Let Educators Educate, Let Builders Build: Making A Case For School Facility Privatization

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LET EDUCATORS EDUCATE, LET BUILDERS BUILD: MAKING A CASE FOR SCHOOL FACILITY PRIVATIZATION

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INTRODUCTION

It is a clear Monday morning in September of 2006, when you walk your kindergartener to the bus stop for their first day of school. They are supposed to be starting school at Red Shaw Elementary school in New Brunswick, New Jersey; however, the town just tore down Red Shaw to make way for a brand new school in its place. Instead, your child is beginning their school experience in what the state calls a “flex space”—a warehouse in an industrial complex. “That’s alright,” you think to yourself, it is only temporary and well worth the short-term sacrifice; soon they will be in their brand new school—but that school does not arrive.

All the schoolchildren starting that day will spend their entire elementary school lives—6 years—in that industrial space, with few windows and no playground. In fact, those children will have graduated from elementary school, completed middle school, and be entering high school by the time the new Red Shaw is completed at a cost nearly triple the targeted amount.\(^1\) That is a tough pill to swallow, especially when considering that New Jersey was engaged in a more than $12 billion school construction program\(^2\) that began years before the state tore down the old Red Shaw Elementary. Unfortunately, Red Shaw is just one of many stories about school construction failures. How could this happen?

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\(^1\) See infra Part II.A.2.c for a discussion on Red Shaw elementary school and the problems surrounding its construction.

\(^2\) See infra Part II.A for a discussion on New Jersey’s school construction program.
Construction on the nation’s nearly 100,000 schools is a massive undertaking, accounting for roughly $55.6 billion in 2009-2010.\(^3\) Despite this spending, the results are quite disparate, especially for those in poorer urban and rural districts. While many wealthier suburban districts have built state-of-the-art schools, poorer districts sometimes languish in old decrepit facilities for decades. As this Article discusses, various reasons contribute to this problem: the failures of traditional funding methods to satisfy certain districts’ needs; poor performing and mismanaged, top-heavy bureaucratic agencies; lack of accountability and properly placed incentives; and the negative influence of special interests.

This Article posits that school districts in desperate need of new facilities have another option — build-lease agreements, under which a district would contract with a private developer who would finance, build, and maintain a school building in return for lease payments from the district. Three main premises are at the core of this Article’s reasoning. First, the core mission of our nation’s school districts is to educate children. Any other interests run secondary to that core mission and often are effectively counter to that mission. Second, the main stakeholders in school construction are the children\(^4\) and the taxpayers. Because it is the schoolchildren’s education that is the core mission, and because it is taxpayers that ultimately pay for education, all other groups and their interests are subordinate for the purposes of this Article.\(^5\) Third, this Article does not assert that privatization and the use of build-lease agreements should be the only

\(^3\) See Table 205: Summary of Expenditures for Public Elementary and Secondary Education, by Purpose: Selected Years, 1919-20 Through 2009-10, National Center for Education Statistics, http://nces.ed.gov/programs/digest/d12/tables/dt12_205.asp (school construction is denoted as “capital outlays” for the purposes of this Table).

\(^4\) Additionally, their parents are stakeholders by extension. Of course, many of those parents will also be taxpayers, which leads to some tension between a district’s taxpayers with school age children and those without school age children. See infra Part I.B.1 for a discussion on taxpayer tension as it pertains to financing through public bonds and the requisite voter referenda.

\(^5\) This is not to say that other groups do not have their own valid interests, rather, it is to separate those interests for the purposes of this Article. Additionally, it is the opinion of this author that it is not the place of the school district to promote those interests, on the contrary, districts should focus exclusively on their core mission and the interests of the main stakeholders only. See infra Part V.A for a discussion on other group’s interests and the likelihood of resistance to certain changes in school construction financing.
way to acquire facilities; rather, it should merely be one option for schools that are struggling under the traditional methods. Limited funding necessitates a serious look at the proper goals of school construction and how maximizing the value of every dollar can help districts achieve those goals.

This Article begins with an overview of the traditional methods of school construction financing and the state of our nation’s school facilities overall. Part I begins with a cursory examination of the overall state of our nation’s school buildings, our historic and current spending levels, and how schools have gotten to that state. Next, this Part discusses the predominant method of financing, general obligation bonds, and the benefits and pitfalls associated with this method, including push back from voters who are displeased with heavy property tax rates. That is followed by a brief look at capital-reserve financing, which is, in effect, a savings account established for use at a later date. Lastly, Part I introduces build-lease agreements as another option and provides an overview of the basic structure of a typical build-lease agreement.

Part II of this Article is a case study on New Jersey’s efforts to provide a more uniform system of school construction across all the state’s districts. This Part begins with a historical retrospective of the New Jersey Supreme Court decisions holding that the state’s constitution requires equal education funding for all of the state’s schoolchildren—including funding for facilities. Additionally, there is an examination of the state’s response, which prompted the creation of a large bureaucratic agency specifically tasked with implementing the Court’s mandates. Next, this Part reviews the results of that agency’s efforts and points out some of the various problems that led to a dismantling of the agency and reinstitution under another name.

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6 See infra Part II.A.1 for a discussion on the seminal history of school litigation as it pertains to school funding and construction.
Part III introduces the concept of privatization ad public-private partnerships. First, this Part reviews the use of privatization in other non-instructional school services; discussing the benefits and drawbacks to their use as well as the significant expansion in these areas. Next, it looks at how entities have used privatization specifically in the school construction context. Lastly, this Part discusses the inherent differences between traditional infrastructure privatization arrangements, such as bridges, toll roads, and parking meters, and school facility privatization, which suffer from some common problems.

Part IV puts forth build-lease arrangements as a potential solution for some districts. It lays out some potential benefits to the utilization of build-lease arrangements, including cost savings, expediency benefits, and logistical benefits. Additionally, this Part looks at government’s role in facilitating these arrangements as well as the benefits that economies of scale and industrial efficiency can produce.

In conclusion, Part V addresses some of the potential concerns surrounding school construction privatization. First, it addresses the almost certain resistance that will be felt from various groups. Among these groups are those that are simply afraid of changing the status quo and those whose personal and financial self-interests prevent them from accepting any change. Lastly, Part V addresses the real concern that poorly drafted contracts will lead to worse situations than the traditional funding methods, a problem very common in other infrastructure privatization arrangements. While these concerns are legitimate, this Part discusses how careful insight and hindsight can help parties build in the requisite safeguards to help avoid many of these problems. Ultimately, properly designed build-lease agreements can provide the badly needed relief that some schoolchildren deserve.
I. TRADITIONAL FUNDING METHODS AND THE STATE OF SCHOOL FACILITIES

School construction and financing are going through a struggle between what we would like and what we can afford. The condition of our schools is poor overall and our traditional ways of funding are proving inadequate to fix the problem. School building finance and construction has traditionally followed a general standard practice with limited variation; identify a need, design a school to fit that need, raise funding through the sale of bonds, build and maintain the new school, pay back the bonds through property taxes. The first section of this Part provides a glimpse of the current conditions of our nation’s school facilities, along with what is required to bring them up to satisfactory levels. The second section provides a brief overview of the traditional forms of school construction and introduces build-lease agreements.

A. The State of School Facilities in the United States

D. That is the grade given to our schools in the American Society of Civil Engineers (“ASCE”) 2013 Report Card for America’s Infrastructure. This was an improvement from the grade of D- received in 2001 and 2003, as well as the F received in 1998—all other years have received Ds. The ASCE relied partly on the last major study that compiled school facility statistics, which the United States Department of Education conducted over 14 years ago. The

8 AMERICAN SOCIETY OF CIVIL ENGINEERS, 2013 REPORT CARD FOR AMERICA’S INFRASTRUCTURE: SCHOOLS 7–8 (2013) [hereinafter ASCE REPORT CARD], available at http://www.infrastructurereportcard.org/a/documents/2013-Report-Card.pdf (last visited Dec. 15, 2013). The ASCE defines the grade of D: “POOR: AT RISK. The infrastructure is in poor to fair condition and mostly below standard, with many elements approaching the end of their service life. A large portion of the system exhibits significant deterioration. Condition and capacity are of significant concern with strong risk of failure.” Id. at 11. In order to provide some perspective, the ASCE ranked schools below our overall national infrastructure rating of D+, and also below bridges (D+), energy (D+), ports (C), public parks and recreation (C-), rail (C+), and solid waste (B-). In fact the only areas of infrastructure receiving a worse grade were levees (D-) and inland waterways (D-).
United States has approximately 16,000 public school districts.\(^{11}\) These districts utilize approximately 100,000 school buildings to serve around 50 million students.\(^{12}\) The ASCE found that “[a]lmost half of U.S. public school buildings were built for the baby boom generation born between 1950 and 1969”\(^{13}\)—placing the average age of half of our public school buildings at a decrepit fifty-three years old and counting.

Despite this status, school construction funding has slowed in recent years.\(^{14}\) In fact, from a peak of around $29 billion in 2004, construction funding had fallen to approximately $10 billion in 2012.\(^{15}\) While the ASCE gives the nation’s school facilities a poor rating overall, the results of our efforts are disparate; some school districts have excellent school buildings while others are saddled with unsafe schools on the verge of collapse.\(^{16}\) As one would expect, a correlation exists between the affluence of a district and the quality of their schools.\(^{17}\) Many of these poorer districts’ schools suffer from a variety of maladies including poor heating and ventilating, leaking roofs, bad lighting, and outdated materials and technology, among others.\(^{18}\)

Often these deficiencies can be severe, such as asbestos contamination,\(^{19}\) structural defects,\(^{20}\) and

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\(^{13}\) *Id.* at 58.

\(^{14}\) *Id.*

\(^{15}\) *Id.* Several reasons can account for this drop, including reduced property tax revenue due to the recession of 2008, coupled with the ever-increasing governmental obligations such as “underfunded pensions and increasing health costs.” See, e.g., Ben Finley, *Underfunded pensions a growing problem across Pa.*, PHILLY.COM (July 6, 2013), http://articles.philly.com/2013-07-06/news/40393936_1_pension-costs-pension-fund-public-pension-plans. Other reasons may account for increased costs, such as government mandates for special education and the higher cost of educating increasing numbers of poor students, but they are beyond the scope of this Article. See, e.g., Michael A. Rebell, *Safeguarding the Right to a Sound Basic Education in Times of Fiscal Constraint*, 75 ALB. L. REV. 1855, 1933–34 (2010). Instead, we look at the physical conditions currently facing our schools.


\(^{17}\) *Id.* at 20.


\(^{19}\) See The ABCs of Asbestos In Schools, *United States Environmental Protection Agency* 3, http://www2.epa.gov/sites/production/files/documents/abcsfinal.pdf (last visited Dec. 15, 2013) (claiming that asbestos is in “most of the nation’s primary, secondary and charter schools”).

health concerns such as black mold. Other problems are not as sensational and garner less attention than the serious issues get; nevertheless, they contribute to poorer educational results and poorer teacher retention. Among the most common yet less serious problems are those that, while they do not pose a physical danger, affect student comfort and concentration, such as temperature control problems, lack of natural light, and proper quality airflow.

On top of all these physical problems, we can add the problem of overcrowding and the expanding population. Like Sisyphus, forever rolling his boulder up hill, perpetually growing student enrollment, exacerbated by concentrations in urban centers, never allows school construction to cease. Our schools’ facilities are complicated and expensive to repair—improving them will take a herculean effort. Estimates for the renovations, additions, and new facilities necessary to bring our schools up to grade vary widely but are all consistently in the hundreds of billions of dollars. Coming up with this vast amount of money will require a commitment by the public and our politicians, coupled with smart spending and creative financing that moves beyond the traditional methods.

B. Traditional Methods of School Construction Financing

School operational funding generally comes from three sources: federal, state, and local. Federal funding provides roughly eight percent, while state and local funding provide 48% and
44% respectively.27 However, when it comes to capital outlays, such as school facility construction, the federal contribution drops to a paltry .00086 percent, so, for every $1,000 a state and local district spend together, the federal government contributes $0.86.28 Perhaps this is because there is no federal guarantee of public education,29 but regardless, the current reality is that state and local government provides the overwhelming majority of funds.30

Once funding is in place, the school district, or other controlling authority,31 has the building design and plans drawn up for permitting and construction. Once approved, the district or authority awards construction contracts through a public bidding process, usually to the lowest qualified bidder.32 State and local governments generally procure their school construction funding through several different approaches including bond financing, capital reserve funds, or build-lease agreements.33

1. Bond Financing

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30. As much as 99.99914% is supplied by the state and local governments. See supra note 28 and accompanying text.
31. Often an overseeing state agency provides significant funding and controls the majority of the construction. See infra Part II.A. for a discussion of one such state agency, New Jersey’s Schools Development Authority and its subdivision the Schools Construction Corporation.
33. See Sendor, supra note 7 at 3-4. Financing through current revenues is a less common financing option for school districts is the use of current revenues to finance a new school building. Id. This funding scheme is only feasible for the largest of school districts and contemplates building a needed school out of the general yearly revenue. Id. However, even the largest of school districts face budgetary constraints that make current revenue financing of school construction virtually extinct. Id.
Bond financing is the predominant form of traditional school construction financing, particularly general obligation bonds. The state or local school districts may issue general obligation bonds, so long as there is statutory authority to do so. Districts and states pay back the bonds through the collection of *ad valorem* property taxes, which are “secured by the full faith and credit and general taxing power” of the governing body. This ability to secure the bonds through the taxing power makes general obligation bonds a popular investment vehicle for state and local governments looking for less risk, additionally, they are often tax exempt, which helps to keep their interest rates down.

One of the advantages to raising revenues through bond financing is that, once approved, it provides a district or state with a readily available pool of money with which to construct schools; money which can be repaid over a long period of time. The reduced interest rates coupled with the relative reduction in payment costs over time make this type of financing very attractive to states and districts. However, general obligation bonds do have some drawbacks, particularly in recent fiscal climates.

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34 See id. at 3. “Bond financing is the traditional method of financing school construction at both the state and local levels.” Id.; Ellen Dannin, *Crumbling Infrastructure, Crumbling Democracy: Infrastructure Privatization Contracts and Their Effect on State and Local Governance*, 6 NW. J.L. & SOC. POL’Y 47, 66 (2011); see also TRACY MILLER, *SCHOOL CONSTRUCTION: MEETING THE CLASSROOM BUILDING NEEDS OF FLORIDA’S GROWING STUDENT POPULATION* 35–36 (2009). It should be noted that another type of bond, revenue bonds, can be used for school construction but are generally less used than general obligation bonds.


36 *Id.* at 594. Although it is generally understood that the issuing body will raise the money through property taxes, technically, all revenues may be subject to the general obligation. See Stoyan Bojinov, *Two Types of Bonds: General Obligation vs. Revenue Bonds*, MUNICIPALBONDS.COM (Aug. 20, 2011), http://www.municipalbonds.com/education/read/60/two-types-of-bonds-general-obligation-vs-revenue-bonds. Of course, at the local level much of the tax revenue is limited to *ad valorem* taxes, unlike the state which can raise revenue through income, sales, gas, or other state level taxes. *Id.*

37 See Bittle, supra note 35 at 605; Sendor, supra note 7 at 3.

38 See Sendor, supra note 7 at 3. “Its main practical advantage is that it raises money quickly while spreading payments over the useful life of the building. By spreading payments over a long time, bond financing minimizes the annual burden on taxpayers.” *Id.*

39 Because inflation will reduce the real value of payments in the future, those payments become cheaper relative to current dollars as time passes. *See id.*
In most circumstances, general obligation bonds are statutorily subject to approval through the voter referendum process.\textsuperscript{40} The voter referendum process can be complicated, time consuming,\textsuperscript{41} and politically charged.\textsuperscript{42} School construction bond referenda are often rejected by voters—particularly those in states or counties where property taxes are highest.\textsuperscript{43} For example, a clear downward trend exists with New Jersey voters, the state with the nation’s highest property taxes.\textsuperscript{44} New Jersey voters have approved fewer and fewer bond referenda over the last decade. In 2003, the high-water mark for bond approval, voters approved 78.5% of referendum, however, that number fell to an average of 51.7% over the three-year period of 2010-2012.\textsuperscript{45} Increasing difficulty in getting bond referenda approved is perhaps the main reason that districts look to other financing methods.

2. Capital Reserve Funds

Capital reserve funding, in its simplest form, is a form of savings account in which a district accumulates funds for capital outlays such as school construction.\textsuperscript{46} Some states have mandatory fund contributions, whereby they are required to put a certain amount of yearly revenue into the capital reserve.\textsuperscript{47} Capital reserve funds can be supplemented by lottery revenues,

\textsuperscript{40} See, e.g., VA. CONST., art X, § 9(b) (West 2013). Section 9(b) provides for the state assembly to authorize bond debt creation provided that a majority of voters approve of it in a referendum. Id.; see also ASCE REPORT CARD, supra note 8 at 58.
\textsuperscript{41} See Bittle, supra note 35 at 598.
\textsuperscript{42} See Sendor, supra note 7 at 3.
\textsuperscript{46} See Sendor, supra note 733 at 3.
\textsuperscript{47} See, e.g., COLO. REV. STAT. ANN. § 22-45-103(1)(c) (West 2013).
user fees, donations and gifts, or any other statutory source. User fees, also known as impact fees or developer fees are a common method used by states and districts to increase revenues to their capital reserve fund. These fees place a burden on the developer and new homebuyers that will theoretically be placing increased strain on the district. Capital reserve funds can help provide needed money for school repairs or new construction, however, they are often underfunded and cannot keep up with the increasing need or cost of facility improvement.

3. Build-Lease Agreements

Build-lease agreements ("BLAs"), also known a lease-finance or lease-rent arrangements, are not new to the school construction scene. Under traditional BLAs, a lessor provides the facility to the district for a pre-determined lease term and at an agreed to monthly or yearly rate. BLAs differ from general obligation debt and are usually not subject to the same requirements including, significantly, exemption from the public referendum requirement. One way in which districts have distinguished BLA debt from general obligation debt is by forming the agreement such that the district can cancel the lease if the funding is not appropriated in any given year.

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48 Id. Section 22-45-103(1)(c) provides: “Moneys allocated pursuant to the provisions of section 22-54-105(2) shall be transferred from the general fund and recorded in the capital reserve fund along with the revenues received pursuant to section 39-5-132, C.R.S. Such revenues may be supplemented by gifts, grants, and donations.” Id. COLO. REV. STAT. ANN. § 39-5-132 provides for the “[a]ssessment and taxation of new construction” and subsection (5) provides that any “[m]oneys received by a school district pursuant to this section shall be deposited in the district's capital reserve fund.”

49 See id.; Miller, supra note 34 at 36.

50 Miller, supra note 34 at 36. The idea is that new homes will draw new families and thus drive up school enrolment.

51 See Sendor, supra note 733 at 4.

52 BLAs can technically vary from other lease-finance agreements in that the latter may not necessarily be built solely for the purpose in question. For example, a lease-finance agreement could entail a district leasing pre-existing office space converted for school use. This Article is largely concerned with BLAs in which the facility is built specifically in contemplation of the BLA, and unless otherwise stated, this is the type of arrangement that the term BLA is meant to represent.


54 See Sendor, supra note 733 at 4.

55 See Bittle, supra note 35 at 595.

56 Id.
BLAs provide the lessor with enough of a monthly payment to cover the cost of construction and provide the lessor a reasonable profit. One advantage of BLAs includes the ability for a school to tap private sector money quickly and “avoid[] the need for the school board to raise the construction funds in advance through a bond issue or capital reserve fund.” Additionally, BLAs spread the cost of the construction out over a long term and depending on the type of BLA structure, can provide the lessor significant tax benefits, which are passed on to the district. Part IV of this Article discusses the potential benefits of BLAs in further detail.

Among the disadvantages of BLAs are the higher interest rates that the requisite private financing will incur instead of the traditionally lower public bond rates. Besides the interest rate difference between private and public financing, there are other potential pitfalls—mostly stemming from poor contract formation. However, as discussed in Parts IV and V of this Article, the benefits of BLAs are attainable and the parties can overcome the disadvantages with careful contract formation.

II. IT’S ALL ABOUT THE KIDS?: PROBLEMS, SHORTCOMINGS, AND CORRUPTION IN THE FUNDING AND CONSTRUCTION OF SCHOOL FACILITIES

A. A Case Study in Waste and Corruption – New Jersey’s Educational Plans go Awry

The State of New Jersey's history of school construction funding provides a useful example of some of the problems associated with the current predominant scheme of complete government administration of school construction. New Jersey, reacting to a series of State Supreme Court decisions requiring increased funding to the state's poorer school districts, passed

57 See Sendor, supra note 733 at 4.
58 Id.; See also Kirk A. Johnson & Elizabeth Moser, Mackinac Center, The Six Habits of Fiscally Responsible Public School Districts 15 (2002).
59 See Sendor, supra note 733 at 4; Johnson & Moser, supra note 58 at 16.
60 BLAs come in several configurations in which determine the responsibilities of the parties and also who will retain ownership of the facility at lease end. See infra Part I.B.3 for an overview on the various types of BLAs.
61 Id.; See also supra Part IV discussing BLA benefits.
62 See Sendor, supra note 733 at 4.
63 See supra Part V.B.
legislation revising the state's school funding formula. The legislation authorized the New Jersey Economic Development Authority (“EDA”) to oversee school construction and initially funded the pseudo-agency with $8.5 billion. The state program suffered from a variety of maladies, ultimately falling far short of its intended goals. Despite re-branding of the agency, and re-funding with over $3.9 billion in additional bond financing, many of New Jersey's poorer urban and rural school districts still suffer with substandard facilities. This Part looks into the New Jersey school funding debacle including a history of the system’s formation, how and why the system failed, and the end results of that failure.

1. The New Jersey Supreme Court Mandates Equal Funding for School Construction in Poorer Districts and The SCC is Born

New Jersey's use of the *ad valorem* funding scheme, like many other states, led to significant school funding disparity between poorer school districts and richer school districts. These disparities lead to criticisms, scrutiny, and claims of educational inequality across the state. Superficially, challenges opposing this funding scheme relied on a claim of unequal funding based on the New Jersey constitutional requirement that the state “provide for the maintenance and support of a thorough and efficient system of free public schools”; however, there was also racial component. The economic disparity between financially diverse districts

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64 See infra Part I.B.1 for an overview of the *ad valorem* taxing system.
66 N.J. CONST. art. VIII, § 4 (West 2012) (emphasis added). The “thorough and efficient” clause of the N.J. Constitution was held by the N.J. Supreme Court as the basis for a constitutional command that all schoolchildren receive an equal, adequate education. See Robinson v. Cahill (Robinson V), 303 A.2d 273, 294 (N.J. 1973). The court has also defined the “thorough and efficient” clause by stating, “[t]he only constant is the definition of a thorough and efficient education—one that will equip all of the students of this state to perform their roles as citizens and competitors in the same society.” Abbott for Abbott v. Burke (Abbott II) 575 A.2d 359, 389 (NJ 1990).
67 See *Abbott II*, 575 A.2d at 389–90. Ultimately, in *Abbott II*, the court held that there was no violation of New Jersey’s Law Against Discrimination, N.J.S.A. 10:5–1 et seq., and the court declined to addressed the issue of equal protection. *Id.* However, the court did take notice of the disparate educational impacts particular effect on the state’s minority students stating, “[o]ur large black and hispanic population is more concentrated in poor urban areas and will remain isolated from the rest of society unless this educational deficiency in poorer urban districts is addressed.” *Id.* at 392.
correlated with the educational disparity between racial groups in New Jersey schools. Because "blacks and Latinos concentrated in poor urban areas and Caucasians constitute[ed] the majority of residents in wealthier suburbs," drawing any lines based on economics was essentially also drawing them on race. Ultimately, opponents of school funding based solely on \textit{ad valorem} revenues would seek their relief through court challenges.

Beginning in the late 1970's, a series of landmark legal decisions by New Jersey's Supreme Court confirmed that the state's existing funding system led to significant disparity between richer and poorer districts. The first challenge came in 1973 in the case of \textit{Robinson v. Cahill}. In \textit{Cahill}, the New Jersey Supreme Court defined three controlling precepts: (1) the state’s constitution places “the ultimate responsibility for a thorough and efficient education . . . upon the State”; (2) the state may “enlist” local government to satisfy this constitutional requirement, including funding through taxation power, subject to “terms which will fulfill that [constitutional] obligation”; and (3) the state maintains ultimate responsibility for rectifying any system that falls short of the “constitutional command” of a thorough and efficient education for all the state’s schoolchildren. In summary, although the state may leave it up to the local districts to raise funds and administer educational services, the state has the ultimate responsibility of assuring that education is equal across all of New Jersey’s schoolchildren.

As a result of the \textit{Cahill} ruling, the New Jersey legislature passed the Public School Education Act of 1975 (the “1975 Act”). The 1975 Act established a statewide school-funding

\begin{flushright}
69 \textit{Id.}
71 \textit{Id.} at 291.
72 \textit{Id.} at 291.
73 \textit{Id.} at 292.
74 \textit{Id.} at 294.
\end{flushright}
scheme that attempted to satisfy the constitutional mandate as outlined in Cahill.\textsuperscript{76} New Jersey’s legislature funded the Act through the enactment of New Jersey’s first income tax in 1976.\textsuperscript{77} Despite being well intentioned, the new funding scheme failed to live up to its promise and proponents of equitable funding would again seek relief in the courts.\textsuperscript{78}

In 1981, a non-profit group filed a suit “on behalf of all children attending New Jersey’s poor and urban schools,”\textsuperscript{79} claiming that the 1975 Act was insufficient to ensure the constitutionally required thorough and efficient education.\textsuperscript{80} That suit, Abbott v. Burke (Abbott I),\textsuperscript{81} set off a series of landmark cases on equitable school funding in New Jersey; furthermore, the court’s reasoning and the ruling’s effects would ripple across the nation.\textsuperscript{82} Abbott II\textsuperscript{83} became the seminal case by invalidating portions of the 1975 Act, proclaiming that the new funding scheme promulgated by the Act, although well intentioned, had no effect on eradicating the

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\item[\textsuperscript{76}] See id § 2(a) (legislative findings).
\item[\textsuperscript{77}] New Jersey Gross Income Tax Act, N.J. P.L. 1976, c. 47. Codified as N.J.S.A. 54:2-1 (1976) (amended date____) The Act established New Jersey’s first income tax and mandated that all taxable income up to $20,000 was subject to a 2% tax and that if the taxable income was over $20,000 the tax would be $400 plus 2.5% of the excess over $20,000. Id.
\item[\textsuperscript{78}] See Abbott v. Burke (Abbott I), 495A.2d 376, 381 (N.J. 1985).
\item[\textsuperscript{79}] Mission and History, EDUCATIONAL LAW CENTER, http://www.edlawcenter.org/about/mission-history.html (last visited Oct. 21, 2013)
\item[\textsuperscript{80}] DOE Archives - History of Funding Equity, NEW JERSEY STATE DEPARTMENT OF EDUCATION (Ocl. 23, 2013), http://www.state.nj.us/education/archive/abbotts/chrono/
\item[\textsuperscript{81}] 495 A.2d 376 (N.J.1985); Abbott would spawn nineteen cases, Abbott I through Abbott XIX, over twenty-three years from 1985 to 2008. The history of the first case, Abbott I, was summarized by the Abbott II court: Students brought action seeking judgment declaring that finance provisions of state statutory system of elementary and secondary public education were unconstitutional. The Superior Court, Chancery Division, Mercer County, dismissed for failure to exhaust administrative remedies. Students appealed. The Superior Court, Appellate Division, reversed and remanded. The defendants petitioned for certification. The Supreme Court reversed, and transferred case to Commissioner of Education. On remand, the Commissioner declined to accept the administrative law judge's recommendations and found that statutory system was constitutional. Students appealed the Board of Education's decision. The Supreme Court certified the appeal directly, bypassing the Appellate Division, and in an opinion by Wilentz, C.J., held that the Public School Education Act was unconstitutional as applied to poorer urban school districts and had to be amended to assure funding of education in poorer districts at the level of property-rich districts, that funding could not be allowed to 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 had to also be adequate to provide for the special educational needs of the poor urban districts in order to redress their extreme disadvantages.
\item[\textsuperscript{83}] 575 A.2d 359 (N.J. 1990).
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disparity between richer districts and poorer districts; in fact, parts of the 1975 Act exacerbated it.\(^{85}\)

In response to the *Abbott II* ruling, in 1990 the New Jersey legislature enacted the Quality Education Act (“QEA”),\(^{86}\) “which modestly increased foundation aid levels for the Abbott districts, but failed to provide parity funding.”\(^{87}\) The New Jersey Supreme Court, in 1994, took up the *Abbott* plaintiff’s claim that the QEA was also unconstitutional; they agreed, invalidating the QEA as unconstitutional as applied to urban districts.\(^{88}\) The Court mandated that the state adopt new legislation that would provide “substantial equivalence between the special needs districts and the richer districts in expenditures per pupil for regular education,” which the QEA had failed to do.\(^{89}\)

In 1996, the New Jersey legislature responded to the *Abbott III* ruling by trying once again to satisfy the mandate. The legislature passed the Comprehensive Education Improvement and Financing Act (“CEIFA”),\(^{90}\) which designated twenty-eight of the poorest school districts as “Abbott districts.”\(^{91}\) Once again, the Abbott plaintiffs challenged the funding scheme and in 1997 requested the N.J. Supreme Court to review the CIEFA and declare it unconstitutional\(^{92}\)—and once again, the Court did just that in their *Abbott IV* ruling.\(^{93}\) This time, however, the Court proscribed much more specific remedies including remanding their remedial order to the trial

\(^{84}\) *Id.* at 363.

\(^{85}\) *See Id.* at 407 (finding that certain types of state aid were “counter-equalizing”).


\(^{87}\) *History of Abbott, supra* note 82.


\(^{89}\) *Id.* at 577.


\(^{91}\) *Id.* “‘Abbott district’ means an Abbott district as defined in section 3 of P.L.1996, c. 138 (C.18A:7F–3),” which in turn references the 28 urban districts from Appendix A of the *Abbott II* decision. These would eventually be expanded to include 31 Abbott districts. For a list of the districts see *Abbott Districts, EDUCATION LAW CENTER*, http://www.edlawcenter.org/cases/abbott-v-burke/abbott-districts.html. Although the Abbott districts are only 31 of 603 districts statewide, they educated approximately 25 percent of the state’s schoolchildren at the time. *See Robert K. Goertz & Margaret E. Goertz, 16 JOURNAL OF EDUCATION FINANCE* 105, n. 3 (1990).

\(^{92}\) *History of Abbott, supra* note 82.

court judge. The trial court judge was tasked with “directing the Commissioner [of education] to initiate a study and to prepare a report with specific findings and recommendations covering the special needs that must be addressed to assure a thorough and efficient education.”

One significant area of “special needs” that the Court recognized was capital improvements—facility remediation, repair, and expansion.

Ultimately, the N.J. Supreme Court adopted that lower court judge’s “Report and Recommendation,” which was the by-product of the court’s fact-finding directive. The Court accepted most of the findings; however, two of the Report’s findings are central to this discussion. First, many of New Jersey’s urban schools had components—buildings or portions of buildings—that were “non-functional or have exceeded their life expectancy,” which impacted what the Court called the health and safety of the children.” Amongst these health and safety deficiencies were; “architectural and structural integrity; heating, ventilation, and air conditioning systems; sanitary and water systems; fire protection and detection systems; plumbing fixtures; electrical power and distribution; emergency egress alarms and signs; and communications systems.”

Second, the Court acknowledged the serious overcrowding concerns facing many of the urban schools. These concerns would require expansion of existing schools as well as a significant number of entirely new school buildings. The engineering group hired by the Department of Education (DOE) conducted a thorough survey, the results of which showed a

\[\text{References:}\]

94 Id. at 444.
95 See id. at 437–38. “CEIFA completely fails to address one of the most significant problems facing the [special needs districts]—dilapidated, unsafe, and overcrowded facilities. The statute neglects to consider the dire need for facilities improvement.” Id. at 437.
97 See id. at 517.
98 See id. at 470.
99 See id.
100 See id. at 517–21 (describing in detail the specific calculations and requirements used in making the assessment).
“required additional capacity for 49,558 students, or 3137 classrooms, primarily at the elementary school level, to serve the State’s proposed whole-school reform program.”101 In response, the Court ordered that each Abbott district submit a five-year plan ensuring that each school building is safe and healthy, in compliance with the Uniform Construction Code, conducive to learning and adequate for the delivery of programs and services necessary to enable all students to achieve the Core Curriculum Content Standards, and that sufficient instructional space is available within the district to house all resident students.102

These five-year plans would serve as the starting point from which all decisions regarding facility remediation, alteration, and expansion would stem.103

The Abbott V ruling’s remedies section, which addressed, among others, those two overarching areas, contained two main points of import for this Article.104 First, the Court recognized that a significant amount of funding needed to be available in order to pay for this bold plan.105 To assure that this necessary funding was available, the Court adopted the DOE’s recommendation that the state grant authority for a special agency to procure funding through the issuance of bonds.106 Thus, the bulk of school construction funding, including all funding for Abbott districts, would be supplied through, and controlled by, one state agency, which also comported with another of the DOE recommendations—“[c]entral state financial management.”107

101 Id. at 517.
102 Id. at 523.
103 See id. at 471.
104 See id. at 524 (recognizing the DOE’s recommendations contained in their Facilities Report).
105 See id. at 525. “As noted, the report . . . indicated that facilities improvements in the Abbott districts will cost at least $1.8 billion; including provisions for soft costs and contingencies, the estimate increases to $2.4 billion. Debt service on $2.4 billion over thirty years at an assumed rate of 5.5% is about $165 million per year.” Id.
106 See id. at 524–26. The DOE recommended that the New Jersey Educational Facilities Authority (“EFA”) handle the bonding. Id. The EFA was a pre-existing authority that had handled funding for higher education facilities since 1963. See About NJEFA – History and Timeline, NEW JERSEY EDUCATIONAL FACILITIES AUTHORITY, http://www.njefa.com/njefa/about/history (last visited Oct. 31, 2013). Ultimately, however, the state would pass legislation placing sole responsibility for implementation of the Abbott V mandate under the Schools Development Authority (“SDA”).
107 See Abbott V, 710 A.2d at 524.
The second point addressed in the remedies section was the recommendation of the DOE that there be “[c]entralized construction management.”\textsuperscript{108} The Court noted that “the EFA does not provide construction management; however, it has done so in the past and would be able to manage construction in the Abbott districts with additional personnel.”\textsuperscript{109} Ultimately, however, the EFA would not handle the construction management, a new entity would—one formed solely for the purpose of satisfying the Abbott IV and Abbott V facilities improvement mandate.

In July of 2000, New Jersey passed the Educational Facilities and Construction Financing Act (\textquotedblleft EFCFA\textquotedblright) for the specific purpose of funding and constructing school facilities at a level that would satisfy the constitutional mandate.\textsuperscript{110} The EFCFA tasked the Economic Development Authority (\textquotedblleft EDA\textquotedblright) with complete responsibility for funding and construction of school facilities projects within the Abbott districts and other districts that received over fifty-five percent of their aid from the state.\textsuperscript{111} Additionally, the EDA was required to contribute funding to for non-Abbott districts that received less than 55\% of their aid from the state, while allowing those districts the option of having the EDA handle the construction management.\textsuperscript{112} In order to accomplish these requirements, the EFCFA authorized the issuance of $66 billion in bonds for Abbott district

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\textsuperscript{108} \textit{Id.} at 524.
\textsuperscript{109} \textit{Id.} at 525.
\textsuperscript{111} \textit{See } EFCFA, supra note 110. \textit{“The authority shall construct and finance the school facilities projects of Abbott districts, level II districts, and districts with a district aid percentage equal to or greater than 55\%.” }\textit{Id.}
\textsuperscript{112} \textit{See id. “Any district whose district aid percentage is less than 55\% may elect to have the authority undertake the construction of a school facilities project in the district and the State share shall be determined pursuant to this section. In the event that the district elects not to have the authority undertake the construction of the project, State support for the project shall be determined pursuant to section 9 or section 15 of this act, as applicable.” }\textit{Id.} Thus, the funding levels for the non-Abbott districts varied based on whether the district chose to relinquish the construction management to the EDA. \textit{Id.}
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construction and an additional $2.5 billion for non-Abbott districts.\textsuperscript{113} Eventually, however, the necessary funding would swell to over $12 billion.\textsuperscript{114}

With the EDA’s requisite funding in place, it began its mission of improving New Jersey’s school facilities. For two years after the EDA was authorized to raise those funds, the agency established a board of directors, instituted policies and procedures, hired staff and consultants, and began work on various “health and safety” projects,\textsuperscript{115} but the EDA was woefully unqualified for a project of this massive scope.\textsuperscript{116} Consequently, in 2002, New Jersey’s Governor signed Executive Order #24, which established the Schools Construction Corporation (“SCC”),\textsuperscript{117} in order “to focus, streamline and coordinate the activities of various State agencies involved in this monumental . . . effort.”\textsuperscript{118} Essentially, the Governor established the SCC to “control the construction component of the [Abbott V] implementation process,”\textsuperscript{119} while leaving the EDA to issue bonds, provide general oversight, develop systems for preauthorization and prequalification of contractors.\textsuperscript{120} The SCC was destined for infamy, plagued with waste, fraud, and mismanagement.\textsuperscript{121}

2. $12 Billion for What?: Broken Promises to Poorer Districts

\textsuperscript{113} See EFCFA, supra note 110. The Act also authorized $100 million for county vocational schools. Id.
\textsuperscript{114} See N.J. P.L.2008, c. 39, § 4 (amending the EFCFA § 14(a) by increasing the authorized funding levels by $3.9 billion). The limits proscribed by EFCFA and its amendments were for the principal amounts of the bonds only and did not include interest or expenses related to the bonds. According to the Economic Development Authority, approximately $12.5 billion has been allocated for school construction. General Information – Frequently Asked Questions, State of New Jersey Schools Development Authority, http://www.njeda.gov/GI/Faq.html; See also, supra Part II.C.3.
\textsuperscript{116} See Greif, supra note 68 at 637. Greif discusses the EDA’s lack of a building program prior to Abbott V as well as the EDA’s general lack of experience in actual construction coupled with the difficulties inherent in simultaneously building in multiple crowded urban areas. Id.
\textsuperscript{118} Id.
\textsuperscript{119} Greif, supra note 68 at 639.
\textsuperscript{120} N.J. Exec. Order No. 2002-24 (July 29, 2002), http://nj.gov/infobank/circular/eom24.htm (last visited Oct. 30, 2013). Additionally, the Order only stripped the EDA of construction related activities, thus, the EDA was still responsible for non-construction mandates of Abbott V. Id.
a. Mismanagement

When we look at the $12.4 billion authorized to fix New Jersey’s crumbling schools it sounds like an awful lot of money, and it is. In 2013 dollars, that $12.4 billion equals approximately $15.9 billion122 and we must note that this does not included money spent by individual school districts—it only represents the state’s contribution.123 But what did that money get the taxpayers and schoolchildren of New Jersey? The 2000 law that authorized and funded the SCC provided for an “area cost allowance” of $138 per square foot124 to be used when planning and estimating school construction. This is an important number to keep in mind because it was a target that was missed by a wide margin. To put that number into perspective, even using only eighty percent of it,125 at $138 per square foot the state could expect approximately 72,000,000 square feet of new schools.

Although critics may claim that the $138 per square foot allowance is far too low, studies show that this allowance is in line with the nation’s average price of actual completed construction.126 Of course, geographical location can account for some higher costs than the average. New Jersey’s cost of living is ranked 46th,127 however, this should only account for an increase of approximately thirty-seven percent,128 bringing the allowance to $189 per square foot—and even that benchmark would be easily exceeded.

122 I arrive at his number by taking the original $8.6 billion authorized in 2000 and the $3.9 billion authorized in 2008 and adjusting for inflation.
123 It does, however, include the vast majority of money spent in the poorest districts because of the Abbott mandates requiring the state to cover 100% of the cost in those districts. See supra Part II.A.1.
124 See 2000 NJ Sess. Law Serv. ch. 72, § 3 (SENATE 200) (WEST).
125 Eighty percent is a random number used in this experiment to account for program administration and overhead. This should be a more than reasonable allowance based on the EDA’s own 15% allowances for contractor profit and overhead. See PAUL ABRAMSON, SCHOOL PLANNING AND MANAGEMENT, 2012 ANNUAL SCHOOL CONSTRUCTION REPORT CR-5 (2012). The report notes that the average elementary school in the United States cost $181 per square foot to construct in 2011. This equals $138.56 in 2000 inflation adjusted dollars. It seems fair to say that the actual costs in 2011 mirror the cost allowance authorized by the New Jersey legislature in 2000.
Not long after the SCC was established, it became apparent that the fund would run out of money before coming close to reaching its goals. In 2004, just over three years since approving the funding law, the legislature was informed that by January of 2006, the fund would be depleted—“well before the school facilities needs in the Abbott and other districts have been met.”\footnote{See 2005 N.J. Sess. Law Serv. Ch. 117, § 1(b) (West), available at ftp://www.njleg.state.nj.us/20042005/PL05/117_.PDF (last visited Dec. 16, 2013).} The legislature established a School Construction Review Commission to review the SCC\footnote{Id. § 2.} and audited the SCC for the period of July 18, 2000, through January 5, 2006. The SCC suffered from a host of maladies and some of them are beyond the scope of this Article, however, it is clear that poor decisions were made at a variety of levels and poor results ensued.

Notably, the state Auditor’s report found that, despite being tasked with spending $6 billion dollars on the Abbott districts alone, the SCC failed to conceive or implement an “overall strategic plan.”\footnote{See RICHARD L. FAIR, NEW JERSEY STATE LEGISLATURE, OFFICE OF LEGISLATIVE SERVICES, OFFICE OF THE STATE AUDITOR, NEW JERSEY SCHOOLS CONSTRUCTION CORPORATION 4 (2006) [hereinafter STATE AUDIT 2006], available at http://www.njleg.state.nj.us/legislativepub/Auditor90195.pdf (last visited Jan. 2, 2013).} Besides critical safety and health related construction renovations, the SCC failed to establish a system to prioritize projects based on need; rather, they used a first-come, first-served approach.\footnote{Id. at 4–5.} Astoundingly, the SCC failed to implement a “comprehensive budget and cost system,” which would have allowed them to track budgeted costs versus actual costs, and they failed to implement a system for accounting and controlling change orders.\footnote{Id.} This failure prevented the SCC from making decisions based on factual data and limited their ability to assess their financial situation,\footnote{Id.} a private sector failure of this magnitude, going unnoticed or uncorrected for over five years, is highly unlikely if not impossible.
The SCC also disregarded the legislature’s intent regarding costs. While the funding law established an area cost allowance of $143 per square foot,\textsuperscript{135} the SCC unilaterally established their own area cost allowance of between $161 and $218 per square foot. Additionally, the SCC seemed to treat these numbers as a baseline rather than a target, often mixing renovations with new construction costs, which led to serious miscalculations and cost overages, including a 21,000 square foot renovation that cost $621 per square foot.\textsuperscript{136} The audit went on to report various other costly problems in several areas including their “Fastrack” program that was supposed to reduce project time,\textsuperscript{137} the SCC’s land acquisition program,\textsuperscript{138} and the use of independent project management firms (“PMF”).\textsuperscript{139}

Of particular interest is the use of outside PMFs. In December of 2001, the NJEDA had thirteen employees responsible for school design and construction,\textsuperscript{140} but by November of 2005, that number had swelled to eighty-eight; yet, all projects were still managed by PMFs—not in-house staff.\textsuperscript{141} These PMFs were paid at a rate of eleven percent of the construction cost estimate of each Abbott district project, a price that dwarfed the mere three percent awarded for construction management firms on non-Abbott districts,\textsuperscript{142} even taking into account the additional design management services provided by PMFs, this number should have been no more than six or seven percent.\textsuperscript{143} This is a significant amount of money when we consider that the initial bulk of the Abbott district construction—$4 billion—would gross PMFs

\textsuperscript{135} This was the inflation-adjusted value of the $138 per square foot area cost allowance under the law at the time of this audit.

\textsuperscript{136} \textit{Id.} at 8.

\textsuperscript{137} \textit{Id.} at 9–10. The Fastrack program was supposed to cut significant amounts of time from a projects schedule. However, the auditor found that various reasons caused the Fastrack program to not only fail to speed up projects, but also to increase overall costs by between $65 and $105 million.

\textsuperscript{138} \textit{Id.} at 11–13. The auditor found that the process that the SCC used to acquire land suffered from inefficiency and red tape and that the SCC was implementing the eminent domain laws incorrectly. Additionally, the auditor found that the SCC seriously underestimated remediation costs for properties that had remediation needs.

\textsuperscript{139} \textit{Id.} at 14–17.

\textsuperscript{140} \textit{Id.} at 14.

\textsuperscript{141} \textit{Id.} at 14–15. Total employees at the NJEDA went from fifty in December of 2001, to 276 in November of 2005. \textit{Id.}

\textsuperscript{142} \textit{Id.} at 14.

\textsuperscript{143} \textit{Id.}
approximately $440 million, for a service that some consider redundant and wasteful.\(^{144}\) It is clear that the SCC suffered from serious mismanagement, but that was not the only problem.

b. The Demise of the SCC and Rebranding as the SDA

Besides poor management, the SCC was rife with other problems including waste, fraud, and abuse. The stories of waste and corruption are both laughable and infuriating, including the purported purchase of $67 million worth of property that already belonged to the state.\(^{145}\) No hard statistics are available on the amount of money wasted, lost, or stolen, however, some claim that over $1 billion has basically gone missing.\(^{146}\) Certainly, others in the know recognized that rampant problems existed at the SCC.\(^{147}\) In 2005, New Jersey’s Inspector General issued a report, which “concluded that the schools corporation was susceptible to ‘mismanagement, fiscal malfeasance, conflicts of interest and waste, fraud and abuse of taxpayer dollars.’”\(^{148}\) Scott Weiner, who took over as the SCC’s chief executive roughly one year before the report

\(^{144}\) The auditor ultimately recommends the use of in-house staff to cover the duties assigned to PMFs. *Id.* It appears that the NJSDA finally heeded that advice in roughly 2010 when it decided, for the first time, to do just that. *See New Jersey Schools Development Authority, Biannual Report on the Schools Construction Facilities Program 3* (2011), available at [http://www.njsda.gov/RP/Biannual_Report/2011_2.PDF](http://www.njsda.gov/RP/Biannual_Report/2011_2.PDF) (last visited Dec. 16, 2013) [hereinafter Biannual Report 2011]. The NJEDA claims to have saved $1.5 million from managing just three projects on their own. *Id.*

\(^{145}\) *See Armand Fusco, School Corruption; Betrayal of Children and the Public Trust* 102 (2005).

\(^{146}\) *See, e.g.,* Adam Dworetzky, *The Cartel and Ineffective Spending in Schools,* *Educ 300: Education Reform, Past and Present Blog* (Feb. 24, 2013), [http://commons.trincoll.edu/edreform/2013/02/the-cartel-and-ineffective-spending-in-schools/](http://commons.trincoll.edu/edreform/2013/02/the-cartel-and-ineffective-spending-in-schools/) (citing the movie *The Cartel* (18:47) which discusses the “School Construction Corporation, which is responsible for allowing a billion dollars to disappear”). *Id.;* *Shocking Statistics, School Funding Exposed,* [http://schoolfundingexposed.wordpress.com/examples-of-waste-fraud-and-abuse/](http://schoolfundingexposed.wordpress.com/examples-of-waste-fraud-and-abuse/) (last visited Dec. 16, 2013) (quoting N.J. Assemblyman Joseph Malone (R-Bordertown) as saying: “People should be in jail. You can’t lose a billion dollars and not be able to explain to the legislature or the public how you spent that money or where the money went”).

\(^{147}\) *See Star Ledger Editorial Board, Name Change Isn’t Enough,* *NJ.com* (Aug. 7, 2007, 10:31 PM), [http://blog.nj.com/njv_editorial_page/2007/08/name_change_isnt_enough.html](http://blog.nj.com/njv_editorial_page/2007/08/name_change_isnt_enough.html). (recognizing the SCC’s reputation as “scandal-plagued” and discussing a newspaper story that “the SCC built schools that cost, on average, 45 percent more than those built by local boards of education”).

acknowledged that “[t]here was a large amount of waste that was a legacy of the previous administration, and that’s been well documented.”

The SCC began to unravel. In May of 2005, the governor replaced the chairman of the SCC’s board, “a former lobbyist accused of conflicts of interest.” This was followed in August of 2005 by the sudden resignation of SCC chief executive, John Spencer, “who admitted ‘money was wasted’ under his watch.” Finally, in what can aptly be described as a game of three-card Monte, Governor Jon Corzine closed the SCC and replaced it with a newly established agency, the New Jersey Schools Development Authority ("SDA"), which promptly requested $3.25 billion dollars in new funding. The Governor did so while transferring the interim chief executive of the SCC, the aforementioned Scott Weiner, and five of the board members directly to the SDA. Ironically, Gov. Corzine stated that “[t]he reorganization of the SCC is testimony to the commitment of this administration to implement reforms that put an end to the waste and mismanagement of the past. We now have a more streamlined entity with the proper controls in place. This will ensure more efficient delivery of quality schools which are greatly needed across the state.” That did not happen and ultimately the state has not held anyone responsible.

149 Id.
151 Id.
153 See SCC Press Release, supra note 152.
154 Id.
155 See, e.g., John Mooney, Schools Development Authority: Progress or Peril?, NJSPOTLIGHT.COM (July 20, 2012), http://www.njspotlight.com/stories/12/0719/2123/ (noting the SDA’s generally slow pace and that the SDA had not begun construction of a new school in the previous 34 months); SDA Continues To Defy Legislature: Agency Seeks to Limit Role of Districts in School Construction Projects, EDUCATION LAW CENTER (Dec. 21, 2010). The story cited the “the expensive, top heavy SDA bureaucracy” and the SDA’s defiance of the legislature’s intent that local districts be given the opportunity to manage their own projects if possible. It also noted:

For close to a year, the NJ Schools Development Authority (SDA) has stopped all work replacing or renovating the worst school buildings in the state, in direct defiance of legislation enacted in 2008 authorizing funding for those projects, and even though the agency spent $50 million in 2010 on salaries and overhead for over 300 employees.

Id.
c. Poor Results

New Jersey’s multi-billion dollar school construction program had partially mixed results. While many suburban districts were able to use state funds to augment their own funds, resulting in high quality, state of the art schools in many affluent districts, the poorer districts often languished behind, waiting years for help that sometimes would not come.\footnote{See, e.g., N.J. School Construction This Lesson Plan is Failing, supra note 148. Despite the construction program's remarkable success in the suburbs and incremental progress in the cities, the IG's revelations jeopardize confidence in the program just as it needs a new round of funding. . . . Suburban districts jumped on the chance to get projects done without having to raise local taxes. Though rarely talked about that way, the construction initiative has become one of the state's largest property-tax relief programs. Suburban projects constitute most of the 2,700 completed to date. Progress in the poor, urban districts, however, has been slow. Health and safety upgrades totaling $660 million were finished in 344 schools by 2003, but most new buildings are just getting started. Of the 50 new schools finished, 22 are in the poorest districts.} Although the failures are too numerous to cover in this Article, a few can be illustrative of the problem. Bearing in mind that the original intent of the school construction program was to provide new schools in a timely manner with an allowance of $138 per square foot, we briefly examine six projects.\footnote{Id.}


Second, Union City High School combined the two high schools that previously served Union City into one 366,500 square foot facility.\footnote{These six projects are all Abbott District projects. No non-Abbott District projects were not used for several reasons. First, the Abbott school districts are funded 100% by the state and provide a more distinct picture of the state’s performance than schools built in non-Abbott districts, which the state only provides partial funding for and for which the individual districts control the budgeting and construction. Second, these were some of the more egregious examples and they were more broadly reported on in the media. While not every school built in Abbott Districts was as expensive as these, on average they were significantly higher than estimated and targeted. See, e.g. STATE AUDIT 2006, supra note 131 at 7–8 (noting that the target cost set by the legislature was $143 per square foot and that the SCC unilaterally changed the target to between $161 and $218, and further noting that projects routinely ran over those higher budget targets, including one that cost approximately $621 per foot of new construction).} The school’s design incorporated an artificial
turf athletic field and bleachers onto the roof of the structure.\textsuperscript{160} It houses 1,800 high school students and cost $176.8 million—$482 per square foot.

Third, Paterson’s International High School, completed in 2008, houses 386 students and “emphasizes global studies.”\textsuperscript{161} In the three years since the school was built it has never had a music program, however, it “features an expansive wing for music classes.”\textsuperscript{162} By March of 2011, the building had not received a certificate of occupancy due to major construction flaws and its “three-story atrium intended to instill grandeur” does not meet fire code, which required the state to pay “firefighters and security officers more than $200,000 to check the fire alarms every hour.”\textsuperscript{163} The school’s distance learning lab, for reasons unknown, does not contain the requisite equipment for it to function and “[n]ot many students use the library, after the librarian was laid off this year due to budget cuts.\textsuperscript{164} Additionally, the school had structural problems including “railings on the staircases . . . breaking apart,” and there were “[l]arge chunks of the ceiling [] crumbling because of leaks.”\textsuperscript{165} The school is 113,000 square feet and cost $53 million—$469 per square foot.

Fourth, New Brunswick High School, which opened in January of 2010, had its budget “soar[] by nearly a third since 2004,” when it was first budgeted.\textsuperscript{166} After years of planning, the school opened without a traffic light at its main entrance or a crosswalk for students to cross the

\begin{footnotes}
\item See Union City (Hudson Co.) Union City High School and Athletic Complex, \textsc{State of New Jersey Schools Development Authority} (Sept. 28, 2009), http://www.njsda.gov/Schools/Schools/descr_det.asp?sec=&SchoolID=17-5240-x07.
\item Id. Arguably, placing the football field on the roof may have actually saved money due to the high cost and shortage of land in Union City. Of course, the other argument was that perhaps they should have foregone a football field or entered into a field sharing deal with a neighboring town.
\item See Paterson New International High School Academy, \textsc{State of New Jersey Schools Development Authority} (Sept. 25, 2008), http://www.njsda.gov/Schools/schools/descr_det.asp?SchoolID=31-4010-S01&SchoolName=New+International+High+School+Academy, Julie O’Connor, Profile of a New Jersey School Construction Fiasco in Paterson, N.J.COM (MAR. 27, 2011, 5:56 AM) (noting that although the school was designed for 528 students it actually only had 386 enrolled).
\item Id., supra note 161.
\item Id.
\item Id.
\item Id.
\item See Hu, supra note 148.
\end{footnotes}
facility’s busy front road. This 400,000 square foot facility houses 1,300 students and cost taxpayers $187 million—$467 per square foot.

Fifth, the SCC tore down New Brunswick’s Redshaw Elementary School in 2006 in contemplation of building a new replacement school. At that time, the students “moved into a temporary warehouse facility” in a nearby industrial complex, which had very few windows and “no playground or auditorium.” The students have waited patiently for over seven years and counting for their new school—but to no avail. The fifth graders who graduated in June of 2011, and every graduating class since, have spent their “entire elementary school career” in that warehouse. Ground was finally broken for the new school on March 21, 2013, and the SDA optimistically claims it will be ready for the 2014-2015 school year. The new facility is 135,000 square feet, will house 900 students, and is estimated to cost $51.2 million—$379 per square foot.

Lastly, is Trenton High School. In what seems like a cruel joke, this eighty-one year old dilapidated structure languishes in need of massive repairs, in the state capital, a mere 1.4 miles from the SDA offices that have spent billions of dollars. In August of 2013, the Trenton school

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168 Id. It should also be noted that this school provides over 300 square feet of space per student—double the square foot space allowance of 151 square feet per high student recommended under the Educational Facilities Construction and Financing Act. See Educational Facilities Construction and Financing Act, STATE OF NEW JERSEY DEPT. OF EDUCATION (1998), http://www.state.nj.us/education/facilities/laws/act_summ.shtml (last visited Dec. 16, 2013).
170 Id.
172 See Officials Break Ground for New A. Chester Redshaw Elementary School, CITY OF NEW BRUNSWICK (Mar. 21, 2013, 2:58 PM), http://thecityofnewbrunswick.org/blog/2013/03/officials-break-ground-for-new-a-chester-redshaw-elementary-school/. Of course the estimated cost and completion date are, based on a significant track record, unlikely to be met.
board sued the SDA because of long delays in making repairs to the school. Students at the school cite rat and cockroach infestations, mold, dirty bathrooms, and dirty lunches, which makes students and teachers sick. Structurally, the building suffers from serious roof leaks, crumbling plaster, and a concrete auditorium floor with a structural crack in it, which required emergency repairs while closing the room to use. Conditions are so poor at Trenton High School that it prompted one visiting politician to remark, “[i]n my district, they would have a revolution. We would have parents all over the place.” Four years prior, the state had plans to build a new school, “but that was scrapped when some objected to bulldozing the landmark building.” Instead, in what amounts to a Band-Aid on a gaping wound, the state has authorized $28 million in repairs over the next two years.

Although these are but a few examples, it is evident that the massive state-run school construction programs have failed to live up to expectations. Billions of dollars have been spent; years have been lost. The few supporters of such a system may point to a few examples of new state-of-the-art schools, nevertheless, the inefficiency, poor choices, exorbitant price tags, and mismanagement has cost a large swath of New Jersey’s poorer districts an opportunity at the equal chance Abbott v. Burke’s ruling mandated almost thirty years ago.

III. UTILIZATION OF PRIVATIZATION IN EDUCATION’S NON-INSTRUCTIONAL SERVICES

Privatization; the mere mention of it in an educational context divides politicians, educators, and parents. Opponents express concern about placing a function that they regard as so inherently governmental in the hands of corporations, whose chief concern is the bottom-line.

175 See Muchanic, supra note 174; Pizzi, supra note 173.
176 Pizzi, supra note 173.
177 See Muchanic, supra note 174.
178 See Pizzi, supra note 173.
Proponents claim that private sector efficiencies and accountability, which the public sector lacks, will provide better outcomes at a lower cost to taxpayers. However, the discussion of school privatization can be divided into two main categories— instructional services and non-instructional services. Instructional services are, as the name suggests, services that bear a direct relationship to the education of the student, including classroom teaching, guidance counseling, extracurricular coaching or advising, and the like. Non-instructional services, also called support services, primarily consist of food services, transportation services, and custodial services.\footnote{See, e.g., Michael D. LaFave, A School Privatization Primer for Michigan School Officials, Media and Residents 4, Mackinac Center for Public Policy (2007), available at http://www.mackinac.org/archives/2007/s2007-07.pdf.} Private construction, ownership, and maintenance of school facilities would similarly fall within the non-instructional category.

The financial and educational results of privatized instructional services, such as charter schools, are hotly debated and beyond the scope of this paper. Support services, however, invoke less of a visceral reaction,\footnote{Joseph Murphy et al., Pathways to Privatization in Education 30 (1998).} are more widely accepted, and show positive results overall. Accordingly, this Article specifically addresses a non-instructional support service—school building construction, building maintenance, and facilities management. Some scholars have concluded, “providing services by private firms in a competitive environment saves taxpayers between 15 and 40 percent over the cost of providing them publicly.”\footnote{See Murphy et al., supra note 180 at 65 (citing five separate studies and scholarly papers from between 1980 and 1989 to support this contention); see also John C. Hilke, Competition in Government Financed Services, 113 (1992) (referencing “continued findings of 20% to 50% cost savings” in privatized areas of government privatization); Hilke, supra note Error! Bookmark not defined. at 1. Hilke’s compilation goes on to summarize each of the over 100 studies. Id.} In fact, a summary of over one hundred studies, between 1973 and 1993, “typically found cost reductions of 20 percent to 50 percent that resulted from privatization and, more importantly, increased competition.”\footnote{Id.} If utilized correctly, facility privatization can yield positive results similar to those experienced in other non-instructional support services, thus providing a viable alternative to the current model.
A. Current Examples and Effects of Privatization in Schooling

1. Privatization and its Effects in Other Non-Educational School Services

Privatization is not a new concept,¹⁸³ nor is its use in non-instructional school support services.¹⁸⁴ However, it appears that privatization has increased in response to tightening school budgets nationwide.¹⁸⁵ The traditional way of privatizing support services is through the “contracting out” of certain duties, previously performed by public employees, to for-profit businesses.¹⁸⁶ Opponents of privatization will undoubtedly point to instances of privatization failure and cost increases rather than decreases.¹⁸⁷ Many of those instances, although not every one, is a result of poor contract formation, poor oversight on behalf of one or both of the contract parties, lack of competition, or other outside forces. Even privatization skeptics, however, must concede that modern public schools cannot survive without some private support services. Furthermore, support services privatization is expanding; more and more districts are embracing it. States embrace privatization at differing levels but the trend is clearly towards greater privatization overall.¹⁸⁸ There must be some sincere motivation behind this trend; some form of positive reinforcement for privatizing. “Imitation is the sincerest of flattery,”¹⁸⁹ and it is one of the strongest indicators of success.

This positive reinforcement has continued to entice school districts to contract out a wide variety of services, including accounting/auditing, data processing, security, waste removal,

¹⁸³ See LAFAIVE, supra note 179 at 3; see also MURPHY ET AL., supra note 180 at 30.
¹⁸⁴ See MURPHY ET AL., supra note 180 at 30.
¹⁸⁶ See LAFAIVE, supra note 179 at 5.
¹⁸⁸ See, e.g., James M. Hohman & Josiah Kollmeyer, School Support Services Contracting Increases to 61 Percent of Districts, MACKINAC.ORG (Sept. 3, 2012), http://www.mackinac.org/17502 (last visited Nov. 18, 2013) (describing the growth of privatization services in Michigan); Colin Hitt, A SURVEY AND OVERVIEW OF PRIVATIZATION IN ILLINOIS’ PUBLIC SCHOOLS, ILLINOIS POLICY INSTITUTE 1 (July 24, 2008), http://illinoispolicy.org/wp-content/files_ml/1378404516privatization_0708.pdf (last visited Nov. 17, 2013) (finding that fifty-six percent of Illinois school district contracted out at least one of the primary support services).
¹⁸⁹ CHARLES CALEB COLTON, LACON, OR, MANY THINGS IN FEW WORDS: ADDRESSED TO THOSE WHO THINK 101 (2010).
energy management, and others. Amongst these myriad services, three services in particular tend to be the most likely to be privatized—custodial and maintenance services, transportation services, and food services, which we will call “primary support services.” These three primary support services dominate the privatized school support services sector.

a. Student Transportation

Busing is most likely the oldest of the support services to experience privatization, tracing its roots back as far as the 1840s when schools paid local farmers in Massachusetts to transport schoolchildren. Student transportation, or “busing,” is also the most widespread of the primary support services that schools have chosen to privatize. Busing is a significant cost component in school budgets, accounting for over four percent of the entire expenditures for primary and secondary education in 2009. That four percent represents expenditures of over $23.7 billion in 2013 dollars, or $947 for each of the more than 25.2 million students transported at public expense by private businesses.

See MURPHY ET AL., supra note 180 at 31. Murphy provides a list of twenty-six services that schools have “contracted out,” which is his term for privatized services.

See id. at 31. Murphy notes that, as of 1998, transportation services, food services and custodial and maintenance services may have been privatized to approximately 30%, 30%, and 10% respectively. However, a study on privatized food services, conducted in 2007, showed that 13.2% of districts had privatized their food services nationwide, with six states having 0% and others having as much as 86% (Rhode Island). See LAFAIVE, supra note 179 at 10. The discrepancy may be attributed to the response rates of the 2007 survey as well as the fact that they used only those schools that participated in the National School Lunch Program. Id. at 13–15, n. xii.

See LAFAIVE, supra note 179 at 17 (citations omitted).

See MURPHY ET AL., supra note 180 at 31. “Currently [as of 1998], roughly 30 percent of the public school transportation system is provided by the private sector;”; See also LAFAIVE, supra note 179 at 18 (citing a 2001 survey that showed 31.8% of reporting districts nationwide had contracted out busing services).


Id. During the 2008-09 school year, the expenditures for public school students transported at public expense was approximately $21.685 billion, which equals $23.667 billion in 2013 constant dollars. The data also showed that this equaled $868 per student, which equals $947 per student in 2013 dollars. Id.

See id. The figure of 25.221 million students transported at public expense was for the school year of 2007-08—the most recent year for which data is available. Id. See also Private Firms Changing Face of School Busing, HARTFORD BUSINESS JOURNAL, http://www.hartfordbusiness.com/article/20110801/PRINTEDITION/308019993/private-firms-changing-face-of-school-busing (last visited Nov 7, 2013). “Nationally, school transportation is a $24 billion industry with 34 percent of school districts outsourcing out their busing to private companies.” Id.
Over 3,000 individual companies of various sizes comprise the privatized school transportation business. These companies run the gamut when it comes to size—from the massive First Student Inc., which uses over 54,000 buses to transport over six million students per day, to sole proprietor owner-operators who contract out a single school bus. The level of services available to school districts also varies. A complete takeover of a district’s busing needs can include purchase of the district’s existing fleet (or supplying their own), providing drivers, often including hiring the district’s current drivers, and maintenance of the bus fleet. More limited service agreements include route optimization, bus leasing and rental, fleet management, special-needs transportation, and others. Private bus contractors claim that they provide service that is equal to or better than the district-run bus service at a lower cost; the data appears to support this claim.

For instance, the Manhasset, N.Y. school district switched to private bus operators and saved approximately $1 million dollars a year. The Southfield, Michigan, school district saved over $3 million its first year and $4.2 million its second—while maintaining a 90% employee

198 See LAFAVE, supra note 179 at 20; MARK PRICE ET AL., RUNAWAY SPENDING: PRIVATE CONTRACTORS INCREASE THE COST OF SCHOOL STUDENT TRANSPORTATION SERVICES IN PENNSYLVANIA 4 (Mar. 2012), available at http://keystoneresearch.org/sites/default/files/RunawaySpending.pdf (last visited Nov. 6, 2013). “The school bus transportation industry includes 4,000 private companies and spans large, nation-wide corporations to small, locally-owned “mom and pops.” The largest companies include First Student, Student Transportation of America, and Durham-Stock. Overall, about 40 percent of pupil transportation services in the United States are contracted out.” Id.

199 See Company Information, FIRSTSTUDENTINC.COM, http://firststudentinc.com/about/company-information (last visited Nov. 6, 2013). “First Student provides student transportation in 38 U.S. states and 9 Canadian provinces while our fleet of more than 54,000 buses serves 6 million student riders every day. We’re not just a leading school bus company - we’re one of the world’s most extensive transportation operations of any kind. In fact, each year we transport more passengers than all major U.S. airlines combined.” Id.

200 See LAFAVE, supra note 179 at 20-21 (discussing that an accurate total number of private busing entities is difficult to calculate because there are a large number of small owner-operators).

201 See, e.g., HITT, supra note 188 at 3.


satisfaction rate. A 1999 study in Tennessee, which studied nineteen privatized districts, showed that fifteen of those districts realized an average savings of twenty-seven percent. Similarly, a Michigan school privatization survey showed that in 2012 alone, twenty-six Michigan school districts switched to privatized busing services. Among those districts, the West Bloomfield school district expects to save $3.5 million over three years and the Port Huron school district expects to save $533,000 per year. Much of this savings comes from reduced labor expenses, particularly long-term costs such as pension and retirement plan contributions mandated by collective bargaining agreements or governmental employment mandates. Some entrepreneurial districts allow advertising on and inside of their buses. Privatized transportation—and the attendant methods of savings—is not without its critics. Critics cite their own evidence showing negative results of school busing privatization. The majority of this evidence is provided by those most negatively affected by privatization—unionized workers—and invariably emphasizes worker satisfaction, performance, and security. As would be expected, actual cost savings to the district and its taxpayers is usually secondary to interests of the transportation workers and their attendant union. Moreover, many of these examples are the results of poor contract formation, poor oversight or management, or

206 See LAFAVE, supra note 179 at 19. That study did show four districts that saw an average increase of 21% after privatization. Id.
208 Id. at 8. The survey showed that between 2005 and 2012 the number of districts privatizing busing services jumped from 21 districts to 89 districts (out of 549 districts statewide). Id. Although this only represents 16.2% of all districts, it is an increase of over 423% in seven years and it also shows an accelerating trend. Id.
209 Id. at 9.
other outside forces such as state interference;\textsuperscript{213} they do not indicate well-planned and implemented privatization efforts on the whole. Nevertheless, critics continue to dispute the overall net value of privatization.

What is indisputable however, is the growth and acceptance of privatized school transportation services. We can make a clear inference from this trend. School district administrators and school boards share information with one another; results of school busing privatization are not kept secret. School districts conduct their own research and communicate with others who have already undertaken privatization in an effort to assuage their constituent’s concerns and to collect first hand results. The evidence shows that more and more districts are taking this information and choosing privatization as a way to help balance their budgets. This is likely to be the strongest endorsement of privatization’s success.

b. Food Services

Next to transportation, food services are the next most privatized of the non-instructional services in our nation’s schools, and approximately 13\% of school districts contract out their food services nation-wide.\textsuperscript{214} The level of food service privatization varies significantly across states, ranging from a high of 86.1\% (Rhode Island) to a low of 0\% (six states).\textsuperscript{215} As with transportation, the trend seems to be strongly favoring further privatization and shows no signs of abating.\textsuperscript{216} And similar to transportation privatization, proponents of food service privatization cite several benefits with cost savings being chief among them.

\textsuperscript{213} See, e.g., Price et al., supra note 187.
\textsuperscript{214} See LaFave, supra note 179 at 10.
\textsuperscript{215} See LaFave, supra note 179 at 10–13. The data was gathered in 2007 and may not be accurate as of this writing. However, the average across the states should be relatively close, or more likely, based on trending, it is higher at the current time. For one example, Michigan has increased its rate of food service privatization from 29.7\% in 2007 to 35\% in 2012. See Hohman & Kollmeyer, supra note 207 at 4.
\textsuperscript{216} See, e.g., Hohman & Kollmeyer, supra note 207 at 4 (showing a 30\% growth in the number of Michigan schools privatizing food services from 2003 to 2011).
As with the vast majority of privatization, cost savings is the general overriding impetus to undertake food service privatization.217 The private food service market differs from the private transportation market in one significant way: unlike busing, large companies dominate the food service market.218 Because food service is an area with very small profit margins,219 much of the savings provided by these large companies is through economies of scale.220 The buying power of these massive companies, which allows them to secure the best prices for food and equipment, “dwarfs even that of the largest of districts.”221 Additionally, as with busing, labor costs are significantly lower with the private employer than with the school district,222 which is likely the main the reason that organized labor is its most vehement opponent.

Again, evidence exists that tends to confirm the cost saving. For example, the Spotswood County school district of northern Virginia, which includes approximately 24,000 students, went from a $500,000 yearly deficit in 2003 to a $450,000 surplus in 2007, largely due to increased efficiencies and meal participation rates.223 Rochester, Michigan, saved over $200,000 per year.

218 See Hitt, supra note 188 at 3. The paper cites Sodexho, Chartwells (a subsidiary of Compass Group North America), and Aramark as the largest of the food service suppliers in Illinois, serving “tens of thousands of thousands of public school students in Illinois every day.”; see also Mike Buzalka, FM’s Top 50 Foodservice Management Companies—2009, Food-MANAGEMENT.COM, http://food-management.com/archive/fms-top-50-foodservice-management-companies-2009 (last visited Nov. 18, 2013) (finding Compass Group ($1.8 billion), Aramark ($375 million), and Sodexho ($385 million) respectively as the top three largest food management companies in 2009 (number in parenthesis is amount of K-12 school revenue)). This difference may also be due to the relatively small startup costs for smaller companies to enter the busing market. Conversely, because of the necessary economies of scale required in the food service market, entry to the market generally is cost prohibitive to all but the larger, established companies.
219 See Hitt, supra note 188 at 5.
220 See LAFAIVE, supra note 179 at 16.
221 Id.
222 See, e.g., Snell, supra note 185 at 19; HORN & KOLLMeyer, supra note 207 at 5 (discussing various district savings through reduced labor and retirement costs including one saving 16% of labor costs); UNITED STATES GENERAL ACCOUNTING OFFICE REPORT TO CONGRESSIONAL COMMITTEES, SCHOOL LUNCH PROGRAM ROLE AND IMPACTS OF PRIVATE FOOD SERVICE COMPANIES 6 (Aug. 1996), available at http://www.gao.gov/archive/1996/rc96217.pdf (last visited Nov. 19, 2013).
when it privatized its food services, and Troy, Michigan, went from a $100,000 deficit to an over $400,000 surplus. However, although cost savings may be the largest motivating factor to privatization of food services, it is not the only one.

Other motivating factors include better regulatory compliance and improved food choice and quality. The federal government heavily regulates school food programs. Many districts receive reimbursements from the federal government through supplemental food programs such as the National School Lunch Program, the School Breakfast Program, and the Special Milk Program for Children, among others. Because these regulations are burdensome, and subject to frequent change, some school districts choose to avoid them by contracting away the compliance responsibility through the food service contracts. Lastly, food quality, nutrition, and choice generally appear to improve under private providers. This is turn leads to a higher percentage of schoolchildren eating the meals available at their schools—a metric that schools and private providers refer to as the “participation rate.”

The most ardent critics of privatized food services are those with the most to lose—organized labor. To be sure, not every instance of food service privatization results in cost savings and the critics will focus primarily on those instances to bolster their position. However,

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just as with transportation privatization, more often than not, a negative outcome is the result of poor contract formation, poor oversight or management, or other outside forces such as state interference. Additionally, one must also take into account the other positive factors associated with privatization in this area. More food choices and better nutrition are a net benefit that is not easily quantifiable and relief from the burdensome task of government compliance allows schools to focus on their core mission—the education of the children.

Once again, the strongest evidence supporting the positive outcomes of privatization is its growth. Districts share information, and evidence shows that more and more districts are taking this information and making the decision to privatize their food services. This mimicry alone provides a strong inference that privatization can work.

c. Custodial Services

Custodial services are the last of the primary support services that this Article compares. Custodial services may be the fastest growing area of support service privatization. This is perhaps owing to the low barriers to entry into the market, which may allow for a vast amount of private contractors of all sizes—from large national companies to the lone self-employed custodian. Generally, not a lot of expensive equipment or supplies are required to perform the custodial work and the labor cost remains the highest “unit cost of operation for many

See supra, n. 213.

See, e.g., HOHMAN & KOLLMEYER, supra note 207 at 5 “Custodial service contracting [in Michigan] surpassed food contracting this year to become the single most commonly privatized service. Since 2003, the portion of districts employing privatized custodians grew by an astounding 500 percent, and the growth has accelerated in recent years.” Id.; But see Hitt, supra note 188 at 6 (finding that custodial services was the least likely area of privatization in Illinois schools due to union strength and many small school districts that might not benefit from a change-over to privatization).

See, e.g., Hitt, supra note 188 at 6. Hitt mentions Sodexho and Aramark, large multi-national corporations, which have contracted with several Illinois school districts, but also, one district contracting with a “one-woman cleaning service to provide part-time janitorial services at the district’s lone school.” Id.
This makes custodial services an area that is ripe for easy savings through privatization.\textsuperscript{237}

This ease of savings through privatization is a double edged-sword. The first edge is the evident savings achieved by those districts that embrace privatization. For example, the Northville Public Schools in Wayne County, Michigan are estimating that they will save $800,000 per year.\textsuperscript{238} In Florida, the Collier County Public Schools saved around $6.5 million over a two and a half year period from late 2008 to early 2011 by contracting out its custodial services.\textsuperscript{239} Additionally, the Fort Wayne, Indiana school district is expecting approximately $4.4 million in savings per year, largely from labor cost savings, after it privatized its custodial services.\textsuperscript{240} The other edge of the sword is that those labor costs savings hit unionized custodians hardest, thus, they are once again the main critics.\textsuperscript{241} These unions are particularly strong and possess the financial and political resources to fight back at privatization efforts.\textsuperscript{242}

Ultimately, privatized custodial services share several main similarities with transportation and food services; they shown a general positive financial impact on school budgets, their main proponent is organized labor, and their use is expanding. Finally, the fact that school districts continue to share information, and that that information motivates other districts

\textsuperscript{237}Because labor costs present the biggest single cost difference between the public and private sector, and because labor is the predominant unit cost in the custodial industry, merely changing the supply of labor often achieves substantial savings. There is some limited savings through economies of scale and technology, however, because these are much small components of the unit cost than labor is, their impact is minimal in comparison.
\textsuperscript{238}See HOHMAN & KOLLMEYER, supra note 207 at 7.
\textsuperscript{239}See Snell, supra note 185 at 20. In 2011, the Collier School Board subcommittee on operations voted unanimously to extend the contract of its custodial services provider, GCS Services. Perhaps in part to a survey from May 2010 in which “74% of the principals and plant operators gave GCA an A, 23% gave the company a B and 3% gave the company a C.” Id.
\textsuperscript{240}Id. at 19. “Much of the savings will come from having 24 fewer custodial positions and reducing pay by as much as $6 an hour. The contract . . . gives the 217 district custodians the right to apply for jobs with Sodexo. Those hired will have their seniority and accrued paid sick time recognized.” Id.
\textsuperscript{241}See, e.g., Hitt, supra note 188 at 6.
\textsuperscript{242}Id. For example, many school janitors are members of the Service Employees International Union (“SEIU”), which has over one million public sector members and 2.1 million members overall in the U.S. and Canada. See Our Union – Fast Facts, SEIU.ORG, http://www.seiu.org/a/ourunion/fast-facts.php?via=footer-links (last visited Nov. 19, 2013).
to adopt those services, continues to be the most ringing endorsement of privatization. The question remains then, whether that trend extends to school facility construction.

2. Examples of Privatization in School Facility Construction

The question that is central to this Article, however, is whether schools can extend the apparent successes of privatization into the realm of school facility construction. School construction is certainly different from the previously discussed support services; labeling it at as a support service likely is a misnomer. The idea of private construction, ownership, and maintenance of school buildings has not taken hold like the privatization of support services. Although no clear answer explains this, it may have to do with the fact that support services are an everyday constant need for schools, unlike school construction, which occurs much more rarely in a school district. Whatever the reasons that school districts have not embraced it more broadly, a look at how schools have used construction privatization thus far is in order.

a. Florida’s Funding of School Construction Through Lease Financing

Beginning in the 1980s, Florida began using a method of school construction funding known as “lease financing.” Lease financing was relatively limited until the 1990 Florida Supreme Court case of State v. School Bd. of Sarasota Cty., after which, the practice expanded by an astonishing 6,500 percent, becoming the “near-exclusive means” by which Florida funded school construction. The Florida Supreme Court looked at whether lease-financing arrangements, because of their partial reliance on ad valorem taxes, require the same approval

243 This Article will further address the differences between school construction privatization, support service privatization, and other forms of privatization of traditional government services in Part III.B.

244 For example, a small, one or two school district will likely go several decades without needing a new school building. Even districts with a dozen or more schools can get by for years without a new school.


246 561 So. 2d 549 (Fla. 1990).

247 Taylor, supra note 245, at 370. In June of 1990, lease financing amounted to $213 million. By June of 2008, lease financing amounted to $14 billion. This represents “a shift from other types of debt, mainly revenue and [general obligation] bonds, to school-district lease financing.” Id. at 370–71 (emphasis in original).
through taxpayer referendum that is required to issue general obligation (“GO”) bonds; the court found that it did not. Based on the ruling, many municipalities turned to these lease-financing arrangements in order to avoid having to convince already leery taxpayers to approve additional *ad valorem* taxes. These types of lease-finance arrangements allow school districts to buy, remodel, or construct school facilities faster than through traditional GO bond financing.

Lease financing begins with a district establishing a not-for-profit financing corporation (“NFC”), which they control, for the overall purpose of facilitating the new school construction. However, the NFC’s purpose is a very limited one. The district provides a “ground lease” covering the actual property for the new school to the NFC. The NFC then appoints a corporate trustee, which in turn raises revenue through the issuance of certificates of participation. In return for the financing, the NFC assigns its interests in the ground lease and the district’s lease payments to the trustee. The NFC appoints the school district as its agent, the district oversees the entire construction project, and the NFC provides the funding, which it has received from the trustee’s sale of certificates.

A typical lease arrangement would provide for a series of one-year leases, which the school district would have the option of renewing. If either a district defaulted or chose not to renew, one of two scenarios would occur; either the board could purchase the lease-financed

248 *School Bd. of Sarasota Cty.*, 561 So. 2d at 551–52. The court “conclude[d] that because these obligations are not supported by the pledge of *ad valorem* taxation, they are not ‘payable from *ad valorem* taxation’ . . . and referendum approval is not required.” *Id.* at 552. Ultimately, the court found that because the lease-finance arrangements were not secured with the *mandatory* requirement to raise *ad valorem* taxes, like the requirement for servicing GO bonds, the leases did not violate the state constitution. *Id.*

249 Taylor, *supra* note 245 at 371–72. In addition to avoiding the totally dependence on voter approval, this avoided the long delays of the referendum process. *Id.* Taylor also claims that, although revenue bonds do not require voter approval either, lease financing generally has a “lower perceived risk” than revenue bonds, which helps account for their popularity. *Id.* at 372–73.

250 *Id.* at 372.


252 *Id.* at 355 & n. 28.

253 *Id.* at 354.

254 *Id.* at 355. Certificates of participation (“COP”) are essentially a purchase of a portion of the lease rights and any revenue associated with those rights. *Id.* at 356 n. 34.

255 *Id.* at 355.

256 *Id.*

257 *Id.* at 367.
facility, or the trustee could “exercise certain remedies,” including repossessing the facility. Ultimately, both the public entity and the private investors have secured their interests; the district has financed and built a school facility faster than through the normal methods and the private investors have a profitable and secured investment.

Although some may look at this method as one form of privatized school construction, it is significantly different from the method advocated by this Article. Under the lease financing scheme employed by Florida, the only privatized function is the financing; the school district still plans, performs, and administers all of the construction and maintenance of the facility. In fact, one could argue that the ownership is still effectively in the hands of the school district. The district retains the sole right to renew; the trustee cannot chose to forego renewal. The district can opt at any moment to stop paying the lease and purchase the financed facility for the amount outstanding on the financing. Lastly, even if a district defaults and turns over possession, the property reverts to the district once the trustee pays off the certificates of participation. Essentially, the district owns, or does not own, at its pleasure. Thus, the only problem addressed by lease financing is the ease and speed of generating the necessary construction funds.

b. Charter School Construction

Charter schools provide a somewhat different perspective on school construction. According to the National Education Association, “[c]harter schools are publicly funded

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258 Id. at 367–68. Among the remedies a trustee could take was forcing the district to surrender possession of the facility. “Upon surrender of the facilities, the trustees could sell their interest in the lease agreements or re-let the facilities to third parties for the remainder of the lease terms—and in either case the financing lenders required the trustees to use the proceeds generated from the sale or re-letting to pay off the COPs and bonds issued to finance the school facilities. If a trustee received any excess rent, it had to pay it to the school boards. Title to the school facilities (as well as possession of the land subject to the ground leases) was to be vested in the school boards upon the retirement of the COPs and bonds, regardless of whether the school boards themselves paid the bonds or third parties paid the bonds via the trustee.” Id. at 368.

259 This is not to say that this is a foolproof method of financing. Indeed, Taylor’s Article is largely about a practice known as “cross collateralization,” whereby the payments for one facility are secured by an interest in multiple properties, and the attendant potential problems that could occur. Id. at Part IV, 370–78.

260 Id. at 368. “Title to the school facilities (as well as possession of the land subject to the ground leases) was to be vested in the school boards upon the retirement of the COPs and bonds, regardless of whether the school boards themselves paid the bonds or third parties paid the bonds via the trustee.” Id.
elementary or secondary schools that have been freed from some of the rules, regulations, and statutes that apply to other public schools, in exchange for some type of accountability for producing certain results, which each charter school’s charter sets forth.”261 These schools receive the amount of public funding associated with each student when the student transfers from a standard public school to the charter school—the money follows the child.262 Charter schools are most often single, stand-alone, non-profit schools: A smaller percentage is run by non-profit organizations that have more than one school, and for-profit companies run approximately thirteen percent of charter schools.263 Although these schools are not disconnected from the public revenue stream, they do have aspects that differ significantly from public schools. Among these differences are the funding, acquisition, and construction of school buildings.

One of the first and arguably most important necessities for a charter school is a facility in which to run their program. Because the charter school must have a facility in place and fully operational prior to any enrollment, these organizations must secure funding and construct these facilities on their own264—only after the school is running will the per pupil allotment be received. Some government funding sources are available for facility construction, however, these are limited and rarely make up more than a small percentage of the costs.265 Ultimately, the charter group is largely independent of the public sector when it comes to funding and

263 Id. “Charter schools choose their own management structure: 67 percent of all charter schools are independently run non-profit, single site schools; 20 percent are run by non-profit organizations that run more than one charter school; and just under 13 percent are run by for-profit companies. For-profit charter schools have to meet financial oversight regulations, just like any company the government contracts with to provide a service.”
264 See, e.g., Joey Garrison, New Charter School Funding Plan Floated, THE TENNESSEAN (Dec. 8, 2013, 2:35 AM), http://www.tennessean.com/article/20131208/NEWS04/312080084 (“Though per-pupil funds follow a student to his or her new school in Tennessee, they typically cover only operating expenses, leaving charters on their own for coming up with a building.”)
construction of its school facilities—particularly if they do not choose any of the limited government funding sources. This independence frees them from much of the red tape and bureaucratic morass that accompanies public school funding and construction, allowing charter schools to be creative in how they fund, build, and utilize their facilities.

A typical funding plan for a charter school might take a privately raised down payment and couple that with traditional construction financing through a banking institution. The private funds can come from a variety of sources including parents, private investment groups, real estate investment trusts, and others. After construction is complete, the construction loan and private investment are paid back by either rolling into a long-term mortgage, generally twenty-five or thirty years, or the debt can be sold to the bond market. Charter schools generally target eighteen to twenty percent of the per pupil public funding revenue for facility costs. While these sources of financing provide plenty of potential funds for school construction, they are not without concerns.

266 See, e.g., Alison Gregory, Defying the Downturn, Charter School Construction Grows in New York, NYTIMES.COM (AUG. 18, 2009), http://www.nytimes.com/2009/08/19/education/19charter.html?_r=0 (last visited Dec. 6, 2013). “Typically, if a charter school accepts public money for construction, the city requires that the school raise 10 percent to 33 percent of the project’s cost from private sources, Mr. Umansky said. Some charter schools, including the Foundling’s, have chosen to forgo public financing. ‘We didn’t use public money for this reason: the city takes ownership of the building,’ said Bill Baccaglini, executive director of the New York Foundling.” Id.

267 See, e.g., Id. “Because it raised private money, the [charter school] avoided the elaborate bidding and contract process required for public school construction. Advocates of charter schools said this can make construction cheaper.” Id.

268 See, e.g., Id. (discussing the charter school entering into an “unconventional arrangement,” under which, they will rehabilitate and expand an existing office building and “about 24,000 square feet of the structure will be used to house city social service providers who will help the elementary school’s 315 students and their families”); Garrison, supra note 264 (discussing plans for charter schools to use existing empty stores and vacant mall space).

269 A typical arrangement will require a thirty percent down payment, or “equity” investment, to support a seventy percent construction loan. Telephone Interview with John Stellmon, The Charter School Fund (Dec. 4, 2013). The Charter School Fund is a not-for-profit consulting group specializing in charter school site acquisition, school funding, and school construction. See ABOUT THE CHARTER SCHOOL FUND, http://thecharterschoolfund.com/index.html (last visited Dec. 7, 2013). They have been involved with over $100 million in charter school investment and the construction of over 650,000 square feet of facility space.


271 Id.

272 Id. In other words, the school projects how many pupils it will educate and then calculates the allowable monthly debt service amount for the facilities based on 18-20 percent of the per-pupil allotment, which is a percentage that they feel is sustainable over the long run. Id.
Banks and bondholders do have some concerns regarding charter school funding and debt. For one, most charter schools are required to have their charters renewed every five years—failure to do so can shutter a charter school. Additionally, the risk of a charter school closing down for other reasons, such as mismanagement, are always present. These concerns factor into investors risk calculations, and although these factors have not been enough to foreclose funding availability, they do affect the bond market’s financing rates, which leads to a somewhat higher cost than public school bond financing.

Perhaps the most significant advantage, however, is the speed at which a charter school can acquire this type of financing. Once a charter school has its down payment secured, they can have the construction funding in hand within three and a half months.

c. Canada’s Public-Private Partnerships

Beginning in 1997, the Canadian province of Nova Scotia developed a public-private partnership (“P3”) program in order to facilitate the building of new schools it felt were necessary to ensure the province’s future. The province initiated the program by seeking proposals for thirty-nine schools; however, the province shut down the program in 1999 following the government’s change from liberal to conservative. The net result of the program

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273 Telephone Interview with Anonymous, (Dec. 5, 2013). The anonymous source works for a large banking company, which provides funding for charter schools.


275 Anonymous, supra note 273.

276 Id. Start to finish, the funding process can take as little as three months plus fourteen days for final paperwork and documentation, at which point the money can be fully funded to a trustee who will disburse the money as need to pay for construction. Id.


278 See Resources-Sectors-Schools, supra note 277.
was the completion of thirty-eight schools.\textsuperscript{279} It is, however, the novel arrangement between the school district and the private entity that provides for the savings.

Nova Scotia entered into twenty-year leases at a rental rate lower than they would have been able to achieve through public financing of the construction and furnishings.\textsuperscript{280} The main reason behind the private firm’s ability to offer this savings was the way in which they utilized the buildings.\textsuperscript{281} The school negotiates with the private firm for the hours it needs the school, typically early morning to mid-afternoon on Monday through Friday, as well as, negotiated hours as needed for weekend uses.\textsuperscript{282} All remaining hours not allocated to the school are available for the private entity to lease the space out to other groups, including private educational groups, community groups, athletic groups, religious groups, etc.\textsuperscript{283}

Critics of the Nova Scotia P3 effort make similar claims as those that are critical of privatized support services. They claim that the new Conservative government cancelled the plan because the schools were costing “much greater sums of money than originally anticipated.”\textsuperscript{284} Specifically, one author claims that the thirty-eight schools built in Nova Scotia cost $32 million more than anticipated and that schools completed through the public sector saved $2 million per school.\textsuperscript{285} Unfortunately, that author does not provide any further detail, perspective, or citation


\textsuperscript{281} \textit{Id.}

\textsuperscript{282} \textit{Id.}

\textsuperscript{283} \textit{Id.”During the remaining hours of the day, as well as on weekends and holidays and over the summer when the facility otherwise would remain idle, the developer leases the classroom space to other education-oriented entities, such as for-profit trade schools and various civic, political, or religious groups, for pre-approved purposes. The purposes are carefully spelled out in the lease to ensure that activities that are inappropriate to an educational facility used by children do not occur in the building.”}

\textsuperscript{284} Shaker, \textit{supra} note 279.

\textsuperscript{285} \textit{Id.}
to support these figures.\textsuperscript{286} Besides the cost criticisms, the author goes on to point out several other problems, most of which boil down to disagreements regarding which party is responsible for paying certain costs.\textsuperscript{287}

Many of these disagreements appear to be the result of poorly formed contracts and the cancellation of the program may be just as likely a result of politics as it is performance. As with support services, the main critics appear to be progressive groups with organized labor ties who are adamantly opposed to any privatization efforts.\textsuperscript{288} It appears that other provinces of Canada have analyzed Nova Scotia’s P3 projects and determined that they could be beneficial. Alberta and New Brunswick have engaged in their own P3 school building arrangements.\textsuperscript{289} Alberta plans to build a total of twenty-eight new schools total, some of which are already operational as of this date, and New Brunswick has two P3 schools that are currently operational.\textsuperscript{290} Certainly, districts and private firms must be diligent when drawing up contracts and projects must be carefully overseen, but as with support services, the analysis and embrace by other school districts may be the strongest signal that privatization can work.

d. Other Examples

Other nations, including Australia, Germany, and Puerto Rico have also used P3 arrangements to provide needed school facilities. Australia’s Alberta province has contracted for

\textsuperscript{286} Id. For example, the author does not address whether the $32 million in extra costs for thirty-eight schools made the overall costs higher than would have occurred if built by public means. Nor does the author address the fact that construction costs regularly run above budget projections and are often far worse with government run construction of schools. See, e.g., supra Part II.A.2.c.

\textsuperscript{287} Id. For instance, the author cites problems with drinking water that were solved by purification systems, which have not been set up over a dispute regarding who is responsible to provide the water, and disputes over who pays to clean up graffiti.

\textsuperscript{288} The previously mentioned author, Erika Shaker, writes for the Canadian Center for Policy Alternatives, which is a self-described “leading progressive” group that generally supports government control and operation over private sector involvement. The group also has a decidedly pro-organized labor stance. See Labour, CANADIAN CENTER FOR POLICY ALTERNATIVES, http://www.policyalternatives.ca/projects/labour-matters (last visited Nov. 29, 2013).


the “design, construction, financing and maintenance of 11 new government schools in key
growth areas of Melbourne.” Interestingly, six of these schools have YMCA facilities built
into them, and just like the Nova Scotia schools, the facilities are available for community and
outside groups when not in use for general school functions. New South Wales undertook the
New Schools Project, under which, a private firm built nine new schools from 2002-2005, which
met or exceeded government building standards. The private firms will provide “cleaning,
maintenance, repair, security, safety, utility and related services for the buildings, furniture,
fits, equipment and grounds” in return for lease payments. At the end of the lease term,
December 31, 2032, ownership of the building will revert to the school authority.

Germany has also utilized P3 arrangements to build schools. The city of Cologne and the
County of Offenbach have plans to build ninety-seven new schools utilizing P3 methods, which
will be leased for either fifteen or twenty-five years, depending on the contract. As of February
2011, Germany has completed building sixty-seven schools using P3 systems.

Puerto Rico passed a law in 2009 that allowed “any government agency to enter into
public-private partnerships (PPPs) with private firms for the design, construction, financing,
maintenance or operation of public facilities” and established the Public Private Partnership

294 Id.
295 Id.
296 Id. at 29.
Authority (“PPPA”) to oversee the privatization efforts. Puerto Rico has approximately 1,500 schools, some of which were built as long ago as the 1930s. According to the PPPA, the Puerto Rican government intends to partner with private firms to “design, build, and maintain approximately 100 schools” across the island.

The idea of government partnering with the private sector is not confined to any one nation; its appeal is evident in many nations. Those nations’ stakeholders are realizing that contracting out non-instructional services provides value while retaining control over the core function of school systems—educating kids. It is evident that they do their own research, learn from others mistakes, and continue to conclude that privatization is a valuable tool.

B. School Facility Privatization has Inherent Differences from Other Types of Privatization

A plethora of literature exists debating the drawbacks and benefits of privatization of traditionally governmental responsibilities or services. However, not all services or responsibilities are alike. In order to provide some additional perspective, we will look at some of the differences between school construction and other areas of privatization previously utilized by government—particularly infrastructure contracts.

1. The State Constitutional Requirement to Provide for an Equal Education

Unlike tool roads, parking meters, information technology, or other areas of government service privatization, every state’s constitution guarantees children a public education. Other
types of government privatization surround services that the state is free to contract away, run internally, or abandon altogether; success or failure of those privatized services is unlikely to result in discrimination lawsuits or inequality in the lives of poorer, mostly minority citizens. While it is certainly within the scope of the state government’s job to provide and maintain highways, no constitutional requirement mandates their adequacy or equal utility for all citizens. Other services, such as parking meters and information technology are even less of a core requirement of government.

States are empowered with certain police powers, which are defined as the power “to establish and enforce laws protecting the public’s health, safety, and general welfare, or to delegate this right to local governments.” This is what allows the state government to legislate, manage, and regulate services and responsibilities; it is also what allows them to contract them out if they so choose. A distinct and significant difference exists however, between the right to provide, manage, and alter government services and the constitutional requirement to provide a minimal level of a specific service equally to all members of the state’s citizenry. Equal education is one of those requirements and that is why it evokes such emotion, causes such litigation, and proves so elusive: That is why it differs vastly from most other privatized services.

2. Traditional Problems with Infrastructure Privatization Contracts are Unlikely to Occur in School Construction Build-Lease Agreements

Critics of infrastructure privatization, such as toll roads, bridges, tunnels, parking garages and meters, cite contract provisions that unevenly protect the private entity’s interests and ensure a guaranteed income while putting much of the risk on the public. The three most troublesome of these contract provisions, which help assure revenue to the private partner, are “(1)
compensation events; (2) noncompetition provisions; and (3) “adverse action” or “stabilization” clauses. Although this Article does not examine individual infrastructure contracts and their net value to the public, a brief explanation of common troublesome provisions, and why they will not be as pertinent in school construction and leasing, is instructive.


A “compensation event” is typically defined in infrastructure contracts as any event that disturbs the contractual usage of the infrastructure and negatively affects the revenue stream of the private entity. For example, in the first quarter of 2009, the City of Chicago had to reimburse the company to whom it contracted out its parking meters over $106,000 for lost meter revenue due to street closings. Likewise, in 2008, Iowa encountered a compensation event when severe flooding required the private toll road operator to waive the toll for evacuees. In compliance with the privatization contract, Indiana compensated the company for all the lost tolls. These types of contractual provisions provide a guaranteed revenue for the private entity; a revenue that the City or State would have never received under the same circumstances.

Compensation event provisions in a build-lease school project would be unnecessary—or at least highly unlikely to trigger. The type of build-lease agreements envisioned here would provide revenue based upon a predetermined monthly lease payment, not the level of usage or “patronage” so to speak. Should the school district choose to shut down school for weather emergencies, teacher conferences, health-care emergencies, or any other reasons, the lessor is

305 Dannin, supra note 34 at 54.
306 Id. at 57.
307 Id. The street closings were due to a combination of street repairs and maintenance as well as closures for public events, such as, parades and festivals. Id.
309 State to pay for waived fees on Toll Road, wthr.com (Oct. 13, 2008, 12:57 PM), http://www.wthr.com/global/story.asp?id=9044891 (last visited Dec. 8, 2013). A spokeswoman for Indiana Governor Mitch Daniels stated that the funds “will come from the $3.8 billion the state received from the [Spanish and Australian] consortium for the 75-year lease agreement to operate and profit from the toll road.” Id.
still only entitled to the predetermined lease amount. Opponents might suggest that this presents the same outcome and proclaim that the lease still guarantees the company an income; they are only partly correct. While it is true that a lease agreement will guarantee the lessor an income, there is a significant difference—it does not put *additional* costs on the public that a compensation provision does.

In the aforementioned examples, the city or state incurred a cost that they would not have been subject to had the infrastructure not been privatized. However, construction financing payments and maintenance costs will still accrue against the district even if the school is built and maintained using only public financing. Thus, while the lease agreement contractually assures revenue, it does not heap an additional layer of risk upon the public—often unknowingly—by protecting against lost revenue from events never contemplated in the financing or contract.

b. Non-Compete Clauses

The non-compete clause is perhaps the most problematic contractual issue surrounding public-private lease arrangements for infrastructure construction. Many lease agreements contain non-compete clauses to protect the investment of the private party; a practice very common in private-private lease arrangements. Simply put, these clauses prevent the public partner from doing certain things that might incentivize people to stop using a particular privatized infrastructure in favor of other non-privatized means; worse yet, sometimes a contract

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310 Often the public does not read these contracts, which means they are often most surprised to hear about these types of reimbursements. See Dannin, *supra* note 34 at 54. In addition, often these contracts are “specialized, complex legal documents that tend to run over 100 pages, not including attached documents that are referred to in the contract.” *Id.* This presents challenges even for the attorneys responsible for their review. *Id.*


312 For example, a lessor of retail space would likely expect to see a clause in a contract with a lessee that prevented that lessor from leasing space to a similar business. This provides the lessee with a way to protect their investments, such as, construction within the space, relocation costs, marketing, good will, etc.
requires the imposition of dis incentives on the non-privatized means. For example, a typical non-compete clause in a toll road lease might include a prohibition on building new roads within a certain distance—or even widening existing roads. Some agreements go as far as requiring the governmental entity to use any legal power at its disposal to prevent competition by other private firms or by other governmental entities. Not only is a non-compete clause in a contract that privatizes traditional government services ironic, it has perverse outcomes when it conflicts with the overall role of government.

These outcomes are perverse because of the government’s fiduciary relationship with the public. They are contractually obligated not to compete with one piece of their responsibility—a single toll road or parking garage—while at the same time being fiduciarily obligated to improve all roads or parking. For instance, a city or state may contract into a non-compete clause that forces them not only to forego building new roads nearby, but to lower speed limits and install traffic lights on adjacent free roads, all in an effort to funnel patrons to the toll road. This may assure the private toll road operator a certain level of revenue, but it comes in direct conflict with any overall improvement for the motorist. However, the type of school build-lease

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313 See Dannin, supra note 34 at 60–61.
314 Id. at 60–63.
315 Id. at 64. Dannan cites two examples:
The contracts for Virginia’s Pocahontas Parkway and Chicago parking meters go farther. The Pocahontas Parkway requires that the government “exercise all discretionary authority available to it under Laws, Regulations and Ordinances to prevent any other governmental or private entity from developing Competitive Transportation Facilities, including but not limited to connections to State Highways.” The Chicago Parking Meter Contract requires the city to “use its reasonable efforts to oppose and challenge such action by any such other Governmental Authority; provided, however, that all reasonable out-of-pocket costs and expenses incurred by the City in connection with such opposition or challenge shall be borne by the Concessionaire.” Id. (internal citations omitted).
316 Note, this is different from being constitutionally obligated to provide certain levels and availability of parking or to provide minimal capacity and quality roadways—something that separates education from these responsibilities. See supra Part III.B.1. The fiduciary duty should require that the government not ostensibly improve the quality and viability of one road (through privatization), at the cost of contracting away their ability to improve others, which will lead to a net loss for the public and a net gain for the private partner.
317 See Dannin, supra note 34 at 60–61 (discussing Denver’s E-470 and how the city’s agreement “required lowering speed limits on nearby Tower Road from 55 to 40 m.p.h. and installing stop lights on 96th, 104th, and 112th Avenues”); Texas: Speed Limit May be Lowered to Boost Toll Revenue, THENEWSPAPER.COM (Oct. 19, 2007), http://thenewspaper.com/news/20/2025.asp (discussing the Texas Dept. of Highways agreement to lower speed limits on a portion of I-35, a nearby interstate highway, that would directly compete with a planned toll road).
arrangements proposed here would not require non-compete clauses, nor would they suffer from the perverse outcomes caused by conflicting governmental interests.

The build-lease arrangements envisioned here are largely immune from traditional competitive forces. Here, the private partner is not directly competing for customers—schoolchildren—in the same way that a toll road or a parking garage would; the entire revenue model is different. In fact, they would only compete to secure the original build-lease contract, once that contract is awarded the necessity to compete virtually ceases. No need exists to funnel schoolchildren to their building or to make it more difficult to attend school elsewhere because their revenue is not based on the same type of per-use model as a toll road or garage. The simplicity of the relationship and revenue stream negates the need for a non-compete clause.318

c. Adverse Action Clauses

Parties generally insert “adverse action” clauses into contracts to protect the private party from any adverse governmental action, that is, any legislative enactments, rules, or regulations that will negatively affect the fair market value of the subject infrastructure.319 Contracts between investors and foreign governments frequently contain similar clauses, called “stabilization clauses,” which are designed to “protect investors from the risk of nationalization or expropriation.”320 Similarly, adverse action clauses protect private partners from government actions, including governments not party to the contract, by providing them with a contract remedy if they are adversely affected. While these types of clauses may be highly beneficial in

318 Of course, there are other considerations that could affect the number of schoolchildren in a facility, including private school, charter school, and home school enrollment increases, or even just demographic changes in the community. These changes tend to happen very slowly and ultimately will not be a concern of the private partner because of the guaranteed lease payment, however, it may motivate the district to keep enrollment up rather than watch the public funding go elsewhere. See infra Part V for further discussion on potential problems with the build-lease agreements.
319 See Dannin, supra note 34 at 69.
320 Id. at 70.
emerging countries, the stability of the United States economic system is less likely to invoke fears of nationalization or expropriation.

That does not mean, however, that private investors will forego the requirement of including adverse action clauses in any build-lease contracts. It is likely that these provisions will be necessary to keep financing concerns and costs to a minimum, and investors will rightly have to protect themselves from future governments legislating away their contract revenues through adverse laws, rules, or regulations.\textsuperscript{321} Again, because of the simplicity of the build-lease relationship and the method of revenue generation, an adverse action clause is not likely to have any real impact.

Under what scenario might an adverse action clause trigger? The stability and history of our economic system militate against any nationalization or expatriation concerns. Beyond those scenarios, one would be looking at a change in the required building or maintenance requirements any new laws would impose on the private builder-lessee. Safety, building, and design standards are already established under existing codes, either local or national, and contract terms requiring compliance with a national code can certainly be enforced. Any changes would only adversely affect construction during the relatively short time between design and completion.\textsuperscript{322}

Perhaps, as an example, changes in energy and conservation laws might affect the operation of a school building. However, under the leases envisioned here, a strong possibility exists that the district will be responsible for its own energy consumption. Additionally, any significant changes that would have to be compensated for under an adverse action clause may

\textsuperscript{321} Id. at 71. “Lenders often view stabilization clauses as an essential element of the bankability of an investment project, particularly in emerging markets, and they may insist that at least the fiscal terms of an agreement be stabilized.” Id.

\textsuperscript{322} It is likely that the window for affecting design and construction would be even shorter because generally speaking, once permits are granted, the design and plans are grandfathered under the old requirements.
be just as likely to cost a district the same amount whether they compensate the lessor or deal with the adverse action themselves.\textsuperscript{323} It is difficult, if not impossible, to plan for every possible adverse action. Suffice to say, adverse action clauses are likely going to remain in any future build-lease contracts, however, they are unlikely to be a risk that makes build-lease arrangements unacceptable.

IV. PRIVATIZATION OF SCHOOL FACILITIES: USING BUILD-LEASE AGREEMENTS AS A POSSIBLE SOLUTION

Reaching the goal of providing safer, better schools, particularly for urban and rural students struggling from long-term facility deficiencies, will require creative solutions; the utilization of BLAs should be one option in a district’s arsenal. This Part discusses ways in which BLAs can benefit districts by saving money and time through the accountability and efficiency of the private sector and economies of scale. Additionally, this Part looks at simplifying the building and maintenance process which allows districts to concentrate on their core mission. Lastly, I discuss government’s role in facilitating and promoting BLAs.

A. Expediency Benefits

For schools languishing with inefficient, overcrowded, and unsafe facilities, every delay is a lost opportunity for a better educational environment for the students. Delays in providing the needed facilities come from two sources—funding and construction. Funding through traditional GO bonds is time consuming and often rejected by the voters.\textsuperscript{324} Additionally, monies provided by the state and federal government are often slow to be dispersed due to layers of bureaucratic red tape. BLAs cut out this protracted funding method by placing the funding

\textsuperscript{323} It is difficult to account for all possibilities, but let us engage in a hypothetical as an example. Hypothetically, the state or federal government could pass a law mandating that every public building, including all schools, install solar panels on the entirety of their roofs. Notwithstanding the argument that the build-lease school is not a “public” building, installation of such a system would cost the same whether the district compensated the lessor or whether they paid for the installation themselves (some would argue that the lessor would be able to do it faster and more efficiently).

\textsuperscript{324} See supra Part I.B.1 for a discussion on the process of GO bonds and recent voter rejection.
squarely on the private entity—an entity with much more liquid funding and credit sources. That ability to get the proper funding in place quicker allows construction to begin sooner, where even more expediency can be realized in the construction phase.

Construction expediency can benefit from privatization in several ways; some of these ways are inherent in the private sector while others will rely on cooperation from government. Private construction is faster than public construction, largely because of the absence of red tape and complicated procedures, and the empirical evidence bears this out. Large commercial builders and property managers can exploit existing relationships with contractors, suppliers, engineers, architects, attorneys, insurers, etc. to help speed up the process. Additionally, the use of design-build firms can speed the process significantly by centralizing the two main facets of a construction project within one concern. Perhaps the most influential factors to speed up construction by private firms are accountability and financial pressure. Private sector accountability far exceeds that of the public sector for cost and time overruns, while pressures

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325 See, e.g., supra Part II.A.2.b, for a discussion on charter school construction financing through traditional bank construction financing. Similarly, large commercial developers regularly use private funding methods and often have established track records and relationships with lending institutions and the bond market.

326 For example, a private builder can make decisions regarding change orders, jobsite conditions, subcontractor issues, etc. much more quickly than a public project a contractor might require its own internal process and additionally require approval from an overseeing architect or engineer, an independent construction manager, the school district, state and county education departments, a state development authority, and others.

327 See RONALD D. UTT, PHD, THE MARYLAND PUBLIC POLICY INSTITUTE, PUBLIC/PRIVATE PARTNERSHIPS OFFER INNOVATIVE OPPORTUNITIES FOR SCHOOL FACILITIES 7 (2005). A comparison of public versus private construction in a variety of privately built infrastructure projects in England, which has the most experience with privatizing school construction, found a significant difference:

In a study of 37 central government projects of various types, NAO found only 22 percent exceeded costs expected by the public owner at the time of contract award. That figure compares to 73 percent of projects with overruns found in a survey of public procurement in 1999. On schedule, 24 percent of PFI projects were late, 8 percent by over two months, compared with 70 percent prior.

Id.; see also Id. at 9–10 (discussing Houston, Texas, building two high schools a year faster and for $20 million less using a BLA, and Natomas, California’s speedier school procurement process due to privatization); David W Gaffey, Outsourcing Infrastructure: Expanding the Use of Public-Private Partnerships in the United States, 39 PUB. CONT. L.J. 351, 353–54 (2010) (discussing the general benefit of private partners in reducing costs and increasing efficiency).

328 Design-build is defined as “[a] project delivery method that combines architectural and engineering design services with construction performance under one contract.” See CONSTRUCTION MANAGEMENT ASSOCIATION OF AMERICA, AN OWNER’S GUIDE TO PROJECT DELIVERY METHODS 1 (2012). See Id. at 21 for a more complete description of the functioning of a design-build arrangement.
from lenders coupled with additional financing costs for delays are strong incentives to remain on schedule; incentives that are largely missing in the public sector.

Government also has a role in helping to increase the speed of facility procurement. As will be discussed below, districts can achieve significant timesaving by utilizing design and construction efficiencies, such as pod designs, pre-approved bidders, design menus, plan clearing-houses, and others. Notably, it will take a change in attitude by school boards, superintendents, government officials, and politicians who are willing to sacrifice micromanagement for expediency.

B. Cost Benefits

Every dollar spent unnecessarily on design, construction, and maintenance of school facilities is a dollar that districts cannot spend on a school’s core responsibility—educating children. Money wasted on superfluous amenities, bad designs, poor choices in building materials, high priced labor, and inefficiency generally, is money that districts cannot spend on better technologies, better teachers, smaller class sizes, extracurricular activities, and a host of other things that have a more direct impact on the educational experience of a child. Similar to expediency benefits, cost benefits are achievable through two main means; (1) private sector efficiencies and innovation, and (2) government cooperation.

As with most services, the private sector can build schools cheaper than the public sector. Private sector savings comes in a variety of ways. For example, the previously discussed privatization effort undertaken in Nova Scotia saved the Province an average of fifteen

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329 See, e.g., Kelly Lapointe, *P3s Lead to Better Quality Construction, Says Industry Panel*, DAILY COMMERCIAL NEWS (Oct. 10, 2013), http://www.dcnonl.com/article/id58005/~p3s-lead-to-better-quality-construction-says-industry-panel. "One of the biggest things that drives the behavior of the project is having lenders watching over you. It drives you to finish your project on time. It drives you to do quality work, in my mind. It’s different than just me interacting with a contractor...it’s different behaviour in the industry." Id. (quoting an infrastructure construction industry leader in Canada).

330 See infra Part IV.E.

331 See, e.g., Utt, *supra* note 280 (discussing a Florida Charter School built privately for “between 22 percent and 34 percent below the state average for constructing public elementary schools”); See also Utt, *supra* note 327 at 9–10 (regarding cost efficiencies in England, Houston, TX, and Natomas, CA).
percent by utilizing BLAs and leasing the new schools for twenty years at a rental rate below what they would have paid through traditional bond financing. The Nova Scotia model includes BLAs in which the lessor has the ability to rent out use of the facility during off-hours. As outlined with expediency benefits, private entities have the added accountability and financial pressures that help keep costs down.

Innovation by private construction firms can save money. For example, Naperville Illinois’ North Central College, constructed a “building within a building” by utilizing an innovative precast concrete wall system that enclosed a recreational facility within a residential building. Likewise, a private firm in England reduced the cost of a new school from $30.4 million to $22 million, while simultaneously shaving twenty weeks off the construction schedule, by utilizing a pre-fabricated “pod” system.

Another way in which private construction saves money is by streamlining the process. Under some public school construction models there can be multiple layers of oversight and involvement; the inefficiency of this model as well as paying for redundant oversight leads to higher costs. Of particular import to cost savings is the redundant and expensive oversight by

332 See id.
333 See supra Part III.2.c.
335 According to the GAO, private sector entities analyze their costs, revenues, and risks throughout all phases of a project in a much more reliable manner than their public sector equivalents, leading to reduced construction and operation costs. In many cases, governments continue to provide funding for public projects even if the projects exceed their planned budget. This occurs in part because there are fewer incentives compelling governmental bodies to fully examine the cost of a project as compared to its expected future revenue, or to streamline the building and subsequent operation of facilities. Private corporations, however, do not have the luxury of falling back on the public treasury, and thus make every effort to accurately forecast operating expenses and revenues in an attempt to reduce all unnecessary expenditures and financial risks.
338 A school in New Jersey, for instance, might have the following involved in its funding and construction: The New Jersey State Department of Education, the New Jersey Schools Development Authority, the County Superintendent of Schools, the local school district board, the Principal and administration of that particular school, the architectural and engineering design
architects and construction managers. Usually, both of these groups receive a percentage of the contract, which some might consider a disincentive to keep costs down, in exchange for overseeing the construction and certifying that the construction is done properly in order to protect the owner—the district. Under a BLA, however, the owner is the architect, engineer, and builder. This eliminates the need for a separate construction manager whose main purpose would be to theoretically protect the lessor from itself. Similarly, oversight by architects or engineers would not be needed if these design professionals were individuals employed by, or firms directly contracted by, the lessor. Under the BLA model, where the lessor is the owner and investor, the lessor’s incentive is not based upon fear of oversight, rather, it is based on their own self-interest—a much more powerful motivator. The BLA model puts the risk of poor construction predominantly on the back of the lessor—if government will let it.

Another major area of cost savings may potentially come from avoiding the higher labor costs associated with much school construction. The labor costs are often higher because much of the school construction labor pays according to prevailing wage rates. These wage rates mirror union labor rates for the geographical area—a rate significantly higher than non-union labor rates, especially when considering fringe benefits. Prevailing wage requirements

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338 Although this would be included with the architect/engineers’ design fees it certainly adds to that cost.

339 Prevailing wage rates are established at the federal level under the Davis-Bacon Act: “The Davis-Bacon and Related Acts (DBRA) are administered by the Wage and Hour Division. These Acts apply to contractors and subcontractors performing on federally funded or assisted contracts in excess of $2,000 for the construction, alteration, or repair (including painting and decorating) of public buildings or public works.” Federal Contracts-Working Conditions: Prevailing Wages in Construction Contracts, UNITED STATES DEPT. OF LABOR, http://www.dol.gov/compliance/guide/dbra.htm (last visited Dec. 10, 2013). Many states have their own laws that mimic the Davis-Bacon Act, known as “Little Davis-Bacon Acts.” See Christine Tracey, An Argument for the Repeal of the Davis-Bacon Act, 5 J. SMALL & EMERGING BUS. L. 285, 290, 307 (2001) (explaining prevailing wage laws at the state and federal level and describing them as a “poorly administered super-minimum wage law”).

promote the use of union labor by making the contractor pay the union wage rate regardless of whether they are affiliated with a union. Opponents of prevailing wages claim that, beyond the wage rate differential, union inspired rules, onerous reporting requirements, and decreased competition that add to the cost.\textsuperscript{341} BLAs could avoid implicating prevailing wage law, but in certain states and instances, government help may be required.\textsuperscript{342}

As with improving expediency, government has a place of value in lowering costs, but again, it will largely rely on government’s willingness to adapt and to sacrifice. One way is by entering into BLAs that allow the lessor to rent out space during unused times.\textsuperscript{343} Another way of maximizing cost savings will rely on government allowing the private entity to build less expensively and accepting buildings designed with function trumping form.\textsuperscript{344} Districts must be willing to allow lessors to make cost saving decisions that do not sacrifice the overall functionality of the facility but that may sacrifice some form; for instance, foregoing more esthetically pleasing materials for less expensive, more durable, or lower maintenance materials. Lastly, state and local governments can amend existing laws to eliminate the application of prevailing wage laws to construction done in furtherance of a BLA and to provide important clarity.

\textsuperscript{341} See Vasquez, et. al., supra note 340 at 1.
\textsuperscript{342} See, e.g., 500 James Hance Court v. Pennsylvania Prevailing Wage Appeals Bd., 33 A.3d 555 (Pa. 2011). In this case, a charter school contracted a preconstruction lease agreement on a new building. Id. at 558. That contract required the private contractor to build the shell of the building and the charter school to perform the interior fit-out. Id. The question before the court was whether the contract was subject to Pennsylvania’s prevailing wage law because of the involvement of public funding. Id. Ultimately, the court found that the shell and interior fit out were easily distinguishable and that the private portion of the work need not be performed in accordance with the state’s prevailing wage laws, however, the interior fit-out done by the school did require compliance. Id. at 576–77.
\textsuperscript{343} See supra Part III A.2.c for discussion on the use of these types of leases Nova Scotia.
\textsuperscript{344} See, e.g., supra Part IV.E for discussion on economies of scale in school design and construction.
C. **Ridding School Districts of the Burden of Maintenance and Repairs**

Maintenance, cleaning, and repair of school buildings are beyond the core responsibility of school districts and a private lessor can perform them more efficiently and at lower cost. As previously discussed, custodial services are an area of non-instructional service that is commonly privatized. Custodial service privatization has proven to be cost beneficial and it is a fair inference that a private lessor, cleaning their own building, possibly using their own in-house staff, would produce even more savings.

Likewise, maintenance and repairs should follow the same cost savings and efficiency pattern as custodial services for many of the same reasons. In particular, the switch from more expensive public labor to less expensive, more easily manageable private labor will produce greater cost savings. The lessor has an incentive to maintain their own building efficiently and will have a less complicated approval process for significant repairs. Additionally, lessors would bear the risk of poor decision-making or inadequate standards. Couple these factors with the accountability and self-interest motivation of the private sector, and the removal of this burden seems clearly beneficial to districts. Removal of this burden will not only save money but also will alleviate another logistical chore that interferes with a district’s focus on their core responsibility—education.

D. **Logistical Benefits Allow Schools to Focus on Their Core Mission**

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345 *See supra* Part III.A.1.c.

346 Under the current system, districts (i.e. taxpayers) would bear the increased cost of repairs that are expounded due to delay or poor maintenance, but under a BLA, the lessor would assume that risk. For example, a heating or cooling system that was repaired or maintained poorly, requiring a premature replacement, would be the responsibility of the lessor, as would a roof repair necessitated by poor maintenance practices on rooftop equipment. The potential examples are myriad but a lessor would have more accountability and motivation help prevent these scenarios, if not, the cost is borne by them.

To be sure, opponents will argue that private lessors may be less than aggressive in cleaning, making repairs, or maintaining building systems. Although this may occur, there is less incentive for the lessor to behave this way because insufficient cleaning and repairs likely will interfere with their lease payments and improper maintenance will cost them more in the long run. Of course, this is predicated on clearly defined and properly drawn up lease agreements. *See infra* Part V.B for a discussion on contractual safeguards.
This Article takes the position that because school districts have one core mission—to educate children—anything else is necessarily a distraction from that mission. Administration, control, and oversight of public school construction by educators forces states and districts to spend time, money, and effort in areas that are not their core mission.\textsuperscript{348} Cost savings allow districts to afford more items and services that directly affect the educational experience of schoolchildren, however, time and effort savings are more difficult to quantify and the available literature has only a passing mention of this component.\textsuperscript{349} Nevertheless, it is self-evident that any time and effort spent by superintendents, principals, and other school officials on funding and construction related responsibilities must necessarily come at the expense of other responsibilities.

\textit{E. Utilizing Economies of Scale and Efficiencies in the Design and Construction of School Facilities}

Districts can achieve significant time and money savings by embracing economies of scale and efficiencies in the architecture and design of school facilities. Large builders and developers possess immense purchasing power that they will undoubtedly use when building facilities of their own—this will result in lower lease payments. Even districts that are not employing a DBA model, that are using the traditional school building scheme, can share in this purchasing power by partnering with one another across districts or even across states. Much of this savings can be realized by what I label as “shared design” systems.

\textsuperscript{348} See Utt, supra note 327 at 25.
\textsuperscript{349} See, e.g., Utt, supra note 327 at 25. “Through public/private partnerships the school system can focus strictly on the core business of education while for-profit developers focus on delivering much needed community facilities. When implemented to its fullest, such a system of partnerships could yield better buildings, better education, and better communities.” Id.; Allison Padova, Library of Parliament, Public-Private Partnerships: Why, Where, When, and How? (2010), available at http://www.parl.gc.ca/Content/LOP/ResearchPublications/2010-18-e.pdf (last visited Dec. 10, 2013) (“In addition to freeing up the government’s resources [public-private partnerships] also allow governments to redirect human resources from infrastructure projects to core functions.”) Id.
Shared design systems envision a limited amount of stock designs, a “menu” of sorts, from which schools may choose from; some experimentation with this has already begun to occur, including North Carolina’s plan clearinghouse and New Jersey’s “Kit of Parts” programs.\(^{350}\) The federal, state, or county governments can hire in-house architects,\(^{351}\) commission plans specifically for this purpose, or compile from previously built school plans.\(^{352}\) Districts could select from these stock plans whether they build using the public construction model, or if they put out bids for a BLA based on a particular school design.\(^{353}\) This practice will reduce architectural and engineering fees to a mere fraction of what they would be under an all-

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350 North Carolina uses a “prototype school design clearinghouse” where they compile school plans from which districts may choose. The 1996 North Carolina General Assembly directed the State Board of Education to establish a central clearinghouse for access by local boards of education that may want to use a prototype design in the construction of school facilities. This system is expected to result in cost and time savings in school design; provide broader access to architects that specialize in school design; and increase awareness of current trends in school design. *Planning and Design for K-12 School Facilities in North Carolina, CLEARINGHOUSE.ORG*, http://www.schoolclearinghouse.org/ (last updated Nov. 20, 2013). The New Jersey Schools Development Authority has instituted their “Kit of Parts” program in response to a Gubernatorial directive in May of 2011 and describes the program as follows:

The NJSDA’s Model Schools Program “Kit of Parts” is the next step towards the advancement of standardization of school designs to be used during construction of new school facilities. The “Kit of Parts” will introduce more consistency across designs for classrooms and other school facility areas. Following Governor Christie’s Capital Program announcement in March 2011, the SDA has been developing methods to utilize standardization in all public school facilities projects in the State of New Jersey that are managed by the SDA. The successful execution of standardized components will facilitate expedited design reviews and code inspections for faster delivery of school facilities projects.

The “Kit of Parts” was developed to create model school components, which can easily be rearranged to accommodate the various shapes and sizes of the school sites and can be used across multiple Capital Program projects. The “Kit of Parts” consists of three parts – Model Programs, Model Educational Specifications and Component Elements. *Kit of Parts, NJSDA. GOV*, http://www.njsda.gov/Design/Kit_of_Parts.html (last visited Dec. 11, 2013).

351 This is more feasible at the state or federal level than at the county or local level due to cost and scale of need. This method would avoid the problem of copyright, which is discussed *infra* at note 352.

352 There are questions of copyright with legal implications that must be addressed. In a scenario where a government entity hires an in-house architect to design a group of prototype schools, the government entity would retain the copyrights to those plans. However, an independent architect’s design usually remains the architect’s property in the absence of an agreement otherwise. *See*, e.g., Mary Jane Augustine & Christopher S. Dunn, *Consequences of Ownership or Licensing of the Project Drawings-If You Pay for It, Do You Own It?*, 28 CONSTRUCTION LAW 35 (Summer 2008); NEW JERSEY OFFICE OF GOVERNMENT INTEGRITY, DEPT. OF LAW & PUBLIC SAFETY, REPORT ON DESIGN PROFESSIONAL CONTRACTS IN USE BY NEW JERSEY SCHOOL DISTRICTS 12–13 (2002), available at http://nj.gov/lps/ogi_sch_arch_rpt_main.pdf (last visited Dec. 11, 2013) The report discusses the retention of ownership by the architect under standard forms, but that the use of EDA forms for NJ schools transfers that ownership to the EDA for situations where a contract or other dispute may sever the architect-district relationship before project completion. *Id.* It does not discuss the right to re-use those plans for future buildings.

In order to realize the most savings, this practice would still require choices based on economy and efficiency in the design, materials, etc. *See supra* Part IV.E.
new design. Additionally, after a set of plans is used to build a school once, it is less expensive for subsequent uses of those plans in building replica schools. However, the benefits of shared design go beyond just reduced design and plan costs.

Shared design will also save costs during construction. Besides the cost savings from learned, and thus avoided, mistakes and change orders, shared design may shave material and production costs. Producers and suppliers that fabricate materials to specifications for a particular building a first time will be able to produce them cheaper for subsequent replica buildings. Sunk costs, such as set-up costs, shop drawings, and losses due to mistake, miscalculation, or error will be reduced or eliminated entirely. Districts or lessors can realize this type of savings in many areas of the construction, including structural steel, pre-cast concrete, curtain walls, aluminum storefront type entrances and windows, concrete reinforcing bar, elevators, HVAC systems, insulated roofing, plumbing and electrical riser diagrams, and others.

Architecture and engineering are still necessary to conform buildings to particular site locations and conditions. Additionally, they may be required for any changes required during construction.

Another advantage to re-using plans is worth noting. As projects are built, problems arise regarding design conflicts, which make certain things difficult or impossible to be built the way that the drawings show. This leads to change-orders that can drive up the cost of projects substantially; often costing much more than if they had been planned that way in the first place. See William Ibbs, Construction Change: Likelihood, Severity, and Impact on Productivity, JOURNAL OF LEGAL AFFAIRS AND DISPUTE RESOLUTION IN ENGINEERING AND CONSTRUCTION 67 (2012), available at http://ascelibrary.org/doi/abs/10.1061/%28ASCE%29LA.1943-4170.0000089 (finding that one third of construction projects studied ran over by more than 19% and that there was a correlation between higher overruns and reduced production overall). Once a project is complete, the plans can be updated and can include the normal “as-built” drawings that are normally filed at the close of a project. This will save future builders of those schools the lost time and money that attended the mistakes and change orders during the first encounter with the plans.

Industry term for heating, ventilating, and air conditioning systems. Usually the ductwork associated with these systems requires pre-planning, shop drawings, and of-site fabrication before being brought to, and installed on, a job-site.

Of course, using the same fabricator, manufacturer, and installer would likely be the most cost efficient method. This may sometimes be impractical because the replica schools might not be within the same service area as the original companies, or because the companies may see it as an opportunity to increase their profit by keeping the price higher than it should be in a repeat situation. However, because the shop drawings and plans should become the property of the district or lessor, they will be able to reduce production costs for any company producing the materials.
Two additional benefits of shared design deserve mention; time savings and risk reduction. The architectural design and planning stage can take months or even over a year. Coupled with the time spent on fabrication plans, shop drawings, etc. and the time savings can begin to mount. This goes hand-in-hand with the risk reduction benefit of shared design, which lowers the risk that is attendant with a design from scratch. Whenever beginning a design from anew, which requires installing all the materials and systems for the first time, there is risk; risk of mistake or risk of plans not working out when physically built.\(^{359}\) These risks then lead to other risks such as delays, large cost overruns, conflict between parties, and sometimes litigation. The more shared design systems are utilized, and the more that the process, plans, and material fabrication can be fine-tuned each time a replica school is built, the greater reduction of those risks.

Districts or lessors can take advantage of these benefits by utilizing these techniques; the more they use, they more time and money is saved. Of course, districts that employ the traditional public construction method can still employ some of these techniques and enjoy some of the same benefits. However, utilizing shared design in conjunction with BLAs will maximize shared design by coupling it with the aforementioned benefits of private entities that can be garnered from a BLA, including increased accountability and efficiencies.

\textit{F. Government’s Role in Facilitating School Facility Privatization}

Government, at all levels, has a role in the success of BLAs, and ultimately in their own success. Government can do certain things to encourage BLAs and to provide relief to schoolchildren in districts that are in desperate need; that help and encouragement can come in

\(^{359}\) This is a common problem in new construction. For example, plans showing a space for a duct, but once actually built, not having enough room because a large pipe has to share the same space.
First and foremost, it will require the willingness of government to try something different, to make a concerted effort to utilize the benefits of the private sector and to not surrender to special interests or wither at the first hint of trouble. What follows is a brief discussion of some potential ways that government can help facilitate BLAs; it is, to be sure, not an exhaustive list of ideas.

The first step that government can take is to accept the idea of BLAs and to embrace their positive potential. They should conduct a complete and fair analysis of the pros and cons, look to past examples of success and failure, and construct the best contractual arrangements possible to protect all parties and stakeholders. Decision makers should analyze and decide aggressively, endeavoring to find a workable BLA based solution; not passively, looking for any potential problem or fear as an excuse to stay with the status quo.

Next, government can cooperate with the private sector in a number of ways that will make BLAs more beneficial to all stakeholders. For example, they can streamline the process so that stakeholders can make decisions more quickly. Utilizing plan clearinghouses of approved designs, pre-certifying and clearing of potential lessors, and perhaps developing a standardized lease agreement can all go a long way in cost and time savings—savings that will ultimately be beneficial to the district.

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360 See PADOVA, supra note 349 at 8. The author describes how government can provide “legal and institutional frameworks” to support the development of public-private partnerships in Canada; the same type of frameworks could produce the same results in the United States. Id.
361 “Stakeholders” here should not be confused with shareholders of a private entity. The label of “stakeholders” is meant to describe all those who have a stake in the outcome; educators, government officials, private lessors, taxpayers, and most importantly, schoolchildren. This is a process that is already employed for the use of contractors in much of government contracting. It can help insure that the lessor that a district is entering into a long-term relationship with, has good qualifications, is financially stable, and fits other criteria established by the governing bodies (for example, rules regarding in-state, or in-country ownership only).
362 A standardized lease would at least lay the ground work for a workable lease even if it had to be slightly tailored for the particular instance. Additionally, this lease could transform over time, taking advantage of the benefit of hindsight on previous leases and constantly refine in an effort to eliminate contractual problems.
Additionally, certain governmental actions will help reduce costs and risks. These actions include clarification of the law relating to BLAs, tax incentives that should not have a net negative effect on tax revenue, and lease guarantees to facilitate better lending arrangements for lessors. First, government, particularly at the state level, can clarify laws regarding BLAs. Legislatures should amend existing laws where applicable to ensure no legal conflicts with entering into BLAs that are paid for with public money. They can also amend any existing laws, or enact laws where there is a void, to assure that school construction is not subject to Davis-Bacon type prevailing wage laws. Of course, this will require the political fortitude to stand up to union pressure in order to benefit schools.

Second, local municipalities, or even the state, can exempt private lessors from property taxes on land used under BLAs. This will not have a net negative effect on tax revenue because that land was untaxed by the municipality under the traditional scheme. Although opponents may claim that this is a windfall for the lessors, they are mistaken. A lessor would necessarily have to factor property taxes into the leasing price, thus, passing it on to its consumer—the district. Exempting the lessor from property taxes saves the lessor time and effort and provides the stability of complete predictability in a traditionally unpredictable cost area over the term of the lease. To take it a step further, the federal and state governments could tax receipts under BLAs differently than regular revenue, although this may begin to make the system more complicated. Again, because the lessor factors all costs into the BLA and passes them on, the tax savings to the lessor should result in a lower lease payment for the district. The government should not look at this as a tax savings windfall for the lessor because effectively it is not: They


It would also prove to be one less area of contractual contention. No consideration of how to handle tax increases would need to be considered and large unanticipated tax increases would not have to be treated as a compensation event.
should see it for what it is—an effective benefit to help a district keep its lease payments as low as possible.

Third, state and federal agencies can provide lease guarantees. Establishing a program whereby the government guarantees leases will help lessors secure better rates for construction financing, which will ultimately lead to lower lease pricing. Similar programs already exist that provide government loan backing for homebuyers,\textsuperscript{366} students,\textsuperscript{367} and small businesses.\textsuperscript{368} These lease guarantees may prove most helpful to urban areas, which may suffer from higher loan rates due to financial risk and poor credit ratings. Lenders will be more apt to fund a school construction project if they can secure the financing along with a government guarantee because it would shield lenders from a bad district or a bad lessor.

\textbf{V. POTENTIAL PROBLEMS: RESISTANCE AND REQUISITE SAFEGUARDS}

As stated earlier, this Article does not assert that BLAs must be the predominant method of school construction,\textsuperscript{369} but rather, just one method available to a district where the traditional methods are failing to produce the needed results. As with most new ideas that change the status quo, BLAs will likely meet with resistance on several fronts and will require a concerted effort to overcome. Additionally, political and special interest pressures will spurn any change that affects

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The Federal Housing Administration, a part of the United States Department of Housing and Urban Development, provides insurance for mortgages taken with approved lenders:

FHA mortgage insurance provides lenders with protection against losses as the result of homeowners defaulting on their mortgage loans. The lenders bear less risk because FHA will pay a claim to the lender in the event of a homeowner’s default. Loans must meet certain requirements established by FHA to qualify for insurance.


\textit{See Guaranteed Loan Programs (Debt Financing)}, SBA.GOV, http://www.sba.gov/content/guaranteed-loan-programs-debt-financing (last visited Dec. 12, 2013). “Banks and other lending institutions offer a number of SBA guaranteed loan programs to assist small businesses. While SBA itself does not make loans, it does guarantee loans made to small businesses by private and other institutions.” \textit{Id.}

Of course, successful use of BLAs could lead to it becoming the predominant method of new school construction; however, this paper does not assume that idea, but rather, assumes that the results will determine how widespread their use becomes.
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their narrow interests. Lastly, any success in using BLAs will necessarily be linked to the quality and thoughtfulness of the contractual agreement that binds the parties.

A. Resistance

Resistance to BLAs will come from several groups including bureaucrats, politicians, construction unions, and the public. Two main motivations will predominantly drive this resistance—fear and self-interest—and although they are distinct, they will be used in conjunction by opponents of BLAs. The stakeholders will have fear, largely based on uncertainty that they will be entering into a long-term contract that will be worse than the current situation. Opponents, particularly those whose self-interest is at stake, will use that fear and uncertainty to scare stakeholders back to the status quo.

The first group that is likely to oppose BLAs is the bureaucrats that oversee the current system. For states in which the school construction process is decentralized, this will not be a significant point of resistance. However, in states where the process is controlled and overseen by a central bureaucracy, such as New Jersey’s Schools Development Authority, the resistance will likely be strong. Whether it is a genuine belief that central planning is the best method, or just plain hubris, the people that instituted, support, and run these agencies are unlikely simply to acquiesce and accept BLAs; but their protestations should not matter for two reasons.

First, the use of BLAs will not be an overnight disruption of the status quo; rather, it will begin slowly, tried first in a few locations. Stakeholders will analyze their successes or failures, agreements will be fine-tuned, and then hopefully the BLA process will repeat—but ultimately, they will stand or fall based on the results. If BLAs fail, the bureaucrats are right back where they were with even more ammunition to justify their roles, but if they embrace the experiment and BLAs succeed, they will be seen as seers and lauded for their accomplishments.
The second reason that bureaucrats’ protests should not warrant any merit is because they have already failed at their mission of providing adequate schools to our nation’s schoolchildren—certainly not all, but far too many. The failures of New Jersey’s SCC and SDA, as well as other failed systems, stand as a stark reminder that this is where the status quo has gotten us. Dozens of court mandates, decades of time, and hundreds of billions of dollars later, the bureaucrats that have broken most of their promises still claim to know best. Certainly, it is time for some fresh ideas.

Politicians may resist for many of the same reasons as the bureaucrats. Many of them will be loath to admit failure and accept new ideas because they too are invested in the status quo. Large school construction programs also provide fertile ground for political favors and graft; something too many ill-intentioned politicians and bureaucrats engage in.\footnote{See supra Part II.A.2. for some examples of fraud and abuse in the New Jersey schools programs.} Of course, newer politicians are more likely to blame the failure on previous leaders and may be more open to change such as BLAs. Politicians have used poor school buildings as election fodder to castigate their opponents for a long time;\footnote{See, e.g., David Foster, State Sen. Doherty Says Deplorable Conditions at Trenton High are Used as ‘Props’, TRENTONIAN.COM, http://www.trentonian.com/social-affairs/20131008/state-sen-doherty-says-deplorable-conditions-at-trenton-high-are-used-as-props (last visited Dec. 13, 2013).} perhaps savvy politicians can benefit from the use of BLAs to actually do something about the problem.

Politicians will also face potential pressure from special interest groups. Groups that oppose privatization and have an inherent distrust of the private sector will see this as a handout to businesses, which they are likely to oppose regardless of the actual net results. Some see education and everything associated with it as inherently governmental and will resent any private involvement. These fears are irrational, however, and politicians, like any stakeholder, should make decisions based on the best available outcome for the students and taxpayers.
Ultimately, pressure from these groups will dwarf in comparison to the pressure politicians will receive from construction unions.

Construction unions possibly stand to lose the most if BLAs are widely adopted and if the government exempts BLAs from prevailing wage requirements. The exemption of BLAs from these requirements may be a pivotal issue if the cost of construction at union scale makes a BLA more expensive than traditional financing and construction methods.\(^{372}\) With tens of billions of dollars in school construction at stake, these unions will not go quietly. A discussion on the merits of union versus non-union construction is beyond this Article—and should be beyond the decision making process when it comes to school construction. As this Article has stated, school financing and construction has a very limited mission; provide adequate schools for all schoolchildren at the most cost effective level possible—all other considerations run counter to that mission.

Unions make significant political donations and carry a lot of power, often voting as a block and getting involved with government operations. It is interesting to note, and highly telling, that the NJSDA has three members on its board that are construction union officials;\(^{373}\) this is equivalent to having defense contractors influence how the defense budget is spent. They will pressure politicians to strengthen prevailing wage laws and fight against any exemption for construction done under BLAs. Politicians should not bow to that pressure. Determining the rate of pay and benefits for a carpenter or a plumber should not be a consideration for stakeholders in determining how to build schools. The core mission does not include assuring anyone of a

\(^{372}\) Although a BLA may be more attractive than traditional methods because of time and efficiency, even if the lease cost is equal to the traditional debt service costs, once a lease cost starts to exceed the traditional finance costs the BLAs loses much of its appeal. Prevailing wage rates, reporting requirements, and union rules make construction using union or prevailing wage labor inherently more expensive, thus, avoiding these added costs could prove pivotal in the success of BLAs. Of course, this would not be a factor in states with no prevailing wage requirements for school construction.

\(^{373}\) See BIANNUAL REPORT 2011, supra note ERROR! BOOKMARK NOT DEFINED, (at unnumbered “Public Members” page just prior to page 1).
minimum rate of pay based on union scale. Stakeholders need to make a choice—worry about their core mission, or worry about the union’s core mission. Unfortunately, in this context, the two are mutually exclusive.

Finally, the public may be another source of resistance. The opponents of BLAs will paint a bad picture and present a parade of horribles that will befall the schoolchildren and the taxpayers. The public is susceptible to misinformation on both sides of BLAs, however, stories of doom and gloom often carry more emotional capacity; it is easy to point to any failure and proclaim that it is a destiny from which escape is impossible. The level of resistance from the public will be proportionate to the amount of solid, rational information that they receive and that they believe. Ultimately, as with any other privatization effort, as BLAs are implemented people will learn from other districts whether BLAs are a success or a failure and make their decisions accordingly.

B. Contractual Safeguards

Once a district overcomes the resistance and decides to enter into a BLA as a way of getting adequate space for their students, they face the challenge of structuring a safe, thorough, and fair contract. The BLA has to benefit both parties; the lessor must be able to make a profit so that they can sustain their business, and the district needs uninterrupted use of a safe, comfortable, and adequate school facility at a reasonable cost. Potential contractual pitfalls abound, and the parties must be diligent in trying to prevent as many as possible; experience and previous successes and failures will be the best teachers here. This Article cannot possibly cover

374 Opponents of prevailing wage laws point to the racist roots of prevailing wage laws and their negative affect on school construction costs. See, e.g., Peter Murphy, “Prevailing Wage”: Profiteering at Schoolchildren’s Expense, NEW YORK FOUNDATION FOR EDUCATION REFORM AND ACCOUNTABILITY, http://www.nyfera.org/?p=2399#sthash.pUt1500X.dpuf (last visited Dec. 12, 2013).
all the possibilities, but instead addresses a few areas that will surely need specific attention. The first step is for the parties to determine what type of BLA they want to enter into.

BLAs come in a variety of configurations with the main issues for our purposes being which party will maintain the building and whether the building’s ownership will automatically convert to the district at the end of the lease term; all of them have advantages and disadvantages.

This Article takes the position that the lessor should maintain the property throughout the lease term. Placing the responsibility for maintenance with the lessor provides several benefits. First, they have the most incentive to maintain the building and control their own costs, which results in lower expenses for the district. Second, it frees up the district to concentrate on their core mission of education.

The question of who will have ownership once the lease terminates can be more complicated. Part of this stems from different states’ laws dealing with long-term leases and can determine whether they are subject to prevailing wage laws.

This Article takes the position that the lessor should retain ownership for several reasons—cost, flexibility, motivation, and risk shifting. First, a BLA in which the lessor retains the building will provide the district with a lower lease payment. Second, at the end of the lease a district can make the choice of renewing the lease or not, based on need at that time, the relationship with the lessor, and the condition of the building. Additionally, a BLA could incorporate options exercisable by the district for shorter terms, say five or ten years, at the end

375 See PADDOVA, supra note 349, Appendix A at i. for a chart on various BLAs and their structure.
376 See supra Part IV.D.
377 See supra Part IV.C.
378 See generally, supra Part IV.F.; supra, notes 19 & 46 and accompanying text.
379 For example, a shabbily built school that is encountering significant problems might motivate a district to forego renewing the lease and just build another school—an option they would not have if they used the traditional method. In that case, they might find out after ten years or more that the school is not built well and will require massive repairs or remediation, which they would now be saddled with.
of the original term. This allows the district to control the decision to continue using the school or to walk away. Third, as previously discussed, ownership of the building affects a lessor’s motivation. They are more likely to use better quality and provide better system maintenance if their own finances are going to be affected. Lessors are also more likely to provide better service when they know that a district has the option of renewing a lease with them as opposed to knowing that at a date certain they will no longer have any responsibility for the building. Lastly, long-term risk is shifted to the lessor. Poor construction decisions, maintenance decisions, and repair decisions will be borne by the builder-lesser. For example, often problems do not surface for many years, so general construction warranties will not cover repair or remediation costs. Under the traditional scheme, the district bears the risk; under a BLA, the lessor bears it.

The parties will have to negotiate and integrate several other important contractual safeguard provisions into any BLA. These provisions can be complicated and multifaceted, requiring astute attention by skillful contract drafters; this Article will just briefly address them. Among these safeguards are conflict resolution, continuity protections, and buyout provisions. These three areas are vital to assuring that there is no interruption in the availability of the school facility and that the district has the ability, in a worst-case scenario, to terminate the relationship while retaining the facility.

Conflicts are certain to come up, but it is how they are dealt with that will determine the success or failure of the agreement. Contract provisions need to be in place to protect both parties with an emphasis on continuity of use of the facility for the students. The contract should provide for a speedy decision by a neutral party, perhaps a pre-approved arbitrator, and clearly outline the process. At the core of any conflict resolution provisions should be the requirement
that continuity of using the facility not be disturbed. The agreement must allow the district to engage outside parties if needed to ensure the facility remains safe and accessible.

For example, a dispute over repairing a heating system in the cold weather months should allow the district to hire an outside service company if needed to bring the building up a reasonable temperature and pass that cost onto the lessor. Similarly, a lessor should undertake any necessary actions to ensure the building stays safe and habitable even if it is beyond their normal responsibility; they can go through the proper process afterwards to determine if the district should be required to absorb the cost.\(^{380}\) It may be impossible to predict all the conflicts that may come up, but the more that are foreseen and the more that are addressed in advance through the contract, the less conflict should arise.

Additionally, the lessor should not be able to institute any “lock out” or eviction type of proceedings if there is any interruption in the lease payments. One way to protect the parties from that scenario is through the purchase of lease insurance, which would indemnify the lessor should the district fail to pay.\(^{381}\) Another way would be for the government to guarantee the lease payments through a program designed specifically for that purpose, which could operate alongside the previously discussed loan guarantee program.\(^{382}\) Ultimately, the BLA must contractually guarantee continuity of use by the schoolchildren by assuring there is an alternative to a traditional eviction for non-payment.

The last contractual protections we will discuss are buy-out provisions. These will be a necessity in any BLA to provide an ultimate safety valve for the district. Districts should have the necessary safety of being able to terminate the relationship with the lessor for a number of

\(^{380}\) As an example, if a district school bus backed into a light post. That is not a cost that the lessor would normally be required to absorb, however, they should be required to fix it as soon as possible for safety reasons. They would then go through the proper process to get reimbursed by the district or their insurer.

\(^{381}\) See, e.g., Dannin, supra note 34 at 60 (discussing the purchase of insurance for various leasing contingencies).

\(^{382}\) See supra Part IV.F. (discussing possible government assistance to lessors seeking school construction loans by guaranteeing them similarly to homebuyer, student, and small business loans).
reasons. First, if the lessor becomes increasingly difficult to work with and is consistently violating the agreement on such things as maintenance or repairs, the district should be able to buy out the lessor. Regardless of which party retains ownership at the end of the initial lease term, the BLA should allow the district to purchase the building for a predetermined amount at any point. Additionally, the BLA should provide for the ownership automatically to revert to the district upon any failure of the lessor, such as bankruptcy, receivership, or any other situation that renders the lessor incapable of performing its contractual obligations. Any debt that the lessor may owe to a third party lender for financing the facility can be paid either directly by the district or by the government loan guarantee program if one has been instituted. Once again, continuity of use dictates the necessity of these provisions and ultimately a district needs to have a way to terminate the BLA if it proves to be unworkable.

CONCLUSION

Educating our nation’s schoolchildren is arguably one of the most important roles that government fills. For many students, school districts fill that role adequately, but for others, the results are less than satisfactory. Because of the way school funding has traditionally been done, natural financial disparities have emerged between poorer and more affluent districts. Many poorer districts just cannot generate enough funds through traditional methods to build badly needed new facilities; the result is that many poorer students suffer in outdated, unsafe, and unproductive learning environments.

Improving the school environment for all students requires the ability to employ different funding and school construction techniques as needed. Difficulties in funding through general obligation bonds and the necessity for public voter referenda, especially amidst pushback from

\[383\] Obviously, the purchase amount would have to change over time, probably based on some form of amortization schedule.
overburdened property owners, have exacerbated the issue. This is where BLAs can prove to be a valuable tool for some districts. By shifting the means and risk of funding, construction, and maintenance to a private sector lessor, certain schools may be in a much better position to fulfill their facility needs. Additionally, BLAs provide streamlining, efficiency, and accountability that are present with the private sector, which multi-layered bureaucratic models often lack.

Ultimately, only a truly cooperative effort between the public entities and the private lessors will provide the best outcome. Besides just embracing the idea of BLAs, government must make some stark choices about school facilities’ priorities. Government must be willing to give up significant control of the process, to set aside any interests that are not in sync with public education’s core mission, to utilize economies of scale and efficiency measures, and to provide a financial backstop for BLAs. Only by incorporating all of these measures will districts realize the most potential from BLAs—and the most benefit to schoolchildren.

Not all schools are failing when it comes to providing adequate facilities, but far too many of them are. Districts that are struggling with sub-standard facilities, who cannot raise funds through the traditional methods, and who have been waiting for state help that never seems to arrive, need other alternatives. States and districts should make a valid attempt at utilizing BLAs, particularly based on the ongoing failures of the traditional government controlled system to fulfill the needs of many schoolchildren. BLAs are only one way to build schools and while they should not be the only option, they should be an option for struggling schools.