SAFE AND ADEQUATE:

USING LITIGATION TO ADDRESS INADEQUATE K-12 SCHOOL FACILITIES

By: David G. Sciarra, Koren L. Bell And Susan Kenyon

JULY 2006

A PUBLICATION OF:

Education Law Center

Standing Up for Public School Children

www.edlawcenter.org

TABLE OF CONTENTS

ABOUT THE AUTHORS

David G. Sciarra is Executive Director of Education Law Center (ELC) in Newark, New Jersey. He is a career civil rights and public interest attorney, and is one of the nation's foremost legal experts on education equity and school finance. David serves as counsel for the plaintiff school children in the landmark Abbott v. Burke school funding lawsuit, and presented the arguments to the NJ Supreme Court in the groundbreaking Abbott IV (1997) and Abbott V (1998) rulings. The New York Times described Abbott as "the most significant education case" since Brown v. Board of Education.

Koren L. Bell is a Skadden Fellow and Staff Attorney at the Education Law Center. She received her J.D. from Yale Law School in 2003 and her B.A. from Swarthmore College in 1998, and served as a Fulbright Scholar in Santiago, Chile and a Rotary Ambassadorial Scholar in Buenos Aires, Argentina prior to starting law school. After law school, Ms. Bell clerked for Judge Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit.

Susan Kenyon currently works as a freelance writing and editing consultant with a focus on education and public policy. From 1995 – 2000, she worked for the Consortium for Policy Research in Education (CPRE) at Harvard University. As Research Coordinator for CPRE, Susan participated in designing a qualitative research study of educational accountability, coordinated and conducted fieldwork for that study, and authored several reports and papers stemming from its findings. Prior to CPRE, Susan worked as a research consultant to the Institute for Responsive Education (IRE) in Boston and as a Chapter 1 reading tutor in a rural K-6 public school. She holds a Masters in Regional Planning from Cornell University, and a Masters in Education from Harvard University

ABOUT EDUCATION LAW CENTER

ELC advocates on behalf of public school children for access to an equal and adequate education under state and federal laws. ELC works to improve educational opportunities for low-income students, and students with special needs, through public education, policy initiatives, research, communications, and when necessary, legal action. For more information on ELC, visit www.edlawcenter.org

ACKNOWLEDGMENTS

The BEST initiative, funded by the Ford Foundation, provided generous financial support. Joan Ponessa, and Theresa Luhm of ELC contributed to writing and editing the report. The conclusions and opinions presented here are those of the authors and do not necessarily reflect the views of the Ford Foundation. ELC is solely responsible for any errors.

FOR MORE INFORMATION ABOUT THIS REPORT, PLEASE CONTACT

David Sciarra, Esq. ▪ Education Law Center ▪ 60 Park Place, Suite 300 ▪ Newark, NJ 07102
973-624-1815 ▪ dsciarra@edlawcenter.org ▪ www.edlawcenter.org

Safe and Adequate:
Using Litigation to Address Inadequate K-12 School Facilities

INTRODUCTION

In the last twenty years, courts throughout the country have entertained claims relating to disparities in school funding. Early school finance suits sought to equalize *inputs* in terms of per pupil or overall expenditures. More recently, the advent of rigorous state accountability plans and the federal No Child Left Behind Act has pushed the question of the resources and conditions necessary for all students to achieve at high levels to the fore. Advocates argue "If the states are making schools and students accountable, then surely the states have a reciprocal duty to make certain that the students have an opportunity to learn…."[1] Accordingly, school finance suits have shifted away from equality of inputs and toward the adequacy (or lack thereof), of public education. Peter Schrag describes the shift this way:

> There's incontrovertible logic, ethical, fiscal and legal, in the tight two-way link between standards and adequate resources. If a state demands that schools and students be accountable -- for meeting state standards, for passing exit exams and other tests – the state must be held equally accountable for providing the wherewithal to enable them to do it. That means calculations to determine the cost of those resources. The most mundane entrepreneur asks the same question: How much will it cost to produce each unit?[2]

Increasingly, these "adequacy" suits center on claims of unsafe and therefore, educationally inadequate facilities in low income school districts. This paper surveys emerging trends in the scope, strategy, and rulings of adequacy suits, focusing on the role facilities deficiencies play in opening the door to broader scrutiny of states' education systems.

The litigation falls into two categories: Those suits in which the problem of dilapidated school facilities is embedded within a more comprehensive challenge to a state's overall school finance system[3]; and those in which facilities are the exclusive[4] or nearly exclusive focus of

---

[1] *Schrag, P. The Final Test: The Battle for Adequacy in America's Schools. The New Press (2003) p. 6*

[2] *Id. at 246-277*

[3] *See* Abbeville County School Dist. v. State, 335 S.C. 58 (1999) (South Carolina); Abbott v. Burke, 100 N.J. 269 (1985) (New Jersey); Alabama Coalition for Equity v. Hunt, 1993 WL 204083 (1993) (Alabama); Campaign for Fiscal Equity, Inc. v. State, 86 N.Y.2d 307 (1995) (New York); State v. Campbell County Sch. Dist, 907 P.2d 1238 (1995) (Wyoming); DeRolph v. Ohio, 78 Ohio St. 3d 193 (1997) (Ohio); Edgewood Independent Sch. Dist. v. Kirby, 777 S.W.2d 391 (1989) (Texas); Helena Elem. Sch. Dist. v. State, 769 P.2d 684 (1989) (Montana); Lake View School Dist. No. 25 of Phillips County v. Huckabee, 91 S.W.3d 472 (2002) (Arkansas); Leandro v. State, 346 N.C. 336 (1997) (North Carolina); Pauly v. Baily, 174 W.Va. 167 (1984) (W. Virginia); Rose v. Council for Better Education, (1989) (Kentucky); Tennessee Small School Systems v. McWherter, 851 S.W.2d 139 (1993) (Tennessee). In other states, whole-scale challenges excluded the facilities issue from the claim. *See* Horton v. Meskill, 486 A.2d 1099 (1985) (Connecticut); State, Dept. of Educ. V. Glasser, 622 So. 2d 1003 (1992) (Florida); McDaniel v. Thomas, 285 S.E.2d 156 (1981) (Georgia); Idaho; Committee for Educational Rights c. Edgar, 672 N.E.2d 1178 (1996) (Illinois); Exira Community School Dist. V. State, 512 N.W.2d 787 (1994) (Iowa); Knowles c. State Bd. Of Ed., 547 P.2d 699 (1976) (Kansas); Hornbeck v. Somerset County Bd. Of Educ., 458 A.2d 758 (1983) (Maryland); McDuffy v. Secretary of Executive Office of Educ., 615 N.E.2d 516 (1993) (Massachusetts); Governor v. State Treasurer, 203 N.W. 2d 457 (1972) (Michigan); Skeen v. State, 505 N.W.2d 299 (1993) (Minnesota);

single- and multi-issue suits. [5] Among those states in the "comprehensive" group are New Jersey, Ohio, Alabama Arkansas, New York and Wyoming. Those representing the "focused" approach include Arizona, Idaho, and California.

These case studies are not intended to advocate one approach over the other. On the contrary, they demonstrate that each state's unique legal precedent and political environment must dictate litigants' strategy. The cases described here illustrate that whether embedded or standing alone, the problem of rundown school facilities is increasingly persuasive and central to the educational adequacy argument.

THE LITIGATION

THE "COMPREHENSIVE" APPROACH:

New Jersey, Ohio, Alabama, Arkansas, New York and Wyoming

The school finance suits in this section lucidly demonstrate the power of facilities evidence in comprehensive attacks on state funding schemes. The cases all illustrate that, amidst the sea of statistical data and other, less-tangible evidence that is typically presented in whole-sale funding attacks, courts find facilities evidence to be uniquely clear, poignant, and "judicially accessible." [6] In this they are quite similar. In other significant ways, they differ.

Claremont School Dist. V. Governor, 703 A.2d 1353 (1997) (New Hampshire); Bismarck Public School Dist. No. 1 c. State By and Through North Dakota State Legislative Assembly, 511 N.W.2d 247 (1994) (North Dakota); Fair School Finance Council of Oklahoma, Inc. v. State, 746 P.2d 1135 (1987) (Oklahoma); Oregon; Danson v. Casey, 399 A.2d 360 (1979) (Pennsylvania); Pawtucket, City of v. of Pawtucket v. Sundlun, 662 A.2d 40 (1995) (Rhode Island); Brigham v. State, 692 A.2d 384 (1997) (Vermont); Scott v. Com., 1992 WL 885029 (1992) (Virginia); Seattle School Dist. No. 1 of King County v. State, 585 P.2d 71 (1978) (Washington); Kukor v. Grover, 436 N.W. 2d 568 (1989) (Wisconsin); *cf.* Vincent v. Voight, 614 N.W. 2d 388 (2000) (subsequent challenge including the facilities issue).

[4] Idaho Schools for Equal Educational Opportunity, et. Al. v. Evans, 850 P.2d 724 (1993); Giardino v. State Board of Educ., No. 98 CV 246 (Denver Dist. Ct. Feb. 26, 1998) (Colorado); Kasayulie v. State, No, 3AN-97-3872 (Alaska Sup. Court Sept. 1, 1999) (Alaska); Roosevelt Elementary School District No. 66 v. Bishop, 877 P.2d 806 (1994) (Arizona).

[5] Williams v. California, No. 312236, Aug. 14, 2000 (Plaintiffs' first amended complaint, filed in San Francisco Superior Court).

[6] In addition to Ohio and Alabama, North Carolina and Tennessee offer additional illustrative examples of litigants' effective use of facilities evidence as part-and-parcel of a comprehensive attack on a school funding scheme. In North Carolina, for example, the Court explained:

> Plaintiffs complain of inadequate school facilities with insufficient space, poor lighting, leaking roofs, erratic heating and air conditioning, peeling paint, cracked plaster, and rusting exposed pipes. They allege that their poor districts' media centers have sparse and outdated book collections and lack the technology present in the wealthier school districts. They complain that they are unable to compete for high quality teachers because local salary supplements in their poor districts are well below those provided in wealthy districts. Plaintiffs allege that this relative inability to hire teachers causes the number of students per teacher to be higher in their poor districts than in wealthy districts. Plaintiffs allege that college admission

It is beyond the scope of this survey to provide expansive, state specific historical and political context. However, it should be acknowledged that the suits described here, and their outcomes, are products of their environment as a whole. So, while it is most informative to draw lessons from litigants' strategy and courts' analysis, it is also useful to consider the backdrop against which these proceedings take place. For example, in most of the states included here, the judiciary is either elected or at a minimum periodically reconfirmed by a yes or no vote. This is not the case in New Jersey. In New York, a state with "perennial upstate-downstate/Republican-Democratic battles" the fact that it was the condition of *city schools* at issue in the funding suit is arguably significant.[7] For a more complete discussion of context, and a broader account of proceedings and remedies (beyond our concern here with facilities), Peter Schrag's Final Test: The Battle for Adequacy in America's Schools is an excellent reference.

One of the most significant aspects of the "comprehensive" states surveyed here is the Courts' recognition of facilities improvements as necessary to the broad-based framework of adequate educational opportunity. [8] Indeed, the New Jersey *Abbott* Court's assertion that "we

---

> test scores and yearly aptitude test scores reflect both the inadequacy and the disparity in education received by children in their poor districts. Plaintiffs allege that end-of-grade tests show that the great majority of students in plaintiffs' districts are failing in basic subjects.

Leandro v. State, 346 N.C. 336, 357 (1997). In Tennessee, like in Ohio and Alabama, the Court used plaintiffs' facilities evidence as an entrée to its broad-based adequacy analysis:

> The record also establishes that sufficient funds have not been available to some of the school districts to provide the programs and facilities necessary for an adequate educational system. Trial testimony indicates that many schools in the poorer school districts have decaying physical plants, and that some school buildings are not adequately heated and have non-functioning showers, buckling floors, and leaking roofs. School superintendents and students also testified that the poorer school districts do not provide adequate science laboratories for the students, even though state regulations require such facilities. In fact, evidence was adduced that some districts' laboratories are so inadequate that only teachers use the equipment in order to "demonstrate" lab techniques. At other schools, the teachers buy supplies with their own money in order to stock the labs. Still other schools engage in almost constant fundraising by students to provide needed materials.
>
> Similarly, the textbooks and libraries of many of the poorer school districts are inadequate, outdated, and in disrepair. One compelling photograph in the record depicts a library in a Hancock County school. The library consists of only one bookcase nestled in a room containing empty boxes, surplus furniture, a desktop copier, kitchen supplies, a bottle of mouthwash, and a popcorn machine. When asked why newer textbooks and more functional libraries were not provided in the schools, the responsible official stated that the additional money needed for such improvements was not available. The lack of funds in some of the plaintiffs' districts also prevents schools in those areas from offering advanced placement courses, state-mandated art and music classes, drama instruction, extracurricular athletic teams, or more than one foreign language in high school.

Tennessee Small School Systems v. McWherter, 851 S.W.2d 139 (1993).

[7] *See Schrag, P. final Test: The Battle for Adequacy in America's Schools. The New Press (2003) pgs. 125-126, 197.*

[8] South Carolina's school finance litigation is another example of a case in which the Court recognized facilities improvements as part-and-parcel of the broad-based framework of adequate educational opportunity and student achievement:

> Minimally adequate education required by Constitution's education clause includes providing students adequate and safe facilities in which they have the opportunity to acquire: (1) the ability to read, write, and

cannot expect disadvantaged children to achieve when they are relegated to buildings that are unsafe and often incapable of housing the very programs needed to educate them,"[9] captures the implicit assumption made by litigants and courts alike in most of these cases. While litigants may disagree as to the extent of facilities deficiencies, few, if any, dwell on *whether* there is a connection between safe, healthy facilities and student achievement.

New York and Wyoming differ from the other "comprehensive" states surveyed here in that in these two states, the issue of causation -- the relationship between the condition of school facilities and student achievement -- is prominent and explicitly addressed, albeit in notably different ways. In New York, the existence of a causal link, and its measurability, are fundamental to the courts' evaluation of litigants' evidence. In fact, causation is one of the major points upon which New York litigants *and* its courts have disagreed. In contrast, the Wyoming Court leads its decision with a proclamation of the indisputable link between capital financing and educational quality, thereby opting to install the causation issue at the front and center of proceedings.

New York and Wyoming are also unusual with regard to their conception of adequacy. In New York, a sound basic education is defined in terms of the bare minimum standard of schooling to which students are entitled -- arguably the lowest bar set by any of the states included in this review. Indeed, the state initially argued (and at least one court, the Appellate Division, agreed) that the eighth or ninth grade level constituted "minimal adequacy," describing any standard beyond that as "aspirational," but not constitutionally required. Ultimately, the New York Court settles this question by defining the minimum entitlement as equivalent to "a meaningful high school education" that provides the basic essentials of "minimally adequate" facilities, "minimally adequate" instrumentalities of learning, and "minimally adequate" teachers. [10] By contrast, the Wyoming Supreme Court describes it's constitution as requiring the provision of education that is "visionary and unsurpassed." [11]

New Jersey

New Jersey's landmark *Abbott v. Burke* litigation is one of the earliest examples of the school facilities issue as central to a sweeping attack on the adequacy of a state's funding scheme; the case is also remarkable in terms of the comprehensive and sophisticated nature of the judgments that resulted.

The history of the *Abbott* litigation begins in 1973 with *Robinson v. Cahill*,[12] a suit that set the stage for the *Abbott* plaintiffs to challenge the adequacy of a school funding scheme that failed to provide a constitutionally-required substantive level of education. In *Robinson*,

---

speak the English language, and knowledge of mathematics and physical science; (2) a fundamental knowledge of economic, social, and political systems, and of history and governmental processes; and (3) academic and vocational skills.

Abbeville County School Dist. v. State, 335 S.C. 58, 68 (1999).

[9] *Abbott V*, 153 N.J. at 188.

[10] *See Campaign for Fiscal Equity, Inc. v. State, 100 N.Y. ed 893 (2003) and Schrag, P. Final Test: The Battle for Adequacy in America's Schools.. The New Press (2003).*

[11] *State v. Campbell County Sch. Dist*., 19P.3d 518, 538 (2001) (*Campbell II*)

[12] 62 N.J. 473 (1973).

plaintiffs alleged the state's system of funding public schools violated the Education Clause of the New Jersey Constitution, which mandates that the legislature "provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this State between the ages of five and eighteen years."[13] The Supreme Court agreed, ordering the State to "define in some discernable way the educational obligation" and to "[c]ompel the local school districts to raise the money necessary to provide that opportunity."[14] In so holding, the Court made pointed note of the fact that "the State's obligation includes as well the capital expenditures without which the required educational opportunity could not be provided."[15]

Fifteen years later, in *Abbott v. Burke*, [16](Abbott II), a new set of plaintiffs challenged the constitutionality of the updated school-funding scheme, once again on the grounds that state funding laws failed to provide New Jersey's poorest children with a "thorough and efficient" education. Plaintiffs' strategy was to present the Court with a voluminous record to support the conclusion that the quality of education in poor urban districts was inferior to other school districts within the state, as measured by finances, programs and student achievement. The comparison was based on differences in educational opportunities in many areas, such as exposure to computers, science education, foreign language programs, art and music programs, physical education – and physical facilities. With regard to the latter, the Court wrote:

> Many poorer urban districts operate schools that, due to their age and lack of maintenance, are crumbling. These facilities do not provide an environment in which children can learn; indeed, the safety of children in these schools is threatened. For example, in 1986 in Paterson a gymnasium floor collapsed in one school, and in another school the entire building was sinking. According to East Orange's long-range facility plan there are ten schools in immediate need of roof repair, fifteen schools with heating, ventilation or air conditioning problems; two schools that need total roof replacement; nine with electrical system problems; eight with plumbing system problems; thirteen needing structural repairs; seventeen needing patching, plastering or painting; and thirteen needing asbestos removal or containment. [17]

---

[13] NEW JERSEY CONSTITUTION, Art. VIII, δ U, par. I.
[14] *Robinson*, 62 N.J. at 519.
[15] *Id.* at 520.
[16]Abbott v. Burke, 119 N.J. 287 (1990) (*Abbott II*). In *Abbott I*, the supreme court determined that an Administrative Law Judge should complete the initial fact-finding of the complex educational issues. Abbott v. Burke, 100 N.J. 269 (1985).
[17] The Court went on to say:

> In an elementary school in Paterson, the children eat lunch in a small area in the boiler room area of the basement; remedial classes are taught in a former bathroom. In one Irvington school, children attend music classes in a storage room and remedial classes in converted closets. At another school in Irvington a coal bin was converted into a classroom. In one elementary school in East Orange, there is no cafeteria, and the children eat lunch in shifts in the first floor corridor. In one school in Jersey City, built in 1900, the library is a converted cloakroom; the nurse's office has no bathroom or waiting room; the lighting is inadequate; the bathrooms have no hot water (only the custodial office and nurse's office have hot water); there is water damage inside the building because of cracks in the facade; and the heating system is inadequate.
>
> In contrast, most schools in richer suburban districts are newer, cleaner, and safer. They provide an environment conducive to learning. They have sufficient space to accommodate the children's' needs now and in the future. While it is possible that the richest of educations can be conferred in the rudest of

The *Abbott II* decision was the first in the Abbott history to so clearly demonstrate the power of school facilities evidence. In the Court's search for a standard against which to measure educational adequacy, vivid, concrete accounts of unsafe, patently unacceptable building conditions such as those presented in the course of this litigation presented a forceful and persuasive argument. Whereas statistical data and test scores are open to debate, there is no arguing with the fact that a sinking building is an unacceptable venue for educating children.

Finding for the plaintiffs, the *Abbott II* Court held that the legislature had failed to adequately define the substantive level of education constitutionally required by the Education Clause; nor had plaintiffs or the state succeeded in setting forth a benchmark for judges to use in their assessment of what a district needs in order to have thorough and efficient education. [18] Despite this lack of affirmative proof, the Court reasoned, the critical question was whether plaintiffs had nevertheless proven that, whatever that standard may be, their districts clearly fell below it: "Does the combination of student need, disproportionately present in poorer urban districts, inferior course offerings, dilapidated facilities, testing failures, and dropout rates leave the issue in doubt?" the Court queried, "And what does the comparison with affluent suburban districts mean if the Constitution indeed requires that poor children be able to compete with the rich?" [19]

Barring a constitutional measuring stick against which to assess the adequacy of education in these poor districts, the Court ultimately accepted plaintiffs' invitation to adopt a comparative framework in its analysis, measuring the quality of programs, resources and conditions in these districts against those in the wealthy, academically successful districts in order to evaluate the alleged violations.[20] Under this analysis, the court concluded that the updated school-funding Act, in fact, failed to provide an adequate level of education in the New Jersey's poorest districts:

> From this record we find that certain poorer urban districts do not provide a thorough and efficient education to their students. The Constitution is being violated. These students in poorer urban districts have not been able to participate fully as citizens and workers in our society. They have not been able to achieve any level of equality in that society with their peers from the affluent suburban districts. We find the constitutional failure clear, severe, extensive, and of long duration.[21]

The remedy, the Court ordered, required that the legislature amend the Act, or pass new legislation, to insure that poorer urban districts' educational funding would be substantially equal to that of property-rich districts every year; that funding would not depend on the ability of local school districts to tax, but had to be guaranteed and mandated by the state; and that the level of funding would be adequate to provide for the special educational needs of the poor urban

---

> surroundings, the record in this case demonstrates that deficient facilities are conducive to a deficient education.

Abbott II, at 362-63.
[18] *Id.* at 318.
[19] *Id.*
[20] *Id.* at 358.
[21] *Id.* at 385.

districts in order to redress their extreme disadvantages.[22]

With regard to the facilities issue, in particular, the Court recalled *Robinson*'s recognition of the state's constitutional obligation to insure adequate capital funding in these districts and noted that the "obligation has not been fulfilled; the lack is so great, the State concedes, that under the present funding plan sufficient capital investment cannot be provided."[23] The Court further held that the issue of capital construction was "a matter within the judicial power to correct, as is the current financing scheme embedded in the Act."[24] Nevertheless, finding the record as yet insufficient to support the fashioning of a remedy, the Court declined to rule on plaintiffs' claim for relief in the form of a capital improvement timetable for all facilities "to be conformed to contemporary educational standards."[25] The Court concluded, correction of the facilities deficiencies would be:

> a massive undertaking, one that this Court could not consider until it knew precisely what the deficiencies are, how much their correction would cost, and how best to bring about such correction. All we have before us are, in addition to some specific figures concerning several districts, general agreement on the desperate condition of school facilities, gross estimates of the cost of correction, and concurrence on the urgent need.[26]

Pursuant to *Abbott II*, the legislature adopted a new substantive definition of a "thorough and efficient" education: the Core Curriculum Content Standards (CCCS),[27] which the Court subsequently accepted, in *Abbott IV*, "as a reasonable legislative definition of a constitutional thorough and efficient education."[28] Finding once again for the plaintiffs in *Abbott IV*, however, the Court declined to deem constitutionally sufficient the amount of funds allotted to the 30 "special needs" districts (SND's or the "Abbott districts") to enact the CCCS under the revised school-funding Act, the Comprehensive Educational Improvement and Financing Act (CEIFA).[29]

The result of the Court's determination regarding CEIFA was a sweeping set of education programs and reforms, in *Abbott IV* and *Abbott V*,[30] widely recognized to be the most fair and just in the nation. Among the *Abbott* "education adequacy" frameworks were rigorous content standards, supported by per-pupil funding equal to spending in successful suburban schools; universal, well-planned and high quality preschool education for all three- and four-year olds; supplemental ("at-risk") programs to address student and school needs attributed to high-poverty, including intensive early literacy, small class size and social and health services; school and district reforms to improve curriculum and instruction, and for effective and efficient use of

---

[22] *Id.* at 385-85.
[23] *Id.* at 390.
[24] *Id.* at 391.
[25] *Id.* at 390.
[26] *Id.* at 391.
[27] The Core Curriculum Content Standards (CCCS) "provide achievement goals applicable to all students in seven core academic areas: visual and performing arts, comprehensive health and physical education, language arts and literacy, mathematics, science, social studies, and world languages." Abbott v. Burke, 149 N.J. 145, 161 (1997) (*Abbott IV*).
[28] *Id.* at 168.
[29] *Id.* at 188.
[30] Abbott v. Burke, 153 N.J. 480 (1998) (*Abbott V*).

funds to enable students to achieve state standards; state accountability for effective and timely implementation and to ensure progress in improving student achievement – *and* new and rehabilitated facilities to adequately house all programs, relieve overcrowding, and eliminate health and safety violations.

Once more, the Court's *Abbott IV* decision revealed the uniquely persuasive force of the facilities evidence presented by the plaintiffs. This time, the Court noted, "The accounts of crumbling and obsolescent schools inundate the record…." In so finding, the Court concluded that capital deficiencies were among "the most significant problems facing SNDs [special needs districts]" and that "CEIFA completely fail[ed] to address. . .dilapidated, unsafe, and overcrowded facilities."[31] "Contrary to the argument of the State," the Court reasoned, invoking *Robinson* and *Abbott II*, "the condition of school facilities always has been of constitutional import. Deteriorating physical facilities relate to the State's educational obligation, and we continually have noted that adequate physical facilities are an essential component of that constitutional mandate." [32]

Importantly, beyond recognizing the capital deficiencies plaintiffs set forth as a per se constitutional violation, the Court also underscored facilities improvements as integral to the efficacy of a coherent framework of remedial programs and reforms:

> Most schools in the special needs districts lack library/media centers, are physically incapable of handling new technology, are deficient in physical facilities for science, and cannot provide sufficient space or appropriate settings for arts programs. Most schools also lack adequate physical-education space and equipment. There is simply no space in these districts to reduce class size; no place for alternative programs; no room to conduct reduced or eliminated programs in music and art; and no space for laboratories. The State's new core curriculum standards will only increase the need for capital expenditures to improve and to augment physical facilities. And, as noted, many SNDs will continue to be incapable of providing early childhood programs because of a lack of space to house the additional student enrollment.[33]

"Such a failure is of constitutional significance," the Court concluded: "We cannot expect disadvantaged children to achieve when they are relegated to buildings that are unsafe and often incapable of housing the very programs needed to educate them."[34] Accordingly, the Court ruled, "the State must, as part of its obligation under the education clause, provide facilities for children in the special needs districts that will be sufficient to enable those students to achieve the substantive standards that now define a thorough and efficient education." [35]

In *Abbott V*, the Court ordered the state to undertake and fund a capital construction program to eliminate deficiencies in all *Abbott* school buildings, and outlined an appeal procedure by which schools and districts could dispute decisions related to the implementation, extension or modification of the complete *Abbott* adequacy framework, thereby granting "districts and individual schools . . . full administrative and judicial protection in seeking

[31] *Id.* at 186.
[32] *Id.*
[33] *Id.* at 187.
[34] *Id.* at 188.
[35] *Id.*

demonstrably-needed programs, facilities, and funding."[36] In *Abbott VII*,[37] the Court reaffirmed full state funding for the construction program.

Summary of Legislative Response to Date:

In response to the *Abbott* facilities mandates, the legislature enacted the Education Facilities Construction And Financing Act ("EFCFA"),[38] which provides that the State's share "shall be 100% of final eligible costs" for Abbott districts.[39] EFCFA authorized an initial $6 billion in bond financing for Abbott school facilities and $2.6 billion in funding for non-Abbott districts.[40] The Act also designated a State authority, the Economic Development Authority (EDA), as the agency responsible for managing, constructing, and financing school facilities projects.[41]

Between December 2000 and July 2001, the Department of Education approved the Abbott districts' five-year facilities plans, contemplating approximately 532 projects, which cleared the way for the State to commence predevelopment and actual construction on these projects. In 2002 in response to the slow movement of the program, then Governor James McGreevey issued Executive Order No. 24[42] which established the Schools Construction Corporation (SCC) under EDA to streamline the school construction process. When reports surfaced in 2005 that the initial allotment of funding would run out by early 2006, the plaintiffs' filed an application to enforce the *Abbott* and EFCFA 100% funding mandate, and the Supreme Court responded with a unanimous ruling, ordering the Department of Education to estimate the cost of over 200 stalled school facilities projects in the State's urban districts in order to guide the legislature's subsequent appropriation of additional funds.[43]

In early 2005, Acting Governor Richard Codey requested that his Office of the Inspector General (IG)[44] conduct a review of the Program to determine whether the $6 billion of funding for Abbott districts was disbursed in an "efficient and appropriate manner and to make recommendations that could result in efficient use of the remaining funds". To date, the Inspector General has issued three reports[45]. In July 2005, SCC released a list of 59 projects that will be completed using the remaining allocated funds.[46] The remaining projects presently in design or requiring significant land acquisition were put on hold causing districts to scramble to meet student needs. In February 2006, the Department issued the Court-ordered report to

---

[36] *Abbott V*, 153 N.J. at 527.
[37] Abbott v. Burke, 170 N.J. 537 (2002).
[38] *N.J.S.A.* 18A:7G-1 et seq. (2000).
[39] *N.J.S.A.* 18A:7G-5(k).
[40] *N.J.S.A.* 18A:7G-14(a).
[41] *N.J.S.A.* 18A:7G-5(j).
[42] http://www.state.nj.us/infobank/circular/eom24.htm

[43] Abbott v. Burke, No. 42,170 (Supreme Court, Dec. 19, 2005), at http://www.edlawcenter.org/ELCPublic/elcnews_051219_CourtOrder.pdf (underscoring that although some improvements have been made, "significant deficiencies in this area persist and are likely to worsen at a severe cost to the State's most disadvantaged school children if there is further delay in addressing the dilapidated, overcrowded and dangerous schools" in the urban districts).

[44] http://www.state.nj.us/infobank/circular/eoc32.htm
[45] http://www.state.nj.us/oig/news.html
[46] http://www.edlawcenter.org/ELCPublic/elcnews_050728_SCCProjectFundsAllocation.pdf

Legislative leaders, estimating the cost of completing the projects currently in design at $5.3 billion. Also in February, the Governor ordered a top-to-bottom review of New Jersey's school construction program, and appointed a Special Counsel and working group to recommend reforms to the program.[47] The first two reports from the working group[48] recommend significant structural changes to governance of the Program, but did not recommend additional funding. The final report from the group to the Governor is expected to be issued in late August 2006.

Ohio

In 1923, the Ohio Supreme Court pronounced: "[an] efficient system of education could not mean one in which part or any number of the school districts of the state lacked teachers, buildings, or equipment." [49] Fifty-four years later, in *DeRolph v. Ohio*, [50] plaintiffs returned to court to enforce the mandates of the Ohio Education Clause. To support their claim that Ohio's elementary and secondary public school financing system failed to provide a "thorough and efficient system of common schools" throughout the state,[51] plaintiffs presented the Court with abundant evidence to show that many school districts were plagued with deteriorating buildings, insufficient supplies, inadequate curricula and technology, and large student-teacher ratios.[52] Regarding deficient facilities, in particular, plaintiffs' extensive record included proof that asbestos had yet to be removed from 68.6 percent of the state's school buildings and that schools had leaking roofs and windows, falling plaster, no ventilation, arsenic in the drinking water, no handicap access, inadequate media centers, cockroach infestations, no science labs, a warped gymnasium floor, lack of proper heating, carbon monoxide poisoning, asbestos, and faulty electrical wiring. Plaintiffs also presented evidence regarding three schools that were, respectively, sliding down a hill; had no cafeteria; and employed a coal heating system that emitted coal dust throughout the school, conducted band rehearsal in the basement, and held special education classes in a closet with one light bulb.[53] In combination, plaintiffs argued, abysmal conditions and resource deficiencies prevented school districts from providing students with a constitutionally mandated, minimally adequate education.

The Supreme Court agreed, holding that students were deprived of educational opportunity. In so concluding, the Court found that plaintiffs had presented "exhaustive evidence" to establish that the appellant school districts were starved for funds, lacked teachers, buildings, and equipment, and had inferior educational programs.[54] Reviewing the "massive

---

[47] *See* "Corzine Signs Executive Order to Facilitate Review and Reform at Schools Construction Corporation," Education Law Center, Press Release, Feb. 7, 2006, at http://www.state.nj.us/governor/news/news/approved/20060207.html.

[48] http://www.edlawcenter.org/ELCPublic/elcnews_060316_ReportToGovernor.pdf, and http://www.edlawcenter.org/ELCPublic/elcnews_060517_WorkGroupReport.pdf

[49] Miller v. Korns, 107 Ohio St. 287, 298 (1923) (considering a constitutional challenge to a statute authorizing funds raised by property taxation within one school district to be used to finance schools in other districts within the county). The Court subsequently recalled this proclamation respecting the requirements of a "thorough and efficient" education in *Board of Ed. Of City School Dist. Of City of Cincinnati v. Walte*, 58 Ohio St. 2d 368 (1979), a case in which the Court upheld the state's school funding system against a challenge to this scheme.

[50] 78 Ohio St. 3d 193 (1997).

[51] *Id.* at 202.

[52] *Id.*at 205-09.

[53] *Id.*

[54] *Id.* at 205.

evidence"[55] before it regarding deficiencies in programs, resources, and conditions, the Court recounted myriad incidents in which plaintiffs had shown that the health and safety of students was threatened, and their opportunity to learn curtailed by the abysmal state of school facilities.

The poignant facilities evidence was determinative and the Court found the entire scheme constitutionally infirm. Indeed, it was only after considering the facilities evidence that the Court proceeded to analyze (with greater brevity), the other alleged broad-based deficiencies in the educational system. Upon finishing its review of the facilities evidence, the Court concluded:

> Obviously, state funding of school districts cannot be considered adequate if the districts lack sufficient funds to provide their students a safe and healthy learning environment. In addition to deteriorating buildings and related conditions, it is clear from the record that many of the school districts throughout the state cannot provide the basic resources necessary to educate our youth.[56]

The Court responded to plaintiffs' evidence regarding the condition of Ohio's school buildings with a specific determination that the "thorough and efficient system of common schools" mandated by the state constitution includes "facilities in good repair and the supplies, and materials, and funds necessary to maintain those facilities in a safe manner, and in compliance with all local, state and federal mandates." [57] Upon declaring the school finance system to be unconstitutional and ordering the legislature to create an entirely new scheme, the Court paused to note that the General Assembly's last-ditch efforts to "soften the blow of the failing system," by appropriating funds for technology grants to assist poorer school districts were "meaningless" in light of the abysmal state of recipient school systems' facilities, as well as the lack of teachers in these schools.[58]

Summary of Legislative Response to Date:

In May, 1997 the Ohio legislature created the Ohio School Facilities Commission (OSFC). The Commission is an independent agency established "to provide funding, management oversight, and technical assistance to school districts in the construction and renovation of school facilities.[59] General obligation revenue bonds provide the largest source of funding for the Commission's programs, in addition to revenue from interest earnings and a portion of the Ohio tobacco settlement funds.

Also in place is the Rebuild Ohio School Facilities Plan, an "umbrella planning initiative"[60] or master plan launched by Governor Bob Taft in 1999 and designed to address the facility needs of every district.

Currently administering 11 programs, the Commission has received over $4 billion in appropriations since its inception with a total of $11 billion in planned or completed projects on the books. To date OSFC has opened 400 new or heavily renovated buildings.

The OSCF Chief of Communications, Rick Sabors identifies the Classroom Facilities Assistance Program and the Exceptional Needs Program as the Commission's two largest

---

[55] *Id.*
[56] *Id.* at 208.
[57] *Id.* at 213.
[58] *Id.* at 211.
[59] *See* http://www.osfc.state.oh.us/Programs/CFAP/CFAP.htm.
[60] Rick Sabors, Ohio School Facilities Commission Chief of Communications. November 23, 2005

initiatives. The Classroom Facilities Assistance Program is described as a "school district fix," focusing upon overall k-12 improvement plans. The Exceptional Needs program identifies buildings in need of immediate repair or replacement. Both programs take district wealth into account in determining eligibility for funds.

Alabama

As in Ohio, the Alabama Court seized on abundant facilities evidence presented by plaintiffs, and used this illustrative data to launch its consideration of related inadequacies in programs, resources, and conditions. In *Alabama Coalition for Equity, Inc. v. Hunt*,[61] plaintiffs challenged the constitutionality of Alabama's system of public elementary and secondary education, which they argued did not offer constitutionally equitable and adequate educational opportunities to the schoolchildren of the state, including children with disabilities.[62] To support their claim, plaintiffs introduced voluminous evidence, including a disparity study conducted by three education experts who sent teams to examine school facilities, staff levels, curriculum, and school supplies and equipment in Alabama's seven highest and eight lowest districts.[63] The Alabama Supreme Court found this evidence, and in particular the facilities evidence, "graphic and troubling" with testimony that was especially compelling with respect to students' opportunity to learn.[64] For example, in its analysis of the "equality" of educational opportunity, the Court described the testimony of one expert:

> He saw 'deplorable' restroom facilities in many schools, visited an elementary school gym fashioned from a portable classroom with holes in the floor, and witnessed children at one poorer elementary school playing on *imaginary* playground equipment. Dr. Ross testified that in his extensive studies of schools he had never before seen conditions as inadequate as those prevailing among some of Alabama's poorest schools. . . [He] testified that poorly maintained restroom facilities can impair students' sense of well-being and-to the extent that students are reluctant to use dirty facilities that do not supply soap, towels and toilet paper-may cause anxiety and physical discomfort that adversely affect learning.[65]

Moreover, the Court continued, "Photographs showed safety problems in less affluent schools, including deteriorating structures and beer cans, broken glass, mud and even cow manure on school grounds;" "[s]afety features such as ramps for students with disabilities, crossing guards, entrance and exit signs and auto pick-up points were also much less in evidence at poorer schools;" and "the condition and appearance of the interior of these facilities" was far inferior in poorer schools with respect to lighting, classroom resources, libraries, laboratories, and health-care facilities.[66] Only after reviewing the expert's testimony with respect to facilities deficiencies did the Court turn its attention to his findings in terms of staff levels and

[61] 1993 WL 204083 (1993).
[62] *Id.* at *1.
[63] *Id.* at *12.
[64] *Id.* at *12-14.
[65] *Id.* at *12.
[66] *Id.* at 12-13.

development and curricular and extracurricular offerings – an order of preference mirrored in the Court's subsequent review of non-expert testimony.[67]

Regarding the "adequacy" of education in Alabama, the Court's analysis of the evidence once again emphasized the facilities issue. "School facilities," the Court began, "are one clear area of deficiency." [68]

Citing the state's Plan for Excellence and Performance Based Accreditation Standards, the Court explained, it had "heard striking evidence that these basic, common-sense standards are not met in many school facilities across Alabama."[69]

> There is a serious shortage of classroom space throughout the state. . . Jesse Todd, principal of Shiloh Elementary/Middle School in Dallas County, testified at trial that one math class at his school meets in a vocational education building in which the din of power tools sometimes drowns out their lessons. At times, the teacher told students to wear radios with headphones to muffle the noise. . . Superintendent Johnson testified at trial that Choctaw County had 56 "temporary" portable classrooms, some of which have been in place for more than 20 years. . . An assessment team that inspected the Handley Middle School in Roanoke recommended that the entire school building be demolished. The Alberta Elementary School's septic tank was condemned because of frequent backups and overflows. The school's main ball field was contaminated with human waste that drained from the septic tank which was visible in the form of large dark spots on the field. . ."The children used to use the field in spite of the sewage," according to the affidavit submitted by one teacher. "We could smell the odor of the sewage inside the

---

[67] Regarding non-expert testimony, the Court recounted:

> In the same vein, Superintendent Toreatha Johnson testified concerning problems in Choctaw County with old and inadequate buildings, erosion, unsanitary bathroom facilities and leaking roofs, and told the Court about schools without any gym facilities, central air conditioning, librarians, guidance counselors, music or art programs, or science labs. Alice Lyles, a parent in Choctaw County, and Andrea Dasis and Besstina Lyles, a fifteen year-old and eleven year-old student there, respectively, discussed the shabby and inadequate condition of many buildings in Choctaw County schools, problems with heating and cooling, the lack of counselors, organized sports, music, art, foreign language, computers and science labs in school, and unsanitary bathroom facilities. Sophia Madison, a parent in Wilcox County, spoke of problems in her county with a lack of counselors, physical education, playground equipment, art, music or drama classes, air conditioning, computers and library books

Id. at *15.

[68] The Court went on to add:

> The Performance-Based Accreditation standards require all schools to provide "appropriate facilities and equipment necessary to reach instructional objectives," because "[t]eachers cannot be effective teachers and students cannot attain expected levels of achievement if facilities are inadequate and equipment is inappropriate or non-existent." *Performance-Based Accreditation Standard* (hereinafter, *Performance*) at 1C. Similarly, the *Plan for Excellence* says that school bathrooms must be sanitary, playgrounds must be safe, classrooms must be well heated and cooled, roofs must be kept in good repair, and deficiencies in facilities should be surveyed and corrected. *Plan for Excellence* (hereinafter, *Excellence*) at 91. "Students cannot be expected to concentrate on learning when the temperature is dangerously hot or cold or with the distractions of leaking roofs.

Id. at *21.

[69] *Id.* at *22.

> classroom." . . .Even as basic an item as potable water is not available in all of Alabama's schools. . . Teachers at the Essex School tell the students to wait to drink the water until the end of the day because it is so highly chlorinated. In Macon County, Choctaw County, Dallas County, and many other school systems, leaking roofs are a constant problem. It is common for schools to place trash cans under these leaks to collect water that pours into the schools. In one school, leaking roofs caused classrooms to flood and destroyed maps and charts. A teacher at this school reported, "[s]o far we have avoided any accidents resulting from children slipping on wet floors or tripping over the rain-filled trash cans by carefully monitoring the children" but she believed that the roof leaks "could be a hazard to the children's safety.". . . Many of Choctaw County's schools have old windows whose panes fall out, sometimes during instructional time. Elementary students in Tuscaloosa have been injured more than once because of broken windows. Further, a number of schools in Alabama are infested with termites and other insects.[70]

Thereafter, and on account of this "striking" evidence, the Court held: "the term 'educational opportunities' to mean, in the broadest sense, the educational facilities, programs and services provided for students in Alabama's public schools, grades K-12, and the opportunity to benefit from those facilities, programs and services."[71] They added that plaintiffs in this case had presented a "stark record" of educational deficiencies in schools across Alabama;[72] that, in terms of the equality and adequacy of the education, Alabama's public school system falls dramatically short; and that, as a result, the legislature would be required to rectify a school funding scheme that was unconstitutional in its current form.[73]

Summary of Legislative Response to Date:

In November, 2003 a proposed school improvement plan, Realizing Every Alabama Child's Hope (R.E.A.C.H) was defeated by referendum. This plan would have infused $1.6 billion per year into Alabama schools, including over $172 million annually for facilities renewal. Currently, there is no explicit facilities improvement program in place with the exception of a legislative lending program, the terms of which permit districts to borrow against future disbursements of facilities maintenance funds.

Arkansas

As in Alabama and the other "comprehensive approach" suits discussed here, evidence of deficient facilities is deeply embedded in Arkansas litigants challenge to that state's school finance system. In *Lake View School Dist. No. 25 of Phillips County v. Huckabee*,[74] an Arkansas school district brought an action against the state, challenging the constitutionality of the public school funding system based on disparities in pupil expenditures and opportunities. The Court

[70] *Id.* at *22-24.
[71] *Id.* at *5.
[72] *Id.* at *53.
[73] *Id.* at *63.
[74] 91 S.W.3d 472 (2002), *mandate recalled by*, 142 S.W.3d 643 (2004) (recalling the mandate for noncompliance with the 2002 judgment), *opinion supplemented by*, 2004 WL 1406270 (2004).

recalled its earlier pronouncement that "[e]ducation becomes the essential prerequisite that allows our citizens to be able to appreciate, claim and effectively realize their established rights," and ruled for the plaintiffs. [75]

In so holding, the Court reviewed abundant evidence plaintiffs had presented regarding testing, rankings, and teacher salaries, as well as testimony regarding deficiencies in buildings, equipment, and supplies -- because the statistical evidence, the Court explained, did "not tell the whole story."[76] In an integrated analysis of the compelling testimony it had received, the Court recounted:

> The Holly Grove School District has only a basic curriculum and no advanced courses or programs. The starting salary for its teachers is $21,000. Science lab equipment, computers, the bus fleet, and the heating and air conditioning systems need replacing. The buildings have leaking roofs and restrooms in need of repair. Because millage increases are difficult to win in the school district, Holly Grove must borrow against next year's revenues to repair a falling library roof and leaking gas line. The Barton Elementary School in Phillips County has two bathrooms with four stalls for over one hundred students. Lee County schools do not have advanced placement courses and suffer also from little or no science lab equipment, school buildings in need of repair, school buses that fail to meet state standards, and only thirty computers for six hundred students. Some buildings have asbestos problems and little or no heating or air conditioning. . . School districts experiencing fast-growing student populations such as Rogers and Bentonville in Northwest Arkansas need additional buildings. Buildings in disrepair are rampant in Eastern Arkansas. And qualification for debt-service-funding supplements from the State depends on how much debt can be incurred by the school districts. Poorer districts with deteriorating physical plants are unable to incur much debt.[77]

Discussing the correlation between the state funding scheme and the demonstrated deficiencies in programs, resources, and conditions, the Court continued:

> Looking then to the end result of expenditures actually spent on school children in different school districts, we quickly discern inequality in educational opportunities. The deficiencies in Lake View and Holly Grove have already been noted. In both those districts, the curriculum offered is barebones. Contrast the curriculum in those school districts with the rich curriculum offered in the Fort Smith School District, where advanced courses are offered and where specialty courses such as German, fashion merchandising, and marketing are available. The inequality in educational opportunity is self-evident.
>
> The same holds true for buildings and equipment. Whether a school district has rainproof buildings, sufficient bathrooms, computers for its students, and laboratory equipment that functions is all a matter of money. Certain schools in Fort Smith, for example, do not suffer from such deficiencies. Other schools in the Delta and in Northwest Arkansas

[75] *Id.* at 492 (citing *Dupree v. Alma School Dist. No. 30*, 279 Ark. 340, 346 (1983), which also held that the school funding scheme was unconstitutional).
[76] *Id.* at 489.
[77] *Id.* at 490.

where the student population is exploding are experiencing dire facility and equipment needs.[78]

In concluding, based on this evidence, that the state had not fulfilled its constitutional duty with respect to the school funding system, and mandating that the state correct this constitutional disability and chart a new course for public education in the state, the Court held that facilities improvements were a requisite and integral part of the remedial framework: "Equality of educational opportunity must include as basic components substantially equal curricula, substantially equal facilities, and substantially equal equipment for obtaining an adequate education." [79] In a supplemental opinion issued June 18, 2004, the Arkansas Supreme Court added that providing an adequate educational opportunity to all school children does not require that curricula, facilities and equipment be of identical quality or quantity in all districts. Citing Amendment 74 of the Arkansas Constitution, the Court thereby reiterated a basic standard of adequacy, but conceded that variances in school district revenues above the base millage rate, and subsequent variation in quality (above and beyond that basic standard) is constitutional.

Summary of Legislative Response to Date:

The Arkansas General Assembly formed the Joint Committee on Educational Facilities in April 2003. The Ad Hoc Finance Committee of the Joint Committee on Educational Facilities began meeting in October of 2004 with the purpose of identifying funding sources for school facilities improvements. This group completed its recommendations in December, 2004.[80]

In May, 2005 the General Assembly established a three member commission to govern the Academic Facilities Immediate Repair Program, the purpose of which is to provide state funds "on a qualified basis" for correction of facilities deficiencies that present an immediate hazard to health and safety.[81] Shortly thereafter, the Division of Public School Academic Facilities and Transportation was created and charged with reviewing district applications for funds.

In addition to a complex funding formula, criteria used by the division to determine eligibility for funds include: [82]

-existence of the hazardous condition by January 1, 2005
-the facility condition index (FCI) of the facility involved is less than 65%
-repair project involving:
    heating, ventilation or air conditioning systems
    floors
    roofs
    sewage systems
    water supplies

[78] *Id.* at 497-98.
[79] *Id.* at 500. The Court stayed its mandate until January 2004 in order to give the state time to act. In January 2004, because of noncompliance with the 2002 opinion, the Court recalled the mandate and appointed a master to assure compliance. *See supra* note 78.

[80] For a detailed outline of the Ad Hoc Committees recommendations regarding funding options, see www.arkansasfacilities.com/pdf/FundingCommitteeReport.pdf
[81] www.arkansasfacilities.com/pdf/Rules%20and%20Regs/Final%20Rules%20Facilities/aft_004_immediate_repair_program.pdf
[82] id.

asbestos abatement
fire alarm systems
exterior doors
emergency exit or egress lighting
academic program or facility accessibility for individuals with disabilities
any other repair necessary to satisfy life-safety code requirements

In September, 2005 the commission approved the transfer of $34.7 million in state funds for 142 districts.[83] Districts had applied for $73 million in total. In addition to the approved funds, the legislature set aside $50 million for building debt incurred after January 1, 2005.

The division also proposed a master plan timeline to identify immediate facilities needs and long-term needs. Beginning in 2008, districts must submit a bi-annual facilities master plan.[84]

New York

In *Campaign for Fiscal Equity, Inc. v. State* ("*CFE I*") (1995),[85] plaintiffs students, parents, and organizations concerned with education issues argued, *inter alia*, that the state funding system failed to provide a sound basic education to the city's school children, in violation of the New York Constitution. With respect to this claim, New York's Supreme Court (its trial court), determined that only the non-school district plaintiffs plead a viable cause of action under the Education Article. Following modification of this decision by the Appellate Division, which dismissed all claims, the Court of Appeals reversed, reinstating the trial court's determination that plaintiffs had a valid claim. By requiring a school system "wherein all the children of this state may be educated," the Court of Appeals held, the State had obligated itself constitutionally to ensure the availability of a "sound basic education" to all its children; further, the Court was responsible for determining the nature of that duty.[86] Though stating that the exact meaning of the "sound basic education" could only be "evaluated and resolved after development of a factual record at trial,"[87] the Court of Appeals did offer this preliminary definition of a "sound basic education:" "the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury."[88] The Court also described the "minimally adequate" *inputs* necessary to a "sound basic education," including clear reference to the condition of and resources within school buildings:

> Children are entitled to minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn. Children should have access to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks. Children are also entitled to minimally

[83] www.arkansasnews.com/archive/2005/09/16/News/328352.html
[84] id
[85] 86 N.Y.2d 307 (1995). In a prior decision, *Board of Educ., Levittown Union Free School Dist. v. Nyquist*, 57 N.Y. 2d 27 (1982), the Court upheld that the school finance system against a challenge to this scheme.
[86] *Id.* at 314.
[87] "Summary of the Decision by the Court of Appeals in *Campaign for Fiscal Equity, Inc. v. State of New York*." www.cfequity.org
[88] *Id.* at 316. *This reference to voting and jury service would become a key element of the State's subsequent appeal, wherein it argued that voting and jury duty required no more that eighth grade skills.*

> adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas." [89]

On remand (CFE II), plaintiffs amassed a voluminous record – 72 witnesses and 4,300 exhibits – on the "inputs" children receive, such as teaching, facilities ("leaky roofs, deficient heating, and other problems"), and instrumentalities of learning, as well as their resulting "outputs," such as test results and graduation and dropout rates.[90] The supreme court evaluated plaintiffs' claim via a three part inquiry. [91] Justice DeGrasse explained that the court was charged with: 1. Defining "what constitutes a sound basic education;" 2. "Whether New York City school children are provided with the opportunity to obtain a sound basic education;" and 3. If children do *not* have the opportunity to obtain a sound basic education, "whether there is a 'causal link' between this failure and the State's system for funding public schools."[92] In defining a sound basic education, the court returned to the minimally basic inputs described by the Court of Appeals in CFE I, which included "minimally adequate" facilities, "minimally adequate" instrumentalities of learning and "minimally adequate" teaching of "reasonably" up to date curricula (see earlier reference to CFE I).

Justice DeGrasse acknowledged, at the outset, that the Court of Appeals, through its repeated reference to minimal and basic adequacy, "intended that a sound basic education should not be defined in a way that incorporates the highest aspirations of educators."[93] Nonetheless, the court was unwilling to accept defendants' assertion that the definition be "limited to an education sufficient to allow high school graduates simply to serve as jurors and voters…." He added that the Court of Appeals referred to the ability to vote and serve on a jury as examples of "the larger concept of productive citizenship," not with the intention of setting the educational threshold at the level of statutory requirements for voting and jury service, which include little more than citizenship, adulthood, a clean criminal record and mental competence.[94] DeGrasse went on to say:

> "A capable and productive citizen doesn't simply show up for jury service. Rather, she is capable of serving impartially on trials that may require learning unfamiliar facts and concepts and new ways to communicate and reach decisions with her fellow jurors…jurors may be called on to decide complex matters that require the verbal, reasoning, math, science and socialization skills that should be imparted in public schools.

This was an early indication that the court, though held to a relatively low standard of educational quality and a simultaneously strict standard of causation, would largely reject the State's defense, and come closer to accepting both plaintiffs' formulation of a sound basic

---

[89] *Id.* at 317.
[90] *Schrag, P. Final Test: The Battle for Adequacy in America's Schools. The New Press (2003) pp175-204*
[91] *Campaign for Fiscal Equity v. State of New York 719 N.Y.S. 2d 475*
[92] *Id.*
[93] *Id. (8 at cfequity.org/decision.html)*
[94] *Id. (10 at cfequity.org/decision.html)*

education[95] and their claim that New York city students were not provided the opportunity to obtain such an education. The third element of the court's evaluation – its determination of a "causal link" between educational deficiencies and the State's school funding system is not as clear cut, particularly with regard to facilities. In this instance, the court concluded that the evidence and expert testimony indicated the existence of a link between decrepit facilities and achievement, but acknowledged that this causal link was not easily measured. Justice DeGrasse wrote:

> The State legislature, SED and BOE have all concluded that the City's decaying and decrepit school facilities impede learning but have not attempted to quantify the negative effect of crumbling school buildings on student performance….
>
> Plaintiffs presented numerous SED and BOE witnesses who testified that the physical plant of the school can have a marked effect upon learning. In the case of absent or obsolete science labs the connection is obvious. Students cannot learn a subject without the requisite tools to do so….
>
> For the reasons stated, the physical condition of New York City's schools has a negative effect upon the academic performance of the City's public school students. However, the magnitude of that effect is unclear from the evidence at trial.

It was on this last point that plaintiffs ran into trouble. Defendants appealed the CFE II (2001) ruling and the Appellate Division overturned DeGrasse, holding that his definition of a sound basic education set the standard too high and that the trial court had gone too far in its conclusions regarding causation.[96] One year later, The Court of Appeals reversed the Appellate Division, rejecting the eighth grade level standard of education but stopping short of a full reversal on the question of causation.

In overturning the trial court's decision, the Court of Appeals returned to its original formulation of the *minimum* essentials that comprise a "sound basic education." In so doing, it also returned to the strict causation standard, declaring that while the evidence was clear that facilities were in need of repair, plaintiffs had not demonstrated a "measurable correlation" between particular deficiencies and student performance.[97] The Court explained:

> As we noted in CFE, children are entitled to 'classrooms which provide enough light, space, heat, and air to permit children to learn' [citation omitted] The trial court divided this further--considering first the physical plant of New York City schools, and then the specific problem of overcrowding and class size--and concluded that New York City schools are deficient. The court conceded, however, that the harmful effect of physical deficiencies of the first kind on student performance is difficult to measure. The

---

[95] *The court stopped short of setting the bar at the Regents Learning Standards level, reasoning that the work required by that accountability scheme (relatively new at the time) exceeded the "basic" and "minimally" adequate standard described by the Court of Appeals. See Schrag, P. Final Test: The Battle for Adequacy in America's Schools. The New Press (2003).*

[96] *Campaign for Fiscal Equity, Inc. v. State of New York (CFE III) (2002) NY Slip. Op. 05327. See also, Schrag, P. Final Test: the Battle for Adequacy in Americas Schools. The New Press (2003).*

[97] *Id.* at 910.

> Appellate Division took note of this concession, dismissed as "anecdotal" plaintiffs' evidence of "leaky roofs, deficient heating, and other problems," and credited testimony that "all immediately hazardous conditions had been eliminated. [citation omitted] Eliminating immediate hazards is not the same as creating an environment conducive to learning, and the record contains much evidence about deficient school infrastructure. Nevertheless, on this record it cannot be said that plaintiffs have proved a measurable correlation between building disrepair and student performance, in general. [98]

Here, though state appellants partially win their point as to strict causation, it is clear that the Court does not intend to go so far as to fly in the face of the common sense assumption that many other courts in this survey have made so readily – that physical conditions, space and resources matter. Holding themselves to a relatively tight standard of judicial restraint, and therefore having to concede the absence of measurability with regard to some facilities deficiencies, the Court still finds a direct link between other deficiencies and educational opportunity; direct enough and broad enough in scope to effectively carry the facilities point overall.

Having granted that plaintiffs did not prove a *measurable* correlation between facilities disrepair and student achievement, the Court went on to say, however, that plaintiffs had succeeded in demonstrating the requisite "measurable correlation" between other aspects of facilities inputs and student performance:

> Plaintiffs presented measurable proof, credited by the trial court, that New York City schools have excessive class sizes, and that class size affects learning. Even in the earliest years--from kindergarten through third grade--over half of New York City schoolchildren are in classes of 26 or more, and tens of thousands are in classes of over 30. As the trial court noted, federal and state programs seek to promote classes of 20 or fewer, particularly in the earliest years, and plaintiffs' experts testified on the advantage of smaller classes. As the 1999 655 Report shows, New York City elementary school classes average five more pupils than those of other schools statewide excluding Buffalo, Rochester, Syracuse and Yonkers. . .We conclude that plaintiffs' evidence of the advantages of smaller class sizes supports the inference sufficiently to show a meaningful correlation between the large classes in City schools and the outputs to which we soon turn.[99]

Importantly, the Court went on to acknowledge that, due to the necessary space implications of reduced class sizes, its recognition of this particular "performance-related" deficiency could not be insulated from the question of facilities inadequacies, more broadly. The Court explained:

> Some facts that the trial court classified as purely "physical" facilities inputs are inseparable from overcrowding and excessive class size--conditions whose measurable effect on students plaintiffs have shown. One symptom of an overcrowded school system is the encroachment of ordinary classroom activities

[98] *Id.* at 911.
[99] *Id.* at 911-12.

> into what would otherwise be specialized spaces: libraries, laboratories, auditoriums and the like. There was considerable evidence of a shortage of such spaces. Particularly poignant is the fact that 31 New York City high schools serving more than 16,000 students have no science laboratory whatsoever. Whether this fact stems from overcrowding or from the design of some old school buildings, its direct impact on pedagogy is self-evident and it counts against the State in any assessment of the facilities input.[100]

Ultimately, in holding the school finance scheme unconstitutional as to New York City, and in ordering the state to initially determine the actual cost of providing a sound basic education in the city and enact reforms accordingly, the Court declared, broadly:

> [T]ens of thousands of students are placed in overcrowded classrooms, taught by unqualified teachers, and provided with inadequate facilities and equipment. The number of children in these straits is large enough to represent a systemic failure. A showing of good test results and graduation rates among these students--the "outputs"--might indicate that they somehow still receive the opportunity for a sound basic education. The showing, however, is otherwise.[101]

Thus, even under a high level of judicial scrutiny; despite the state's aggressive, heavily resourced battle; and against the backdrop of a relatively low constitutional standard of educational quality compared with other states, the Court *still* held adequate facilities to be an essential component of a "sound basic education" in New York.

In the wake of the Court of Appeals ruling (*CFE III)*, the state's failure to take action in accordance with the Court's mandate led to the appointment of a panel of special masters, charged with recommending dollar figures for the cost of an adequate education.[102] The panel's recommendation, released in November 2004, recognizes the centrality of sufficient facilities in the provision of educational opportunity: The special masters suggested $9.2 billion in facilities improvements, as well as $5.6 billion in additional operating aid for standards-based education and extra programs for low-income and special needs students, to be phased-in over the next four years.[103] These recommendations were affirmed, in their entirety, by Justice DeGrasse of the trial court in March, 2005.[104]

The most recent development in this litigation came on August 5, 2005 with the State's filing for appeal of the trial court's compliance order. Putting forth separation of powers arguments, the State claimed, once again, that the courts have overstepped judicial bounds. CFE

---

[100] *Id.* at 911 n.4.
[101] *Id.* at 914.
[102] *See* Final Report and Recommendation of the Special Referees, Nov. 30, 2004, at 3, *available at* http://www.cfequity.org/compliance/RefereesFinalReport11.30.04.pdf (recounting this history).
[103] *See* Final Order of Justice DeGrasee, Mar. 16, 2005, *available at* http://www.cfequity.org/compliance/degrassefinalorder031505.pdf .
[104] *Id.*

submitted a response brief on September 7, 2005, wherein it looked to Kansas for precedent to counter the state's separation of powers argument.[105]

Summary of Legislative Response to Date:

In June 2005, the Chair of the Education Committee introduced the Schools for New York's Future Act into the New York Assembly in an effort to seek a political solution to the long-standing and continuing litigation.[106] The bill, drafted by the Campaign for Fiscal Equity ("CFE"), lawyers for the plaintiffs in the case, and a coalition of statewide organizations, would provide an additional $8.6 billion in operating expenses statewide; an additional $10 billion to relieve overcrowding, reduce class sizes, and other facilities projects; an equitable, simplified foundation formula that would align funding with student need and ensure predictability; and enhanced accountability to ensure that the influx of funds is spent in an effective an appropriate way.[107]

In presenting a 2006 budget to the legislature, however, the New York Governor failed to respond to the Act by proposing an increase in funding sufficient for the New York schools to remedy the resource and facilities deficiencies addressed in the *CFE* rulings. [108]

In February 2006, the legislature's Education Committee held a hearing at which the Director of CFE presented testimony on the requirements of the *CFE* rulings and the pressing need for passage of the Schools for New York's Future Act.[109] This testimony highlighted for the Committee the failures of the Governor's budget in terms of New York school-childrens' resource and facilities needs, and urged for passage of the Act this year in the face of a $3.3 billion surplus that would more than pay for the first year of the Act.[110]

In April 2006, the Governor announced that State Budget included a new aid category aimed to help school districts with school construction projects. The one-time allocation program called Expanding our Children's Education and Learning (EXCEL) amounts to $2.6 billion statewide with $1.8 billion going to New York City, as required by the court-ordered mandate that the State send more money to the New York City schools. The money will come through the Dormitory Authority. Districts must use the money for new building projects only, and applications will be accepted beginning July 1.

Wyoming

Unlike other states, which emphasize additional funding, equalized funding, or adequate or sufficient education, Wyoming, as its Supreme Court has explained, "views its state constitution as mandating legislative action to provide a thorough and uniform education of a

---

[105] See www.cfequity.org for a copy of the filings in this case, including these latest filings.
[106] *See* "Assemblyman Sanders Introduces Schools for New York's Future Act for Passage in Current Legislative Session," Campaign for Fiscal Equity, Press Release, June 7, 2005, at http://www.cfequity.org/PressRelease6-7-05.pdf.
[107] *Id.*
[108] "Testimony of Geri D. Palast," Public Hearing of the New York City Council Education Committee, Feb. 13, 2006, at http://www.cfequity.org.
[109] *Id.*
[110] *Id.*

quality that is both visionary and unsurpassed."[111] The Wyoming school finance case is also unusual in that all parties agreed that inadequate funding causes serious damage to school districts' ability to deliver a constitutional education to the children of Wyoming; that the current method for financing capital construction was not constitutional; and that capital construction financing cannot be based upon local wealth, but must be based upon the wealth of the state as a whole.[112] Moreover, from the outset, the Wyoming Court itself was adamant about the powerful relationship between facilities deficiencies and the delivery of the "full basket" of a constitutionally adequate education. Further, unlike the New York Court's strict causation approach, the Wyoming Court actually sought to emphasize its own deep-seated and long-standing understanding of the relationship between adequate facilities and an adequate education. "Before we again focus on methodology details," the Court explained in *State v. Campbell County Sch. Dist* (*Campbell III*):

> It cannot be forgotten why, since 1981, we have found that capital construction financing critically impacts the quality of education.
>
> . . .
>
> Our 1995 opinion found the challenger school districts had proved that the cumulative effect from years of diverting and cutting operational funding had forced untenable staff and program cuts while failing to prevent the deterioration and overcrowding of school buildings. Consequently, school districts were unable to provide to all students in this state a sufficient number of teachers and buildings to maintain small class size, sufficient programs necessary to deliver a proper education, and assurance that all buildings met basic safety standards. [113]

"Since 1995, the legislature has comprehensively addressed school districts' operational funding issues, but not capital construction deficiencies… Unless the two parts of the whole are simultaneously remedied, the unconstitutionality of the system is not eliminated."[114]

Campbell III – the Court's opinion on the state's petition for rehearing, which addressed only the facilities component of the funding scheme – arose out of a whole-sale attack on the school finance system. In *Campbell I*,[115] plaintiff school districts challenged the constitutionality of Wyoming's school financing statutes under the state's equal protection section and education article. Among the evidence presented by plaintiffs at trial was testimony that, "considered the contribution of physical facilities towards educational quality" and student achievement:

> Educational research reports a relationship between the condition of buildings and quality of education. As the building deteriorates and becomes more crowded, test scores go down.[116]

[111] State v. Campbell County Sch. Dist., 19 P.3d 518, 538 (2001) (*Campbell II*).
[112] State v. Campbell County Sch. Dist., 32 P.3d 325, 327 (2001) (*Campbell III*).
[113] *Id.* at 327.
[114] *Id.* at 328.
[115] Campbell County Sch. Dist. v. State, 907 P.2d 1238 (1995) (*Campbell I*).
[116] *Id.* at 1255.

Holding for the plaintiffs, the Court ruled that several components of the school funding scheme – including the capital construction financing component – resulted in funding disparities that were not cost based, in violation of the Wyoming Constitution. Accordingly, the Court ruled,

> As nearly as possible, and making allowances for local conditions, special needs and problems, and educational cost differentials, the education system must achieve financial parity. A cost of education study and analysis must be conducted and the results must inform the creation of a new funding system. To fulfill the constitutional command of "equality of financing will achieve equality of quality," the legislature must state and describe what a "proper education" is for a Wyoming child. The constitution requires it be the *best* that we can do.[117]

Pursuant to the Court's 1995 mandate and subsequent legislative sessions, the plaintiff school districts and the Wyoming Education Association returned to court to challenge the revised scheme. In a second opinion, consolidating these actions, the Court again ruled on issues involving the constitutionality of operations as well as capital construction financing as part of its task of determining whether the funding adopted by the legislature in 1999 met the constitutional standard of the "*best* we can do."[118]

Recounting the long history of Wyoming's struggle to ensure equal educational opportunity, the Court, in *Campbell II,* once more underscored facilities funding as central to the project:

> This court declared the entire school finance system unconstitutional in *Washakie County School District Number One v. Herschler,* 606 P.2d 310 (Wyo.1980). . .Although *Washakie* was focused on operational financing, the holding was equally applicable to capital construction.
>
> We see no reason to give particular attention to the question of finances for the physical facilities with which to carry on the process of education. It is a part of the total educational package and tarred with the same brush of disparate tax resources. . .statewide availability from total state resources for building construction or contribution to school buildings on a parity for all school districts is required just as for other elements of the educational process. [119]

Indeed, in holding that various aspects of the revised scheme were unconstitutional,[120] the thrust of the *Campbell II* opinion rests on the question of the enduring deficiencies in the capital

---

[117] *Id.* at 1279 (emphasis in original).
[118] *Campbell II*, 19 P.3d 518.
[119] *Id.* at 528.
[120] Respecting aspects other than capital financing, the Court held:

> • The cost-based model approach chosen by the legislature which relies upon past statewide average expenditures is capable of supporting a constitutional school finance system.
> • The funding legislation must be modified as follows, on or before July 1, 2002, in order to provide a constitutionally adequate education appropriate for our times:
> [x] The model and statute must be adjusted for inflation each biennium, with 1996-97 as the base year, utilizing the Wyoming cost-of-living index (WCLI), beginning in 2002-03, so long as a cost of education model using historic costs is relied upon for the basis of education funding. The legislature shall conduct a

funding scheme and the fashioning of an appropriate facilities remedy – one which would support the broad-based remedial framework of other programs and reforms. Ultimately, with respect to facilities, the *Campbell II* Court ruled:

> The legislature must fund the facilities deemed required by the state for the delivery of the "full basket" to Wyoming students in all locations throughout the state through either a statewide tax or other revenue raising mechanisms equally imposed on all taxpayers. . ..All facilities must be safe and efficient. [121]

From this second opinion, the State petitioned for rehearing. Because the petition indicated an interpretation of the *Campbell II* decision not intended by the Court regarding the issue of capital construction, the Court addressed only the facilities issue in *Campbell III*. It was in this third, and final, decision that the Court noted the absence of "serious dispute from any party that inadequate funding impedes school districts' ability to deliver a constitutional education to our children:"[122] The centrality of facilities improvements to the efficacy of the overall scheme was well established; only the adequacy of the remedy remained in contention. After outlining four "fundamental precepts" which were to apply to the efforts to implement the legislature's plan for capital construction, the Court concluded:

> The effort we all must maintain as citizens and officials is to remain focused on the very purpose those who created the constitution of this state sought: the adequate and equal opportunity for education of our children. When that purpose is given its proper place in our priority for our future as a state, open discussion of divergent points of view will inevitably lead to better resolution of issues in education. Our history must not be based on a legacy of school finance cases laid on the doorstep of the Supreme Court, but rather

---

> review of all components of the model in 2001 and every five years thereafter to assure it remains an accurate reflection of the cost of education.
> [x] Administrative and classified salaries must be adjusted to account for differences in experience, responsibility, and seniority.
> [x] Cost of maintenance and operation, including utility costs, must be determined by either development of a formula which uses enrollment measured by ADM, building square footage, and number of buildings in the district or actual costs fully reimbursed, subject to state oversight.
> [x] Pending future development of an accurate formula with which to distribute adequate funds, actual and necessary costs of educating economically disadvantaged youth and limited English speaking students shall be fully funded, subject to state oversight.
> [x] The costs of providing teachers and equipment for vocational and technical training must be included as line items in the MAP model and funded accordingly.
> [x] Any small school adjustment must be based on actual differences in costs which are not experienced by larger schools.
> [x] Any small school district adjustment must be based on documented shortfalls under the MAP model that are not equally suffered by larger districts.
> [x] Statewide average costs must be adjusted for cost-of living differences **527* using either the entire WCLI or another reasonable formula which includes a full housing component, including the rental of shelter costs, and a medical component to cover costs not included in the benefits portion of the salary component.
> • Kindergarten Error--The legislature, on or before July 1, 2002, shall provide a one-time supplement to fully fund each school district's 1998-99 kindergarten component cost in the total aggregate amount of the $13,930,000 funding error.

Id. at 526.
[121] *Id.*
[122] *Campbell III*, 32 P.3d at 327.

on the considerate resolution of never-ending challenges we all face as responsible adults when providing for our children.[123]

Summary of Legislative Response to Date:

In response to the *Campbell III* decision, the Wyoming Legislature created the School Facilities Commission in 2002. Working independently of the Department of Education and reporting directly to the Governor, this seven member commission includes the DOE Superintendent of Public Instruction; one member of the state board of education and remaining members with expertise including: building and facilities engineering, construction and operations; building design and specification; estimating, bidding and building construction; school facilities planning and management; and the state educational program for public schools as required by law. According to the Wyoming State Government Annual Report, 2005 the mission of the Commission is to "provide an avenue for adequate educational facilities for all children in the State of Wyoming..." and to "oversee all aspects of construction for school facilities…." (Wyoming State Government Annual Report, 2005)

As of year end 2005, school buildings in all Wyoming districts had undergone an annual review based upon the Commission's statewide facility adequacy standards. Maintenance, repair and replacement construction is ongoing with $293,999,412 appropriated for that purpose by the 2004 legislature. All 48 Wyoming school districts are required to submit annual updates to their Five Year Plans (with the assistance of expert consultants), prioritizing facility improvement needs. Major Maintenance funds are distributed to districts before July 1st each year. The 2005 budget for Major Maintenance funds was $67,789,404.(Wyoming State Government Annual Report, 2005)

THE "FOCUSED" APPROACH:

Arizona, Idaho and California

In some states, litigants decide that a whole-sale attack on the adequacy of the school funding scheme is strategically unwise or otherwise foreclosed by a prior court ruling. Under these circumstances, a targeted challenge to the facilities funding scheme provides an alternative for plaintiffs to contest deplorable capital conditions, while also providing entrée to present evidence of other, broad-based educational deficiencies. As the "comprehensive" litigation demonstrates, facilities evidence has a concrete, illustrative, and therefore judicially-accessible quality unmatched by test score data and poverty statistics. For this reason, stark testimony on danger, squalor, overcrowding and disrepair in the state's public schools is difficult to ignore, even for courts reluctant to revisit old precedent upholding school funding schemes, or those reticent to engage in any effort to define the elements of an "adequate education." Not surprisingly, therefore, when courts in focused adequacy suits undertake analysis of facilities deficiencies and attempt to fashion appropriate remedies, the opportunity to learn almost inevitably comes under scrutiny. In other words, facilities funding can be a powerful tool for litigants to use in the quest to ensure educational opportunity even when plaintiffs are unable, or

[123] *Id.* at 337.

for strategic reasons opt not to approach broad-based systemic and programmatic deficiencies head-on.[124] It is a tool used effectively, though in different ways, by litigants in focused facilities funding suits in Arizona, Idaho and California -- three suits set against vastly different historical and political backdrops.

Arizona

In *Shofstall v. Hollins*,[125] Arizona taxpayers and schoolchildren in a low-property wealth school district launched a broad-based attack on the state's school finance system, asserting that the system violated equal protection clauses of the state and federal constitutions. Although the Supreme Court acknowledged education as a fundamental right, the Court nevertheless rejected plaintiffs' claim using the rational basis test. Specifically, the Court held that, to meet the constitutional requirement, the state's system need only be rational, reasonable, and neither capricious nor discriminatory, and the fact that taxpayers of one county shouldered a different tax burden than citizens of another county and also received varying degrees of governmental service was not, per se, a violation of equal protection requirements of state and Federal Constitutions.[126]

Acting against the backdrop of the somewhat incoherent *Shofstall* precedent, almost 20 years later in *Roosevelt Elementary School District No. 66 v. Bishop* ("*Roosevelt I"*),[127] plaintiff school districts and parents opted to bring a "focused" action against the Superintendent of

---

[124] Alaska and Colorado are two additional examples of states in which prior adverse rulings in whole-sale finance challenges influenced litigants to challenge only the facilities funding aspect of the scheme in subsequent adequacy suits.

In *Matanuska-Susitna Borough Sch. Dist. v. State*, 931 P.2d 391 (1997), the Alaska Supreme Court ruled against plaintiffs' whole-sale challenge to the school funding laws. Subsequently, in *Kasayulie v. State*, No, 3AN-97-3872 (Alaska Sup. Court Sept. 1, 1999), litigants opted to attack only the state facility-funding mechanism on the basis that the scheme violated the Education Cause because it failed to "adequately maintain schools in rural areas." *Id.* at 1. In denying the State's motion for summary judgment, the Alaska Superior Court noted that the Education Clause imposes an "affirmative duty on the state to provide public education facilities," and further declared that facilities are an "integral part of education . . . inseparable from the State's obligation to maintain a public education system." *Id.* at 3 (citing the Alaska Department of Education standards, which dictated that the "'school plant, consisting of site, buildings, equipment, and services, is an important factor in the functioning of the educational program . . . [and] serves as a vehicle in the implementation of the school mission.'"). The Court also asserted that the State was obligated to provide school districts "substantially equal access to facilities funding." *Id.*

Similarly, in *Lujan v. Colorado State Board of Educ.*, 649 P.2d 1005 (1982), the Supreme Court of Colorado held that the school finance system was constitutional in the face of plaintiffs' challenge to this scheme. Subsequently, in *Giardino v. State Board of Educ.*, No. 98 CV 246 (Denver Dist. Ct. Feb. 26, 1998), litigants focused their attack on the capital funding scheme, listing, among the facility deficiencies: "(a) condemned portions of school; (b) inadequate fire security systems; (c) leaky and failing roofs; (d) over-crowded facilities; (e) excessive maintenance and repair costs for antiquated facilities[.]" *Id.* at 7–8. Two years into the suit, plaintiffs reached a settlement agreement with the state. *Giardano v. Colorado State Board of Education*, 98CV0246 (Denver Dist. Ct. June 6, 2000) (Settlement Approval Order and Final Judgment). The agreement required that the legislature provide a mechanism for funding capital construction, repair and maintenance in public schools that includes $190 million for facilities funding disbursed within an eleven-year period. *Id.* at 3. The settlement in no way addressed the constitutionality of the capital funding scheme, thereby making future challenges to the system a viable option for plaintiffs.

[125] 515 P.2d 590 (1973).

[126] *Id.*

[127] 877 P.2d 806(1994) (*Roosevelt I*).

Public Instruction and state, with the "focus" on funding for school facilities. Before the trial court, plaintiffs amassed an "undisputed record [that] showed enormous facility disparities among the various school districts and traced these disparities to the statutory financing scheme, which relied in large part on local property taxation for public school capital requirements."[128] This time, the Arizona Supreme Court agreed with the plaintiffs. It held that a statutory financing scheme for public education "that is *itself* the cause of gross disparities in school facilities" failed to comply with the "general and uniform" requirement of the Arizona Constitution.[129] The Court then directed the legislature to enact appropriate laws to finance capital expenditures in the public schools in a way that did not, in themselves, create substantial disparities among schools, communities or districts.[130]

Though the plaintiffs' official challenge focused on facilities, and the court's ultimate remedy did the same, the issues raised and addressed during the course of this action were much broader in scope. Beyond the question of capital deficiencies per se, plaintiffs set forth additional proof about general inadequacies in programs, resources, and conditions. The Court, in turn, invoked this evidence as part of its "capital" analysis, looking beyond physical facilities to the "quality" of certain resources and even the presence of certain programs. The Court explained:

> The quality of elementary and high school facilities in Arizona varies enormously from district to district. There are disparities in the number of schools, their condition, their age, and the quality of classrooms and equipment. Some districts have schoolhouses that are unsafe, unhealthy, and in violation of building, fire, and safety codes. Some districts use dirt lots for playgrounds. There are schools without libraries, science laboratories, computer rooms, art programs, gymnasiums, and auditoriums. But in other districts, there are schools with indoor swimming pools, a domed stadium, science laboratories, television studios, well stocked libraries, satellite dishes, and extensive computer systems.[131]

Moreover, in analyzing the capital funding scheme and resulting facilities deficiencies, the Court made proclamations about the meaning of a "general and uniform" education, the constitutional value of public school education, and the flaws in the school finance scheme, more generally; indeed, the Court even expressed skepticism about the *Shofstall* precedent. The Court explained:

> We agree with the districts that *Shofstall* is not dispositive. We do not understand how the rational basis test can be used when a fundamental right has been implicated. They seem to us to be mutually exclusive…. We need not, however, resolve this conundrum because where the constitution specifically addresses the particular subject at issue, we must address that specific provision first. [citation omitted] We therefore begin with those portions of our constitution that specifically address the field of education.
>
> . . .
>
> As the conventioneers who drafted Arizona's constitution foresaw, public education has been a key to America's success. The education provisions of the constitution

[128] *Id.* at 808.
[129] *Id.* at 814-16.
[130] *Id.* at 816.
[131] *Id.* at 808.

> acknowledge that an enlightened citizenry is critical to the existence of free institutions, limited government, economic and personal liberty, and individual responsibility. Financing a general and uniform public school system is in our collective self-interest.[132]

In its effort to define "general and uniform," the Court looked to other whole-sale funding suits, and ultimately distilled two fundamental principles from these cases: First, "funding mechanisms that provide sufficient funds to educate children on substantially equal terms tend to satisfy the general and uniform requirement;" second, "as long as the statewide system provides an adequate education, and is not itself the cause of substantial disparities, local political subdivisions can go above and beyond the statewide system."[133] Thereafter, in striking pronouncements just as applicable to deficiencies in programs and resources as to facilities, the Court held that the state's education financing system – taken as a whole – did not comply with the Arizona Constitution because it directly caused substantial capital disparities: The system was "a combination of heavy reliance on local property taxation, arbitrary school district boundaries, and only partial attempts at equalization." Therefore, "the state's financing scheme could do nothing but produce disparities."[134]

Concurring in the majority opinion, the Chief Justice went even further with respect to *Shofstall* and the broad meaning of a "general and uniform" education:

> The opinion prefers . . .to analyze this case under Ariz. Const. art. 11--the education article. I do not object to the routing, although I doubt its necessity. In my view, *Shofstall* did not decide the scope of our constitution's education article. *Shofstall* was exclusively an equal protection case that decided two questions: first, whether the student plaintiffs were deprived of equal protection by the school financing plan, and second, whether the taxpayer plaintiffs were so deprived. The briefs did not argue and the court evidently neither considered nor decided whether the financing system violated the general and uniform provisions of art. 11, § 1. Therefore, the meaning of the general and uniform clause of art. 11, § 1, as applied to financing schemes, is a question of first impression in Arizona.
>
> . . .
>
> Moreover, the Arizona Constitution already tells us how to achieve a general and uniform school system. At the constitution's command and the legislature's direction, the Arizona State Board of Education ("Board") has already completed this difficult task. . . The Board regularly sets and updates the minimum courses of study and competency requirements for Arizona's schoolchildren. The courses of study are basic; the competency requirements are attainable by the average, reasonably motivated student. In light of this, I can only conclude that the legislature cannot constitutionally impose a capital funding scheme that creates such disparity in facilities and equipment that it prevents some Arizona school districts from furnishing the environment, facilities, textbooks, equipment, and other capital resources needed to give students an equal opportunity to attain the Board's prescribed minimum course of study.[135]

[132] *Id.* at 811-14.
[133] *Id.* at 814-15.
[134] *Id.* at 815.
[135] *Id.* at 817-22.

"Further," the Chief Justice concluded, "I believe that we have an obligation to explain to the legislature, which after all must now create a new financing scheme, just what the constitution requires and what we mean when we state that the system must provide an adequate education."[136]

Pursuant to *Roosevelt*, the legislature amended the funding plan, and the Governor sought a judicial declaration that those amendments complied with Court's mandate.[137] In *Albrecht I*, the Supreme Court held that the revised funding scheme *did not*, in fact, meet constitutional requirements because it continued to result in substantial capital-facility disparities among school districts, improperly delegated to the districts the state's responsibility to maintain adequate facilities, and failed to provide minimum adequacy standards for capital facilities.[138] In so holding, the Court, once again, touched on broader questions regarding the substantive meaning of a constitutionally adequate education. The Court's readiness to engage questions about the meaning of a "general and uniform" system of education, and the funding scheme that would support this system, was in turn reflected in the standards-based nature of the facilities funding system the Court envisioned – a system capable of providing the capital facilities, resources and equipment necessary to "house" teaching, learning, and ultimately, academic achievement in line with state proficiency standards.[139]

> The general and uniform requirement applies only to the state's constitutional obligation to fund a public school system that is adequate. Defining adequacy, in the first instance, is a legislative task. But, in addition to providing a minimum quality and quantity standard for buildings, *a constitutionally adequate system will make available to all districts financing sufficient to provide facilities and equipment necessary and appropriate to enable students to master the educational goals* set by the legislature or by the State Board of Education pursuant to the power delegated by the legislature.[140]

Pursuant to *Albrecht I,* the legislature passed new legislation ("Students FIRST"), a school capital-finance program funded by dedicated revenue from the state's transaction privilege tax. Once more, the Governor filed a petition for special action seeking the Court's declaration that the Act complied with the Arizona Constitution.[141] Based on *Albrecht I*'s two-pronged test for assessing whether a school financing system meets constitutional requirements – that the state must establish minimum adequate facility standards and provide funding to ensure that no district falls below them; and that the funding mechanism chosen by the state must not itself cause substantial disparities between districts – the Court approved Students FIRST to the extent that it created adequacy standards for capital facilities and ensured, through state funding, that all school districts would be able to comply with those standards.[142] Once more, the connection between adequate facilities funding and the public education system overall was of paramount importance to the Court:

---

[136] *Id.* at 819.
[137] *See* Hull v. Albrecht, 950 P.2d 1141, 1143 (1997) ("*Albrecht I*").
[138] *Id.* at 1146.
[139] *See id.* at 1145. *See also* Molly Hunter, *Building on Judicial Intervention: the redesign of school facilities funding in Arizona*, Campaign for Fiscal Equity (Sept. 2003), at 17, 30, *available at http://www.schoolfunding.info/resource_center/research/azFinal6.PDF*.
[140] *Id.* at 1145 (emphasis added).
[141] Hull v. Albrecht, 960 P.2d 634 (1998) ("*Albrecht II* ").
[142] *Id.* at 637.

> The Act. . .directs the School Facilities Board ("SFB"), a new nine-member administrative agency, to promulgate additional requirements. *The SFB must set standards for all facilities and equipment necessary to achieve the state's academic requirements,* including school sites, classrooms, libraries, cafeterias, auditoriums or multi-purpose rooms, technology, transportation, and facilities for science, arts and physical education. Thus, on its face, the Act complies with the requirement that a general and uniform school financing system include statewide minimum adequacy standards for capital facilities.[143]

However, the Court disapproved that portion of the scheme allowing a district to "opt out" of state funding and pay for its capital needs solely through local financing, explaining that the provision contravened a system of general and uniform public-school financing, and because the opt-out section was not severable. Therefore, once again, the Court concluded that the Students FIRST legislation was unconstitutional.[144]

Pursuant to *Albrecht II*, the Legislature amended Students FIRST, establishing three key funding mechanisms and creating building adequacy standards. In 2003, plaintiff school districts returned to court to challenge constitutionality of the state's failure to fund the Building Renewal Fund according to the statutory formula for fiscal years 1999-2003. This time holding for the state, the *Roosevelt II* Court[145] nonetheless underscored the causal link between adequate facilities and student achievement:

> There is no doubt that the public schools in Arizona need adequate funding in order for students to achieve the academic standards declared by the Legislature. However, because the school districts have not shown that they have current unmet needs related to academic achievement, we reverse and remand this case for further proceedings consistent with this opinion.
>
> In other words, although the districts showed that they have capital facilities needing repairs and renovation, they did not link those needs to their pupils' scholastic performance. What they showed instead is that district officials have a significantly more difficult situation than they would have if there were sufficient funds available to improve their facilities not directly linked to pedagogical success.[146]

The original *Roosevelt* case and subsequent related actions effectively opened the door that was closed by *Shoftstall* 30 years earlier. Lawyers for the *Roosevelt* plaintiffs have begun to expand beyond the facilities issue, arguing that adequate educational opportunities are not being provided for English Language Learners (ELL) students and "at risk" students.[147] In *Crane Elem. School Dist. v. State,*[148] plaintiffs built on the Court's precedent in the *Roosevelt* line of cases to argue that the state must "provide the programs and funding that are necessary for at risk

---

[143] *Id.* (emphasis added).
[144] *Id.* at 638-40.
[145] Roosevelt Elementary School District No. 66 v. Bishop, 74 P.3d 258 (2003) (*Roosevelt II*).
[146] *Id.*at 268.
[147] *See* Hunter, *supra* note 112, at 29.
[148] *See id.* At 30 n.95 (citing Complaint, *Crane Elementary School Dist. v. State* (Sept. 20, 2001) and *Quality Counts 2003*, EDUC WEEK, *at* www.edweek.com/reports/qc00/tables/resources-tl.htm (Jan. 2003)).

students to acquire the basic education" – in other words, that, like facilities funding, funding for programs for at-risk students must be standards-based. The trial in *Crane* began in March 2004.[149] In a second case, *Flores v. Arizona*,[150] plaintiffs sued in federal court, alleging that the state funded programs for ELLs was in violation of the EEOA and the regulations implementing Title VI of the CRA of 1964. Finding for the plaintiffs, the federal district court ordered the state to perform a costing-out study of ELL programs. Although the study was ultimately inconclusive, it formed the basis for legislative action in December 2001 that increased the per-pupil funding by $161 for ELLs. After subsequent court action, final resolution of *Flores* is still pending.[151]

Summary of Legislative Response to Date:

In 1998 Governor Jane Dee Hull signed legislation establishing Students FIRST (Fair and Immediate Resources for Students Today), a school capital finance program funded by revenues dedicated from the state sales tax. Administered by the Arizona School Facilities Board (an independent agency), Students FIRST is a three prong program that includes:

1. Deficiency Correction: a fund established for the purpose of correcting deficiencies in existing school facilities, based upon minimum school facility guidelines established by the School Facilities Board (these guidelines also serve as minimum standards for new school facilities).
2. Building Renewal: a fund established for the purpose of maintaining existing school facilities. "These funds can be used for major renovations and repairs of a building, for upgrades to building systems (e.g. heating, cooling, plumbing, etc.) that will maintain or extend the useful life of a building…" (http://www.sfb.state.az.us/sfb/sfbaays/org_overview.asp)
3. New School Facilities: a fund established for the purpose of constructing new schools in keeping with the School Facilities Board's minimum adequacy guidelines. Districts may apply to the Board for new facilities funding once a year. Criteria for eligibility are "based on annual evaluation and approval of district enrollment projections and the additional square footage that will be needed to maintain adequacy standards in a district."(ibid.) Distribution of monies "is based on the following formula: (number of students) X (square footage) X (cost per square foot) = allocation. Land costs are funded in addition to formula funding for new construction."(ibid).

It should be noted that the Building Renewal component of Students FIRST is currently under-funded. A formula based amount is supposed to be distributed to districts every November and May, but the legislature has not appropriated funds according to the formula as required. A suit, brought by some of the same districts that were party to the Roosevelt litigation, is currently pending and scheduled to go to trial in March 2006. (http://www.azcentral.com/families/education/articles/0716studentsfirst16.html)

---

[149] *Id.* at 30.

[150] *See id.* at 29 n.94 (citing *Flores v. Arizona*, 48 F.Supp.2d 937 (D.Ariz. 1999); *Flores v. Arizona*, 172 F.Supp.2d 1225 (D.Ariz. 2000) (finding for plaintiffs); *Flores v. Arizona*, 160 F.Supp.2d 1043 (D. Ariz. 2000) (ordering a costing-out study); *Flores v. Arizona* 2002 U.S. Dist. LEXIS 23177 and 2002 U.S. Dist. LEXIS 23178 (D. Ariz.); The Arizona Department of Education, English Acquisition Program Cost Study-Phases I through IV (May 2001)).

[151] *Id.* at 29.

Also noteworthy is a recent change in the new construction formula. In October 2005, the Arizona legislature increased the cost per square foot allocation for new construction. This increase is not retroactive, however, and therefore not applicable to new facilities projects that were approved prior to October 2005.

Idaho

As in Arizona, an early comprehensive attack on Idaho's public school finance system met with failure. In *Thompson v. Engelking*,[152] plaintiff taxpayers and students argued that the school financing system violated the Idaho constitutional requirement of a basic, thorough and uniform system of public schools and denied them equal protection of the law under the state and federal constitutions. The Court rejected plaintiffs' claims, holding that education was not a fundamental right. "To do otherwise," the Court explained, "would be an unwise and unwarranted entry into the controversial area of public school financing, whereby this Court would convene as a 'super-legislature', legislating in a turbulent field of social, economic and political policy."[153]

Eighteen years later, in *Idaho Schools for Equal Educational Opportunity, et al. v. Evans* (*ISEEO I*),[154] a group of citizen/taxpayers, school districts, superintendents and a superintendent's association brought consolidated suits challenging, whole-sale, Idaho's system of funding public schools on a variety of legal bases. The Court held that the provision of the state constitution requiring the legislature to establish a "uniform" system of public, free common schools required only uniformity in curriculum, not uniformity in funding, and accordingly, dismissed the "uniformity" claims as well as the equal protection claims. [155] With respect to the claims alleging that the funding system did not provide "thorough" education within meaning of the Idaho Constitution, however, the Court held that ISEEO, the school districts, and parents of students attending public schools had standing to bring suit and had stated a claim upon which relief could be granted.[156]

In *ISEEO II*,[157] the Court assessed whether the district court, on remand in *ISEEO I*, had properly granted summary judgment to the state, dismissing plaintiffs' suit as moot in the wake of intervening legislative action that included increases in the appropriations for the 1994-1995 school year, revisions in the funding formula, the adoption of a statutory definition of thoroughness, and the sunsetting of the State Board of Education's regulations. Holding once more for the plaintiffs, the Court found that, in spite of these changes, "there remain[ed] the fundamental issue whether a thorough education had been provided by the State as mandated by the education article of the Idaho Constitution."[158]

The third round, *ISEEO III*,[159] marked a dramatic shift in plaintiffs' strategy, as they tapered their claims from a whole-sale challenge to Idaho's school finance scheme to a focused

[152] 537 P.2d 635 (1975).
[153] *Id.* at 640-41.
[154] 850 P.2d 724 (1993) (*ISEEO I*).
[155] *Id.* at 736. The Court excepted from this determination the equal protection claims challenging the differential funding of charter and non-charter schools.
[156] *Id.*
[157] 912 P.2d 644 (1996).
[158] *Id.* at 653.
[159] Idaho Schools for Equal Education Opportunity v. State, 976 P.2d 913 (1999) (*ISEEO III*).

attack on the system for funding capital facilities. On remand to the trial court, which the Court had ordered in *ISEEO II*, plaintiffs initially continued the allegation that the legislature had failed to comply with the thoroughness requirement of the constitution.[160] The trial court determined that the "orderly resolution of the Plaintiffs' claims require[d] that the issue of the standard for a thorough education be resolved before the trial on the issue of whether the State [was] providing sufficient money to provide a thorough education," and ordered the plaintiffs to respond within 28 days as to whether they sought to challenge the substantive definition of thoroughness set forth in the legislative Act that had been adopted pursuant to *ISEEO I.*[161] If plaintiffs indicated that they did not, in fact, intend to attack the constitutionality of this definition, the trial court further explained, then the legislature's definition would be applied to the action.[162]

Subsequently, plaintiffs filed a "Notice of Possible Challenge to Constitutionality ... and Relief from Filing Deadline of April 16th," and the trial court ordered Plaintiffs to submit a list of the specific issues they intended to raise.[163] In their initial response, which remained consistent with their whole-sale strategy, plaintiffs identified five issues – including three allegations regarding inadequate funding of capital facilities, as well as a challenge to the constitutionality of the Act and a broad-based allegation that the State was "failing in its constitutional duty to provide funding at a level adequate to provide a 'thorough' education for Idaho's public school students."[164] Following a status conference, however, plaintiffs changed course and moved to re-identify the issues "which [would] be before the Court in the November trial."[165]

The re-identification of issues eliminated the whole-sale challenges to the Act and the school funding scheme, retaining only the capital facilities funding aspects of the claim. Plaintiffs now asked the court to determine

> (1) Whether there is a constitutional requirement that the Legislature provide capital facilities and capital assets funding for the conduct of education in Idaho, and if so, what is the responsibility of the Legislature to provide funding for the outstanding unmet needs (as evidenced in part by the shortfall listed in the Facilities Needs Assessment Study of 1992 of approximately $700,000,000 and now believed by the Plaintiffs to approach the sum of $1 Billion Dollars), together with legislative funding of future capital facilities/assets. . .
>
> (2) Whether the present system of funding capital expenditures is unconstitutional in the sense that, as ruled by the Arizona Supreme Court in the case of *Roosevelt Elementary School v. Bishop,* [179 Ariz. 233] 877 P.2d 806 (Ariz.1994), there is no equalization or funding through the foundation formula for capital expenditure needs, the foundation formula providing funding and equalization only for maintenance and operation needs of the schools. . .
>
> (3) Whether, similar to the decision of the Washington Supreme Court in *Seattle School District No. 1 v. State,* [90 Wash.2d 476] 585 P.2d 71 (Wash.1978), the Idaho

[160] *Id.* at 915.
[161] *Id.*
[162] *Id.* at 915-16.
[163] *Id.* at 916.
[164] *Id.*
[165] *Id.*

> Constitution is being violated to the extent that the school districts are required to submit special override levy elections to the voters (i) in order to fund basic maintenance and operation needs, (ii) and for special facilities levies.[166]

Once again, the trial court granted summary judgment to the state.[167]

On appeal, the Supreme Court held that, as to plaintiffs' second and third claims, the trial court had properly granted summary judgment to the state. Regarding claim two, the Court explained, the *Engelking* holding that the "uniformity" requirement did not require uniformity in funding, reaffirmed in *ISEEO I*, effectively foreclosed plaintiffs' claim that a "thorough" system required the elimination of funding disparities through foundation formula for capital expenditure needs. Regarding claim three, the Court continued, *Engelking* made clear that the Idaho constitution contained no provision analogous to Washington's that would make the provision of public education a paramount duty of the legislature.[168]

As to plaintiffs' first claim, however, the Court held that the trial court had improperly granted summary judgment.[169] A "thorough" system of public, free common schools, within meaning of the state Constitution, "includes facilities that offer a safe environment conducive to learning," the Court explained, and "the Legislature has the duty to provide a means for school districts to fund facilities" that meet this constitutional standard.[170] In so holding, the Idaho Court, like its Arizona counterpart, recognized the central, integrated role that facilities funding plays in the provision of educational opportunity. And, although the Idaho Court was somewhat less expansive than the Arizona Court in its analysis, and in fact, reaffirmed precedent even more harmful to plaintiffs than Shofstall proved to be in Arizona, the Court's reasoning nevertheless reflects consideration of the meaning of a constitutionally "thorough" education, beyond the question of facilities deficiencies per se. The Court explained:

> In *ISEEO I,* the Court discussed thoroughness, as follows: Balancing our constitutional duty to define the meaning of the thoroughness requirement of art. 9 § 1 with the political difficulties of that task has been made simpler for this Court because the executive branch of the government has already promulgated educational standards pursuant to the legislature's directive in I.C. § 33-118. *See State Board of Education Rules and Regulations for Public School K-12,* IDAPA 08.02. We have examined those standards carefully and now hold that, under art. 9, § 1, the requirements *for school facilities*, instructional programs and textbooks, and transportation systems as contained in those regulations presently in effect, *are consistent with our view of thoroughness.*
>
> . . .
>
> The statute defining thoroughness enacted by the Legislature after *ISEEO I* provides that a thorough system of public schools is one in which "[a] safe environment conducive to learning is provided" and requires the State Board to "adopt rules ... to establish a thorough system of public schools...." [citation omitted]. The new rules the

[166] *Id.* at 916-17.
[167] *Id.* at 917.
[168] *Id*. at 920-21.
[169] *Id.* at 917-19.
[170] *Id.* at 917.

> State Board adopted pursuant to I.C. § 33- 1612 deal explicitly with school facilities. [citation omitted] They state that facilities are "a critical factor in carrying out educational programs" and that "[t]he focus of concern in each school facility is the provision of a variety of instructional activities and programs, with the health and safety of all persons essential." [citation omitted] In the same spirit with which we accepted the prior rules as consistent with our view of thoroughness, we conclude that the new rules and I.C. § 33-1612 are consistent with our view of thoroughness with respect to facilities. [171]

However, "[e]ven without these expressions from the Legislature and the State Board," the Court explained, "we conclude that a safe environment conducive to learning is inherently a part of a thorough system of public, free common schools that Article IX, § 1 of our state constitution requires the Legislature to establish and maintain."[172] Thereafter, the Court remanded the case to the trial court, directing it to "conduct a trial or other appropriate proceeding to determine whether the Legislature has provided a means to fund facilities that provide a safe environment that is conducive to learning."[173]

After a trial, the lower court concluded that the system of school funding established by the legislature was in fact insufficient to meet the constitutional requirement because the scheme's reliance on local property taxes alone to pay for major repairs or the replacement of unsafe school buildings was inadequate for those districts with a low property tax base or low per capita income. [174] The district court initially deferred any remedial action to allow the legislature time to address its findings, but began implementing its remedial measures, including a phase of information gathering and the appointment of a special master, when the court determined that the legislature had failed to take appropriate action.[175] In the 2003 legislative session the legislature passed a new Act, which established among other requirements, that the plaintiffs and the state sue school districts where unsafe school buildings exist.[176]

Subsequently, in June 2003, the Supreme Court ordered the trial court to decide all motions regarding the constitutionality of the Act. The trial court found the Act to be unconstitutional in its entirety,[177] and in *ISEEO IV*, the Supreme Court agreed, ordering the matter to proceed to briefing, oral argument and decision on the underlying issues raised by the appeal.[178]

Summary of Legislative Response to Date:

---

[171] *Id.* at 919-20 (emphasis in original).
[172] *Id.* at 920.
[173] *Id.* at 922.
[174] *See* Idaho Schools For Equal Educational Opportunity v. State, 97 P.3d 453, 456 (2004)(*ISEEO IV*).
[175] *Id.*
[176] *Id.* The Act also provided that that venue for these suits would be changed to the judicial districts in which the defendant school districts lie; that the parties of the current case would be dismissed if they did not follow the procedures of HB 403; and that state district courts could impose an educational necessity levy to repair or replace unsafe school buildings. *Id.* at 456-57.
[177] *Id.* at 457.
[178] *Id.* at 464.

In 2003, the Idaho legislature enacted a statute intended to eliminate the ISEEO case and prevent future cases of this type.[179] The law, HB 403 "required parents seeking safe school buildings to sue their local school district instead of the state, authorized the legislature to sue the ISEEO plaintiff school districts, and required Idaho Courts to order property tax increases in poor school districts if unsafe building conditions were found."[180] The Idaho Supreme Court subsequently affirmed a state district court decision, declaring HB 403 unconstitutional on the basis that it was only intended to end a particular lawsuit and that it also violated separation of powers doctrine by assigning the power to tax to the judiciary.[181]

Currently, the State of Idaho is appealing another district court decision in favor of ISEEO, in which the court determined that the Idaho legislature has not met its responsibilities to "establish and maintain a general, uniform and thorough system of public, free common schools," as required by the Idaho Constitution. ISEEO asserts that poorer school districts are unable to "maintain, repair or rebuild aging schools" to constitutionally required standards by relying on property tax levies alone.[182] Oral arguments in this appeal were heard on November 7, 2005.

California

As in Arizona and Idaho, litigants in California's *Williams v. California*[183] adequacy lawsuit ultimately made a strategic choice to launch a focused, inputs-oriented challenge rather than a comprehensive attack on the state's funding scheme. This decision came following a series of attempts at the more whole-sale approach which ultimately backfired.

In *Serrano v. Priest* (*Serrano I, 1971*),[184] plaintiff students and parents attacked California's school funding scheme on the basis of the equal protection clauses of the U.S. Constitution and various provisions of the California constitution. The California Court held for the plaintiffs on the basis that a public school financing system which relies heavily on local property taxes and causes substantial disparities among individual school districts in the amount of revenue available per pupil invidiously discriminates against the poor and violates the equal protection clause of the Fourteenth Amendment, as well as the pertinent provisions of the State Constitution.[185] In so holding, the Court reasoned that, under the federal and state constitutions, school funding should not be dependent on district wealth; rather, equal tax rates should yield equal funding.[186]

Just a few years later, in *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1976), the U.S. Supreme Court determined that education was not a fundamental right. So, when litigants

[179] See www.schoolfunding.info/states/id/lit_id.php3
[180] See www.schoolfunding.info/news/litigation/8-30-04idahofacilities.php3
[181] id
[182] See www.isc.idaho.gov/audio.htm
[183] (2000). **[get Complaint.]**
[184] 487 P.2d 1241 (1971) (*Serrano I*).
[185] *Id.* at 1245. Respecting plaintiffs' claims under two provisions of the State Constitution, the Court noted that, because these provisions were 'substantially the equivalent' of the equal protection clause of the federal Constitution, its analysis of plaintiffs' federal equal protection contention was equally applicable to these state constitutional provisions. *Id.* at 1249 n.11.
[186] *Id.* at 1251-53.

brought *Serrano II*,[187] the California Court had to contend with the new federal context of *Rodriguez*. Undeterred, the Court determined that state constitution's equal protection provisions have an "independent vitality" which requires a different interpretation than that of the federal constitution.[188] The Court also ruled on the intervening legislative enactment which modified the system of finance in place at the time of *Serrano I.* The modification placed caps on spending, with provisions allowing a voter override of the cap. In effect, lower caps were placed on higher spending districts and higher caps were placed on lower-spending districts in order to enable the latter to spend more, and in theory, close the gap over time.[189] Regarding this Act, the Court held that the legislation failed to meet *Serrano I's* "fiscal neutrality" principle: Due to the override provision, the legislation did not meaningfully reduce funding disparities, the Court declared.[190] Further, to accord with the fiscal neutrality mandate, the Court held that whatever school finance scheme the legislature adopted in its place would be required to reduce expenditure disparities to less than $100 per pupil.[191]

Subsequent to *Serrano II*, the legislature passed a second Act. This time, it increased revenue limits and increased the low-revenue districts' financial capacity to raise funds above the foundation program level, guaranteeing a district a set amount of money if it taxed itself at a certain rate determined by the state.[192] If the district recovered less than the scheduled amount when it levied that rate, the state made up the difference.[193] The program also set forth a cap-and-recapture scheme whereby transfers of revenues away from the high-revenue districts went to the state for redistribution to low-revenue districts.[194]

Thereafter, voters approved Proposition 13. The Proposition provided that no property should be taxed at more than 1 percent of the 1975 fair market value; that municipalities could only impose "special taxes" by a two-thirds vote of the electors; that assessments could not grow more than 3 percent annually from their 1975-76 levels to which they were rolled back, except for property sold after 1975-76; and that no increase in state taxes could occur without a two-thirds vote of the state legislature.[195] The passage of Proposition 13 rendered unworkable the structure for reform set out in the legislature's revised Act, which relied primarily on provisions for redistribution of local property taxes from high to low revenue districts.[196] The Proposition also effectively put the state on the road to full state funding, since most districts could no longer afford to fund their educational systems on the basis of the property tax.[197]

In response to Proposition 13, the state passed an emergency Act under which the state guaranteed every district from 85 percent (for high revenue districts) to 91 percent (for low revenue districts) of the revenues it would have received if the pre-Proposition 13 revenue limit

---

[187] Serrano v. Priest, 557 P.2d 929 (Cal. 1976) (*Serrano II*).
[188] *Id.* at 951.
[189] *See* Serrano v. Priest, 226 Cal. Rptr. 584, 591 (1986) (*Serrano III*) (reviewing the procedural history of the case in a subsequent compliance action decided by California's Appellate Court).
[190] *Id.*
[191] *Serrano II*, 557 P.2d at 940 n.21.
[192] *Serrano III*, 226 Cal. Rptr. at 592.
[193] *Id*.
[194] *Id.*
[195] *Id.* at 593.
[196] *Id.*
[197] *Id.*

formula of the Act had gone into effect.[198] Thereafter, the legislature enacted a permanent funding scheme designed to lessen the impact of Proposition 13 on local governments. The measure contained a "*Serrano* closure formula" to tether inflation increases to the wealth of the districts, providing greater increases for poorer districts; the Act also aimed to refine the revenue limit by excluding components that were designed to serve pupils with special needs or to compensate districts with variable costs. [199]

On the basis of this Act, plaintiffs returned to Court to argue that the legislature's new scheme failed to comply with *Serrano*. Finding for the state, in *Serrano III*,[200] California's Appellate Court upheld the Act on the basis that the revised scheme effectively reduced the gap between the revenue of wealthy and poor districts to "insignificant differences."[201] The Court further determined that a sufficient number of districts met *Serrano II's* standard of no disparities greater than $100 per pupil, and that further reducing the disparity, the Court explained, would cause more harm than good for poor and minority students, since higher-spending districts tended to house greater numbers of needier students. [202]

In the wake of *Serrano III,* spending in California plummeted and academic achievement fell to an all time low.[203] In effect, the *Serrano* line of cases authorized the notion that the California Constitution was satisfied by equally *under*-funded schools. In contrast to *Abbott*, in which the Court equalized expenditures by using the state's academically-successful districts as a baseline, the *Serrano* Court effected a "leveling down" of public education by equalizing resources without reference to a qualitative standard.

In light of this history, sixteen years later, plaintiff school districts and students in the *Williams* case opted to file a focused, multi-issue challenge to California's failure to provide predominantly low-income students of color with the bare essentials necessary for learning: specifically, adequate books and classroom materials, credentialed teachers, and clean, safe school facilities. [204] To prove that the state had in fact abdicated its constitutional obligation, plaintiffs amassed a damning record of extreme deficiencies in materials, teacher qualifications and facilities. In August 2004, the parties settled the case in a heavily facilities-oriented agreement. The Court approved this agreement on March 23, 2005.

The settlement focuses on the lowest-scoring schools throughout the state, and provides nearly $1 billion to identify and repair deteriorating, low-performing schools, to put instructional materials in the hands of students, and to ensure that qualified teachers are in every classroom. Specifically, the agreement provides $800 million over four years to make emergency and other repairs to deteriorating facilities in the lowest performing schools (those ranked in the bottom 3 deciles under the statewide Academic Performance Index [API]); $20 million to inventory facilities needs in the lowest performing schools; $30 million to build County Superintendents'

---

[198] *Id.*
[199] *Id.* at 593-94.
[200] 226 Cal. Rptr. 584.
[201] *Id.* at 601, 603, 615.
[202] *Id.* at 617-18.
[203] *See, e.g.*, John Merrow, *First to Worst,* (Feb. 2004) (documenting, for PBS, the rise and fall of California's school system), *available at* http://www.edsource.org/first_to_worst.cfm.
[204] *See* Press Release, *ACLU and California Officials Reach Settlement in Historic Equal Education Lawsuit*, Aug. 13, 2004, *available at*, http://www.aclu.org/news/NewsPrint.cfm?ID=16247&c=155.

capacity to oversee low performing schools and fund emergency repairs in those schools next year; and nearly $139 million for new instructional materials for students attending schools in the bottom two API deciles.[205] The agreement also sets standards for access to clean and safe facilities, needed books, and qualified teachers; holds districts accountable for meeting these standards in the state's lowest performing schools; and provides for students and teachers to file complaints and seek redress when the standards are not met.[206]

Summary of Legislative Response to Date:

Legislation responding to the Williams settlement addresses the full range of adequacy issues. Two statutes focusing explicitly on the issue of facilities are SB 6 and SB 550.[207]

SB 6 created the School Facilities Needs Assessment Grant Program and the accompanying School facilities Emergency Repair Account. This statute requires the one time assessment of building conditions in all low performing schools and provides the funding for emergency repair to those schools found to be grossly deficient. Eligible schools are identified by the California Department of Education (CDE) based in part upon standardized test scores and funds for repairs are apportioned by the Office of Public School Construction (a division of the Department of General Services) which is responsible for administering school bond funds.[208] The School Facilities Planning Division of CDE determines the appropriateness of school sites and designs in concert with county and district offices, based upon environmental assessments, educational program needs and other qualitative criteria. Districts must receive approval from all relevant state and local agencies for their proposed construction projects prior to disbursement of funds by the Office of Public School Construction.[209]

SB550 calls for county Superintendents to make annual assessments of overall school adequacy, including that of facilities, and to report their findings to the governing board of each school district. The Office of Public School Construction was called upon to develop an interim instrument for evaluation of each school facility. That office is currently finalizing a permanent set of standards for distribution beginning in 2006.

Also affected by the Williams settlement was the existing Classroom Instructional Improvement and Accountability Act. This law requires all districts to generate an annual "Accountability Report Card." SB 687 revises some administrative requirements of that act, and requires districts to assess the condition of their facilities against the Office of Public School Construction building adequacy standards in the report card process.

---

[205] *Id.*
[206] *Id.*
[207] For history and detail regarding these statutes and other aspects of the Williams case, see www.decentschools.org
[208] In Los Angeles Unified School District alone, at least $12 billion in bonds have been passed by the taxpayers at the time of this writing.
[209] For more information regarding the administrative break down of these programs, contact Marcia Lutsuk at the Office of Public School Construction, mlutsuk@bgs.ca.gov

SUMMARY AND LESSONS LEARNED

This paper has explored the significance of the school facilities funding issue through case studies of "comprehensive" and "focused" adequacy litigation in diverse states across the country. These cases reveal that, regardless of the particular legal approach used, school finance litigants have been effective in their utilization of facilities evidence to address capital deficiencies and courts have responded, recognizing facilities improvements as a central, powerful component of educational opportunity in "comprehensive" and "focused" suits alike.

Widely recognized to have resulted in the most sweeping and detailed framework of remedial programs and reforms in the nation, New Jersey's *Abbott v. Burke* litigation offered an introductory illustration of the effect and future potential of the facilities funding issue in a comprehensive attack on a state's adequacy scheme. The persuasive force of the facilities evidence the *Abbott* plaintiffs presented – clear-cut, poignant, and judicially-accessible – resonated in a series of judgments which recognized the constitutional import of capital conditions, as well as the requisite role facilities improvements play in the efficacy of an adequacy framework comprised of educational programs and reforms geared towards boosting achievement, all of which have necessary space implications.

The other "comprehensive" cases examined here emphasized aspects of the same. The Ohio, Alabama and Arkansas cases illustrated the unique persuasive power, for courts, of voluminous evidence documenting danger, squalor, overcrowding, and deterioration in the states' public schools – evidence so "inviting" in its clarity and force that these courts used the facilities issue to initiate their broad-based adequacy analyses and to determine, in the first instance, that the entire school funding scheme was constitutionally infirm.

The New York and Wyoming suits illustrated the range of interpretations that can be applied to "adequacy," and also two very different treatments of the causation question. These two cases are well paired when considering the usefulness of facilities evidence. In most respects, the New York and Wyoming cases couldn't be more dissimilar. However, the fact that facilities evidence carried the day in *both* New York and Wyoming, despite the torturous causation wringer through which it was forced in New York (as compared to the royal treatment it received in Wyoming), vividly demonstrates its force and incontrovertibility. Peter Scrag says it well: "The rats and the toilets are secondary issues, but they are powerful symbols – 'they slam it in everybody's faces.'"

The second set of cases examined – the "focused" suits – demonstrated that the facilities issue is also an effective tool for litigants who have determined that a whole-sale attack on the school funding system is strategically unwise or otherwise foreclosed by negative precedent. Indeed, as the Arizona litigation illustrated, a focused challenge to the facilities funding scheme can offer plaintiffs an alternative avenue to address deplorable capital conditions in the state's public schools and the entrée to broader issues related to educational programs, resources, and conditions, and the funding scheme that supports the delivery of an adequate education overall. Faced with the opportunity to issue a focused ruling as to the constitutionality of a facilities funding scheme, courts wary of reversing old precedent, or those reluctant to engage in an analysis of the substantive meaning of adequacy, may be encouraged to express doubt about old precedent or to issue general proclamations about the validity of the funding scheme. As in Arizona, these pronouncements may, in turn, open the way for future litigants to build on the

facilities funding case, bringing subsequent challenges to other aspects of the educational scheme.

Even in the Idaho litigation, where the breath of the Court's adequacy analysis was less expansive, the decision made clear that the question of the constitutionality of the facilities funding scheme is seldom a surgical exercise for courts, divorced from consideration of the meaning of a constitutionally-sufficient education, broadly, and the role of capital improvements "conducive to learning" in this overall scheme. The multi-issue California litigation further underscored the foundational nature of the facilities issue in this integrated educational scheme: of three minimum educational necessities identified by plaintiffs and the state, facilities improvements was the one that figured prominently, and repeatedly, in the remedial scheme.

Having surveyed strategy and outcomes in these cases, the question becomes, what insights do they offer educational advocates and potential future litigants? As already discussed, the unique political and historical context of each state must not be underestimated. For example, Peter Schrag recounts the comments of a former California Supreme Court Justice on the subject of deciding complex, controversial issues in a state where judicial elections or reconfirmation is always looming: "It was like 'finding a crocodile in your bathtub when you go in to shave in the morning. You know it's there and you try not to think about it, but it's hard to think about much else."[210] Not surprisingly, therefore, the political backdrop of suits in New York, Ohio, Idaho and California figure strongly in their overall picture. On the other hand, Schrag points out that "the court's strength in New Jersey depended in considerable part on a constitutional structure that, unlike those in most states, never requires a justice to go before the voters."[211] The variability of these state contexts does not undermine their value to future advocates, however. In fact, it is a great strength. There are very few permutations the facilities issue has NOT undergone. The causation question has been thoroughly debated; an adequate education has been defined and refined repeatedly and in every case, facilities has held a prominent and essential position; [212] and judicial remedies have been implemented or are in the process of implementation, thereby testing judicial resolve to resist waves of political pressure, and also testing public opinion of legislative response.

As the cases surveyed here demonstrate, school reform and in particular, arriving at a formula for funding it, is a complex and often inflammatory endeavor. The relatively new adequacy approach is promising in its standards based, reciprocal logic and, as Justice Michael Rebell points out:

> [it] tends to invoke less political resistance at the remedial stage because rather than raising fears of 'leveling down" educational opportunities currently available to affluent students, it gives promise of 'leveling up academic expectations for all other

---

[210] *Shrag, P. The Final Test: the Battle for Adequacy in America's Schools. The New Press (2003) p. 126*

[211] *Id.*

[212] For an analysis of the facility attributes that most affect academic outcomes, see Mark Schneider, *Do School Facilities Affect Academic Outcomes?*, NAT'L CLEARINGHOUSE FOR EDUCATIONAL FACILITIES (Nov. 2002) (surveying the research on indoor air quality, ventilation, and thermal comfort; lighting; acoustics; building age and quality; school size; and class size). *See also* Mark Schneider, *Linking School Facility Conditions to Teacher Satisfaction and Success*, NAT'L CLEARINGHOUSE FOR EDUCATIONAL FACILITIES (AUG. 2003) (documenting how teachers perceive that school facility conditions affect their job performance and teaching effectiveness).

> students….Instead of threatening to shift money from rich districts to poor districts, therefore, adequacy offers the possibility of increasing the pie for all.[213]

The fact remains, however, that appeals to judicial authority around this issue are ongoing; that there are those who would still challenge the connection between safe, healthy school buildings and student achievement; and that enforcement of these favorable court decisions is an ongoing battle. All the more reason, therefore, to draw upon the lessons learned from the suits discussed here, as well as those in other states, for new and effective inroads to chip away at the corrosive inequalities still very much present in the American public school system.

[213] *Shrag, P. The Final Test: the Battle for Adequacy in America's Schools. The New Press (2003)p. 232*