

# Ballots Not Barristers

## *Arizona case shows limits of litigation*

by JOSHUA DUNN and MARTHA DERTHICK



While the competition is formidable, one case today best illustrates why the judiciary is ill suited to crafting education policy. *Flores v. Huppenthal* (formerly *Horne v. Flores* and *Flores v. Arizona*) has been in federal court since 1992 and could very well stagger on for several more years. Litigation, *Flores* shows, is time-consuming,

costly, subject to political manipulation, and prone to prompting unpredictable policy reforms that even the plaintiffs may not wish for. When the Supreme Court heard the case in 2009, it cautioned against judicial adventures in reforming educational institutions. Recent developments give this warning some measure of vindication.

### **Litigation is prone to prompting unpredictable policy reforms that even the plaintiffs may not wish for.**

Four years ago, the Court held that Arizona should be allowed to argue that expenditures should not be considered the sole criterion for its English Language Learner (ELL) program. The plaintiffs had argued that Arizona was underfunding ELL instruction in violation of the federal Equal Educational Opportunities Act (EEOA). In response to the lawsuit, Arizona modestly increased its funding for ELL students and adopted a new policy requiring them to spend four hours a day in special language classes. Students would transition to regular instruction after testing proficient in English.

The plaintiffs replied that the funding increases were insufficient and opposed the instructional reforms. Four hours of language instruction amounted to segregation, they contended, and made ELL students fall behind in other subjects. The trial court and the Ninth Circuit agreed that both the funding and the reforms were inadequate, and even refused to let Arizona argue that the instructional changes were working and would bring it into compliance with the law.

The Supreme Court, however, remanded the case back to the Ninth Circuit and ruled that Arizona at the least should be able to argue that its instructional reforms were working before deciding whether more money was necessary. As well, the court worried that the case had become collusive because the governor, who was then a Democrat, Janet Napolitano, had refused to defend the state and thus was using the lawsuit as a political lever against a Republican legislature.

Despite winning before the Supreme Court, Arizona still was not out of the judicial woods. The same trial-court judge, Raner Collins, would hear the case on remand. Prior to the Court's ruling, his attitude toward Arizona could best be described

as hostile. He twice found the state in civil contempt and imposed \$21 million in fines. Few would have been surprised if he had found that Arizona's four-hour model was unlawful, leading to a fresh round of judicial interventions.

After concluding a four-month hearing in January 2011, he inexplicably waited to issue a judgment

until March 2013. Even more surprising than his delay was his decision: he sided with the state. He quickly dismissed the argument that the program was discriminatory. He conceded that the state had adopted the four-hour model for the purpose of helping ELL students. Grouping students by English proficiency, like other groupings by ability, was not "segregation" and was in fact allowed under the EEOA. He then noted that ELL students had made progress since 2006, and that it was not his job to decide whether the four-hour program was "ideal" or whether the plaintiffs had an even better plan. He said the state has great latitude to set education policy, and with at least some hint at exhaustion, announced that "this lawsuit is no longer the vehicle to pursue the myriad of educational issues in this state."

The plaintiffs naturally did not accept this bitter pill from their former ally and immediately appealed to the Ninth Circuit. It is not unreasonable for them to hope that Collins's decision will be overturned there. But even under the best of circumstances, it would take several more years before any judicial action would change Arizona's policy. Thus, after 21 years, most of which were spent before a compliant district and appellate court, the primary consequence of the litigation has been the adoption of an educational model that the plaintiffs oppose and under which at least an entire generation of students will be taught. Such results should give even the most hardened public-interest attorney pause before racing to the courthouse rather than the ballot box.

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