) develop an alternative program to meet its constitutionally-mandated responsibilities to these children. In other words, exercising the option to take no further action does not appear consistent with Judge Manning's order, now upheld by the court of appeals.

(3) Alter Eligibility Requirements for Existing NCPK Program

The court of appeals specifically affirmed the trial court's order "mandating the State to not deny any eligible *'at-risk'* four year old" admission to the NCPK program (emphasis added). It is possible that the General Assembly could alter the

definition of what constitutes an “at-risk” child. Such a change could result in fewer eligible four year olds that would need to be served by the state. This option has its limitations, though. The supreme court defined an “at-risk” student in *Leandro II*,

> as one who holds or demonstrates one or more of the following characteristics: (1) member of low-income family; (2) participate in free or reduced-cost lunch programs; (3) have parents with low-level education; (4) show limited proficiency in English; (5) are a member of a racial or ethnic minority group; (6) live in a home headed by a single parent or guardian.

Any significant departure from this definition by the legislature is likely to lead to additional litigation.

(4) Fully Fund Existing NCPK Program

The General Assembly could choose to fully fund the NCPK program to serve all eligible at-risk four year olds. The state could allocate additional general fund dollars and state lottery proceeds to cover the short-fall. Alternatively, the State could assign some of this funding responsibility to counties. The supreme court held in *Leandro I* that the State “may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate.”

(5) Replace NCPK With Other Program

Finally, the General Assembly could decide to take an entirely different approach to meet its constitutional responsibility to prepare “at-risk” children to “avail themselves of their right to the opportunity to obtain a sound basic education[].” Subject to court approval, it could repeal the entire NCPK program and replace it with another (potentially less costly) program or programs.

Links

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- www.aoc.state.nc.us/www/public/sc/opinions/1997/179-96-1.htm
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