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**Building a Sustained School
Facilities Remedy:
Arizona's Innovative
Blueprint for Capital
Funding**

Molly A. Hunter

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We shape our buildings, and afterward our buildings shape us.

--Winston Churchill

For over ten years, the State of Arizona has implemented an innovative statewide process for financing and building school facilities and purchasing other capital items for its schools. Spawned by an education quality lawsuit, the 1998 Students FIRST Act established the School Facilities Board, which succeeded in helping rural, suburban, and urban communities build and improve their school buildings. This was no small task because Arizona has been one of the fastest growing states in the nation during these years. In a state whose population increased from 5.1 to 6.5 million people from 2000 to 2008,¹ the growing number of school-aged children fueled construction at the average rate of 35 new schools every year.²

During the same period, in order to serve *all* students well, Arizona's existing school buildings needed to be maintained and some required major renovation or full-scale replacement to meet the state's higher minimum facilities requirements. Moving away from a dysfunctional financing arrangement that caused enormous disparities among school districts, depending on relative wealth, the new approach has corrected thousands of building deficiencies and renovated or replaced dilapidated schools. This Students FIRST success in identifying and correcting deficiencies warrants imitation by other states and education cost study experts, not only for school facilities but also for the parallel deficiencies that develop in underfunded school operations. The great progress in Arizona is compromised somewhat by under-funding for existing facilities, and other imperfections in the law's implementation are manifest.

Despite remarkable improvement and success, overall, the political branches have not held themselves fully accountable. They have, at times, taken steps to assess results and needs during

¹ U.S. Census Bureau, State and County QuickFacts. Data derived from Population Estimates, Census of Population and Housing, (February 23, 2010). For 2000-08, Arizona was the second fastest growing state, edged out by first-ranked Nevada.

² School Facilities Board, Five-Year Strategic Plan (October 1, 2005) [hereinafter Five-Year Plan], www.azsfb.gov/sfb/General%20SFB/FY06-11%20Strategic%20Plan.pdf.

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implementation and authorized effective responses, such as significant training to cure and prevent maintenance ills. However, they have not yet appropriated full funding for “building renewal,” and school districts filed compliance proceedings to regain this commitment. Pivotal adjustments that could enhance and sustain the success of the state’s facilities program also await legislative action.

This article briefly recounts the education quality litigation and remedy that led to a novel standards-based school facilities boon in Arizona. It documents the subsequent years of implementation, including standards setting, financing, assessment, deficiency corrections, and related initiatives. Weaknesses that have emerged in the remedy -- primarily underfunding -- are also summarized.

Finally, this article considers the success of the Arizona education quality litigation and its remedy by applying the “successful-remedies model” postulated by Michael A. Rebell in his book, *Courts and Kids: Pursuing Educational Equity Through the State Courts*.³ Using this framework facilitates analysis of the Arizona experience as to the role of the courts and examination of the impact of the state’s changes to facilities financing and decision making on standards, funding, accountability, public involvement, and student performance.

³ MICHAEL A. REBELL, *COURTS AND KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS* (Chicago: University of Chicago Press, 2009) at 57-84 (explaining the successful-remedies model) [hereinafter *COURTS AND KIDS*].

THE ROOSEVELT LITIGATION

In 1991, the Roosevelt Elementary School District was the first named of seven plaintiffs who represented the interests of over 40 low-wealth or heavily taxed districts when they filed a lawsuit against the State of Arizona.⁴ The *Roosevelt* case challenged the state’s scheme for funding school facilities and other capital items. Capital funding in Arizona was a separate system from operational funding for schools and was funded largely through local property tax revenues.⁵ Under that system, leaders in low-wealth districts had felt powerless as they watched their facilities deteriorate over the years without a sufficient tax base to generate needed funds for building maintenance and renewal and for new buildings to accommodate growth.⁶ They sought relief from the state courts.

There was no trial. The *Roosevelt* plaintiffs gathered extensive evidence of leaking roofs, lack of equipment, overcrowding, and other facilities problems and submitted “voluminous exhibits” to the court in support of a motion for summary judgment.⁷ They also contrasted the status of their facilities with those in more affluent districts to substantiate their claim that the state’s capital funding system violated the “general and uniform” clause of the state constitution’s education article.⁸

The trial court denied plaintiffs’ summary judgment motion, but on appeal the Arizona Supreme Court reversed. After distilling “fundamental principles” from school funding cases decided in other states, the supreme court, in its 1994 decision, defined the general and uniform

⁴ *Roosevelt Elementary Sch. Dist. No. 66 et al. v. Bishop*, 877 P.2d 806 (Ariz. 1994).

⁵ *Roosevelt*, 877 P.2d at 808-11.

⁶ Telephone interview with Timothy M. Hogan, executive director, Arizona Center for Law in the Public Interest (Nov. 18, 1998, and July 19, 1999).

⁷ Defendant’s Response to Plaintiffs’ Motion for Summary Judgment, *Roosevelt v. Bishop*, No. CV91-13087 (Superior Court for Maricopa County, June 12, 1992) at 2.

⁸ Telephone interview with Timothy M. Hogan (Nov. 18, 1998, and July 19, 1999). The general and uniform clause of the Arizona Constitution, art. XI § 1 states: “The Legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system, which system shall include kindergarten schools, common schools, high schools, normal schools, industrial schools, and a university”

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clause, explaining that it requires the state to adopt capital funding “mechanisms that provide sufficient funds to educate children on substantially equal terms” and to avoid a financing system that “itself creates gross disparities”⁹ Chief Justice Stanley Feldman concurred in the court’s holding that “the present state financing system for capital facilities violates Ariz. Const. art. 11 § 1,” the general and uniform clause.¹⁰

The Chief Justice further illuminated the way forward by tying this constitutional provision to the state’s student competency standards:

[W]hen the state itself sets minimum, basic standards for educational curricula and attainment -- as it does in Arizona -- the general and uniform clause requires that the state provide a financing scheme that will enable each district in the state to acquire the facilities and equipment necessary to achieve those standards . . . the system cannot claim uniformity if the legislature’s financing scheme results in such great disparity in facilities and equipment that many children are denied the opportunity to obtain the basic education that the state itself requires.¹¹

Over the next four years, a colloquy on capital funding developed between Arizona’s governors and legislative leaders, on the one hand, and members of its courts, on the other. Initially, legislators were slow to respond to the court order. After a year of inaction, the State Superintendent of Public Instruction called an “education finance summit” to jumpstart the process. The summit attracted 14 legislators, over 20 educators, and numerous business leaders, tax experts, and parents for a three-day process that included review and discussion of position papers from participating organizations that offered solutions. Not surprisingly, the ideas examined at the summit included the measures

⁹ Roosevelt, 877 P.2d at 814.

¹⁰ Roosevelt, 877 P.2d at 819-23 (Feldman, C.J., specially concurring).

¹¹ Roosevelt, 877 P.2d at 819-20. In this regard, the Chief Justice was contributing to the growing tradition of state courts using state student learning standards in their school funding adequacy rulings. See, e.g., *Claremont School District v. Governor*, 703 A.2d 1353, 1357 (N.H. 1997) (“[T]he record demonstrates that a number of plaintiff communities are [financially] unable to meet existing standards despite assessing disproportionate and unreasonable taxes”); *Montoy v. Kansas*, 102 P.3d 1160, 1164 (Kan. 2005) (holding that funding was constitutionally inadequate based partially upon a study finding funding levels insufficient for schools to meet state standards); *Helena Elementary Sch. Dist. No. 1 v. Montana*, 769 P.2d 684, 690, 692 (Mont. 1989) (finding that the current funding failed to meet even state standards, which fall short of the constitutional minimum).

finally enacted three years later.¹²

The summit also garnered important media coverage but did not spur a broader public engagement process. At least one Arizona leader attributed limited public involvement to the state's relatively transient population. Its rapid growth actually resulted from enormous in-migration partially offset by large out-migration.¹³

After the summit, an iterative process propelled decision-making forward as the legislature enacted remedial statutes that the *Roosevelt* plaintiffs challenged in court. The courts found these attempted remedies insufficient and sent the problem back to the legislature. Also, in the course of these proceedings, a lower court judge set a deadline for the summer of 1998, and the state supreme court affirmed.¹⁴ Importantly, when the issue again reached the high court in 1997, it clearly articulated the constitutional requirements of (1) adequate facilities to “enable students to master the [state’s] educational goals” – and (2) a finance system that “must not itself cause substantial disparities between districts.” Moreover, the court wrote that the state had to establish “facility standards and provide funding to ensure that no district falls below them.”¹⁵

The Planets Were Aligned

In light of the court's unequivocal order and deadline, a new governor, Jane Dee Hull, a new speaker of the Arizona House of Representatives, Jeff Groscost, and a newly energized senate majority leader, Marc Spitzer, as well as the state superintendent, Lisa Graham, all Republicans, worked together to forge a pioneering new finance system. At this point, the planets were aligned. The governor's desire to solve the constitutional violation and move beyond it overlapped with the other leaders' goals. The superintendent felt the need for increased funding for education, generally,

¹² Arizona Department of Education, Education Finance Summit (June 1995); editorial, *Look at School Summit as an Opportunity*, PHOENIX GAZETTE June 10, 1995, at B4. For a fuller description of the summit, see Molly A. Hunter, *Building on Judicial Intervention: The Redesign of School Facilities Funding in Arizona*, 34 J. LAW & EDUC. 173, 182-84 (2005).

¹³ Telephone interview with Elaine McLean, executive director League of Women Voters of Arizona (Jan. 25, 2000). From 1995-2000, 112.9 out of every 1,000 people moved out of the state, while 187.2 moved into the state. In comparison, nationally, 86.7 of every 1,000 people moved from one state to another. U.S. Census Bureau, *Domestic Migration Across Regions, Divisions, and States: 1995-2000* 3 (2003).

¹⁴ *Hull v. Albrecht*, 950 P.2d 1141, 1141-46 (Ariz. 1997); *Hull v. Albrecht*, 960 P.2d 634, 636-40 (Ariz. 1998).

¹⁵ *Hull v. Albrecht*, 950 P.2d at 1144-46.

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and the speaker recognized the situation as an opportunity to shift funding for facilities away from local property taxes and onto the state, where revenues were based largely on sales taxes.¹⁶

This convergence of interests, in the crucible of the court's unyielding position, gave birth to the Students FIRST (Fair and Immediate Resources for Students Today) statute. Although the initial version contained an opt-out provision that the court rejected because it would have continued to "cause" disparities, a revised bill deleted the opt-out and passed within weeks.¹⁷ No other state has so dramatically leaped from primarily local revenue to almost entirely state-based capital funding. Of course, the court did not require this particular approach. Nonetheless, creative problem solving, under strong pressure from the court, led to a radically altered capital finance system. Some criticized it as providing too little funding while others claimed it offered too much and would bankrupt the state.¹⁸

¹⁶ Telephone interview with Jeff Groscoast, former speaker of the Arizona House of Representatives (May 14, 2002); telephone interview with Timothy M. Hogan (Nov. 18, 1998 and July 19, 1999); telephone interview with Jaime A. Molera, Governor Hull's policy advisor for legislative affairs and education and, formerly, director of policy and federal relations at the Arizona Department of Education. (May 15 and 16, 2000).

¹⁷ *Hull v. Albrecht*, 960 P.2d at 636-40; *Hull v. Albrecht*, Supreme Court No. CV-98-0238-SA, Sup. Ct. Order of July 20, 1998.

¹⁸ Lynn Schnaiberg, *Arizona Ponders Making School Bond Issues History*, EDUC. WEEK, Mar. 25, 1998; Editorial, *Schools in Need, Governor Grabs Momentum*, ARIZ. REPUBLIC, Apr. 23, 1998.

LAYING THE CORNERSTONES: STANDARDS AND FUNDING

Students FIRST, itself, contained two basic building blocks for school facilities: mandatory square feet per pupil and cost per square foot, the latter to be adjusted annually using a construction market index. The law’s design of the School Facilities Board included strict conflict of interest exclusions and, for each of its nine voting members, specific technical facilities know-how or relevant educational expertise, including one school architect, one school engineer, and one school board member with finance experience.¹⁹ Political cronyism seems to have been minimized.

Importantly, the statute required the Board to develop extensive standards to be applied to all schools across the state, and to do so in accordance with the court’s directive that school buildings and equipment offer students the opportunity to achieve the state’s competency standards, that is, to succeed academically. The statute specified formulation of “adequacy guidelines” for school sites, classrooms, libraries, technology, transportation, and several other elements.²⁰ The Board was required to consider the facilities and equipment of schools with the “highest academic productivity scores,” and the Board, ultimately, adopted guidelines to ensure that no aspects of the physical plant of the schools would hinder students in their progress toward reaching the state’s learning goals. The standards were adopted in September 1999 and have been amended twice to add guidelines for energy efficiency, media center equipment and to update technology guidelines.²¹

The Students FIRST statute also requires the Board to inspect all buildings once every five

¹⁹ Ariz. Rev. Stat. Ann. § 15-2001 (1998). The other six voting members are a: demographer; school construction expert; private citizen representing a taxpayer organization; classroom teacher; person with public school facilities management experience; and owner or officer of a private business. The state superintendent is the tenth (and only nonvoting) member. In sharp contrast is the Schools Construction Corporation (SCC) set up in 2002 by the governor of New Jersey, where an audit less than three years later generated charges of fraud and brought work on many facilities projects in the state’s low-wealth communities to a halt, Arizona’s Board seems to have run effectively and efficiently. Compare NJ Exec. Order #24, July 29, 2002, Office of Inspector General, New Jersey Schools Construction Corporation 4 (Apr. 21, 2005) with Office of Auditor General: A Performance Audit and Sunset Review of the Arizona School Facilities Board, Rep. No. 07-06 (August 2007) [hereinafter OAG Review], www.auditorgen.state.az.us/Reports/State_Agencies/Agencies/School_Facilities_Board/Performance/07-06/07-06Report.pdf.

²⁰ Ariz. Rev. Stat. Ann. §§ 15-2002, 2011 (1998). The statute required guidelines on facilities for science, the arts, and physical education, among others.

²¹ Ariz. Rev. Stat. Ann. §§ 15-2002, 2011 (1998); Arizona School Facilities Board Rules & Policies §§ R7-6-221-250, filed Jan. 13, 2000 (Supp. 00-1), as amended; OAG Review, *supra* note 20, at 2.

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years and made the Board responsible for issuing bonds and administering three separate funds, through which it is responsible for disbursing hundreds of millions of dollars annually: Deficiencies Correction Fund; Building Renewal Fund; and New School Facilities Fund.²²

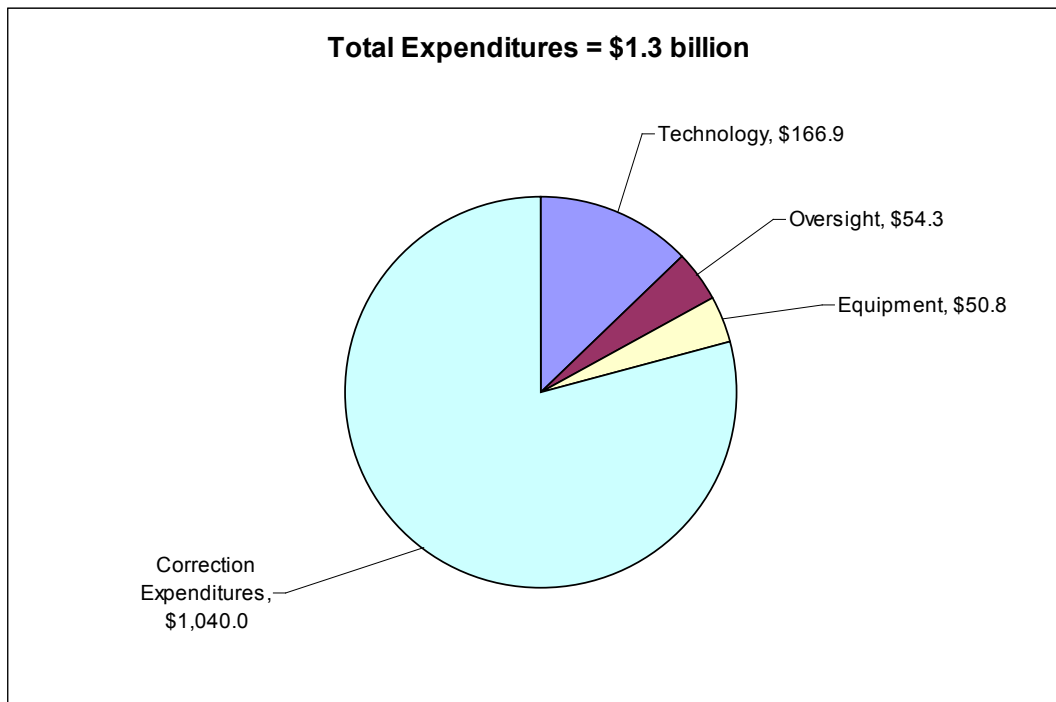
Deficiencies Correction

The Deficiencies Correction Fund expended \$1.3 billion on 9,002 projects to remedy problems identified in Arizona's 1,200 schools and 1,400 school sites. Most of these funds, about \$1.1 billion, came from Board-issued bonds. Deficiencies were, by statutory definition, any condition that did not meet the standards, that is, the adequacy guidelines. Board staff and a contractor compared all school facilities in the state with the guidelines and identified square footage shortfalls and many quality deficiencies, including, lighting, air quality, and technology.²³

²² Ariz. Rev. Stat. Ann. § 15-2002 (1998).

²³ Pat Flannery, *Suit Triggered Gigantic Spending, All Schools Will Meet Standards*, ARIZ. REPUBLIC, Apr. 29, 2001, at 12A; OAG Review, *supra* note 20, at 3; Ed Boot, interim executive director, Newsletter to School Superintendents (Apr. 15, 2003) (on file with author).

Figure 1. Expenditures of Deficiencies Correction Fund Monies as of April 10, 2007 (in Millions)



Source: OAG Review, *supra* note 20 at 3.

The assessment of all school facilities revealed unanticipated problems caused by the failure to perform routine maintenance. Visiting buildings experts found sizable trees growing on roofs and heating and air conditioning systems damaged so badly they had to be replaced because low-cost filters had not been changed. Some 70% of identified deficiencies resulted from this type of neglect. Ultimately, the Board adopted Preventative Maintenance Guidelines and training to improve the knowledge and skills of local personnel, and the Board is now responsible for monitoring compliance with these guidelines.²⁴

The most dramatic effects of the deficiencies correction effort were realized in Arizona’s 417 rural and remote schools, where many buildings had to undergo major renovation or outright replacement. For some schools, assessments found replacement would cost less than renovation. The new schools are often the center of their communities and people feel they have seen “dreams come true.”²⁵

²⁴ Ariz. Rev. Stat. §§ 15-2002, 15-2031 (1998); Philip Geiger, executive director, Arizona Schools Facilities Board, presentation at Education Priorities Panel, New York, April 2002.

²⁵ Boot, *supra* note 24; Geiger, *supra* note 25; telephone interview with Christopher Thomas, Legal Counsel to the Arizona School Boards Association (June 13, 2003).

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The original statutory deadline for correction of all deficiencies was June 2003, which was extended to June 2006. As of June 2007, only one school district was still finishing its deficiency projects. The Board's identification of deficiencies and funding of corrections was a one-time process and has now ended.²⁶

Building Renewal

The Building Renewal Fund provides school districts with monies to help them maintain the quality of existing school facilities and extend their useful life.²⁷ However, this fund has generated controversy and been awkwardly implemented. The legislature has fully funded it for only one fiscal year since it began in 1999. The fund's statutory formula would have required the Board to disburse \$1.330 billion for renewal in fiscal years 1999 through 2008, but legislative appropriations were only \$693.2 million, a shortfall of over \$637 million. Studies by a Joint Legislative Study Committee indicate that the formula should be funded in order to avoid higher long-term costs that would likely be caused by delayed renewal projects.²⁸

Preventative maintenance and renewal are simple concepts, widely understood and used. Why is this ordinary process not effectively incorporated into Arizona's state-administered school facilities funding? Plaintiffs raised this and other questions in a compliance case they filed in 2004 to challenge the under-funding of Building Renewal, as both a constitutional and statutory violation. Plaintiffs claimed that the missing renewal funds caused some school buildings to fall below the minimum adequacy standards and caused others to deteriorate toward that status. In 2006, the trial court held that plaintiffs' claim was premature, and in 2009 ruled that the plaintiff

²⁶ Ariz. Rev. Stat. Ann. § 15-2021 (1998); Laws 2005, 7th S.S., Ch. 287, § 7, changed the deadline. An Emergency Deficiencies Correction Fund has been set up and has disbursed \$8.4 million, primarily to replace a school that burned. OAG Review, *supra* note 20, at vi. In the 2006-2007 school year, about \$4.5 million was distributed from this fund. Arizona School Facilities Board, Annual Report: Fiscal Year 2006-2007 (2007), <http://www.azsfb.gov/sfb/General%20SFB/FY2007%20Annual%20Report.pdf>.

²⁷ Ariz. Rev. Stat. Ann. § 15-2031 (1998).

²⁸ OAG Review, *supra* note 20, at iii.

school districts must first apply for emergency funding.²⁹

In the meantime, the legislature has passed bills to modify the formula, but the governor has vetoed them, “citing concerns from [the] pending lawsuit.”³⁰ And, in June 2007, the legislature formed a task force to study and make recommendations to change the formula. The same formula was found to provide appropriate support for state building renewals for other state agencies, such as the Board of Regents and the Department of Transportation. Furthermore, the Office of the Auditor General’s Review recommends changes to the formula and improved Board oversight of how school districts are spending the building renewal revenues they receive.³¹

Table 1. Building Renewal Funding

Fiscal Year	Formula Amount in Millions	Appropriated Amount in Millions	Shortfall In Millions
1999	\$103.7	\$75.0	\$28.7
2000	108.4	82.5	25.9
2001	122.7	122.7	0
2002	132.0	62.1	69.9
2003	128.3	38.3	90.0
2004 ³¹	118.4	0	118.4
2005	134.9	70.0	64.9
2006	130.1	70.0	60.1
2007	161.5	86.3	75.2
2008 ³²	190.2	86.3	103.9
Total	\$1,330.2	\$693.2	\$637.0

Source: OAG Review, *supra* note 20, at 25; Five-Year Plan, *supra* note 3, at 10.

New Construction

The New School Facilities Fund provides school districts with monies to purchase land and

²⁹ Roosevelt Elem. Sch. Dist. #66 v. Hull, CV 1999-019062 (Maricopa County Superior Court 2006). Roosevelt Elem. Sch. Dist. #66 v. Hull, CV 1999-019062 (Maricopa County Superior Court 2009).

³⁰ OAG Review, *supra* note 20, at 25.

³¹ *Id.* at iii-v.

³² Laws 2002, Ch. 330, section 6 (HB 2710) suspended the building renewal formula for fiscal year 2004. The legislature noted that it intended the Deficiencies Correction program to provide the necessary funds for building renewal that year. Five-Year Plan, *supra* note 3, at 11.

³³ 2008 data was not included in the Five Year Plan, but was derived from a report issued by the School Facilities Board. Arizona School Facilities Board, FY 2008 Building Renewal Distribution (2007), www.sfb.state.az.us/sfb/Building%20Renewal/FY%202008%20Distribution.pdf.

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build new facilities, or add space to existing buildings, to accommodate enrollment growth. The Board employs a demographer to assess projected growth and applies statutorily prescribed square feet per student and funding per square foot. In 2000-2001, its first fiscal year of actually allocating funds for new construction, the Board disbursed \$226 million to school districts for 30 projects to build 2.1 million square feet of school buildings.³⁴

As of May 2008, the Board had awarded new school facilities projects worth about \$2.94 billion, while it had actually disbursed \$1.96 billion in “progress payments” for these projects, including over \$300 million in the 2007 fiscal year. Interestingly, appropriations from the state’s General Fund and lease-to-own agreements have provided most of these funds.³⁵ However, inflation in construction costs has undermined the sufficiency of the funding being provided by the Board, which has tried to address these shortfalls through “supplementary funds.” Also, as the state studies its school building needs for the future, bonded indebtedness may become the favored source for new school construction.³⁶

Table 2. School Facilities Board New Construction Awards ³⁷

Fiscal Year	Number of Projects	Sq. Footage in Millions	Funding Dollars in Millions
1999	20	2.7	95.0
2000	48	2.9	269.6
2001	32	2.5	304.6
2002	40	2.2	263.3
2003	32	2.4	242.2
2004	39	2.1	259.4
2005	25	2.7	245.3
2006	30	2.8	349.8
2007	32	1.0	404.9
2008	12	1.0	159.3
Total 1999-2008	310	22.4	\$2,593.4

Source: Arizona School Facilities Board, *New Construction Approvals to Date (2008)*, www.sfb.state.az.us/sfb/new%20construction/NC%20approvals%20to%20date.xls

³⁴ Ariz. Rev. Stat. Ann. § 15-2041 (1998).

³⁵ OAG Review, *supra* note 20, at 4.

³⁶ Building Arizona’s 21st Century Schools: Ensuring Innovative School Facilities for the Digital Age 8, 53-59 (Sept. 2007) [hereinafter 21st Century Schools].

³⁷ The reported values for 2008 are cumulative through only May 12, 2008. The School Facilities Board frequently adjusts past funding year awards at meetings. This causes the disparity between values reported in this source and those for the same funding year in the OAG Review and the Five Year Plan. The most recent values, as reported in the table, represent the most accurate data. Telephone interview with Amber Peterson, school finance specialist, Arizona School Facilities Board (July 15, 2008).

FACILITIES FOR THE 21ST CENTURY

Anticipating the need for a “next generation of schools for the digital age” and the need for small schools and smaller class sizes, Governor Napolitano issued an executive order in January 2007 requiring the School Facilities Board to conduct a study, “in consultation with Arizona school districts” and issue a report with “specific recommendations on how best to

- . . . integrate technology into teaching and learning;
- create personalized instructional environments . . .;
- foster productive relationship building between teachers and students . . .;
- ensure safety . . .; and
- maximize energy and water efficiency.”³⁸

Following additional directives of the order, the Board also analyzed and reported on school size, class size, and the best way to pay for the new schools the state needs.³⁹ Published in September 2007, Building Arizona’s 21st Century Schools, “re-confirmed the fact that the environments within which our students spend their school days do indeed affect the level of their achievement,” and intends to focus public policy discussions on schools that are “equal to the nature and demands of a future fueled by emerging technologies.”⁴⁰

Using a 20-year timeframe, 2007 to 2027, the School Facilities Board anticipates the need to build over 800 new schools, about 40 per year, at a total cost of \$18 billion. This estimate was calculated using projections for: population growth; inflation rates for construction costs; and, the cost of debt, that is, long-term bonds to finance the construction. The Board’s study also advances the position that these new buildings must be capable of offering students a “21st Century education.”⁴¹

Unsurprisingly, the report calls for all new schools to incorporate technological advances,

³⁸ Executive Order No. 2007-06, Janet Napolitano, governor of Arizona; Arizona School Facilities Board, Building Arizona’s 21st Century Schools: Ensuring Innovative School Facilities for the Digital Age (Sept. 2007) [hereinafter 21st Century Schools].

³⁹ Executive Order No. 2007-06; 21st Century Schools, *supra* note 39.

⁴⁰ Preamble to 21st Century Schools, *supra* note 39.

⁴¹ *Id.* at 24, 53, 65-66.

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such as wireless internet access. At the same time, most of the Board's recommendations rely on education research to inform the best design decisions to foster excellence in teaching and learning and "accommodating and enriching the teacher-student connection." Class sizes no larger than 15 in the early grades is a prime example. Moreover, safety and energy and water conservation are central to the report's vision of 21st century schools in Arizona. Finally, although state policy seems to embrace the need for full-day kindergarten, the legislature has backed away from providing the facilities funding to accommodate it.⁴²

The financial implications of the Board's analysis and report are significant and numerous items require legislative authorization. The report's most costly single recommendation appears to be a 32% increase in the "kindergarten—3rd grade school square foot allocation" from 80 square feet per student "to 105.5 square feet per student."⁴³ The report asks the legislature to explore possible dedicated revenue streams, to allow local bonding for modernizing existing schools, and using long-term state debt to fund new school construction.⁴⁴ Now in the midst of its 2010 session, the legislature has not yet enacted any of these recommendations.

In sum, Arizona has successfully implemented a groundbreaking capital finance system, for over ten years, that applies to all public school districts. The state developed school building standards aligned with state academic standards

- evaluated all school buildings to identify deficiencies relative to the standards
- developed training to resolve maintenance problems found during the evaluations
- oversaw correction of all 9,000 deficiencies at a cost of \$1.3 billion
- analyzed and approved 337 new school construction projects
- disbursed \$2.94 billion for new construction
- researched needs and made recommendations for the next 20 years.

While these accomplishments are impressive, certain weaknesses and potential problems have also emerged in the ongoing implementation of Arizona's school facilities process. At this juncture,

⁴² *Id.* at 2-4; Five-Year Plan, *supra* note 3, at 3, 14.

⁴³ 21st Century Schools, *supra* note 39, at 7.

⁴⁴ 21st Century Schools, *supra* note 39, at 8.

legislative policy decisions and actions are still pending to resolve important issues, such as:

- funding of building renewals
- recommendations to enable schools to meet 21st century standards
- need to upgrade adequacy guidelines
- facilities to accommodate full-day kindergarten

ENSURING SUCCESSFUL REMEDIES: INSTITUTIONAL ROLES

How successful have the *Roosevelt* litigation and the Students FIRST/School Facilities Board remedy been? Without exaggeration, there have been dramatic successes, some of them visually obvious in new and renovated schools across the state. The creative, out-of-the-box thinking that led to Students FIRST was itself a success. Although moving governmental functions from local authorities to a state agency for decisions that affect local communities often raises concerns about the loss of local control,⁴⁵ none of the potential backlash or anticipated disruption has surfaced in this major shift of authority in Arizona. The new agency appears to be customer-oriented, with many local customers who have voiced their satisfaction.⁴⁶

This successful remedy to an education quality challenge warrants an in-depth analysis, and applying the “successful-remedies model” fosters an exploration of the degrees of success in the Arizona experience. This model is based in part on comparative institutional perspectives of the three branches of government, concluding that the state courts have important strengths and a critical role in education quality litigations. More specifically, the model calls on state courts to apply the *Castaneda* three-part test in educational quality cases: Is the proposed remedy theoretically sound? Are its provisions “reasonably calculated to implement effectively the . . . theory adopted”? And, finally, after a reasonable passage of time, has it been effective?⁴⁷

Regarding the institutional roles, the Arizona Supreme Court viewed its own responsibilities as letting all citizens know what rights the constitution provides and articulating for the legislature its obligations in honoring those rights. As explained by the Chief Justice in the initial *Roosevelt* decision,

⁴⁵ Lorri Baker, *Districts Demand Action Schools Frustrated by Students FIRST*, ARIZ. REPUBLIC, Oct. 31, 1999, at 1B; Chris Moeser and Robbie Sherwood, *Hull Wants Education Sales Tax Proposal Stuns Lawmakers*, ARIZ. REPUBLIC, Mar. 22, 2000, at 1A.

⁴⁶ See Flannery, *supra* note 24; Chris Moeser, *Timing Vital for Special Session*, ARIZ. REPUBLIC, May 23, 2000, at 1A; Jessica L. Sandham, *Capitol Expenditures*, EDUC. WEEK, June 6, 2001.

⁴⁷ See COURTS AND KIDS, *supra* note 4, at 70-73 (quoting *Castaneda*, 648 F.2d 989, 1009-1010 (5th Cir. 1981)).

This case . . . involves the meaning and application of a state constitutional clause that gives the children of Arizona a fundamental constitutional right to education and that places on the legislature the corresponding obligation to enact laws necessary to establish and maintain a system that will transform that right from dry words on paper to a reality bringing to fruition the progressive views of those who founded this state. . . . Parents, their children, and all citizens need to know what rights the constitution gives our children, and the legislature needs to know the extent of its obligation in effectuating those rights. This court exists primarily for the purpose of resolving such issues.⁴⁸

In the court’s explanation of institutional roles, it is the legislature’s obligation to bring rights “to fruition,” but it is the court’s role to define the extent of that obligation. Indeed, this duty to interpret the constitution for practical application in legislative statutes is a primary reason for the court’s very existence, which accords with one aspect of the successful-remedies model.

Fulfilling these responsibilities on the question of capital financing of education facilities, the court offered a remedial framework for the constitutional violation it found. The court defined the constitutional rights imparted by the general and uniform clause of the education article and stated unambiguously that it is the state’s duty (1) to guarantee that school buildings offer students the opportunity to reach the state’s academic standards and (2) to ensure that no school falls below that level.⁴⁹ An additional and crucial part of the court’s definition, however, was that the funding system itself must not create disparities among schools.⁵⁰

The new law, the court declared, would have to ensure adequate school buildings for all and, only then, could school districts choose to spend extra for facilities enhancements.⁵¹ This is the classic “education adequacy” paradigm, where a floor of adequacy – usually a “high floor” or a

⁴⁸ Roosevelt, at 823 (Feldman, C. J., specially concurring).

⁴⁹ Hull v. Albrecht (Hull II), 960 P.2d 634, 636-37 (Ariz. 1998); Hull v. Albrecht (Hull I), 950 P.2d 1141, 1144-45 (Ariz. 1997).

⁵⁰ Hull II, 960 P.2d 634, 636-37 (Ariz. 1998); *Hull I*, 950 P.2d 1141, 1144-45 (Ariz. 1997).

⁵¹ Hull II, 960 P.2d 634, 637 - 638 (Ariz.1998).

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“high minimum” tied to the level of education demanded in preparation for the information age – is established for all, with school districts permitted to go above and beyond that high minimum, at their own local community’s expense.⁵²

Actually, this quite practical interpretation and definition were not entirely clear in the court’s first plurality decision, which produced three separate opinions – united in finding a constitutional violation but not in delineating a remedy. However, in the course of the colloquy that developed among the branches during responsive legislative actions and court proceedings to assess them, the court spoke more and more with one voice. The court rejected partial remedies and, finally, became satisfied that the Students FIRST Act and its implementation would eliminate the inadequacies and enormous disparities that the prior capital funding approach had caused. The court then closed the case, trusting the executive branch to implement the new law properly and both political branches to be accountable for long-term effectiveness.⁵³

The Arizona court asked and answered the first of *Castaneda*’s three questions, more rigorously even than *Castaneda* itself envisions. In fact, the court’s close analysis of the proposed Students FIRST remedy and its insistence that no opt-out be included, answered, at least in part, the second *Castaneda* question. The court did not settle for a remedy that was merely theoretically sound. Instead, it expected the legislature to enact a statute that established a particularized, statewide system for financing the public schools’ capital needs, including reasonable assurance that it would meet the court’s implementation goals over a period of years.⁵⁴

Students FIRST laid out the blueprint and detailed implementation plan for a state agency with the personnel, processes, and authority to determine when and where school buildings needed to be built, renewed, or their deficiencies corrected and to issue bonds to fund these actions. The statute required the new agency to develop guidelines and procedures applicable to all noncharter

⁵² MICHAEL A. REBELL, *Education Adequacy, Democracy and the Courts*, in *ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL* (Christopher Edley, Timothy Ready & Catherine Snow, eds., National Academy Press, 2002).

⁵³ Roosevelt, *supra* note 5, at 816; *Hull I*, 950 P.2d at 1146 (Moeller, J., dissenting) (arguing that the court should have retained jurisdiction).

⁵⁴ *Hull I*, 950 P.2d at 1145-46.

schools, aligned with the state's learning standards and to approve and oversee all facilities projects.⁵⁵ Far more than a sound theory, the breadth and depth of the *Roosevelt* remedy provided considerable assurance to the court that it was reasonably calculated to implement the court's mandates effectively.

However, the court did not retain jurisdiction to ensure proper implementation, and it did not engage *Castaneda*'s last question -- whether the remedy was effective, as the successful-remedies model urges. It is also the courts' responsibility, the model asserts, to ensure effective implementation of remedies, even if that means retaining jurisdiction for several years, or even decades. Long-term court involvement was essential in the desegregation cases in federal court, but may not be practicable in state court education quality cases, where co-equal state government branches would be the subjects of judicial oversight.⁵⁶

The Arizona Supreme Court did not consider retaining jurisdiction beyond the passage of a constitutionally acceptable education capital finance law. Even when the legislature failed to fund the Building Renewal Fund, spurring effected school districts to file a compliance motion, the court did not require the state to fund its own formula but, instead, sent plaintiffs back to prove that deficiencies had developed.

How has Arizona fared without the *Castaneda*-type follow through from the courts proposed by the successful-remedies model?

⁵⁵ Ariz. Rev. Stat. Ann. § 15-2011 (1998); Ariz. Rev. Stat. Ann. § 15-2031 (1998).

⁵⁶ See Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 Val. U.L. Rev., 473-474 (1996) (arguing that federal courts possess the institutional stature and structural legitimacy to reform rights, but not the law to do it, while state courts possess all of the law, but none of the stature or legitimacy); Michael Heise, *Preliminary Thoughts on the Virtues of Passive Dialogue*, 34 AKRON L. REV. 73, 91-92 (2000) (judicial oversight is more difficult when legislatures possess the power to easily amend the state constitution); See generally James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, (1992).

SUCCESS!

In addition to institutional roles, the successful-remedies model focuses step by step on aspects of successful implementation of education quality remedies: “challenging standards . . . adequate funding levels, effective . . . accountability mechanisms” and, moreover, emphasizes the need to encourage maximum public involvement.⁵⁷ Over ten years later, has Arizona’s remedy been successful and sustained, based on the model’s definition of success?

Challenging Standards

The successful-remedies model looks to the courts, in the first instance, and to a colloquy among the branches of state government, over time, to articulate, develop, and implement challenging academic standards. Examining Arizona’s experience with standards in an education quality litigation remedy reveals an inventive and unique evolution of this principle.

Arizona had student competency (academic) standards⁵⁸ prior to the *Roosevelt* litigation, and those standards proved key to a successful regimen to solve the constitutional violation identified by plaintiffs and declared by the supreme court. The high court accepted and relied on the state’s previously established standards. Then, going to another level, the court prodded the legislature to enact a new capital funding system that extended those standards to school buildings.⁵⁹

Specifically, Students FIRST mandated certain minimal square footage per pupil at the elementary and secondary levels, and required the executive branch, through the School Facilities Board, to develop a set of “adequacy guidelines” for school facilities. Subsequently, and on a timely basis, the Board wrote detailed guidelines to ensure that each building system was sound and functional and the buildings, in essence, were devoid of barriers to students’ opportunities to reach

⁵⁷ COURTS AND KIDS, *supra* note 4, at 57.

⁵⁸ See, e.g., Ariz. Rev. Stat. Ann. 15-203(12) (Supp. 1997); Ariz. Rev. Stat. Ann. § 15-203(15) and § 15-721-22 (Supp. 1993); Ariz. Admin. Code § R7-2-302.03 (1989).

⁵⁹ See discussion *supra* at 4-5.

the learning standards.⁶⁰ The Board stopped short of athletic fields and did not include auditoriums. While debate as to the appropriateness of the facilities guidelines began immediately and continues to date, the principle of tying facilities to academic standards grows stronger as recent research confirms the connection between school buildings and achievement.⁶¹

Furthermore, aligning facilities requirements with competency standards validates the vision and practicality of the standards-based reform movement, which urged states to set ambitious student learning standards and then align all aspects of their educational systems with the standards so that students could reach the learning goals. In fact, many states have tried to align teacher preparation, induction, curriculum, assessments, and other aspects of their educational systems to their learning standards. Rarely, however, have states tried to align their funding or facilities with the standards.⁶² While standards-based reform did not anticipate application of its principle of alignment to school facilities standards and construction, Arizona's reform is wholly fitting with standards-based reform's intent that the entire education enterprise mold and reshape itself to hone in on enabling students to reach the learning goals.⁶³

Although Arizona's facilities guidelines should be updated, this state has succeeded in promulgating acceptable standards and has sustained those standards, with indications that it will continue to do so, in significant compliance with the education article of its constitution.

Adequate Funding and Costing Out Deficiencies

The successful-remedies model views adequate funding in two steps: first, determining costs, and, second, putting in place a finance system that delivers the funding of those costs to all

⁶⁰ Arizona School Facilities Board Rules & Policies §§ R7-6-221-250, filed Jan. 13, 2000 (Supp. 00-1), as amended. "Building systems" include the plumbing, heating, ventilation and air conditioning, electrical, and mechanical systems. *Id.* at § R7-6-265.

⁶¹ See Glen Earthman, *Prioritization of 31 Criteria for School Building Adequacy*, (ACLU Foundation of Maryland), Jan. 5, 2004, www.schoolfunding.info/policy/facilities/ACLUfacilities_report1-04.pdf; Mark Schneider, *Do School Facilities Affect Academic Outcomes?* (Nat'l Clearing House for Educ. Facilities, Washington, D.C.), Nov. 2002, www.edfacilities.org/pubs/outcomes.pdf.

⁶² See Md. Code Ann., Educ. § 5-202; Md. Code Ann., Educ. §§ 5-301 – 5-303; *Abbott v. Burke*, 149 N.J. 145 (N.J. 1997); *Abbott v. Burke*, 153 N.J. 480 (N.J. 1998).

⁶³ See *Where We Stand: Standards Based Assessment and Accountability* (American Federation of Teachers), July 2002 (suggesting that standards are necessary to judge student achievement and that more attention needs to be paid to proper implementation so that students will be able to reach learning goals).

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schools.⁶⁴ The emphasis on cost studies is well placed but not directly applicable to the Arizona capital funding situation examined in this article.

Instead of education cost studies, a parallel process emerged. The detailed assessment of the status of all school buildings to identify deficiencies and the expeditious funding and completion of corrective actions could be said to represent a type of cost study. Similarly, the design of prototype schools for construction of new and replacement buildings and analysis of the related costs constituted another study of essential costs and putting in place a finance system that delivers the funding for them.⁶⁵

Arizona's experience with "deficiency correction" in the capital funding context should be taken as instructive by cost study experts and those enacting remedies for the more common operational funding schemes challenged in most state education quality litigation. States often neglect operational funding of schools in low-income communities for years, even decades, and then ask cost study experts to determine the cost of an "adequate education," as if they are doing so on a blank slate. The deficiencies that have grown in under-funded schools and districts over the years – and the costs to correct them – are generally ignored.⁶⁶

These accumulated deficits should be acknowledged and addressed. Cost studies should calculate how much funding will be necessary to bring under-resourced schools up to adequacy and then, as they do now, estimate the costs of maintaining adequacy. The costs to correct accumulated deficiencies, such as a faculty with a number of under-qualified teachers, schools and districts with large class sizes, and others, are substantial. Using a funding mechanism that parallels Arizona's "deficiencies correction" program, other states designing new remedial finance systems should include correction of these accumulated operational deficiencies. The successful-remedies model would be stronger if it called for future cost studies to include the costs of alleviating accumulated deficits.

⁶⁴ COURTS AND KIDS, *supra* note 4, at 64-65.

⁶⁵ See discussion *supra* at 8-11.

⁶⁶ See, e.g., American Institutes for Research and Management Analysis and Planning, Inc., *New York Adequacy Study: Providing All Children with Full Opportunity to Meet the Regents Learning Standards* (March 2004); Augenblick, Palaich, and Associates Inc., *Costing Out the Resources Needed to Meet Pennsylvania's Public Education Goals* (November 2007).

Students FIRST and the School Facilities Board that it established have disbursed \$1.3 billion to school districts for deficiencies correction, over \$600 million for building renewal, and \$1.96 billion for new construction, with about \$820 million more committed to approved construction projects. Almost all deficiencies were corrected in less than five years, while funding for new construction and renewal are anticipated far into the future. Nonetheless, some school districts have challenged the under funding of building renewal because it has allegedly caused some buildings to fall below the adequacy guidelines already and could do further harm in districts with older facilities.⁶⁷

If the court had retained jurisdiction to ask and answer the third *Castaneda* question, this issue might have been resolved more expeditiously or avoided entirely. The legislature may have been reluctant to move money out of Building Renewal funds if it knew that the court had retained jurisdiction to ensure an effective and full implementation. Even with the same legislative decisions, plaintiffs’ compliance proceedings, which have been ongoing for years, may have been resolved sooner. On the other hand, even with continuing jurisdiction, it is possible that the Arizona Supreme Court would have chosen a similar path in requiring plaintiffs to return to the trial court to prove the harm alleged.

Sustainability is also critical to adequate funding. With the possible exception of the alleged shortage in building renewal funds, the State of Arizona has now sustained its new facilities finance system for more than ten years. Nevertheless, the Arizona legislature faces major decisions that will affect long-term sustainability in the next few years.

Table 3. Per Pupil Expenditures

	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07
Arizona	\$5,964	\$6,282	\$5,991	\$6,184	\$6,515	\$7,338
U.S. average	\$7,734	\$8,044	\$8,310	\$8,701	\$9,154	\$9,683
Arizona Ranking	47	44	49	49	49	49

Source: NCES, *Common Core of Data, State Fiscal Reports (Nov. 1, 2007)*, http://nces.ed.gov/ccd/pub_rev_exp.asp.

Note: Rankings are within the 50 states and do not include Washington, DC. In 2008-09, Arizona’s per pupil expenditures were \$5,932, compared with the national average of \$10,190; Arizona ranked 49th out of 50. (NATIONAL EDUCATION ASSOCIATION, *RANKINGS & ESTIMATES: RANKINGS OF THE STATES 2009 AND ESTIMATES OF SCHOOL STATISTICS 2010 55 (2009)*, www.nea.org/assets/docs/010rankings.pdf).

⁶⁷ See discussions *supra* at 11-12 and 18.

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Interestingly, Arizona is near the bottom of all states with regard to its operational funding of its public schools. The legislature has resisted increases in funding for the large portion of the state's students who are learning English – 16% – and to fund programs and services that would improve test scores for the state's high proportion of at-risk students, that is, students in poverty – 49%. This under-funding also becomes ironic, in light of *Roosevelt's* remedial success and the *Castaneda*-successful-remedies model, because the state is resisting federal court orders enforcing the same federal statute that was at issue in *Castaneda*.⁶⁸

Effective Accountability, Feedback Loop

The successful-remedies model recommends that courts exercise their staying power by retaining jurisdiction “long enough to ensure that effective programming and effective accountability systems have been put into place.”⁶⁹ The Arizona Supreme Court, as most sister courts, chose to end its jurisdiction when the constitutionally compliant capital funding system was signed into law. This lack of successful-remedies-type follow-through by the Arizona Supreme Court potentially weakens Students FIRST because the court is not available to review the remedy for effectiveness after a “period of time sufficient to give the plan a legitimate trial.”⁷⁰

In this particular instance, however, Arizona's political branches have made important adjustments during implementation without court review. For example, when the Board discovered that expensive heating and air conditioning systems had to be replaced due to lack of minor maintenance, such as replacing filters, the state was able to respond constructively. The Board proposed and the state funded on-going local maintenance training to avoid these unnecessary costs in future.⁷¹

Effective accountability must function as a feedback loop, using accurate reviews and data to highlight strengths and weaknesses that inform revisions and mid-course corrections. The

⁶⁸ See *Flores v. Arizona*, 516 F.3d 1140 (9th Cir. 2008) (noting that Arizona still had not complied eight years after the judgment to remedy its § 1703(f) violation); 20 USC § 1703(f) (requiring states to take appropriate action to overcome language barriers that impede equal participation of students).

⁶⁹ COURTS AND KIDS, *supra* note 4, at 76-77.

⁷⁰ *Castaneda*, 648 F.2d 989, 1009-10 (5th Cir. 1981).

⁷¹ See *Five-Year Plan*, *supra* note 3, at 13 (suggesting funding); Ariz. Rev. Stat. Ann. § 15-2031 (1998) (enacting funds).

legislative design of Students FIRST did include some accountability provisions. It required the Board to submit comprehensive annual reports and to comply with notice and open meeting requirements. All bond funds are subject to annual audits. Also, the governor, the legislature, and the Board have initiated studies and a task force that performed accountability functions. Moreover, the Office of the Auditor General (OAG) is responsible for performing financial and performance audits of state agencies and making recommendations to improve their operations.⁷²

The Board's studies and the OAG's review raise important questions about the need to use long-term state debt as the primary source of facilities funding in the future, and both also present strong arguments for enhanced features needed in new buildings and school renovations in order to educate students for the 21st century. The enhancement proposals, such as more square footage for the early grades, safety measures, and technology upgrades, would increase building costs. During the next few legislative sessions, the legislative and executive branches did not use the feedback and information offered to them to adjust Students FIRST. Instead, their inaction has fueled concerns about the long-term sustainability of this heretofore successful remedy. The opportunity to dispel those doubts will likely arise only after the current state revenue crisis, caused by the economic downturn, passes.

The fact that Students FIRST links capital finance with the state's academic standards and discharges an obligation at the constitutional level may prove pivotal in legislative deliberations, especially on facilities enhancements, because the standards and constitutional parameters define the scope and ultimate goals the buildings must be designed to fulfill.⁷³

Political Culture and Public Engagement

In the most ambitious item on its bold agenda of court-led reform, the successful-remedies model encourages courts to attempt to change the "political culture" of their respective states to prevent backsliding. After seemingly effective school funding remedies were adopted in Kansas, for example, legislative changes undermined and virtually eliminated funding system

⁷² Ariz. Rev. Stat. Ann. § 41-2951; OAG Review, *supra* note 20, at i.

⁷³ See discussion *supra* at 8.

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improvements.⁷⁴ While moving the culture toward more equity is a worthy goal, the courts have rarely taken on this role.

The successful-remedies model reminds us that one of the courts' primary roles in these cases is to declare the "public values of the Constitution," and in asserting that this "principled perspective" can foster public support for equity and help make pursuit of equity seem like the natural order.⁷⁵ As discussed above, the Arizona Supreme Court declared the values embodied in the state constitution and, thereby, welded additional influence in the capital funding debates. Media editorial boards' support likely also helped move the political branches forward in an election year, that is, 1998, when the Students FIRST remedy became law. In any event, tremendous improvements in the equity and adequacy of school facilities continue to be broadly accepted.⁷⁶

Whatever the level of this acceptance, a changed political culture may not be the cause, however, because subsequent school funding litigations and remedies have not found fertile ground in which to gain similar success. The lawsuit seeking better opportunity and funding for "at-risk" students is inconclusive on this point; it did not go to trial, much less reach the remedy stage. The trial court granted summary judgment to the state defendants, and its ruling was upheld on appeal.⁷⁷

More revealing of the state's "political culture," perhaps, is the *Flores* case, brought on behalf of English learners (EL) in federal court and filed in 1992. Despite the District Court's clear declarations of values and principled perspective, as well as strong federal precedent, the legislature

⁷⁴ Molly A. Hunter, Education Adequacy Litigations in Kansas: Are the Courts Pushing Sisyphus' Rock Up the Hill and the Legislature Rolling It Down? Paper prepared for the symposium "Equal Education Opportunity: What Now?" Teachers College, Columbia University, November 12-13, 2007.

⁷⁵ COURTS AND KIDS, *supra* note 4, at 93. Many have credited the U.S. Supreme Court's *Brown v. Board* decision as the premier example of positive court influence on political culture. Adam Liptak, *Brown v. Board of Education, Second Round*, N.Y. TIMES, Dec. 10, 2006, at 4-3. We may see the opposite effect from the Court's 2007 Seattle/Jefferson County opinion. See, e.g., COURTS AND KIDS, *supra* note 4, at 3 (suggesting that implicit in the Court's position is a disparagement of judicial education reform); Sam Dillon, *Alabama School Rezoning Plan Brings Out Cry of Resegregation*, N.Y. TIMES, September 17, 2007, at A1; but see Jeffrey Rosen, *Can a Law Change a Society?*, N.Y. TIMES, July 1, 2007, at 4-1.

⁷⁶ See discussion *supra* at 19.

⁷⁷ Crane Elementary Sch. Dist. v. State of Arizona, 1 CA-CV 04-0076 (Ariz. Ct. App., Nov. 22, 2006).

and the state superintendent have adamantly resisted the court's orders. The *Flores* plaintiffs claim that the state inadequately funds EL programs in violation of the federal Equal Educational Opportunity Act (EEOA). The parties reached agreement on a Stipulation in 2002, and the court ordered a costing-out study.⁷⁸

The state has twice added small per-pupil amounts to EL funding, but plaintiffs have argued and the court has agreed that a substantial shortfall remains. After a number of court proceedings,⁷⁹ the state appealed a December 2005 order to the Ninth Circuit Court of Appeals. On remand, the district court held a hearing in January 2007 and issued two subsequent rulings, which the state again appealed to the Ninth Circuit; the court affirmed the decision of the district court.⁸⁰ In June 2009, however, the United States Supreme Court reversed the Ninth Circuit's decision and remanded the case, instructing the court to consider improvements the state has made in the way schools teach English learners.⁸¹ Trial will begin in September 2010 to determine whether the state is currently violating EEOA. If this case and state officials' struggles against it reflect the political culture of Arizona at this time, educational equity and quality are not being honored as important public values.⁸²

While changing political culture may stretch beyond the ordinary scope of the courts, public engagement campaigns mounted in conjunction with education quality litigations have earned significant influence, at least as it relates to public views of educational equity and quality. Education advocates in other states would do well to follow the example of successful efforts

⁷⁸ *Flores v. Arizona*, 172 F. Supp. 2d 1225 (D. Ariz. 2000) (finding \$150 per pupil EL funding to be arbitrary and capricious); *Flores v. Arizona*, 2007 U.S. Dist. LEXIS 20716 (D. Ariz. 2002) (finding increased funding just as arbitrary and ordering a cost study).

⁷⁹ See, e.g., *Flores v. Arizona* 2002 U.S. Dist. LEXIS 23177 (D. Ariz. 2002) *Florez v. Arizona*, 405 F. Supp. 2d 1112 (D. Ariz. 2005) (sanctions imposed for non-compliance with court order); *Flores v. Arizona*, 2006 U.S. Dist. LEXIS 97365 (D. Ariz. 2006) (stay pending appeal denied).

⁸⁰ See *Flores v. Rzeslawski*, 204 Fed. Appx. 580 (9th Cir. 2006) (ordering the district court to hold an evidentiary hearing to determine if modification of its orders was appropriate); *Flores v. Arizona*, 480 F. Supp. 2d 1157 (D. Ariz. 2007) (finding that modification was not appropriate); *Flores v. Arizona*, 2007 U.S. Dist. LEXIS 96500 (D. Ariz. 2007) (finding Arizona in civil contempt and awarding attorney's fees); *Flores v. Arizona*, 516 F.3d 1140 (9th Cir. 2008) (affirming the district court); see also The Associated Press, *Arizona Lawmakers Seek Reversal of Ruling on English Learners*, TUCSON CITIZEN, Nov. 5, 2007.

⁸¹ *Horne v. Flores*, 129 S.Ct. 2579 (2009).

⁸² See generally Michael Kiefer, *So Sue Me*, PHOENIX NEW TIMES, Dec. 18, 1997, at Features.

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in Kentucky, New York, and Arkansas, for instance.⁸³ Many are doing so.⁸⁴ However, Arizona advocates have been able to mount very little public engagement around education quality despite court cases focused on at-risk and EL issues.⁸⁵

Student Performance and Other Progress

Although the successful-remedies model considers gains in student performance the ultimate goal and proof of successful remedies in education quality cases, it also concedes that, to date, courts ruling on these suits have not attempted evaluation of changes in long-term student outcomes; they have not tried to tie them to education quality remedies. Only in “second generation” education quality cases, the successful-

⁸³ COURTS AND KIDS, *supra* note 4, at 95-103. See also ROBERT F. SEXTON, MOBILIZING CITIZENS FOR BETTER SCHOOLS (Teachers College Press 2004); Melissa Mangino, *Campaign for Fiscal Equity and Public Engagement (January 18, 2005)*; *The State of Education in Arkansas: Reforming Arkansas Public Schools – a Grassroots Approach*, PUBLIC POLICY WATCH, Spring 2004 at 1, 4.

⁸⁴ For Pennsylvania’s public engagement success see Tim Puko, *Group Rallies for Education Funding Reform*, PITT. TRIB. REV., May 21, 2008; Moriah Balingit, *Rendell Advocates More School Funding*, PITT. POST. GAZ., May 22, 2008, at EZ-3; Dan Hardy, *Pa. Support for Schools Jumps*, PHIL. INQ., July 8, 2008. For California’s public engagement success see JEANNIE OAKES & JOHN ROGERS, *The Educational Justice Collaborative: Activist Groups Working Together for Equitable Schools*, in LEARNING POWER: ORGANIZING FOR EDUCATION AND JUSTICE 131, 131-156.

⁸⁵ *Flores v. Arizona*, 172 F. Supp. 2d 1225 (D. Ariz. 2000) (finding \$150 per pupil EL funding to be arbitrary and capricious); *Flores v. Arizona*, 2007 U.S. Dist. LEXIS 20716 (D. Ariz. 2002) (finding increased funding just as arbitrary and ordering a cost study).

Table 4.

NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS AVERAGE SCALE SCORES FOR SELECTED YEARS AND GROUPS				
FOURTH GRADE READING				
	Arizona 1998	Arizona 2007	National 1998	National 2007
All Students	206	210	213	220
Free and Reduced Lunch Students	189	196	195	205
African-American Students	191	206	193	203
Hispanic Students	188	197	192	204
EIGHTH GRADE READING				
	Arizona 1998	Arizona 2007	National 1998	National 2007
All Students	260	255	261	261
Free and Reduced Lunch Students	246	241	245	247
African-American Students	248	248	242	244
Hispanic Students	244	241	241	246
FOURTH GRADE MATHEMATICS				
	Arizona 2000	Arizona 2007	National 2000	National 2007
All Students	‡	‡	224	239
Free and Reduced Lunch Students	206	219	208	227
African-American Students	207	219	203	222
Hispanic Students	204	220	207	227
EIGHTH GRADE MATHEMATICS				
	Arizona 2000	Arizona 2007	National 2000	National 2007
All Students	269	276	272	280
Free and Reduced Lunch Students	251	262	253	265
African-American Students	244	266	243	259
Hispanic Students	248	262	252	264
FOURTH GRADE SCIENCE				
	Arizona 2000	Arizona 2005	National 2000	National 2005
All Students	140	139	145	149
Free and Reduced Lunch Students	124	127	126	135
African-American Students	124	127	121	128
Hispanic Students	118	123	121	132
EIGHTH GRADE SCIENCE				
	Arizona 2000	Arizona 2005	National 2000	National 2005
All Students	145	140	147	148
Free and Reduced Lunch Students	127	124	127	130
African-American Students	127	125	120	123
Hispanic Students	125	123	125	127
Source: NAEP at http://nces.ed.gov/nationsreportcard/nde/criteria.asp , using data downloaded on October 15, 2007				
‡ Reporting standards not met				

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remedies model points out, have courts reviewed student achievement. When they have, they have found substantial improvement.⁸⁶

Overall, student performance in Arizona has been relatively low, on average, and the state has consistently ranked near the bottom in per pupil spending when compared with all other states. As reflected in Table 4, Arizona's recent NAEP scores are consistently and significantly below the national average. Since the *Roosevelt* litigation was not a broad education quality suit but rather a more narrowly pled school facilities and capital funding case, the potential for later court review of the influence of better school buildings on student performance is unlikely for the Students FIRST statute and its implementation. While there is a growing body of research that demonstrates the connections between good school buildings and student achievement,⁸⁷ no review of the impact of Students FIRST has attempted to analyze these connections.⁸⁸

Review of the results of education quality litigation remedies, after a reasonable time, should take a broader view than the narrow window of student test scores allows. Whether a funding system has become more equitable and adequate and its reforms are sustainable are critical measures of effectiveness. Better access to programs for “at-risk” students, such as high quality preschool, improves a broad range of outcomes, including graduation rates, teen parenting rates, and homeownership years later.⁸⁹ These indicators, among others, should be considered in assessing successful remedies.

With respect to school buildings, recent research indicates that teacher retention is higher when school buildings themselves are of good quality⁹⁰ and that criteria such as lighting,

⁸⁶ COURTS AND KIDS, *supra* note 4, at 78.

⁸⁷ See Earthman, *supra* note 63; Sound Basic Education Task Force, Campaign for Fiscal Equity, Inc., *Adequate Facilities for All: Reforming New York State's Building Aid System and Meeting Schools' Urgent Capital Needs* (April 2004).

⁸⁸ Telephone interview with Michael T. Martin, research analyst, Arizona School Boards Association (November 1, 2007).

⁸⁹ LYNN A. KAROLY AND JAMES H. BIGELOW, *THE ECONOMICS OF INVESTING IN UNIVERSAL PRESCHOOL EDUCATION IN CALIFORNIA* (Rand Corp. 2005) (finding that the state economic benefit of every \$1 invested in pre-school yields \$2 for the state of California); Robert G. Lynch, *Enriching Children, Enriching the Nation*, 2007 ECON. POLICY INST. (projecting that targeted pre-K investment would yield \$315 billion in societal benefits by 2050).

⁹⁰ David G. Sciarra, Koren L. Bell, and Susan Kenyon, *Safe and Adequate: Using Litigation to Address Inadequate K-12*

temperature control, acoustics, air quality, overcrowding, and science labs and equipment, significantly affect students' ability to learn and teachers' ability to teach.⁹¹ In Arizona, the Students FIRST remedy has produced a more equitable capital funding system, a major success in itself when spending on school facilities in most states has been extremely inequitable over the last decade⁹²

Arizona's school facilities litigation and the innovative remedial measures it spawned have succeeded and endured. So much so, that this approach constitutes a model that deserves wider dissemination and deeper analysis. The Arizona story resonates with advocates in many states who are struggling to gain decent, educationally sound school buildings and a funding system that would support and enable that goal. Policymakers in those states would do well to examine and, perhaps, follow Arizona's example.

An important lesson from Arizona's "deficiencies correction" process highlights a major missing set of costs in most cost studies and operational funding remedies in school funding litigations, generally. In long-neglected schools, building the capacity to educate students to reach ambitious standards requires overcoming deficits, that is, correcting deficiencies that have accumulated over time. Instead of the common practice of assuming "adequacy" in resource-deprived schools, states – and their cost study experts – should acknowledge the steps and related costs necessary to create learning environments that are truly adequate.

Emerging events in Arizona will, of course, determine future directions for Students FIRST. Evaluations and audits as well as legislative and executive actions, or inaction, add another chapter to the story each year. Until recently, progress continued. When Arizona emerges from its current economic difficulties, new developments from this leader in school facilities funding will bear watching and further discussion.

School Facilities (Education Law Center.), July 2006.

⁹¹ Earthman, *supra* note 63, at 26-50.

⁹² Growth and Disparity: A Decade of U.S. Public School Construction 1995-2004 (Building Education Success Together (BEST)), October 2006, www.21csf.org/csf-home/publications/BEST-Growth-Disparity-2006.pdf; Building Minds, Minding Buildings (American Federation of Teachers), Dec. 2006, www.aft.org/topics/building-conditions/downloads/minding-bldgs.pdf.

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