Children Have a Constitutional Right to Pre-Kindergarten Education Programs

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INTRODUCTION

The United States Supreme Court in *San Antonio Independent School District v. Rodriguez*, held that education is not a fundamental right.\(^1\) Although the Supreme Court has not recognized this right, all state constitutions contain an education clause requiring legislatures to create and maintain a system of free public schools.\(^2\) In fact, more than half of forty states, having considered whether a fundamental right to an education exists under their respective state constitution, have concluded that their state constitutions guarantee a fundamental right to education.\(^3\) Despite the Supreme Court’s ruling that there is not a fundamental right to education, the Supreme Court has explicitly left open the possibility that some minimal level of education is constitutionally protected.\(^4\)

This paper will argue that children should have a federal right to a minimally adequate education, and that pre-kindergarten education programs are an essential component of this federal right. Accordingly, equal education opportunity requires offering pre-kindergarten education programs to all children or, alternatively, at the very least to all disadvantaged children.

I. CHILDREN HAVE A FEDERAL CONSTITUTIONAL RIGHT TO A MINIMALLY ADEQUATE EDUCATION

All children should have a constitutional right to a minimally adequate education. The Supreme Court has suggested that a minimal level of education is constitutionally protected. For example, in *Papasan v. Allain*, the Supreme Court did not dismiss the possibility “that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful

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exercise of either [the right to speak or the right to vote].”5 Additionally, in Wisconsin v. Yoder, the Supreme Court pointed out that “some degree of education is necessary to reasonably prepare citizens to participate effectively and intelligently in our political system if we are to preserve freedom and independence.”6 Finally, in Plyler v. Doe, the Supreme Court stated that, “[p]ublic education is not a ‘right’ granted to individuals by the Constitution. But neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation…”7 Chief Justice Burger’s dissent in Plyler stated that the majority opinion implied that education was a “quasi-fundamental right.”8

Although the Supreme Court has not yet definitively settled the question of whether a minimally adequate education is a fundamental right, the Constitution implicitly provides for a minimally adequate education. The United States Supreme Court has recognized numerous fundamental rights not expressly provided for in the Constitution. For example, the right to travel, the right to move from state to state, and the right to privacy. There are three constitutional sources to support the right to a minimally adequate education: (1) the First Amendment; (2) participation in the political process; and (3) the concept of liberty.9

As for the first and second constitutional sources, the Supreme Court has established a link between the First Amendment and participation in the political process along with the right to the acquisition of knowledge. In Griswold v. Connecticut the Court concluded that, “the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.”10 Similarly, in Board of Education v. Pico, the Court found that the removal of

5 Id.
8 Id. at 244.
books from school libraries violated the First Amendment rights of students, identifying “the right to receive information and ideas . . . as an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution.”

As for the third constitutional source, a right to a minimally adequate education is supported by the concept of liberty. In *Meyer v. Nebraska*, the Court found the term “liberty” to denote “not merely freedom from bodily restraint but also the right of the individual . . . to acquire useful knowledge.” In *Youngberg v. Romeo*, the Court recognized a liberty interest for the institutionalized mentally disabled concluding that these group of individuals have a right to a “minimally adequate training [to ensure] safety and freedom from unreasonable restraints.” As such, the concept of liberty is linked to the acquisition of knowledge.

Therefore, all children should have a federal constitutional right to a minimally adequate education. The Supreme Court has forcefully indicated that there is a right to a basic education. Furthermore, the Constitution implicitly provides for this right through the above mentioned constitutional sources.

1. **PRE-SCHOOL IS AN IMPORTANT COMPONENT OF A MINIMALLY ADEQUATE EDUCATION**

Pre-kindergarten education programs are an essential component of a minimally adequate education because of their proven short-term and long-term benefits. Indeed, the evidence is unassailable that high-quality pre-kindergarten programs produce dramatic short-term and long-term educational, social, emotional and economic benefits. Short-term benefits include school readiness for kindergarten and first grade. School readiness is crucial to school success because

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those who begin behind tend to stay behind or fall even further behind. The Carnegie Corporation of New York found that one-third of children entering elementary school lack basic school-readiness skills.\(^\text{15}\) Long-term benefits include decreased placements in special education and decreased grade retention. These educational benefits are supported by the National Institute for Early Education Research (the NIEER) through its extensive research.

Additionally, W. Steven Barnett, a professor at Rutgers University Center for Early Education and the Director of the NIEER, has researched and analyzed available evidence of early education and has concluded that, “[a] solid body of evidence demonstrates that high quality pre-school education can produce substantial gains in language, cognitive, social, and emotional development.”\(^\text{16}\) In 2002, Barnett reviewed the findings from fifteen schools of model pre-school programs, which examined the impact of the programs on I.Q. and achievement scores, grade retention, special education placement, and high school graduation.\(^\text{17}\) Barnett concluded that there was “overwhelming evidence that [pre-school] can produce sizeable improvements in school success.”\(^\text{18}\) On average, 20% fewer students were placed in special education, and 15% fewer had to repeat a grade.\(^\text{19}\)

These model programs could be replicated on a large scale. The Chicago Child-Parent Centers shows encouraging evidence of a public pre-school program. This program has generated significant and lasting benefits for students and the public, including lower rates of


\(^{18}\) Id.

\(^{19}\) Id. at n.61
grade retention and placement in special education, higher rates of graduation, and lower rates of juvenile arrest.\textsuperscript{20}

These short-term and long-term benefits should be considered components of an adequate education. While the federal government has not definitively determined that children have a right to a minimally adequate education, several state courts, in the context of adequacy suits, have already focused on pre-kindergarten education services as a component of a minimally adequate education.

For example, the New Jersey Supreme Court included pre-kindergarten education programs and services in its definition of education adequacy.\textsuperscript{21} The court defined the pre-school program requirement in \textit{Abbott v. Burke (Abbott VI)} and identified several components of this requirement, namely: (1) substantive educational standards for all district pre-school programs to be adopted by April 17, 2000; (2) high standards for pre-school teacher hiring, including a requirement that all new teachers be college graduates; (3) a teacher-student ratio of one to fifteen in all pre-school programs; (4) extensive collaboration of community-based daycare programs and Head Start programs; (5) attention to facilities and supplemental program funding, and funding increases when possible; and (6) community outreach programs to ensure that all children whose parents wish them to be enrolled in state pre-school programs are actually enrolled.\textsuperscript{22}

Although West Virginia and Kentucky did not specifically include pre-kindergarten services as a component of education adequacy, the elements set forth in the respective states can be executed through the use of pre-kindergarten education programs. The West Virginia and


\textsuperscript{21} see Abbott \textit{ex rel. Abbot v. Burke}, 748 A.2d 82 (N.J. 2000).

\textsuperscript{22} Id. at 88-95.
Kentucky Supreme Courts’ decisions provide a strong basis for defining education adequacy. For example, in *Pauley*, the West Virginia Supreme Court legally recognized eight elements in their definition of educational adequacy to be met by a school district operating in compliance with the state constitution. Pre-kindergarten education programs would help achieve the following elements set forth by the West Virginia Supreme Court: (1) literacy; (2) work-training and advanced academic training as the child may intelligently choose; and (3) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society.

The Kentucky Supreme Court, in *Rose v. Council for Better Education*, also defined educational adequacy by examining the educational services provided by the state system. Pre-kindergarten education programs would help achieve the following elements: (1) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (2) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (3) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (4) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states (in academics or in the job market).

The elements of educational adequacy set forth by New Jersey, West Virginia, and Kentucky can be satisfied by establishing pre-kindergarten programs. Specifically, the pre-kindergarten benefits of school readiness, decreased grade retention, improvements in school success, and higher rates of graduation would fulfill each of the elements of education adequacy in the respective states. Therefore, pre-kindergarten education programs should be a component of a minimally adequate education.

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2. **PRE-KINDERGARTEN PROGRAMS SHOULD BE OFFERED TO ALL CHILDREN, OR ALTERNATIVELY AT THE VERY LEAST TO ALL DISADVANTAGED CHILDREN**

Pre-kindergarten education programs benefit all children. While social science evidence suggests that disadvantaged children benefit the most from pre-school, this does not foreclose recognizing a right to universal access to all children.\(^\text{25}\) For example, smaller class sizes provide a greater benefit to disadvantaged students; however, smaller class sizes benefit all students and courts typically do not limit this educational provision solely to disadvantaged children.\(^\text{26}\)

The benefits of pre-kindergarten programs are prevalent in children from poor socioeconomic conditions and minority groups.\(^\text{27}\) Disparities in the level of pre-kindergarten programs available to the nation’s three and four-year-old children results in a significant discrepancy in school readiness, and it also results in a virtually insurmountable “achievement” gap as early as kindergarten.\(^\text{28}\) The estimated achievement gap between poor children and affluent children is eighteen months.\(^\text{29}\) The problem of school readiness has continued to be a problem through the implementation of the No Child Left Behind Act and state accountability systems.\(^\text{30}\) High-quality pre-kindergarten education programs can help disadvantaged children close the gap in school readiness. Moreover, pre-kindergarten education programs can lead to long-term increases in educational success and, in turn, adult social and economic success.\(^\text{31}\)

\(^{25}\) Ryan, *supra* note 2, at 77.


\(^{29}\) Barnett, *supra* note 16.


\(^{31}\) Barnett, *supra* note 16.
A right of access to pre-kindergarten programs would not necessarily make pre-kindergarten mandatory.\textsuperscript{32} Kindergarten provides a useful comparison; for example, in most states children have a right to attend kindergarten, but attendance is compulsory in only thirteen states.\textsuperscript{33} Indeed, most constitutional rights need not be exercised.\textsuperscript{34} Moreover, right of access to pre-kindergarten programs would not intrude into parents’ interest. Therefore, pre-kindergarten programs should be offered to all children or, alternatively, to all disadvantaged children.

**CONCLUSION**

Children have a constitutional right to a minimally adequate education. Even though it has not been directly decided by the Supreme Court, a right to a minimally adequate education can be supported from case law and from three constitutional sources. Moreover, pre-kindergarten education programs are an essential component to a minimally adequate education because of their solidly proven short-term and long-term benefits and their link to a basic education. Pre-kindergarten education programs should be provided to all children or at the very least to disadvantaged students. “Establish the law for educating the common people. This it is the business of the state to effect and on a general plan,” stated and advocated by Thomas Jefferson.\textsuperscript{35}

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\item[32] Ryan, supra note 2, at 92.
\item[34] Ryan, supra note 2, at 92.
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