
2015

Can Universal Pre-K Overcome Extreme Race and Income Segregation to Reach New York's Neediest Children? The Importance of Legal Infrastructure and the Limits of the Law

Natalie Gomez-Velez
City University of New York School of Law

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstlrev>



Part of the [Education Law Commons](#)

[How does access to this work benefit you? Let us know!](#)

Recommended Citation

Natalie Gomez-Velez, *Can Universal Pre-K Overcome Extreme Race and Income Segregation to Reach New York's Neediest Children? The Importance of Legal Infrastructure and the Limits of the Law*, 63 Clev. St. L. Rev. 319 (2015)
available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol63/iss2/6>

This Article is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

CAN UNIVERSAL PRE-K OVERCOME EXTREME RACE AND INCOME SEGREGATION TO REACH NEW YORK’S NEEDIEST CHILDREN? THE IMPORTANCE OF LEGAL INFRASTRUCTURE AND THE LIMITS OF THE LAW

NATALIE GOMEZ-VELEZ*

I.	INTRODUCTION	320
II.	PUBLIC EDUCATION REFORM: CHOICE, ACCOUNTABILITY, RE-SEGREGATION, AND THE PROMISE OF PRE-KINDERGARTEN	322
	A. <i>New York City’s Extreme Race, Income, and School Segregation</i>	322
	B. <i>Reforms Focused on Choice and Accountability Ignore Re-Segregation</i>	323
	C. <i>Limits of the Law in Addressing Race/Class Education Segregation</i>	325
	D. <i>Efforts to Expand Early Education and New York’s Pre-K</i>	327
III.	NEW YORK’S TWO PRE-KINDERGARTENS: THE STRUGGLE TO IMPLEMENT QUALITY PROGRAMS FOR THE NEEDIEST KIDS.....	327
	A. <i>Experimental and Targeted Pre-Kindergarten</i>	328
	B. <i>Efforts to Expand Targeted Pre-Kindergarten – Policy Versus Politics</i>	329
	C. <i>Universal Pre-Kindergarten Gains Attention and Political Support in New York</i>	330
	D. <i>New York State’s Universal Pre-Kindergarten Law</i>	331
	1. Age and Developmentally Appropriate Curriculum and Encouraging Children to be Independent and Self-Assured	332
	2. Assessment of Language, Cognitive and Social Skills Development.....	333
	3. Program Continuity with Instruction in the Early Elementary Grades.....	334
	4. Encouraging the Co-location and Integration of Children with Special Needs.....	334
	5. Staff Qualifications, Development, and Training	335
	6. Random Selection of Eligible Children	336

* Professor of Law, City University of New York School of Law. The author extends sincere thanks to Andrea McArdle, Janet Calvo, and Roberto Velez for their thoughtful comments and insights on drafts of this article and to Stephanie Rivera for her excellent research assistance in the preparation of this article and to participants in the CUNY Law School faculty forum organized by Professors Babe Howell and Sarah Lamdan for their very helpful comments and suggestions on an earlier draft of the article. The author also wishes to thank Carrie Valdez and Patrick Rahill of the Cleveland State Law Review for their assistance editing the article and Cate Smith of the Education Law Association for organizing an excellent symposium at which a version of this article was presented.

7.	Class Size Caps, Parental Involvement, Facilities Requirements	336
IV.	STRUCTURAL AND FISCAL BARRIERS TO IMPLEMENTING UPK	336
A.	<i>Fiscal Sisyphus: Never Quite Getting to “Universal” Pre-K</i>	337
B.	<i>Budgetary Impact on Equity in Access to Pre-Kindergarten</i>	339
C.	<i>Budget Impacts on Capacity Building and Program Quality Across the State</i>	341
D.	<i>New York City’s Efforts to Phase-In UPK: One Step Forward, Two Steps Back</i>	341
1.	Universal Pre-Kindergarten in New York City.....	342
2.	New York City Candidate-Turned-Mayor Bill de Blasio’s UPK Funding Proposal and the Governor’s Response	343
3.	Current New York City Universal Pre-K Efforts.....	345
V.	BENEFITS AND LIMITATIONS OF NEW YORK’S PRE-K LAW AND THE CONSIDERATION OF STATUTORY VERSUS CONSTITUTIONAL MANDATES AND TARGETED VERSUS UNIVERSAL PROGRAMS	348
A.	<i>New Jersey’s Court-Mandated, Targeted, High Quality Pre-Kindergarten – an Anti-Subordination Model?</i>	348
B.	<i>Targeted Versus Universal Pre-K</i>	351
C.	<i>Constitutional Versus Statutory Mandate</i>	352
D.	<i>Sustaining Support and Prioritizing Need in Universal Pre-Kindergarten</i>	353
VI.	CONCLUSION	354

I. INTRODUCTION

The quest to make public pre-kindergarten available to the neediest children, and ultimately available to all three- and four-year olds across the country, has been decades in the making. The push for universal pre-kindergarten has been a front page issue for New York City and State this past year, as it has been in several other states and urban school districts over the last decade. At the same time, New York State has earned the dubious distinction of having the most segregated schools in the country by race and class, including extreme segregation in New York City.¹ New York’s segregation has contributed to deep inequality in public schooling and persistent educational opportunity gaps. New York City recently elected a progressive Mayor, committed to addressing income inequality, improving the public schools, and creating a more racially and ethnically inclusive city. Fully implementing universal pre-kindergarten to reach all eligible children in New York City is a signature issue for New York’s current Mayor² — part of a broader education and social reform platform aimed at reducing inequality and improving access to quality education.

¹ See John Kucsera & Gary Orfield, *New York State’s Extreme School Segregation: Inequality, Inaction and a Damaged Future*, THE CIVIL RIGHTS PROJECT (Mar. 2014), at vi, available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/ny-norfler-report-placeholder/Kucsera-New-York-Extreme-Segregation-2014.pdf>.

² Lisa Colagrossi, *Mayor de Blasio, Farina Welcome Kids Back to School as Universal Pre-K Launches*, NEW YORK (WABC), Sept. 4, 2014, available at <http://7online.com/education/de-blasio-farina-welcome-nyc-kids-back-to-school-as-universal-pre-k-launches/293902/>.

Improving public education has been a stated public priority in New York and across the country for several decades. Yet recent reforms have failed to alleviate—and some argue have exacerbated—segregation and social inequality by race and class. Universal pre-kindergarten is a particularly popular education reform, aimed at supporting children’s short- and long-term development and at closing opportunity gaps. In contrast to market and competition-based education reforms, universal pre-kindergarten offers an inclusive, holistic program aimed at reaching all eligible children. Yet in New York, as in several states and localities, the goal of having pre-kindergarten reach the neediest children in segregated, under-resourced schools and communities has been stubbornly elusive.

This article will examine New York City and State’s current universal pre-kindergarten efforts as related to social goals of serving low-income children in segregated schools to address inequality and close opportunity gaps. It also will examine the educational goals of enhancing cognitive gains and improving school readiness for all children. Part I considers pre-kindergarten in a climate of extreme segregation by race and class and in the context of current technocratic education reforms operating against a backdrop of diminished legal remedies for the harms of race and class segregation and inequality. Part II examines pre-kindergarten, with a focus on New York’s role as one of the earliest states to introduce pre-kindergarten, first as targeted to the state’s neediest children as anti-poverty and social equalization strategy and more recently as a universal program focused on educational policy. It will discuss more recent efforts to introduce and implement universal pre-kindergarten primarily from an educational perspective rather than as an anti-poverty strategy.³ Part III will note persistent structural and fiscal barriers to full implementation of either targeted or universal pre-kindergarten that mirror barriers to high quality preschool and public education access more broadly. Part IV considers statutory and constitutionally-based approaches to achieving equitable access to pre-kindergarten, noting the difficulties in establishing and sustaining access for low-income urban Black and Latino children, regardless of the approach.

The article raises the question whether some form of targeted pre-kindergarten might better ensure that New York City’s neediest children gain access to quality programs. Targeted programs better serve *Brown’s* anti-subordination goals. However, over the years it has proven difficult to gain and sustain political and fiscal support for targeted programs (especially in the current climate of “colorblind” rhetoric). Universal programs have the benefit of public support but are more expensive and raise questions about the ability to ensure equitable access to high quality programs — especially given circumstances of extreme race and class segregation. Given these realities, the article argues that legal structures and detailed quality mandates are important in supporting effective pre-kindergarten programs. However, most programs, regardless of legal form, remain vulnerable to political resistance and fiscal shortfalls. It concludes, therefore, that only strong and consistent advocacy and political support will ensure that the necessary, dedicated and sustained investments are made to ensure that high quality pre-kindergarten and high quality public education will reach all children — particularly those most marginalized by race and class segregation.

³ See ELIZABETH ROSE, *THE PROMISE OF PRESCHOOL: FROM HEAD START TO UNIVERSAL PRE-KINDERGARTEN* 16-17, 101-05, 131-35 (Oxford 2010).

II. PUBLIC EDUCATION REFORM: CHOICE, ACCOUNTABILITY, RE-SEGREGATION, AND THE PROMISE OF PRE-KINDERGARTEN

A. *New York City's Extreme Race, Income, and School Segregation*

New York City is among the most diverse cities in the United States. It is also among the most segregated by race and class.⁴ School segregation mirrors neighborhood segregation by race and class. Neighborhood segregation by race in New York City is very high — yielding a 79.1 dissimilarity score⁵ according to a study of 2010 Census data by professors John Logan and Brian Stults of Brown and Florida State University.⁶ A score above 60 on the dissimilarity index is considered very high segregation.

Class segregation also is extreme in New York City. For example, it has been noted that:

Manhattan's top five percent of households earn 88 times as much as the poorest 20 percent, according to data released by the Census Bureau's American Community Survey. That gap, which translates to more than \$860,000, is the largest in the nation. About 1.7 million of the city's 8.4 million residents live below the poverty line, according to the data from 2013, the final year of ex-Mayor Michael Bloomberg's term.⁷

Double segregation demonstrates and reinforces social inequality along lines of race and class across New York City. Double segregation in New York City is at its most extreme in public schools. This has a significant impact on educational opportunity — exacerbating the opportunity gap between Black and Latino students and White, and to some extent, Asian American students. The New York City public school system is the largest in the country, with 1.1 million students.⁸ It is also among the most diverse; yet despite increasing diversity, school segregation has grown between 2000 and 2010.⁹ According to a recent report by John Kucsera and

⁴ See, e.g., Christopher Mathias, *These Maps Show Just How Segregated New York City Really Is*, HUFFINGTON POST, Apr. 15, 2014, http://www.huffingtonpost.com/2014/04/15/new-york-city-segregation-map_n_5153739.html.

⁵ According to the University of Michigan Population Studies Center, the dissimilarity index measures the evenness with which two mutually exclusive groups are distributed across the geographic units that make up a larger geographic entity; for example, the distribution of blacks and whites across the census tracts that make up a metropolis. Its minimum value is zero and its maximum value is 100. See *Racial Residential Segregation Measurement Project*, POPULATION STUDIES CENTER, UNIV. OF MICH., available at <http://enceladus.isr.umich.edu/race/calculate.html>.

⁶ John R. Logan & Brian J. Stults, *The Persistence of Segregation in the Metropolis: New Findings from the 2010 Census*, US2010 PROJECT (Mar. 24, 2011), available at <http://www.s4.brown.edu/us2010/Data/Report/report2.pdf>.

⁷ See Jonathan Lemire, *NYC Mayor: Income Inequality Not Acceptable*, WASH. TIMES, Sept. 18, 2014, <http://www.washingtontimes.com/news/2014/sep/18/nyc-mayor-income-inequality-not-acceptable/>.

⁸ See Karen Matthews, *Report: NY Schools Are Most Racially Segregated*, AP, Mar. 26, 2014, <http://www.bigstory.ap.org/article/report-ny-schools-are-most-racially-segregated>.

⁹ See, e.g., Elizabeth A. Harris, *New York City Council to Look at School Segregation*, N.Y. TIMES, Oct. 21, 2014, at A23.

Gary Orfield of the Civil Rights project, the increase in school segregation coincides with the introduction and implementation of more choice- and market-based educational policies and programs.¹⁰ As a result, New York City “has failed to address student racial isolation, support the pursuit of diversity efforts and integration initiatives, and possibly increased school segregation across the city.”¹¹ The report authors note that:

Over time, the extreme share of Black students enrolled in intensely segregated schools has steadily increased [I]n 2010, over half of Black and Latino students in New York attend schools with less than 10% of White enrollment¹² New York students in racially isolated schools are far more likely to attend schools with higher percentages of low-income students, segregating students by race and class. Schools that are isolated by class are often places that limit students’ educational opportunities and outcomes.¹³

The report further notes that in New York City, schools in which Black and Latino students are isolated in areas of concentrated poverty produce limited educational opportunities and outcomes, including: less qualified and less experienced teachers; less stability in the teaching force; less successful peers; and inadequate facilities and resources.¹⁴ These and other factors contribute to the inequalities found in segregated schools.¹⁵

B. Reforms Focused on Choice and Accountability Ignore Re-Segregation

The United States is in the midst of a wave of public education reforms that operate largely along an ostensibly colorblind, market-based, choice and accountability model.¹⁶ New York City is among urban cities that have undergone market- and choice-based reforms.¹⁷ These reforms, catalyzed by significant private and federal funding support, focus on centralized standards, test-based accountability models, and business models involving choice and competition aimed at re-directing funding away from “failing” public schools.¹⁸ For example, they use high stakes tests to determine everything from student retention, to teacher evaluation and school

¹⁰ Kucsera & Orfield, *supra* note 1, at 22.

¹¹ *Id.*

¹² *Id.* at 35.

¹³ *Id.* at 39.

¹⁴ *Id.*

¹⁵ *Id.* at 29.

¹⁶ See, e.g., Amy Stuart Wells, *Seeing Past the “Colorblind” Myth of Education Policy*, NAT’L EDUC. POL’Y CTR. (Mar. 2014), at i, available at http://nepc.colorado.edu/files/pb-colorblind_0.pdf.

¹⁷ See, e.g., Natalie Gomez-Velez, *Urban Public Education Reform: Governance, Accountability, Outsourcing*, 45 URB. LAW. 51 (2013).

¹⁸ See *id.*; see also Monica Teixeira de Sousa, *A Race to the Bottom? President Obama’s Incomplete and Conservative Strategy for Reforming Education in Struggling Schools or the Perils of Ignoring Poverty*, 39 STETSON L. REV. 629, 639-65 (2010).

closure, without regard to the possible deleterious impacts such an approach can have on low-income, minority students trapped in conditions of double segregation.¹⁹

At the same time, school segregation by race and income has increased significantly, erasing gains in school integration that took place between the 1960s and the 1980s.²⁰ This is true in New York City, long thought to be progressive and diverse yet, as noted above, reported to have the most segregated schools in the country. Discourse about the significant impacts of race and class segregation on educational quality, opportunity and student achievement is marginalized almost to the point of nonexistence in the current reform discussion.²¹ Reforms designed to combat segregation have been replaced by a variety of technocratic approaches to public school reform, many of which claim the mantle of civil rights in their rhetoric.²² Urban Black and Latino children isolated in segregated, substandard public schools are regularly cited as the impetus for reforms. Yet many current reforms involving choice and accountability ignore or exacerbate conditions of segregation.²³ For example, a great deal of emphasis has been placed on raising standards using high stakes testing to measure progress. The emphasis on high stakes testing, though presented as neutral and “colorblind”, actually serves to reinforce

¹⁹ Indeed, proponents of such reforms tend to cast them as taking a “no-nonsense” approach to education designed to improve conditions for low-income Black and Latino students. Yet little educational research supports this high stakes approach. See, e.g., DIANE RAVITCH, REIGN OF ERROR: THE HOAX OF THE PRIVATIZATION MOVEMENT AND THE DANGER TO AMERICA’S PUBLIC SCHOOLS (First Vintage Books ed. 2014).

²⁰ See, e.g., Gary Orfield & Erica Frankenburg, *Brown at 60: Great Progress, a Long Retreat and an Uncertain Future*, THE CIVIL RIGHTS PROJECT, May 15, 2014, at 2, available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60>. The report notes the particular harms of “double segregation” where race and class overlap, leading to severely isolated and under-resourced schools. *Id.* at 15.

²¹ For example, the White House education web page leads with the notion of education as “knowledge and skills for the jobs of the future” and refers to rigorous standards, better data systems, support for teachers and school leaders, and rigorous interventions to turn around the lowest performing schools using district competition. See *Race to the Top*, WHITEHOUSE.GOV, available at www.whitehouse.gov/issues/education/k-12/race-to-the-top. No mention is made of the need to address the impact that race and class segregation have on educational inequality or outcomes. Similarly, the White House early learning initiatives focus on preschool for all and expanding access, but do not reference segregation and inequality.

²² See, e.g., Arne Duncan, Sec’y, Dep’t of Educ., Dep’t of Justice Event on the 50th Anniversary of the Civil Rights Act at Howard University (Jul. 15, 2014), available at <http://www.ed.gov/blog/2014/07/the-civil-rights-act-at-50-arne-duncan-at-howard-university/>. Secretary Duncan regularly refers to education as the civil rights issue of our time. However, he does not reference race and class segregation in public schools. For example, in this recent speech at Howard University, although he noted that in the 2014-15 school year, public schools will be majority minority for the first time in the nation’s history, and referred to the need to address excessive school suspensions, dropout rates, and violence, Duncan did not squarely address school segregation by race and class as related to political, social, and educational inequality. *Id.*

²³ See, e.g., Joy Resmovits, *60 Years After Brown v. BOE, Mostly White Reformers Try To Fix 'The Civil Rights Issue Of Our Generation'*, HUFFINGTON POST, May 17, 2014, 12:59 PM, http://www.huffingtonpost.com/2014/05/17/race-in-ed-reform_n_5339713.html.

learning deficits and inequality based on conditions of race, class segregation and subordination.²⁴ Another reform involves expanding choice and competition through the establishment of charter schools and specialty public schools, in tandem with the closure of schools marked as “failing” — often in segregated neighborhood public schools. Despite the claim that these reforms support achievement, they have had little effect at best, and at worst have impeded or derailed effective student learning.²⁵ Moreover, they appear to reinforce conditions of segregation and race/class isolation in New York City and in other urban school districts.²⁶

C. Limits of the Law in Addressing Race/Class Education Segregation

At the same time, several legal avenues for challenging school segregation and educational inequity have been limited to the point of being all but foreclosed.²⁷ A federal jurisprudence of rigid formal equality that ignores both historical and current realities of race and class has all but eliminated the ability to bring successful equal protection or equity claims to address segregation or its effects. Since the Supreme Court’s decision in *Brown v. Board of Education*,²⁸ declaring *de jure* segregation an unconstitutional violation of equal protection because of its stigmatizing effects on Black students in segregated schools, judicial interpretations of federal constitutional law have shifted dramatically.²⁹ *Brown*’s purpose in declaring segregated schools to be inherently unequal was to combat the subordinated status of Black children that is the product of state-sanctioned discrimination. *Brown* represents an anti-subordination ethos of constitutional equal protection. Several observers note that equal protection jurisprudence in the Supreme Court has since moved away from the anti-subordination approach articulated in *Brown* to an anti-classification or “colorblind” approach which subjects all racial classifications to strict scrutiny.³⁰ This formalistic approach to equal protection does not seek to remedy current structural inequality. Instead, it pretends that inequality does not exist, and subjects all governmental classifications by race or other protected class to strict scrutiny,

²⁴ See, e.g., Jamie Gullen, *Colorblind Education Reform: How Race-Neutral Policies Perpetuate Segregation and Why Voluntary Integration Should Be Put Back on the Reform Agenda*, 15 U. PA. J.L. & SOC. CHANGE 251, 260 (2012).

²⁵ See Wells, *supra* note 16, at 13.

²⁶ See *id.* at 13; see also Kimberly Jenkins Robinson, *The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. 277, 318 (2009).

²⁷ The Supreme Court’s decision in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) marked a significant obstacle to federal constitutional challenges to school segregation and educational inequity through its holding that education is not a fundamental right under the federal Constitution. *Id.* It set the stage for limited federal remedies to address school segregation and inequality. *Id.*

²⁸ 347 U.S. 483 (1954).

²⁹ See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. 1*, 551 U.S. 701 (2007) (striking down voluntary school integration plans for failing to meet strict scrutiny standard for racial classification).

³⁰ See, e.g., Robinson, *supra* note 26, at 315-16; see generally Goodwin Liu, “History Will Be Heard”: An Appraisal of the Seattle/Louisville Decision, 2 HARV. L. & POL’Y REV. 53 (2008).

striking even good-faith state efforts to address extreme social inequality that results from a long history of race or class segregation and subordination particularly focused on Blacks and Latinos. The result has been that racial classifications designed to remedy past, current and structural discrimination regularly have been declared unconstitutional.³¹ This shift to ostensibly colorblind equal protection jurisprudence has made measures toward integration more difficult to achieve.³² Chief Justice Roberts' plurality opinion in *Parents Involved in Community Schools v. Seattle Sch. Dist. 1* provides an example of this so-called colorblind approach as applied to voluntary school desegregation efforts. In striking down the Seattle, Washington and Louisville, Kentucky school districts' voluntary integration plans, Roberts asserts that racial classifications are subject to strict scrutiny. He then determines that the districts have failed to articulate compelling interests in remedying past intentional segregation or in supporting a recognized diversity rationale, and that they have failed to demonstrate that their plans are narrowly tailored to serve a recognized compelling state interest.³³ Justice Roberts gives no weight to the plans' remedial and forward-looking integration goals. Nor does Roberts acknowledge the continuing reality of race and class segregation as related to structural inequality in access to adequate schooling. Justice Kennedy, in his concurrence (and in declining to join the portion of the opinion that would require school districts to ignore *de facto* re-segregation in schooling), leaves open a narrow space for voluntary integration.³⁴ However, Kennedy provides little guidance as to the kinds of plans that would survive federal constitutional scrutiny. Thus, the options for voluntary integration plans are quite limited and uncertain, such that school districts are unlikely to risk even race-neutral approaches to remedying segregation.³⁵

The reduced availability of federal constitutional remedies for the harms to public education wrought by segregation and structural inequality prompted a search over the years for remedies through state constitutional challenges to the equity and/or adequacy of state education funding allocations.³⁶ Public school funding has long been structured to align with local property taxes, despite an environment of persistent race and income segregation in housing.³⁷ Therefore, several state constitutional challenges to educational equity and adequacy focused on the structure of public school funding on the state level, seeking to equalize statewide funding,

³¹ See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Parents Involved*, 551 U.S. at 701.

³² See, e.g., James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 132-33 (2007).

³³ *Id.* at 720-37.

³⁴ *Id.* at 786-90.

³⁵ See Robinson, *supra* note 26, at 291; see also Ryan, *supra* note 32.

³⁶ See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *Campaign for Fiscal Equity v. State*, 861 N.E.2d 50 (N.Y. 2006); *Abbott v. Burke* (Abbott V), 710 A.2d 450 (N.J. 1998).

³⁷ See, e.g., Ryan, *supra* note 32, at 140-41 (describing the failure of government and courts to address residential housing segregation as a driver of school segregation).

while leaving intact local control and the ability of affluent White communities to continue to fund local schools at desired levels.³⁸ Several such challenges have succeeded in fostering more equitable distribution of state education funding. Some, like New Jersey's *Abbott* cases, emphasized equity by ordering that state education funds be targeted to needy school districts as a constitutional requirement.³⁹ Other state constitutional decisions, like New York's *Campaign for Fiscal Equity*, emphasize adequacy, requiring funding adequate to provide students across the state an opportunity for a "sound basic" education.⁴⁰ Unfortunately, many state school finance challenges have not succeeded in court, or even when they have, resistance, delays, and fiscal limitations have thwarted progress toward more equitable school funding.⁴¹ Recent calls for education reform, while often highlighting the plight of urban, under-resourced schools deemed to be "failing," as their impetus, have all but ignored the social reality of race and class as they impose technocratic, market-based measures on public education.

D. Efforts to Expand Early Education and New York's Pre-K

Among education reform measures, proposals to expand early learning opportunities, from Head Start, to preschool, to pre-kindergarten, have been underway for several years.⁴² Recently, pre-kindergarten proposals have gained renewed attention on the federal level and in states across the country. Universal pre-kindergarten efforts have differed from other recent education reforms in that they place less emphasis on competition and aim instead to provide broad access to services for all eligible children.

New York State and City have been engaged in efforts to provide quality pre-kindergarten programs, first targeted to the neediest children and more recently in the form of voluntary universal pre-kindergarten available to all children for decades. However, notwithstanding the existence of both targeted and universal pre-kindergarten programs, New York State and City have yet to ensure that children in urban school districts, so often labeled as failing, receive pre-kindergarten services. Despite the recent rush of support and publicity about universal pre-kindergarten, a question that emerges is whether universal pre-kindergarten can overcome existing extreme segregation to ensure that the neediest children, including low-income Black and Latino children in segregated environments, benefit from these programs.

III. NEW YORK'S TWO PRE-KINDERGARTENS: THE STRUGGLE TO IMPLEMENT QUALITY PROGRAMS FOR THE NEEDIEST KIDS

New York State has provided formal support for pre-kindergarten programs for several decades now. New York pre-kindergarten began with experimental, targeted

³⁸ See JAMES E. RYAN, *FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA* 153-54 (Oxford 2010).

³⁹ *Abbott V*, 710 A.2d at 455-57.

⁴⁰ *Campaign for Fiscal Equity*, 861 N.E.2d at 52 (restating earlier holding that the New York State constitution requires the State "to offer all children the opportunity of a sound basic education" and finding that the mandate is not met for New York City).

⁴¹ See RYAN, *supra* note 38, at 152-55.

⁴² See ROSE, *supra* note 3 (describing the history of public preschool efforts dating from the 1950's to the present).

programs aimed at serving children in poverty with holistic programs and has moved more recently toward establishing statewide voluntary universal pre-kindergarten.⁴³ New York State established targeted public preschool for low-income children beginning in the 1960s.⁴⁴ Since that time, efforts have been made to expand pre-kindergarten to serve greater numbers of children.

Many of the early programs were developed with holistic child development and social service goals in mind, with a focus on alleviating the impact of poverty.⁴⁵ More recent programs place a greater emphasis on cognitive development, educational goals, and school readiness.⁴⁶

A. *Experimental and Targeted Pre-Kindergarten*

In 1966, New York established a State-funded half-day experimental pre-kindergarten (EPK) program to serve economically disadvantaged four-year-old children.⁴⁷ New York's experimental pre-kindergarten later became known as targeted pre-kindergarten. Targeted pre-kindergarten (TPK), like Head Start, focuses on disadvantaged children and provides comprehensive services, including social and health services (medical, dental, vision, and hearing).⁴⁸ It operates within schools supported by grant funding.⁴⁹ Targeted pre-kindergarten programs offer "a balance of indoor and outdoor active and quiet play, and individual and group activities to address the social, emotional, intellectual, creative development, and language/literacy needs of all children."⁵⁰

Targeted pre-kindergarten explicitly sought to reach needy children with a range of services that included school readiness along with a range of social and health services. Its model, like the federal Head Start model, was squarely aimed at addressing inequality, countering the impacts of poverty on young children, and closing educational opportunity gaps that were evident right at the beginning of

⁴³ Indeed, New York's efforts to fund public early education have been said to date back to 1927 "when the Spelman Fund awarded grants to the New York State Education Department, two universities (Cornell and City College) and two school districts (Rochester and Albany) for study, service, and research in child development and parent education." Anne Mitchell, *The State with Two Prekindergarten Programs: A Look at Prekindergarten Education in New York State (1928-2003)*, EARLY CHILDHOOD POL'Y RESEARCH (Jun. 2004), at 26, available at http://www.earlychildhoodfinance.org/downloads/2003/NYCaseStudy_2003.pdf.

⁴⁴ CITIZENS BUDGET COMM'N, THE CHALLENGE OF MAKING UNIVERSAL PRE-K A REALITY IN NEW YORK STATE (Oct. 2013), at 5, available at http://www.cbcny.org/sites/default/files/REPORT_UPK_10222013.pdf.

⁴⁵ See, e.g., ROSE, *supra* note 3, at 16.

⁴⁶ See *id.* at 132; see also James E. Ryan, *A Constitutional Right to Preschool?*, 94 CAL. L. REV. 49, 50 (2006).

⁴⁷ *Universal Prekindergarten: Questions and Answers, Including Mid-Year Programs*, NEW YORK STATE EDUC. DEP'T, <http://www.p12.nysed.gov/upk/QA.html> (last updated Mar. 18, 2014).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ N.Y. COMP. CODES R. & REGS. tit. 8, § 100.3 (2014) (Program requirements for students in grades prekindergarten through four).

formal schooling.⁵¹ While very popular among children's advocates and supported by educational research, targeted pre-kindergarten programs often struggled to get the political and funding support needed to reach all eligible children.⁵²

B. Efforts to Expand Targeted Pre-Kindergarten – Policy Versus Politics

The benefits of pre-kindergarten were not lost on policy makers. Beginning soon after the establishment of EPK, several attempts were made over the years to make public pre-kindergarten more widely available. The New York State Board of Regents issued a proposal in 1967 to establish “a free public education for all 3 and 4 year olds whose parents wish them to attend school.”⁵³ That proposal failed, as did several others. Efforts to expand experimental pre-kindergarten to reach a greater number of low-income children also failed to make significant strides. While there was some expansion in funding for EPK during Governor Mario Cuomo's administration,⁵⁴ EPK remained limited to those school districts already participating in the program.⁵⁵

In addition to the Regents' proposals⁵⁶ for universal pre-kindergarten in the 1960s, several other efforts were made to expand public pre-kindergarten to all New York State children. Former Governor Mario Cuomo proposed universal pre-kindergarten at several points during the late 1980s without success.⁵⁷ The New York State School Boards Association recommended expanding pre-kindergarten to all areas of the state in 1986.⁵⁸ In New York City, Mayor Edward I. Koch introduced Project Giant Step in 1986 with a goal of making pre-kindergarten universally available in the city.⁵⁹ This effort saw some expansion of pre-kindergarten in New York City, but that expansion was short-lived.⁶⁰ New York's pre-kindergarten program remained targeted to the cohort of disadvantaged students identified in the initial legislation for thirty years, despite evidence of the benefits of pre-kindergarten and many efforts to provide broader access to it.

⁵¹ ROSE, *supra* note 3, at 118.

⁵² *Id.* at 41-51, 101.

⁵³ Mitchell, *supra* note 43, at 6.

⁵⁴ Governor Mario Cuomo, in a 1988 budget message, recommended to the legislature \$25 million to begin a multi-year initiative to make pre-kindergarten available to all New York four year olds. *Id.* at 9. That program was not launched, but EPK funding increased through Governor Cuomo's tenure, reaching \$47 million by 1994, his last year in office. *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 6.

⁵⁷ *Id.* at 8-9.

⁵⁸ *Id.*

⁵⁹ Project Giant Step was praised for a curriculum that provided high quality early education. Its design and implementation was built on existing Head Start, Child Care, and other public preschool initiatives. However, after three years, enrollment reached only 7,000 of the estimated 40,000 eligible children due largely to a lack of capacity in the program. Giant Step ultimately was cut by the Dinkins administration due to fiscal constraints in the wake of federal cuts by the Reagan administration. *Id.*

⁶⁰ *Id.*

Under Governor George Pataki, universal pre-kindergarten efforts were abandoned. EPK was continued and renamed the “Targeted Pre-K” program (TPK) in the 2003-04 budget.⁶¹ However, funding constraints continued, restricting TPK’s growth such that it reached only a limited portion of eligible needy children. New York’s targeted pre-kindergarten program is funded as a grant outside of the regular education funding formulas.⁶² Funding was limited to specific school districts deemed eligible⁶³ until 2008, when TPK was folded into New York’s universal pre-kindergarten program.⁶⁴ The more recent universal pre-kindergarten program’s formula allocation also operates outside of regular K-12 state aid formulas but uses the public school funding formula when setting per pupil expenditures.⁶⁵

C. Universal Pre-Kindergarten Gains Attention and Political Support in New York

As research and public discourse about the benefits of preschool gained national attention in the 1990s, advocates worked to persuade the New York state legislature to support and enact universal pre-kindergarten.⁶⁶ This time public sentiment was on the side of universal pre-kindergarten proponents. Brain science studies touting the dramatic benefits of early learning gained significant media attention in the 1990s, while concerns about student achievement along with strong, organized advocacy drew support for universal pre-kindergarten.⁶⁷ Some observers noted the impact of various forces on New York State’s enactment of universal pre-kindergarten legislation:

Universal Prekindergarten developed in response to a number of challenges and opportunities recognized during the 1990s: the need for more attention to school readiness; welfare reform legislation requiring parents of young children to work and thus obtain child care; and an accumulating body of research demonstrating the long-term benefits of early education to children.⁶⁸

In 1997, the New York State Legislature enacted a law paving the way for voluntary universal pre-kindergarten in school districts across the state.⁶⁹ The

⁶¹ Mitchell, *supra* note 43, at 9.

⁶² *Id.* at 12.

⁶³ NEW YORK STATE EDUC. DEP’T, *supra* note 47.

⁶⁴ See W. Steven Barnett et al., *The State of Preschool 2013: State Preschool Yearbook*, NAT’L INST. FOR EARLY EDUC. RESEARCH (2013), at 101-02, available at <http://nieer.org/sites/nieer/files/yearbook2013.pdf>.

⁶⁵ N.Y. EDUC. LAW § 3602-e(10) (McKinney 2014) (providing UPK grants based on a complex formula that includes base aid drawn from the school aid formula as of a certain year, plus a determination of the number of children to be served, provided that “the maximum grant shall not exceed the total actual grant expenditures incurred by the school district in the current school year as approved by the commissioner.”).

⁶⁶ Mitchell, *supra* note 43, at 10.

⁶⁷ See ROSE, *supra* note 3, at 102-5.

⁶⁸ KRISTI S. LEKIES ET AL., RAISING ALL BOATS: COMMUNITY-BASED PROGRAMS AS PARTNERS IN UNIVERSAL PREKINDERGARTEN 13 (The Cornell Early Childhood Program 2005).

⁶⁹ See N.Y. EDUC. LAW § 3602-e (McKinney 2014).

Assembly bill had as its goal phasing in high quality voluntary universal pre-kindergarten across the state over five years.⁷⁰ Universal pre-kindergarten was proposed and promoted ostensibly to respond to research establishing the foundational importance of early learning to student development and achievement, and to address the lack of access to pre-kindergarten and other early education for low- and moderate-income families.⁷¹

Educational researchers had repeatedly emphasized the importance of early education to long-term development and academic success of children, and as especially important to urban, low- and moderate-income children. In New York, as elsewhere, the educational justification for pre-kindergarten gained more traction than earlier justifications based on the need to provide care and early learning foundations for children in poverty.⁷² Although initially promoted as a mechanism to narrow educational opportunity gaps between low- and moderate-income children of color and wealthier White children, pre-kindergarten shifted to focus on benefits to all children. This was not surprising given that pre-kindergarten proposals gained the widest public support when offered to all four year olds.⁷³

Georgia was one of the more successful states in launching universal pre-kindergarten program in 1995-96.⁷⁴ Georgia's effort benefited from the strong support of Governor Zell Miller, specific earmarked lottery funding, and broad public support keyed toward the goal of improving educational outcomes for all four year olds and improving academic outcomes over the long term.⁷⁵ Georgia used a combination of public schools and community-based organizations to house programs, which facilitated a fairly rapid phase-in of voluntary, universal pre-kindergarten and achieved significant participation in pre-kindergarten in a relatively short period of time.⁷⁶ The approach gained wide attention, including in New York, and Georgia's example provided support for New York's UPK legislation.⁷⁷

D. New York State's Universal Pre-Kindergarten Law

New York's 1997 law⁷⁸ provided for voluntary universal pre-kindergarten to be phased in and developed in cooperation with local school districts and community-

⁷⁰ See ROSE, *supra* note 3, at 119.

⁷¹ See *id.*

⁷² See *id.* at 117-20.

⁷³ See Ryan, *supra* note 46, at 49-50.

⁷⁴ See Jennifer B. Sandberg, *General Provisions: Create Office of School Readiness; Elementary and Secondary Education: Provide State School Superintendent with Authority to Employ Certain Senior Staff Personnel and to Enter into Certain Contracts; Vocational Education: Provide that the Department of Adult and Technical Education be Responsible for Libraries*, 13 GA. ST. U. L. REV. 160 (1996).

⁷⁵ See GEORGIA DEP'T OF EARLY CARE & LEARNING, *History of Georgia's Pre-K Program*, available at <http://decal.ga.gov/Prek/AboutPrek.aspx> (last visited Oct. 10, 2014).

⁷⁶ See Anthony Raden, *Universal Prekindergarten in Georgia*, FOUND. FOR CHILD DEV. (Aug. 1999), at 37-38, available at http://fcd-us.org/sites/default/files/UPKInGeorgiaACaseStudy_0.pdf.

⁷⁷ See ROSE, *supra* note 3, at 118-19.

⁷⁸ N.Y. EDUC. LAW § 3602-e (McKinney 2014).

based organizations.⁷⁹ The law sought to create a high quality preschool program to help children develop social and pre-academic skills to help them succeed in school and develop to their full potential.⁸⁰ New York's universal pre-kindergarten law is an achievement. It provides for early childhood education that promotes cognitive, linguistic, physical, cultural, emotional, and social development. Participation is optional for localities; however, when districts like New York City choose to participate, they must make pre-kindergarten available free of charge to all four year olds.⁸¹ Under the legislation, universal pre-kindergarten is to be provided through state fiscal grants to local school districts.⁸² The law contemplates a collaborative effort among schools, existing early childhood provider agencies and community-based organizations.⁸³ To ensure such collaboration, the law provides set-asides of not less than 10% of school district grant awards for such collaborative efforts.⁸⁴ To be approved, the law requires that pre-kindergarten programs must meet a number of specific program criteria, most of which track recognized pre-kindergarten quality standards.⁸⁵ Those criteria, many of which are particularly important in serving low-income children, are set forth below.

1. Age and Developmentally Appropriate Curriculum and Encouraging Children to be Independent and Self-Assured

Under New York's law, pre-kindergarten programs must provide for an age- and developmentally-appropriate curriculum and activities which are learner-centered.⁸⁶ Consideration of age- and developmentally-appropriate curriculum is important to ensure that children experience an educational and social "match" with the pre-kindergarten work and play in which they are engaged. Such a requirement helps to ensure that children are not pressured or pushed inappropriately, which may cause them to turn off to school, blocking the pathways to effective social development necessary for school readiness. This is a key requirement in an era of education reforms based on high stakes testing that tends to disadvantage low-income students of color, often marking them for failure. As some education policy experts have noted:

In recent years, education policy has come to be dominated once again by the immediate need to raise test scores. And preschool supporters fear that tests don't measure important things that preschool teaches children — how to get along in school, how to be curious, how to try hard. They say

⁷⁹ STATE OF N.Y., COMM. ON EDUC., LEARNING, ACHIEVING AND DEVELOPING BY DIRECTING EDUCATION RESOURCES (LADDER) (Mar. 1997).

⁸⁰ See N.Y. EDUC. LAW § 3602-e (McKinney 2014).

⁸¹ See *id.*

⁸² *Id.* at § 3602-e(2).

⁸³ *Id.* at § 3602-e(5).

⁸⁴ *Id.* at § 3602-e(5)(e).

⁸⁵ See *id.* at § 3602-e(7)(a)-(i).

⁸⁶ *Id.* at § 3602-e(7)(a).

preschools are being pushed to “teach to the test” and that preschool will become too much like what kindergarten has become.⁸⁷

These concerns, and the evidence that kindergarten curricula has come to emphasize literacy, math, and testing to a harmful extent, make the focus on age-appropriateness in the pre-kindergarten curriculum crucial.

A related requirement in New York’s pre-kindergarten law is the explicit statement that the programs encourage children to be self-assured and independent.⁸⁸ In this way, the law gives attention to the need for child-centered, age- and developmentally-appropriate methods of teaching and learning. An example of how this requirement is articulated in New York City’s pre-kindergarten learning standards assessing whether a child demonstrates confidence and positive self-image includes determining the degree to which a child “expresses feelings, needs, opinions and preferences independently and in a socially acceptable manner; uses words to identify and express needs; desires and feelings to resolve conflicts; understands and shows empathy for the needs of others; increasingly maintains self-control in challenging situations.”⁸⁹

The law’s focus on the importance of social development toward independence and self-confidence recognizes the need for this emphasis in early learning.

2. Assessment of Language, Cognitive and Social Skills Development

The law requires that pre-kindergarten programs provide for an assessment of the development of language, cognitive and social skills.⁹⁰ This requirement encourages programs to meet young students “where they are” while also requiring that they identify individual student needs with regard to educational and social development. This can help teachers and administrators determine how best to serve children during pre-kindergarten and plan for school readiness. It also appears to seek a balance between curricular models focused on social development and those that address cognitive development for school readiness.

⁸⁷ American Radio Works, *Early Lessons* (American Public Media 2014), available at <http://americanradioworks.publicradio.org/features/preschool/a2.html>; see also EDWARD MILLER & JOAN ALMON, *CRISIS IN THE KINDERGARTEN: WHY CHILDREN NEED TO PLAY IN SCHOOL* 24 (ALLIANCE FOR CHILDHOOD 2009), available at http://www.allianceforchildhood.org/sites/allianceforchildhood.org/files/file/kindergarten_report.pdf (noting the importance of age-appropriate, child-initiated learning and instruction for kindergarten and pre-school children, including the importance of play: “Play is a major mode for learning in early childhood. With sensible boundaries and support from teachers, it leads to enormous growth in all aspects of the child’s development—cognitive, social, emotional, imaginative, and physical. Furthermore, it is the primary tool through which children explore their interests, express their joys, and process their fears, disappointments, and sorrows.”).

⁸⁸ N.Y. EDUC. LAW. § 3602-e(7)(d) (McKinney 2014).

⁸⁹ N.Y.C. DEP’T OF EDUC., *PREKINDERGARTEN PERFORMANCE STANDARDS* (2003), at 19, available at <http://schools.nycenet.edu/offices/teachlearn/PreKStandards.pdf>.

⁹⁰ N.Y. EDUC. LAW § 3602-e(7)(b) (McKinney 2014).

3. Program Continuity with Instruction in the Early Elementary Grades

The requirement that pre-kindergarten programs ensure continuity with instruction in the early elementary grades⁹¹ seeks to establish mechanisms for seamless transition from pre-kindergarten into the K-12 system. Taken together with the law's requirement that advisory councils be established to support partnerships and school-community collaborations, these statutory requirements set a goal of seamless transition from pre-kindergarten to elementary school. The goal of seamlessness may be in tension with concerns about the current obsession with standards and testing in the elementary grades and its impact on pre-kindergarten. The difficulty with this requirement is determining how to support school readiness without imposing on preschool children standards and educational requirements designed for later grades. On the other hand, pre-kindergarten and other early learning partnerships might also be used to persuade teachers in kindergarten to emphasize age-appropriate methods of instruction shown in the research to be more effective to young children's entry into school and longer-term development.

4. Encouraging the Co-location and Integration of Children with Special Needs

New York's law requires that pre-kindergarten programs encourage inclusion and co-location of children with special needs.⁹² Providing early learning opportunities to children with special needs has shown significant benefits to this population of children, decreasing the need for longer term special education services and improving later educational outcomes.⁹³ However, providing quality care and appropriate educational programming to special needs preschoolers is a significant and ongoing challenge. Services for special needs preschoolers often are provided in locations set apart from public preschool settings, because of the required training and supervision and associated costs.

Many of the publicly funded services for preschool special needs students have been provided through for-profit and non-profit contractors. Unfortunately, New York State has incurred very high costs in providing preschool special needs services by this method, due not only to actual costs, but also to fiscal mismanagement, fraud, and abuse facilitated by inadequate oversight and monitoring. For example, a 2012 audit by the New York State Comptroller revealed significant losses of public funds for preschool special education programs resulting from fiscal mismanagement, and in some cases outright fraud, by contracted private providers.⁹⁴ The audit findings

⁹¹ *Id.* at § 3602-e(7)(c).

⁹² *Id.* at § 3602-e(7)(e).

⁹³ See generally Center on the Developing Child, Harvard University, *InBrief: The Science of Early Childhood Development* (2007), available at http://developingchild.harvard.edu/index.php/resources/briefs/inbrief_series/inbrief_the_science_of_eecd/. For a summary, see The Nat'l Early Childhood Technical Assistance Center, *The Importance of Early Intervention for Infants and Toddlers with Disabilities and Their Families* (July 2011), available at <http://www.nectac.org/~pdfs/pubs/importanceofearlyintervention.pdf>; see also Individuals with Disabilities Education Improvement Act of 2004, Part C The Infants and Toddlers with Disabilities Program, 20 U.S.C. § 1400 et seq. (2004) (demonstrating recognition of the benefits of inclusive early learning experiences for children with special needs).

⁹⁴ See STATE OF N.Y., OFFICE OF THE STATE COMPTROLLER, FISCAL AND PROGRAM OVERSIGHT OF SPECIAL EDUCATION PROVIDERS: STATE EDUCATION DEPARTMENT (Dec. 2012), available at <http://www.osc.state.ny.us/audits/allaudits/093013/12s103.pdf>.

demonstrate the importance of oversight when contracting out for educational services as well as a need for structures other than the existing contract model to provide preschool options for special needs children. Integrated and co-located special education pre-kindergarten might provide better programming for special needs preschoolers. It may also help diminish the incidence of fiscal mismanagement and fraud through integration with existing systems that have more robust oversight and monitoring mechanisms. To achieve successful integration and co-location, careful planning and effective training and oversight are required.

5. Staff Qualifications, Development, and Training

Under New York's law, pre-kindergarten program staff must meet several qualifications, including degree requirements, teacher certification in early childhood education, training to identify child abuse, education in serving children with special needs, as well as background checks required of all teachers and early childhood workers.⁹⁵

For pre-kindergarten teachers in partnering agencies, the requirement is more flexible.⁹⁶ Pre-kindergarten teachers employed by organizations licensed by the State satisfy the qualifications through such licensure.⁹⁷ Teachers employed by agencies not requiring a license may meet the qualifications established by their employers.⁹⁸ However if the teacher is not certified, she or he must have an education plan that will lead to obtaining New York State teacher certification for Birth — Grade 2 within five years.⁹⁹ In addition, a certified on-site education director is required to be present during the organization's pre-kindergarten sessions until all of the teachers at a collaborating site are certified.¹⁰⁰ If the eligible agency is unable to provide an on-site certified teacher as the education director, the district may opt to assign a qualified individual to be on-site during the pre-kindergarten hours of operation.¹⁰¹ These requirements strike an important balance between the need for trained, qualified teachers and program capacity needs.

The law also requires that pre-kindergarten programs provide staff development and teacher training for staff and teachers in all settings in which pre-kindergarten services are provided.¹⁰²

⁹⁵ See N.Y. EDUC. LAW § 3602-e(12)(a)-(c) (McKinney 2014); N.Y. COMP. CODES R. & REGS. tit. 8, § 151-1.3 (2014).

⁹⁶ See STATE OF N.Y., DEP'T OF EDUC., *Universal Prekindergarten: Questions and Answers, Including Mid-Year Programs* (Mar. 18, 2014), available at <http://www.p12.nysed.gov/upk/QA.html>.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ N.Y. COMP. CODES R. & REGS. tit. 8, § 151-1.3 (2014).

¹⁰⁰ *Id.* at (e)(2).

¹⁰¹ *Id.*

¹⁰² N.Y. EDUC. LAW § 3602-e(12) (McKinney 2014).

6. Random Selection of Eligible Children

The New York pre-kindergarten law establishes a method for selection of eligible children to receive pre-kindergarten program services on a random selection basis where there are more eligible children than can be served in a given school year. The law further provides, however, that a school district that operated a targeted pre-kindergarten program in the base year may continue to use the selection process established for such a program.¹⁰³ The requirement of random selection is important to equity in access to programs.¹⁰⁴

7. Class Size Caps, Parental Involvement, Facilities Requirements

The regulations accompanying the legislation provide for class size caps, noting that “the maximum class size for a prekindergarten class is 20 children” and requiring one teacher and one para-professional for classes up to 18 students and an additional para-professional assigned to classes of 19 or 20 students.¹⁰⁵ The regulations also set forth standards for staff qualifications, fiscal and program oversight and monitoring, professional development, parental involvement and support services.¹⁰⁶ Both class size and teacher performance and experience have been identified as contributing meaningfully to improved student outcomes.¹⁰⁷

In sum, New York State has a very good universal pre-kindergarten law. Its design includes components that serve the interests in reaching vulnerable children, ensuring high quality programs, and addressing issues necessary to close achievement gaps. Yet notwithstanding strong, detailed, and thoughtful legislation, after more than fifteen years, New York State and City have yet to realize implementation of pre-kindergarten that reaches all eligible children.

IV. STRUCTURAL AND FISCAL BARRIERS TO IMPLEMENTING UPK

Much of the failure to implement fully the laudable vision expressed in New York’s universal pre-kindergarten law has to do with funding barriers tied to governance and politics in which poor communities tend to be shortchanged, even within a funding structure ostensibly designed to give added support to lower income school districts.

¹⁰³ *Id.* at § 3602-e(7)(i).

¹⁰⁴ See generally Monica Texeira de Sousa, *Compelling Honesty: Amending Charter School Enrollment Laws to Aid Society’s Most Vulnerable*, 45 URB. LAW. 105 (2013) (discussing the importance of selection and enrollment criteria to equitable access to popular school programs).

¹⁰⁵ N.Y. COMP. CODES & REGS. tit. 8, § 151-1.3(d) (2014).

¹⁰⁶ See, e.g., *id.* at (e)-(i).

¹⁰⁷ See, e.g., LINDA DARLING HAMMOND, *THE FLAT WORLD AND EDUCATION: HOW AMERICA’S COMMITMENT TO EQUITY WILL DETERMINE OUR FUTURE* (Teachers College Press 2010). Hammond notes the importance of small class sizes and personalized school environments. *Id.* at 246-50. She additionally emphasizes the importance of teacher effectiveness to improving student outcomes. *Id.* at 44-45; see also Anthony Francis Bruno, *Is Achieving Equal Educational Opportunity Possible? An Empirical Study of New York State Public Schools*, 25 J. CIV. RTS. & ECON. DEV. 225, 253-54 (2011).

A. Fiscal Sisypheus: Never Quite Getting to “Universal” Pre-K

New York State’s experience with UPK provides an example of the multiple pressures that can thwart adequate funding and full implementation. Funding for New York’s statewide voluntary universal pre-kindergarten program initially was scheduled to grow from \$50 million to \$100 million in the 1999-2000 school year, then to \$225 million in the 2000-01 school year, and \$500 million each year thereafter.¹⁰⁸ The goal was to provide access to all four year olds by 2002.¹⁰⁹

Unfortunately, soon after its introduction, New York’s Universal Pre-K program was threatened by varying and uneven state fiscal support that has yet to reach the targeted \$500 million level contemplated in the original legislation. As noted by the Citizen’s Budget Commission:

Initial UPK grants to school districts ranged from \$2,000 to \$4,000 per pupil, determined by a formula that included district wealth (measured by local property values and income) and district need (measured by the portion of students in poverty). Initial school district eligibility was determined based on the number of four-year-olds who were not already placed in other prekindergarten programs and by district need. In the first year of implementation[,] 130 districts were deemed eligible, but only 68 opted to provide pre-k classes in the 1998-99 school year. First year enrollment was 18,176; nearly 14,000 of these students were in New York City. Acknowledging the originally appropriated funding was not sufficient to spark widespread enrollment, the Legislature increased the program’s budget during the year to \$67 million. About \$57 million was disbursed in grants in that year.

Funding for the second and third years of the program followed the schedule in the original legislation — \$100 million and \$225 million for school years 1999-00 and 2000-01, respectively. But school districts were slow to initiate or expand programs, and in the 2000-01 year districts used only \$183.9 million. Districts that did not use their full allocation were permitted to place the unused portion in a reserve fund for use the next year.¹¹⁰

The dot-com bubble of 2000 followed by the terrorist attacks of September 11, 2001, put a strain on New York State’s budget, including fiscal support for UPK’s phase-in.¹¹¹ In 2002 and 2003, then-governor George Pataki reduced state funding for the initiative and threatened to eliminate it.¹¹² Statewide funding for authorized

¹⁰⁸ See STATE OF N.Y., COMM. ON EDUC., ANNUAL REPORT 2001 (2001), available at <http://assembly.state.ny.us/comm/Ed/2001Annual/#CommB>.

¹⁰⁹ As noted by the NYS Assembly in its 2001 Annual Report, then Governor Pataki failed to fund universal pre-kindergarten per the 1997 commitment. Instead, the program received \$225 million, a cut of \$275 million. See *id.*

¹¹⁰ CITIZENS BUDGET COMM’N, *supra* note 44, at 5-6 (internal citations omitted).

¹¹¹ *Id.* at 6.

¹¹² See ROSE, *supra* note 4, at 120.

UPK grants remained at \$204.7 million from the 2001-02 through the 2005-06 school years.¹¹³

Governor Eliot Spitzer revived support for universal pre-k during his short tenure. In 2007-08, in response to the decision in the *Campaign for Fiscal Equity* case, which held that New York State's funding formula failed to provide the constitutionally required "sound basic education" to students in New York City,¹¹⁴ the state's funding formula was changed. A new allocation formula for UPK aid was adopted in connection with the new funding formula.¹¹⁵ This resulted in an increase in authorized grants for universal pre-kindergarten from \$254.7 million to \$437.9 million in 2007-08. Governor Eliot Spitzer, included a nearly 50 per cent increase in funding for pre-kindergarten in 2007, connected pre-k funding to a restructured state education formula, and folded targeted pre-k into UPK.¹¹⁶

However, Spitzer's resignation following a scandal in 2008, de-railed momentum on pre-k and a host of promising education reforms.¹¹⁷ Although Spitzer's successor, Governor David Paterson, expressed support for UPK, New York's budget process, fiscal constraints, and the intricacies of public education funding, regularly resulted in shortfalls in funding for universal pre-k. Fluctuations in statewide grant allocations have continued under current Governor Andrew Cuomo. In the 2009-10 school year, the UPK statewide grant allocation was reduced to \$414.1 million, where it remained in 2010-11.¹¹⁸ In 2011-12 the allocation dropped to \$384.3 million.¹¹⁹

Changes and declines in state funding have an impact on per pupil expenditures and school districts' ability to build and maintain capacity and provide locally supported supplemental programming. For example, the state funding decline in 2011-12, combined with local budget pressures, caused the Yonkers and Poughkeepsie districts to scale back from full-day to half-day programs.¹²⁰ State funding declines contributed to difficulties in establishing stable and adequate programming in an environment in which per pupil expenditures already vary widely due to the application of the funding formula together with numbers of eligible and enrolled students. For example:

In 2011-12, New York's school districts spent \$380.7 million of the \$384.3 million allocation. Enrollment was 103,573, resulting in per pupil allocations of \$3,676 on average. In 2012-13, \$385 million was allocated, and districts spent \$374.4 million. New York's large city districts, the "Big 5," served 63 percent of pupils in the program in school year 2012-13 with per pupil grants ranging from \$2,951 in Yonkers to \$5,636 in

¹¹³ CITIZENS BUDGET COMM'N, *supra* note 44, at 6.

¹¹⁴ 861 N.E.2d 50, 52 (N.Y. 2006).

¹¹⁵ CITIZENS BUDGET COMM'N, *supra* note 44, at 7.

¹¹⁶ ROSE, *supra* note 4, at 123.

¹¹⁷ *Id.*

¹¹⁸ CITIZENS BUDGET COMM'N, *supra* note 44, at 6.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 7.

Rochester. New York City received \$220 million to serve 57,759 pupils, an average per pupil of \$3,810. The second largest grant went to Buffalo, which received \$13 million or \$4,731 per pupil to serve 2,697 pupils. Other districts among the top ten grant recipients include East Ramapo, Brentwood, Newburgh, Albany, and Utica. Per pupil grants for these districts ranged from \$2,866 for East Ramapo to \$4,493 for Newburgh.¹²¹

Needless to say, New York's universal pre-kindergarten program has yet even to approach the goal of universality. The New York State Education Department estimates that there were approximately 230,000 four year olds in the state as of the 2013-14 school year.¹²² The \$385 million appropriated for the 2013-14 school year was estimated to provide state funding for fewer than half that population.¹²³ Governor Cuomo's addition of a \$25 million competitive grant for pre-kindergarten expansion in 2013¹²⁴ did not close the gap.

B. Budgetary Impact on Equity in Access to Pre-Kindergarten

Fluctuations and inconsistencies in budget allocations for New York's universal pre-kindergarten have impeded efforts to improve equity in funding among and within school districts across the state. Thus, in addition to adequate and consistent funding, New York's universal pre-kindergarten requires local budget recalibration to ensure greater equity in funding targeted to the neediest districts and students. New York State's foundation aid formula in theory targets the neediest districts and children. However, delays in implementing the more equitable foundation funding formula, as well as arcane vagaries in state and local funding practices, have allowed inequities in funding to persist. As noted by the Campaign for Educational Equity:

[A]ctual allocations under the current system vary significantly from the theoretical model because (1) allocations for the numbers of students the district served in 2006-07 continue to be funded at the rates in effect for that year; (2) the phase-in of the new, more equitable funding system has been frozen for the past several years, meaning that most students continue to be funded at the more inequitable, pre-2006-07 rates; (3) the current \$2,700 per-student minimum funding amount, especially in the absence of adequate funding for all districts, substantially exacerbates the inequities of the current system; and (4) a maintenance-of-effort factor and enrollment-growth caps further limit total district allocations and reduce per-capita funding under certain circumstances. In short, the

¹²¹ *Id.*

¹²² *Id.* at 9.

¹²³ This is at existing state per pupil expenditures and at funding levels contemplated when the 2001 UPK law was enacted. As noted above, pre-k per pupil expenditures vary widely among states. In addition, given differences in local school district contributions as well as efforts to leverage Child Care, Head Start and other early childhood funds per pupil expenditures also vary within the state and among programs and can be difficult to track.

¹²⁴ CITIZENS BUDGET COMM'N, *supra* note 44, at 8.

current UPK methodology falls far short of the legal requirement to “align funding with need.”¹²⁵

The delays in updating eligibility numbers and in phasing in more equitable funding formulas, together with quirks in baseline requirements, have thwarted true need-based allocations, resulting in some stark funding inequities. For example, in the 2013-14 school year, the very affluent Great Neck school district, which reports a 10% low income student population, received state UPK per pupil expenditures of \$3,390 while Utica, a high poverty small city with 80% low income students received \$3,864 in UPK per pupil dollars.¹²⁶ Rochester, with very high poverty proportion of 88% and a very low local taxing ability received \$5,678 per pupil that year.¹²⁷ Thus Great Neck, whose foundation aid per pupil is \$605 because of district wealth, receives almost the same amount of UPK funding as Utica whose foundation aid is \$7,232; and not significantly less than Rochester whose foundation aid is set at \$10,998 based on a significant proportion of students in poverty and an extremely low local tax base.¹²⁸

In addition, even though state funding for preschool is designed to be less available in affluent districts, a higher proportion of children from affluent families attend preschool in New York than children from low and moderate income families, with the lowest levels of participation among the near poor or working poor.¹²⁹ There remains much work to be done to ensure that state education funding formulas used to allocate pre-kindergarten funds to target districts with the highest need actually achieve these goals. Failure to do so often thwarts districts’ ability to bring programs to capacity and meet the needs of all eligible children. Worse, it risks exacerbating rather than alleviating opportunity gaps by providing free pre-kindergarten to families able to access it on their own, while continuing to deny access to those who cannot.¹³⁰

¹²⁵ Michael A. Rebell et al., *Making Prekindergarten Truly Universal in New York: A Statewide Roadmap*, CAMPAIGN FOR EDUC. EQUITY & CTR. FOR CHILDREN’S INITIATIVES (Oct. 2013), at 13, available at <http://origin.library.constantcontact.com/download/get/file/1102516341830-433/New+York+PreK+long+report.pdf>.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ CITIZENS BUDGET COMM’N, *supra* note 44, at 9. “Among the poorest children in New York State (i.e., those in households with income at 50 percent or less of the federal poverty threshold), an average of 57 percent of four-year-olds attended nursery school or other preschool over the 2007 to 2011 period increasing to 64 percent for children from households with income at 100 to 150 percent of the poverty level. Interestingly, participation dips to 60 percent for children in the 150 to 200 percent-of-poverty income bracket – perhaps reflecting the more limited availability of public programs. Above that income level participation rates climb to 83 percent at the highest income levels.” *Id.*

¹³⁰ See generally Elizabeth U. Cascio & Diane Whitmore Schanzenbach, *The Impacts of Expanding Access to High Quality Preschool Education*, BROOKINGS PAPERS ON ECON. ACTIVITY (2013), at 174, available at http://www.brookings.edu/~media/Projects/BPEA/Fall%202013/2013b_cascio_preschool_education.pdf. The authors note that the impact of attending high quality preschool “depends crucially on what the child would have been doing in the absence of the program” and state findings that children from low income backgrounds

C. Budget Impacts on Capacity Building and Program Quality Across the State

Budgetary shortfalls and fluctuations have impeded capacity building and have caused uneven development of pre-kindergarten across New York. The program's development and capacity building efforts in New York City, by far the largest school district in the state, are described in more detail in section D. Allocations for public universal pre-kindergarten vary widely by district across New York. This is due to the State's aid funding formula used in allocating pre-kindergarten funds, and because of differences in local district size, wealth, and numbers of eligible students. New York's large city districts, the "Big 5," served 63 percent of pupils in the program in the 2012-13 school year, with state per pupil grants ranging from \$2,951 in Yonkers (to serve 1,447 children with a grant of \$4 million), to \$5,636 in Rochester (to serve 1,915 children with a grant of \$11 million).¹³¹ New York City's state grant was by far the largest, with a state per pupil allocation of \$3,810 to serve 57,759 children, for a total grant of \$220 million.¹³² The second largest was Buffalo, which received a state per pupil allocation of \$4,731 to serve 2,697 children, for a total state grant of \$13 million.¹³³

New York State budget shortfalls and fluctuations for pre-kindergarten have affected school districts' ability to build and sustain program capacity. For example, the Yonkers school district has grappled with questions of how best to allocate funding between curricular programming and transportation, and has had to scale back from full-day to half-day programs in response to budget changes and constraints over the last several years.¹³⁴ Notwithstanding the funding targets set forth in the law, New York State average UPK aid per pupil decreased from \$5,306 per pupil in 2002 to \$3,707 in 2012.¹³⁵ The lack of consistent and sustained state support for UPK has made it difficult for districts to plan and maintain quality programs. This is particularly true in smaller districts that may be more nimble, but often have little room to maneuver in response to budget shortfalls. It also affects larger districts, like New York's "Big 5" that are tasked with managing complex pre-kindergarten programs involving many partners and various funding streams.

D. New York City's Efforts to Phase-In UPK: One Step Forward, Two Steps Back

Soon after the enactment of the state UPK law, New York City approved a plan to phase-in free universal pre-kindergarten for all eligible four year olds starting in the 1998-99 school year.¹³⁶ Because of space, budgeting, and other capacity limitations in the public schools, New York City's universal pre-kindergarten

benefit more from such programs than children from wealthier backgrounds who tend simply to switch from private to public preschool programs, reducing spending on preschool and child care. *Id.*

¹³¹ CITIZENS BUDGET COMM'N. *supra* note 44, at 7.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *See id.* at 10.

¹³⁵ *Id.* at 11.

¹³⁶ N.Y.C. INDEP. BUDGET OFFICE, *Implementing Universal Prekindergarten in New York City* (Nov. 1999), available at <http://www.ibo.nyc.ny.us/iboreports/PreKind.pdf>.

program was established in close partnership with, and heavy reliance on, a number of community-based organizations.¹³⁷ It also relied on significant fiscal support from the City of New York in addition to the state funding allocation.¹³⁸ Indeed, as noted by the New York City Independent Budget Office, in implementing the phase-in of universal pre-kindergarten, New York City contributed more than one-third of operating funds for pre-kindergarten in the city.¹³⁹

1. Universal Pre-Kindergarten in New York City

New York City's existing UPK program operates in all five boroughs in public schools and in programs operated by community-based organizations (CBOs). Pre-kindergarten in New York City can take the form of a stand-alone program or can be coordinated with other Early Childhood Education programs, such as existing day care or Head Start programs.¹⁴⁰

New York City's UPK program is administered by the Department of Education's (DOE) Office of Early Childhood Education (OECE).¹⁴¹ "Parents who wish to send their eligible children to a State-funded UPK program can apply at DOE public schools or at DOE-contracted CBOs that offer such a program."¹⁴² "Public schools direct parents to CBO-based UPK programs if their school does not offer UPK programs or if all available seats are filled."¹⁴³

"CBOs interested in providing UPK services at a particular site must respond to DOE's Request for Proposal (RFP)."¹⁴⁴ To be eligible, CBO providers must "adhere to the regulations of the UPK program as administered by the New York State Education Department (NYSED)."¹⁴⁵ CBOs must meet the state qualifications for UPK discussed above, which include experience, licensure and certification, insurance, facilities, and class size and student-teacher ratio requirements.¹⁴⁶ Approved proposals result in DOE and each CBO entering into a three-year UPK contract with the option to extend, at the discretion of DOE, for an additional two years.¹⁴⁷ "Payments made to the providers are based on the number of children registered and attending the UPK program multiplied by the cost per child."¹⁴⁸

¹³⁷ *Id.* at 2.

¹³⁸ *Id.* at 2.

¹³⁹ *Id.* at 7.

¹⁴⁰ See N.Y.C. OFFICE OF THE COMPTROLLER, *Audit Report on the Department of Education's Planning and Allocation of Funds to Community-Based Organizations for the Universal Pre-Kindergarten Program* (Oct. 13, 2011), at 4, available at http://comptroller.nyc.gov/wp-content/uploads/documents/MH11_059A.pdf.

¹⁴¹ *Id.* at 1, 4.

¹⁴² *Id.* at 4.

¹⁴³ *Id.* at 4-5.

¹⁴⁴ *Id.* at 5.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

The cost per child varies by CBO. It is based on the CBO's capacity, proposed budget, and operating needs to run a quality UPK program either as a free-standing program or in conjunction with other early childhood programs.¹⁴⁹

"In addition to UPK classes offered at DOE-contracted CBOs, UPK classes are [also] offered in public schools as well as through the City's Administration for Children's Services (ACS)."¹⁵⁰ ACS-based UPK programs are provided through that agency's contracted CBOs to all UPK-eligible children served in ACS-funded Child Care and Head Start programs.¹⁵¹

According to [the New York City] DOE, for Fiscal Year 2010, UPK services were provided to approximately 15,500 students at 444 ACS CBO sites through the MOU agreement, while an additional 22,700 students received UPK services at 549 public schools. For Fiscal Year 2010, the State's UPK appropriation to the City totaled \$248 million, of which \$99 million was spent on DOE UPK programs by the public schools, \$65 million by DOE-contracted CBOs, and \$51 million by ACS. Additional general programmatic expenditures totaled almost \$4 million. During the same period, according to OECE, DOE had 398 contracts with 368 CBOs providing approximately 18,500 children UPK services at 448 separate sites.¹⁵²

This mix of approaches has been central to building program capacity. It has also created and supported the integration of community-based efforts to support school-readiness in a manner that aligns with local public schools and after school programs. Thus, New York City has developed a robust, complex, and multi-faceted pre-kindergarten program network that includes public schools and CBO-based programs, which draws on various funding streams and seeks to coordinate half-day, full-day, and after-school services to best serve families.¹⁵³

2. New York City Candidate-Turned-Mayor Bill de Blasio's UPK Funding Proposal and the Governor's Response

The question of support for Universal Pre-K became a central issue in the 2013 mayoral campaign, and is a signature issue for Mayor Bill de Blasio.¹⁵⁴ His proposal to fully fund universal pre-kindergarten by imposing a tax on wealthy New Yorkers

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* "Based on a 2007 Memorandum of Understanding (MOU) funding agreement between DOE and ACS, a portion of the same State funds funneled through DOE are used to reimburse ACS for its half-day UPK program." *Id.*

¹⁵² *Id.* at 5-6.

¹⁵³ The mix of programs, service providers, and funding streams is not without its challenges. For example, in connection with the current expansion of universal pre-kindergarten, New York City Comptroller Scott Stringer has raised concerns that a significant proportion of contracts associated with the fall 2014 pre-kindergarten expansion yet to be submitted by late August, 2014, impeding necessary oversight and review of providers. See Jonathan Lemire, *NYC Comptroller: Some Pre-K Sites May be Unsafe*, ASSOCIATED PRESS, Aug. 27, 2014, 5:51 PM, <http://www.ksl.com/?nid=157&sid=31320966>.

¹⁵⁴ Colagrossi, *supra* note 2.

proved popular with many New York City voters and was among the issues that garnered widespread support for de Blasio's election as Mayor. Well aware of the difficulties in attaining adequate and sustained funding for high quality universal pre-kindergarten, de Blasio proposed a tax on wealthy New York City residents to help fund high quality, full-day universal pre-kindergarten in the state's largest school district.

The Mayor's plan to make pre-kindergarten universal in New York City contemplated a fairly rapid phase-in based on City estimates of need:

We estimate that 73,250 families are likely to need a full-day pre-k option for their 4-year-old. Currently, fewer than 27 percent of these 4-year-olds have access those services. The remaining 53,767 children are either in a half-day free pre-K program, a free half-day program with a fee charged for the remainder of the day, or receive full-day services at programs that contract with the Administration for Children's Services, combining half-day UPK with Child Care and Head Start services. The 12,681 children in ACS programs must meet income eligibility requirements and, in some cases, pay Child Care fees. Even if these seats are also counted as existing full-day options, that still leaves approximately 41,000 children in need of full-day services — 70 percent of whom are in high-need areas.¹⁵⁵

The Mayor's proposal emphasized the urgency of making pre-kindergarten available to serve current needs as an important investment in the City's future.¹⁵⁶ The proposal specifically referenced New York City's history of uneven, inadequate, and unpredictable funding to support pre-kindergarten: "We owe it to our children to maximize the number of options to add each year, rather than set limitations driven by legislative sessions and budget processes far removed from the pressing needs of our city's children now."¹⁵⁷ To address the need for dedicated and sustained funding, it proposed a tax of between 3.87% and 4.4% on city residents whose income exceeds \$500,000.¹⁵⁸ The tax would raise funds of about \$340 million dedicated to providing sustained funding for universal pre-kindergarten and an additional \$190 million to support after school programs for middle school students.¹⁵⁹ Like many local school districts participating in UPK, New York City contributed significant local funds to support the program. However, with uneven state aid and fluctuations in the City budget, funding shortfalls impeded full implementation.

¹⁵⁵ N.Y.C., OFFICE OF THE MAYOR, *Ready to Launch: New York City's Implementation Plan for Free, High Quality, Full-Day Universal Pre-Kindergarten* (Jan. 2014), available at <http://www1.nyc.gov/assets/home/downloads/pdf/reports/2014/Ready-to-Launch-NYCs-Implementation-Plan-for-Free-High-Quality-Full-Day-Universal-Pre-Kindergarten.pdf>.

¹⁵⁶ *Id.* at 3.

¹⁵⁷ *Id.*

¹⁵⁸ See Javier C. Hernandez, *Obstacles Seen for de Blasio's Preschools Plan*, N.Y. TIMES, Aug. 28, 2013, http://www.nytimes.com/2013/08/29/education/obstacles-seen-for-de-blosios-preschools-plan.html?pagewanted=all&_r=0.

¹⁵⁹ *Id.*

The Mayor's tax proposal, though popular with many City voters, hit a roadblock with the Governor and New York State Senate.¹⁶⁰ Responding to concerns of wealthy New Yorkers (many of whom presumably are political donors) and pressure on the Governor not to increase taxes in a gubernatorial election year, Governor Andrew Cuomo declined to support the Mayor's UPK tax proposal.¹⁶¹ Understanding the political salience of UPK, Governor Cuomo spun the Mayor's tax plan as an issue of fairness statewide, arguing that the City should not gain an advantage over children in school districts around the state, and offered instead to provide increased funding for UPK across the state.¹⁶² In what some perceived as a political outmaneuver of the Mayor, the Governor did not support the Mayor's legislative request for a dedicated tax, but allocated \$340 million for UPK statewide, \$300 million of which would go to New York City.¹⁶³ For his part, the Mayor could claim victory for getting the funding increase needed to expand pre-kindergarten in the City, fulfilling his campaign promise without raising taxes (and leaving the sustainability question for another day).

I provide this narrative in some detail because it exemplifies the multilayered political calculations often involved in funding determinations — even for a popular initiative like UPK. In this case, lost in the political maneuvering was the demonstrated need for dedicated funding to ensure full and sustainable UPK implementation.

3. Current New York City Universal Pre-K Efforts

The new Mayor and Chancellor quickly set out to expand pre-kindergarten capacity and to encourage parents of four year olds in 2014-15 to apply and enroll. New York City's expanded pre-kindergarten program¹⁶⁴ builds on the infrastructure already in place through a combination of public school, ACS, and CBO programs described above.¹⁶⁵ The DOE and the Mayor's office engaged in an intensive

¹⁶⁰ Implementation of the tax required state approval by the legislature and governor. See Freeman Klopott, *De Blasio Plan to Tax NYC Wealthy Faces Albany Roadblocks*, BLOOMBERG BUSINESSWEEK, Jan. 3, 2014, <http://www.businessweek.com/news/2014-01-03/de-blasio-plan-to-tax-nyc-s-wealthy-faces-albany-roadblocks>.

¹⁶¹ See Jarrett Murphy, *Without a Dedicated Funding Stream, Cuomo's Plan for Universal Pre-K Will Fall Short*, THE NATION, Jan. 22, 2014, 1:07 PM, <http://www.thenation.com/blog/178032/distrust-cuomos-upk-counteroffer-about-more-math#>; Kenneth Lovett, *Gov. Cuomo to Unveil Universal Pre-K Plan Without Hiking Taxes in Budget Address*, N.Y. DAILY NEWS, Jan. 21, 2014, 2:33 AM, <http://www.nydailynews.com/new-york/cuomo-unveil-statewide-pre-k-plan-hiking-taxes-article-1.1586050>.

¹⁶² See Carl Campanile, *Cuomo Says de Blasio Pre-K Tax Plan Is Unfair to Rest of State*, N.Y. POST, Feb. 13, 2014, 1:44 AM, <http://nypost.com/2014/02/13/cuomo-says-de-blasio-pre-k-tax-plan-is-unfair-to-rest-of-state/>.

¹⁶³ Thomas Kaplan & Javier C. Hernandez, *State Budget Deal Reached; \$300 Million for New York City Pre-K*, N.Y. TIMES, Mar. 29, 2014, <http://www.nytimes.com/2014/03/30/nyregion/cuomo-new-york-state-budget.html>; AFRICAN AMERICAN PLANNING COUNCIL INC., *New York Leaders, Gov. Cuomo Reach Deal on Budget*, Mar. 31, 2014, <http://aapci.org/site/new-york-leaders-gov-cuomo-reach-deal-on-budget/>.

¹⁶⁴ See N.Y. EDUC. LAW § 3602-e (McKinney 2014).

¹⁶⁵ The current UPK rollout makes little reference to the EarlyLearnNYC initiative established by the former mayor in October 2012 to blend the existing patchwork of early care

outreach plan, working with community leaders, council members, and others to get the word out about expanded, full-day pre-kindergarten options. The DOE disseminated a pre-kindergarten expansion guide, providing instructions to parents about how to apply for public school seats online or in person at various borough enrollment offices.¹⁶⁶ The guide provided instructions for enrollment in public schools with a deadline of April 23, 2014.¹⁶⁷ The guide also directs parents to instructions for applying to CBO pre-kindergarten options, which would be available in June of 2014 for enrollment in the fall of 2014.¹⁶⁸

The hallmarks of Mayor de Blasio's current pre-kindergarten expansion include a stated commitment to reaching all eligible children, with a goal of addressing inequality and closing opportunity gaps.¹⁶⁹ Some observers have raised concerns about the city's ability to build and sustain capacity to reach all children, and in particular, to ensure that the neediest children are well served by the program. Some note the tendency of universal programs to best serve children in higher income and more politically connected communities. History and experience with public early childhood programs have demonstrated the difficulty in establishing and sustaining quality programs that reach the low-income students in segregated settings who stand to gain the most from such interventions. Based on his stated priorities, Mayor de Blasio's approach is promising. It is too soon to tell, however, whether the program will achieve its aspired reach. The pre-kindergarten expansion is proceeding with a goal of filling approximately 53,000 seats in September 2014 and 73,250 seats by the 2015-16 school year.¹⁷⁰

As of the official October 1, 2014 headcount, over 51,000 four year olds have registered for pre-kindergarten in NYC.¹⁷¹ Although this is just short of the 53,000

and education programs into a unified system serving children 6 weeks to 4 years old. A recent report about EarlyLearnNYC notes the program's mixed results and highlights the risks that consolidation of programs could hurt small child care providers and that a centralized program of subsidized care and vouchers could benefit members of communities with political clout over those demonstrating the greatest needs. See Kendra Hurley & Abigail Kramer, *Big Dreams for New York City's Youngest Children: The Future of Early Care and Education*, CTR. FOR N.Y.C. AFFAIRS (2014), at 4, available at <http://blogs.newschool.edu/child-welfare-nyc/2014/07/final-report-big-dreams-for-new-yorks-youngest-children-the-future-of-early-care-and-education-2/>.

¹⁶⁶ See N.Y.C. DEP'T OF EDUC., PREKINDERGARTEN EXPANSION GUIDE (2014), available at <http://schools.nyc.gov/NR/rdonlyres/0A11B651-FEDC-4317-9DEC-57ED5024EB77/0/PreKExpansionGuideFINALfullwebversion.pdf>.

¹⁶⁷ *Id.* at 3.

¹⁶⁸ *Id.* at 5.

¹⁶⁹ See, e.g., E.J. Dionne Jr., *An Interview with New York City Mayor Bill de Blasio*, WASH. POST, Apr. 20, 2014, <http://www.washingtonpost.com/blogs/post-partisan/wp/2014/04/20/an-interview-with-new-york-city-mayor-bill-de-blasio/>.

¹⁷⁰ See N.Y.C., OFFICE OF THE MAYOR, *In First Wave of UPK Implementation, Mayor de Blasio Announces More Than 4,200 New Full Day Pre-K Seats Added to Public Schools* (Apr. 2, 2014), available at <http://www.opt-osfns.org/nycdsf/referenceDoc/news/NYC1stWaveOfUPKImplement.pdf>.

¹⁷¹ See Robin Shulman, *NYC Conducting Careful Tally of Pre-K Expansion Numbers*, WNYC (Oct. 7, 2014, 5:27 PM), <http://www.wnyc.org/story/counting-four-year-olds-enrolled-pre-k/>.

de Blasio was hoping for, it more than doubles the number of students enrolled in full day pre-kindergarten the prior year. To try to get to the 53,000 mark, the de Blasio administration extended the October 1st deadline indefinitely.¹⁷² Six hundred public schools and 1,100 community-based organizations run the pre-kindergarten programs.¹⁷³ Enrollment varies most widely in these private, community-based organizations, with some facing huge waiting lists and others with half empty classrooms.¹⁷⁴ As a result, concern has developed about equitable access to pre-kindergarten programs. A recent report revealed an uneven distribution of seats in lower income communities, finding specifically that the 35 New York City zip codes with lowest median income also saw the lowest rate of increase in new pre-kindergarten seats.¹⁷⁵ New York City officials adamantly reject the report's findings noting that seats in low-income neighborhoods were funded by the city before the expansion.¹⁷⁶ At the same time, the City has acknowledged its efforts to boost enrollment in middle-income neighborhoods, where the "district schools are at capacity and community-based centers are few."¹⁷⁷ The lack of increased enrollment in high poverty communities goes to the heart of the concern about targeted versus universal programs. Some enrollment disparities may be due to pre-existing programs and to variations in community outreach, logistics, and/or capacity-building issues related to an expansion of this kind.

Certain problems with capacity-building related to teachers, facilities, and contracts, many of which were expected, have been identified and are being addressed.¹⁷⁸ Still, the full day Universal Pre-K program is popular with families in both middle- and lower-income communities, many of whom could not take advantage of part-day programs because parents work full time. Given the Mayor's

¹⁷² See Robin Shulman, *New York City Gives Pre-K Programs More Time to Recruit Students*, WNYC (Oct. 6, 2014, 6:36 PM), http://www.wnyc.org/story/new-york-city-gives-pre-k-programs-more-time-recruit-students/?utm_source=/story/counting-four-year-olds-enrolled-pre-k&utm_medium=treatment&utm_campaign=morelikethis.

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ See Bruce Fuller, *Expanding Preschool in New York City – Which Communities Benefit from Gains in Supply?*, UNIV. OF CAL.-BERKELEY (2014), at 3, available at <http://gse.berkeley.edu/sites/default/files/users/bruce-fuller/NewYorkCity-PreK-Distribution.pdf>.

¹⁷⁶ See Jessica Glazer, *After Study Questions Equity of Pre-K Expansion, City Pushes Back*, CHALKBEAT (Oct. 7, 2014, 7:08 PM), <http://ny.chalkbeat.org/2014/10/07/after-study-questions-equity-of-pre-k-expansion-city-pushes-back/#.VEU4noBJqyP>.

¹⁷⁷ See *id.* As of October 8th, there are 16 public schools and 33 community providers with empty seats. See Amy Zimmer, *There's Still Time to Enroll Your 4-Year-Old in Free Pre-K This Fall*, DNAINFO (Oct. 9, 2014, 7:25 AM), <http://www.dnainfo.com/new-york/20141009/lower-east-side/theres-still-time-enroll-your-4-year-old-free-pre-k-this-fall>. The majority of these schools seem to be clustered in middle class neighborhoods in Brooklyn and Queens. *Id.* The DOE and the providers are trying to fill these seats, as without students many of them are in danger of closing. *Id.*

¹⁷⁸ See Juan Gonzalez, *Full Day Pre-K is Set to Launch for Thousands of Children in the City*, N.Y. DAILY NEWS (Aug. 28, 2014, 9:57 PM), <http://www.nydailynews.com/new-york/education/full-day-prekindergarten-set-launch-nyc-article-1.1920966>.

stated commitment to addressing inequality, the hope is that children in the most segregated and isolated communities around the City will be able to access universal pre-kindergarten in significant numbers. It is also hoped that given the universal nature of the program and pre-kindergarten options that include programs in schools and community-based organizations, that programs will include children from mixed socio-economic backgrounds. Of course, much of the program's long-term success will depend not only on its effective implementation, but also on continued funding commitments in future years. This is where the legal structure and fiscal support for pre-kindergarten prove crucial.

V. BENEFITS AND LIMITATIONS OF NEW YORK'S PRE-K LAW AND THE
CONSIDERATION OF STATUTORY VERSUS CONSTITUTIONAL MANDATES AND
TARGETED VERSUS UNIVERSAL PROGRAMS

Many pre-kindergarten programs around the country are established by statute through the political process. A few others, like New Jersey's, were established as part of a state constitutional mandate to eliminate educational inequity. Comparisons between New York's and New Jersey's programs and experiences raise two sets of questions: (1) whether a state constitutional mandate that includes preschool as part of its requirements for educational equity or adequacy provides significantly greater support for implementation; and (2) whether a targeted or universal approach to pre-kindergarten stands the better chance of achieving greater equity and closing achievement gaps.

*A. New Jersey's Court-Mandated, Targeted, High Quality Pre-Kindergarten – an
Anti-Subordination Model?*

New Jersey has been noted as a model for other states for the quality of its "Abbott V" pre-kindergarten programs and preschool expansion districts and for a funding formula that drives resources to the neediest districts.¹⁷⁹ The *Abbott V* programs are full-day, high quality, targeted pre-kindergarten programs, funded in a manner consistent with thorough cost assessments and in partnership with both schools and community providers. The state per pupil expenditure for pre-kindergarten in New Jersey was \$12,070 in 2012-13 with no local funding match required.¹⁸⁰ By comparison, New York's state spending per pre-kindergarten child enrolled in 2012 was \$3,609.¹⁸¹ While New Jersey does not provide universal pre-kindergarten, it is unique in that pre-kindergarten is mandated by the State Supreme Court for urban districts determined to be "high need" as a result of a series of state constitutional education finance cases dating back to the 1970s.¹⁸² New Jersey provides an example of high quality, well-funded, pre-kindergarten targeted to high needs children. Its history also exemplifies the significant difficulty in moving state government leaders and policymakers to support a high-quality, resource intensive program, particularly when targeted to high need districts, even with a court order.

New Jersey's state constitution states that the "Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools

¹⁷⁹ See generally Barnett et al., *supra* note 64, at 94-98.

¹⁸⁰ *Id.* at 95.

¹⁸¹ *Id.* at 102.

¹⁸² See *Abbott v. Burke*, 960 A.2d 360, 362-63 (N.J. 2008).

for the instruction of all children in the state between the ages of five and eighteen years.”¹⁸³ Based on a history of housing¹⁸⁴ and school segregation that resulted in stark inequities in urban versus suburban schools across the state, New Jersey has undergone more than thirty years of litigation in which the state’s highest court has sought to enforce constitutionally-required improvements in the state’s urban school districts. The court battles began in 1970 with *Robinson v. Cahill*,¹⁸⁵ a lawsuit brought on behalf of New Jersey’s urban schoolchildren, charging that the state’s school funding system discriminates against poorer districts by creating unconstitutional disparities in the quality of education for those students. In 1973, the New Jersey Supreme Court rejected a lower court’s equal protection rulings, but unanimously invalidated New Jersey’s funding scheme on the ground that it violated the constitutional “thorough and efficient system of free public schools” clause by generating disparities in per pupil expenditures across the state.¹⁸⁶ The victory in *Robinson* was met with legislative resistance, such that resistance continued even after Governor Brendan Byrne proposed a new funding formula.¹⁸⁷ Further court intervention was required to get the legislature to enact the Public School Education Act of 1975 (known as Chapter 212). Following Chapter 212’s enactment, the legislature failed to appropriate the funds needed for the law to go into effect, pushing the Court to shut down the schools for eight days in the summer of 1976 to get the legislature to put in place the state income tax needed to fund Chapter 212.¹⁸⁸

Even after the enactment of Chapter 212, disparities in funding of poorer urban versus wealthy suburban districts persisted. This prompted another lawsuit, *Abbott by Abbott v. Burke*,¹⁸⁹ to be filed in 1981, charging that Chapter 212 was inadequate to assure a thorough and efficient system of public schools.¹⁹⁰ The *Abbott* case carried on for more than sixteen years. During the course of the case, an administrative law judge ruled that New Jersey’s funding formula unconstitutionally discriminated against poor districts.¹⁹¹ The state Supreme Court, adopting that

¹⁸³ N.J. CONST. art. VIII, § 4.

¹⁸⁴ See, e.g., BARRY A. GOLD, STILL SEPARATE AND UNEQUAL: SEGREGATION AND THE FUTURE OF URBAN SCHOOL REFORM 11-14 (Teachers Coll. Press 2007) (describing the socioeconomic impacts of urban and suburban residential patterns in New Jersey and the *Mt. Laurel* fair housing case, which sought but ultimately failed to improve disparities in housing that then affected school funding via a property tax-based formula).

¹⁸⁵ 287 A.2d 187 (N.J. Super. Ct. Law Div. 1972), *modified & aff’d*, *Robinson v. Cahill* (Robinson I), 303 A.2d 273 (N.J. 1973).

¹⁸⁶ *Robinson I*, 303 A.2d at 273.

¹⁸⁷ See Craig A. Ollenschleger, *Another Failing Grade: New Jersey Repeats School Funding Reform*, 25 SETON HALL L. REV. 1074, 1077-78 (1995).

¹⁸⁸ See Richard D. Ballot, *State Constitutional Law – Public School Financing – Spending Disparity Between Wealthy School Districts and Poor Urban School Districts, Caused by Reliance on Local Property Taxes, is Violative of the “Thorough and Efficient Education” Clause – Abbott by Abbott v. Burke*, 119 N.J. 287, 575 A.2d 359 (1990), 21 SETON HALL L. REV. 445, 446-49 (1991).

¹⁸⁹ 477 A.2d 1278 (1984).

¹⁹⁰ *Id.* at 1279.

¹⁹¹ *Abbott by Abbott v. Burke* (Abbott V), 710 A.2d 450, 455 (1998).

determination, engaged in a back and forth with the governor and legislature, seeking to remedy various school funding inadequacies.¹⁹² In 1997, the New Jersey Supreme Court in *Abbott IV*, declared the changes to state education funding imposed by Governor Christine Todd Whitman unconstitutional and ordered State officials to increase funding for *Abbott* school districts to achieve parity with suburban schools.¹⁹³ The Court also ordered hearings to determine the supplemental services needed by urban children and facilities needs of the *Abbott* districts.

In 1998, the New Jersey Supreme Court in *Abbott V* ordered groundbreaking entitlements for children in *Abbott* districts. These included “whole school reform”; full-day kindergarten and preschool for all three and four year olds; and a state-funded and managed facilities program to provide adequate and up-to-code space for educational programs in the *Abbott* schools.¹⁹⁴

Thus, although not explicitly required to provide preschool under its constitution, New Jersey is mandated by the state Supreme Court’s *Abbott V* decision to provide preschool to students in the high needs *Abbott* districts.¹⁹⁵ As the Education Law Center noted:

The New Jersey Supreme Court’s 1998 ruling in *Abbott v. Burke* (*Abbott V*) represents the first judicial directive in the nation that public education must include a high quality, well-planned preschool program starting at age three. This unprecedented decision applies to 31 urban school districts, known as the *Abbott* districts, which serve approximately 25 percent of the State’s public school students.¹⁹⁶

In connection with the School Funding Reform Act of 2008, New Jersey expanded pre-kindergarten under two additional programs, the “Non-Abbott Early Childhood Program Aid” (ECPA) for districts where 20 to 40 percent of children qualify for free or reduced price lunch (these districts may contract with Head Start or other private providers to offer services); and the Early Launch to Learning Initiative (ELLI) to provide access to preschool for all of the state’s low income four year olds.¹⁹⁷

New Jersey’s pre-kindergarten program is targeted to the neediest districts and schools, consistent with the court-imposed, state constitutional mandate to eliminate the persistent, structural inequities identified in the *Abbott* cases. At the same time, New Jersey’s pre-kindergarten programs have been characterized as among the most high quality and effective in the country. The focus on quality programs stems from

¹⁹² *Id.* at 455-61 (describing the course of the litigation leading up to the *Abbott V* determination).

¹⁹³ See *Abbott v. Burke* (*Abbott IV*), 693 A.2d 417 (1997).

¹⁹⁴ See ROSE, *supra* note 3, at 125-26.

¹⁹⁵ *Abbott V*, 710 A.2d at 450. The 31 *Abbott* districts receive mandated pre-kindergarten funding through the New Jersey Department of Education for all resident 3- and 4-year-olds. *Id.*

¹⁹⁶ Danielle Farrie & Jenna Weber, *The Abbott Preschool Program: A 10-Year Progress Report*, EDUC. LAW CTR. (Aug. 2010), at 3, available at <http://www.edlawcenter.org/assets/files/pdfs/publications/AbbottPreschoolProgressReport.pdf>.

¹⁹⁷ *Id.* at 1.

the court's prescriptive language in *Abbott V* as amplified in state law and regulations.¹⁹⁸ The *Abbott V* requirements are similar to those in New York's UPK law and consistent with the approach recommended by advocates.¹⁹⁹ There is an argument that New Jersey's pre-kindergarten programs are of such high quality because of the constitutional mandate. There is another argument that targeted, high quality programs advance equity more readily than universal programs.

B. Targeted Versus Universal Pre-K

The success of New Jersey's *Abbott V* pre-kindergarten program highlights the question of whether for purposes of equity, a targeted approach to pre-kindergarten might better achieve the most oft-stated goal of closing the achievement gap through access to pre-kindergarten for the neediest children.²⁰⁰ A targeted approach to pre-kindergarten may more effectively reach children most in need and who stand most to benefit from pre-kindergarten. However, such an approach would have to be broad enough to include all eligible children. To do so would require funding adequate to establish and maintain high quality programs, and an outreach process that seeks to include all eligible children. As a practical matter, this requires both a strong mandate and robust and sustained fiscal (and thus political) support.

New York's pre-kindergarten program includes both targeted and voluntary universal programs for those districts that elect to provide them. Over many years since its inception, the targeted program failed to grow beyond its initial eligibility cohorts. Conventional wisdom and recent experience demonstrate that universal public preschool programs tend to gain more public and fiscal support than early childhood targeted to the low income children and families.²⁰¹ If, however, universal pre-kindergarten programs follow education resource distribution patterns, they may fail to reach many children in segregated, under-resourced environments. In addition, New York's universal approach has met political and fiscal obstacles that raise concerns about the ability to make real strides in achieving universal pre-kindergarten goals. Thus, it may be that the better approach from the standpoints of equity and fiscal prudence is to seek stronger support for targeted pre-kindergarten programs. On the other hand, New York's demonstrated inability to expand targeted pre-kindergarten, or to gain and maintain political and fiscal support, demonstrates the risk of having a marginalized program of very limited impact.

The most obvious and persistent obstacle to accessible, high quality pre-kindergarten in New York has been the inability to obtain full and sustained funding for either targeted or universal pre-kindergarten. As noted above, New York's universal pre-kindergarten efforts differ from those in places like Georgia, where the plan included a dedicated funding stream sufficient to support quality programs over time. Dedicated, sustained funding allowed school districts to build capacity in pre-

¹⁹⁸ N.J. ADMIN. CODE 6A:10-2.3 (2014).

¹⁹⁹ See Rachel Schumacher et al., *Making Pre-K Work for Low-Income Families*, CTR. FOR LAW & SOC. POL'Y (June 2007), at 10-11, available at <http://files.eric.ed.gov/fulltext/ED537496.pdf>.

²⁰⁰ See CAMPAIGN FOR FISCAL EQUITY PROJECT & THE ALLIANCE FOR QUALITY EDUC., *A Tale of Two States: Equity Outperforms Inequity* (Jan. 11, 2014), at 9, available at <http://www.edlawcenter.org/assets/files/pdfs/Newsblasts/Tale%20of%20Two%20States.pdf>.

²⁰¹ See, e.g., ROSE, *supra* note 3, at 131.

kindergarten and strengthen programs over time. In New York, the goal of universal pre-kindergarten has been thwarted regularly by ongoing budget shortfalls that even strong popular support has not overcome. This is why Mayor de Blasio's dedicated tax proposal was an important component of his pre-kindergarten vision for New York City.²⁰²

While New Jersey's targeted approach arguably has achieved greater equity, the battles to ensure funding for full implementation of its targeted program were years in the making and continue through today. In the long run, New Jersey's targeted approach appears to have made greater strides in achieving equitable access to high quality pre-kindergarten. That success may have to do as much with how New Jersey's funding formula distributes resources to high need schools as with the targeted nature of its programs.²⁰³ New Jersey's targeted programs and progressive funding may in turn depend on *Abbot V's* constitutional mandate.

C. Constitutional Versus Statutory Mandate

The contrast between New Jersey and New York pre-kindergarten programs raises questions about whether a constitutionally-based equity and/or adequacy mandate provides measurably stronger support toward achieving high quality pre-kindergarten for children of color isolated in educational deserts of extreme race and class segregation.²⁰⁴ A few states, in addition to New Jersey, have considered the question of a constitutional right to preschool as part of state constitutional requirement of educational equity or adequacy. However, none has yet recognized such a right to preschool.²⁰⁵ The support of a constitutional mandate would provide a stronger legal basis to ensure that, whether targeted or universal, quality preschool programs would reach children in under-resourced schools harmed by double segregation.

New York's pre-kindergarten programs emerged out of the political process rather than by constitutional mandate. To be sure, a constitutional mandate would place pre-kindergarten on firmer footing. However, the practical impact of a constitutional mandate depends to a great degree on the interpretation of the scope and language of the state constitution's education article. Some New York advocates are exploring this approach as a next step in seeking to achieve greater equity. Unlike New Jersey's *Abbott* decision, New York's constitutional education finance decision does not extend to pre-school.²⁰⁶ Some argue that it should. Interpretations of the New York State Constitution's education article requiring that the State provide students a "sound basic education" seem grounded more in adequacy than in equity.

²⁰² See discussion *supra* notes 161-164 and accompanying text.

²⁰³ See CAMPAIGN FOR FISCAL EQUITY PROJECT & THE ALLIANCE FOR QUALITY EDUC., *A Tale of Two States: Equity Outperforms Inequity* (Feb. 11, 2014), at 4, available at http://www.educationjustice.org/newsletters/ej_newsblast_140321_Tale-of-Two-States.pdf.

²⁰⁴ See Michael Rebell, *The Right to Comprehensive Educational Opportunity*, 47 HARV. C. R.-C.L. L. REV. 47 (2012).

²⁰⁵ As James Ryan has noted "[t]he supreme courts of Massachusetts, North Carolina, and Arkansas declined to recognize a right to preschool, all overturning trial court decisions that had done so. Ryan, *supra* note 46, at 52.

²⁰⁶ See *Campaign for Fiscal Equity, Inc. v. New York*, 861 N.E.2d 50 (N.Y. 2006).

However, some observers posit that the “growing understanding of the critical importance of pre-kindergarten to educational opportunity and school success” that led New Jersey to recognize a right to pre-kindergarten could and should apply for purposes of adequacy and equity under New York’s constitution as well.²⁰⁷ They would argue that systemic pre-kindergarten funding shortfalls combined with access obstacles related to extreme race and class segregation have operated to deny this component of a sound basic education to low-income students of color across New York City and State. This could form the basis for recognition of pre-kindergarten as necessary to a sound basic education and a mandate that New York State fund it. A constitutional mandate would provide a stronger basis upon which to target funds to the neediest students and school districts. Ultimately, however, even the achievement of a constitutional mandate, would not relieve advocates of the need to push for adequate, sustained, equitable funding.

D. Sustaining Support and Prioritizing Need in Universal Pre-Kindergarten

Crafting a high quality pre-kindergarten program that will succeed in reaching beyond conditions of extreme segregation to help combat inequality and close opportunity and achievement gaps depends on legal infrastructure and much more. Clear and detailed quality mandates, whether by statute, regulation, or court order are critical. Such program requirements exist in New York’s pre-kindergarten statute and in New Jersey’s court decree and implementing statute and regulations, as well as in various other states’ programs. Yet experience has shown that neither a strong legislative mandate nor even a preferable constitutional mandate alone is sufficient.

Notwithstanding laudable statutory mandates detailing requirements for high quality pre-kindergarten, time and again, regular fiscal support — which translates into political support requiring advocacy — spells the difference between aspiration and full implementation. This is a problematic reality in an environment of extreme segregation and social inequality. It is especially troubling against the backdrop of virtually empty equal protection jurisprudence and the limited remedies afforded under New York’s constitutional adequacy mandate for public education. As a result, much of the success of universal pre-kindergarten in reaching the neediest children depends on political and public support. That is why finding a balance between the equity goals that drive targeted programs and the political benefits of universal programs is important. Gaining and sustaining strong political leadership support also is crucial.

Currently, New York City is fortunate to have a mayor and chancellor committed to addressing inequality and to making universal pre-kindergarten an important part of that goal. Their ability to establish and sustain quality universal pre-kindergarten that serves children most harmed by extreme race and income segregation depends on uncertain budgetary and political factors. The support of a constitutional mandate that includes pre-kindergarten will be helpful but not sufficient. Legal mandates, whether statutory or constitutional, must be accompanied by solid fiscal commitments to provide adequate resources that are distributed equitably if there is to be a hope that the current pre-kindergarten project will scale the barriers imposed by extreme race and income segregation and offer a foundational rung on the ladder of educational opportunity.

²⁰⁷ See Rebell, *supra* note 125, at 8.

VI. CONCLUSION

Whether universal pre-kindergarten can overcome extreme race and income segregation to reach low-income children of color depends on legal infrastructure and sufficient, equitable, and sustained fiscal commitment. This is because equal protection jurisprudence has replaced *Brown v. Board of Education*'s anti-subordination ethos with a formal anti-classification rubric that treats even voluntary integration efforts as suspect. New York's constitutional requirement of a "sound basic education" requires consistent fiscal implementation. Fiscal and statutory support for public education depends on political will. Experience in New York and New Jersey has shown that, while legal structures supporting high quality pre-kindergarten are vitally important, there are limits to what the law alone can provide. Separate and unequal access to public schools and public resources negatively impacts low-income Black and Latino students' access to quality education, including quality pre-kindergarten programs. This is because racial and class segregation track income and wealth inequality, which in turn impact political influence. In a climate of diminished federal equal protection remedies, and with limited state constitutional tools, strong legislative and regulatory structures, along with political support to ensure sustained and equitable funding, are needed.

New York City's current emphatic public commitment to equitable, high quality universal pre-kindergarten is a positive development. The failure to win dedicated funding support for the program through a modest tax on wealthy New Yorkers cautions that, even with strong mayoral and public support, absent continued advocacy, universal pre-kindergarten that reaches all eligible children, including those most harmed by extreme segregation, may remain an elusive goal.