



Though the Constitution of the City of Buenos Aires establishes a duty for the city government to provide all children over 45 days old with access to education, since at least 2002 thousands of children were denied early education. Civil society organization ACIJ successfully used budget analysis and strategic litigation to pressure the city government to meet its obligation to its children.

Photo courtesy of Manuela Garza

The following case study illustrates how budget monitoring tools can be used in conjunction with litigation strategies to pressure governments to fulfill their obligations, in this instance with regard to the right to education. This is a summary of a more in-depth study that includes references and supporting evidence prepared by Fernando Basch as part of the Learning Program of the IBP's Partnership Initiative. The PI Learning Program seeks to assess and document the impact of civil society engagement on public budgeting.

Download a PDF of the complete case study at <http://internationalbudget.org/wp-content/uploads/LP-case-study-ACIJ.pdf>

ARGENTINA: CLAIMING THE RIGHT TO EDUCATION WITH BUDGET ANALYSIS AND LITIGATION

After the government of Buenos Aires had for years ignored a plea by civil society groups to address a shortage of pre-schools and kindergartens that was preventing thousands of children from beginning their education, one organization decided it would sue the government into taking action.

The Civil Association for Equality and Justice, known by its Spanish acronym ACIJ, had drawn attention to the fact that Buenos Aires was falling short on a pledge enshrined in the city's Constitution to deliver free education to every child over 45 days old. When the organization recognized that its advocacy was not having an effect, it chose as a last resort to lead a class action suit against the City of Buenos Aires.

Making a legal argument against a government for its failures in public education is difficult because many courts perceive the issue as essentially political — a matter of resource allocation that is best left to the legislature and the wishes of the electorate. ACIJ, however, argued that the legislature had already expressed the public's will; now the government was failing to fulfill that mandate. Its extraordinary success at pleading this case to the courts is attributed to its innovative use of budget monitoring tools.

Through “freedom of information” requests and the use of budget analysis, ACIJ was able to put together a litigation and public pressure strategy that led to a legally enforceable agreement from the government that it would take steps to address the shortage of early education facilities.

The campaign's greatest legacy, however, may be the precedent it set for future social rights campaigns to use budget tools and litigation to hold governments to account for failing to carry out legislative decisions.

THE ISSUES: AN UNFULFILLED RIGHT TO EDUCATION

The Constitution of the City of Buenos Aires enshrines the right to education and establishes that the government must guarantee and finance a public, secular, and free education system that respects the principle of equal opportunities for every child older than 45 days.¹ Furthermore, it stipulates that budget items assigned to education cannot be reallocated.

Yet from 2002 to 2009 a growing shortage of early education facilities prevented thousands of children from beginning their education. Every year, as the demand for spaces grew, no new early education facilities were added, while existing schools struggled with their overcrowded classrooms. Between 2002 and 2006 the number of children excluded from early

education increased by 37 percent. By 2006, 6,047 children were excluded; by 2008, almost 8,000.

The shortage also disproportionately affected children living in the city's disadvantaged districts, in violation of the city's constitutional obligation to uphold an equality of opportunities in the education system. More than half of the excluded children lived in the city's six poorest districts, and less than 15 percent lived in the six most affluent districts.

Former high-ranking officials and Ministers of Education from different Buenos Aires administrations acknowledged the issue to a leading newspaper, citing an array of problems: the challenges facing the country after its debt default, deficiencies in budget monitoring, and mere inefficiency. According to Silvina Gvirtz, professor of education at San Andrés University in Buenos Aires, a more fundamental problem stems from the absence of organized parent groups in Argentina to act as a watchdog over the sector.

Parents, however poorly organized, were nonetheless concerned. ACIJ was first alerted to the problem of early education through its broader efforts to promote educational equality by forming cooperative networks with grassroots organizations in urban slums, conducting workshops, and channeling complaints about access to education to the relevant authorities.

During this time, ACIJ took a conventional advocacy approach to try to persuade public officials to take action on early education. It gathered testimonies and evidence, issued a watchdog report on the matter that included data on budget spending, and produced a documentary film to raise public awareness. It also prepared a draft bill aimed at resolving some of the problems plaguing the educational system's ability to monitor schools' spaces, enrollment, and registration.

By 2006, with no indication from the City of Buenos Aires that they were willing to change course, ACIJ filed a class-action suit. An organization founded by lawyers, ACIJ has long used litigation as its primary advocacy tool, but this case presented a new challenge. To force the hand of government on early education — a public policy area in which many consider political means to be preferable to legal action for addressing problems and resolving conflicts — would require a precedent-setting legal case.

BUDGET TOOLS FOR LITIGATION

ACIJ's prior research into the allocation and spending of budget resources for school infrastructure provided the inspiration for its legal argument, and its adept use of budget analysis strengthened its arguments considerably.

By filing its lawsuit against the city, ACIJ aimed to convince the courts of two points. First, it argued that children were denied their right to early education because of a shortage of spaces at schools. Although the situation was worse in the poorer southern half of the city than in the north, it did occur in all districts, which justified a general claim about the violation of the right to early education, as well as a claim about the violation of the right to equal treatment and autonomy. Second, ACIJ aimed to show that while there was a shortage of spaces, the government had been underspending budget



TACTICS FOR DEFENDING THE RIGHT TO EDUCATION IN BUENOS AIRES

Advocacy

- Forming cooperative networks
- Writing and publicizing watchdog reports
- Raising public awareness with a documentary
- Proposing legislation to fix the problem

Right to Information Requests and Budget Analysis

- Requesting detailed data on budget allocation and actual spending
- Identifying underspent budget items
- Determining who is affected

Litigation

- Using budget analysis to make a case for failed government execution
- Generating public attention to encourage judicial activism
- Taking the opportunity for dialogue when it presents itself

resources specifically allocated to schools' infrastructure and maintenance. By proving these points, ACIJ hoped to convince the judiciary that the government should be held legally liable for failing to fulfill a political decision that had already been made.

"Access to Information" and Budget Analysis

The first major obstacle faced by ACIJ in its legal suit was the lack of publicly available budget information in Argentina. Both the national and provincial governments are reluctant to publish data on the Internet, and the administrative conditions for accessing information about spending data and public policies are generally numerous and tedious.

Thus, before introducing its lawsuit, ACIJ's first move was to use the city's Freedom of Information Act to get the necessary data. It requested information about the total number of existing schools offering early education, a detailed account of the number of students who had applied for early schooling between 2001 and 2006, and the number of children placed on waiting lists in each school. It also requested information about all budget resources allocated to school infrastructure between 2001 and 2005, as well as detailed spending data on construction, maintenance, and school provisions for those fiscal years. With this information, ACIJ could determine whether the government had underspent its budget for early education facilities.



OUTCOMES RELATED TO THE LAWSUIT

- Two court judgments against the City of Buenos Aires for its failure to guarantee early education
- A high-profile public hearing on the matter hosted by the city's highest court that raised awareness of the issue
- A legally binding agreement from the government to take steps to address the shortage of pre-schools and kindergartens

The government initially refused to divulge the data, so ACIJ sued on the grounds of the Freedom of Information Act. By April 2006 it had won the case, forcing the government to provide the information. After collecting all the necessary information, ACIJ was able to compare allocated budget resources to actual spending data for the same budget items in a given time period. Using this budget analysis tool, ACIJ learnt that for five years the city's government had failed to spend resources allocated to the infrastructure, building, and maintenance of early education facilities. According to the data, between 2002 and 2005 an average of 32.3 percent of the resources allocated had not been spent.

The Lawsuit

Based on this information, ACIJ claimed that the government of the city of Buenos Aires had not complied with its constitutional obligation to guarantee and finance universal access to early education. The organization alleged that not only had the right to education been violated but also the right to lead an autonomous life, since the capacity to be autonomous depends on receiving an education. ACIJ also argued that the right to equal protection of the laws had been breached, because some children had access to early education while many others had not. ACIJ asked the court to order the government to comply with its constitutional obligations and to design and execute urgent measures to remedy the situation.

Naturally, the city government fought back. Besides presenting procedural objections, it claimed that no omission could be attributed to the local state and, therefore, that no right had been breached. The government denied that it had failed to fulfill its duties and pointed to a number of infrastructure works that were being developed in school facilities in order to address the shortage. The city's attorneys, however, never attempted to refute the findings that ACIJ had submitted on the basis of its budget analysis. Indeed, the government's difficulty in producing and incorporating trustworthy information, even in support of its own positions, was evident throughout the case.

In August 2007 the court sided with ACIJ. The government's failure to guarantee early education in light of the unambiguous constitutional directive made it mandatory for the judiciary to intervene. The court explained that it was not for the judiciary to tell the government how to comply with its obligations, but

it could order it to prepare and submit a plan showing that it would.

The court ordered the government to submit detailed information about all works being carried out and projects for new works directed at satisfying the existing space demands, with the caveat that none of the plans should reach completion after 2010. Moreover, the court demanded that the government produce specific plans aimed at guaranteeing access to early education, including for children who had been excluded since 2007.

The Appeal

The government appealed the court's ruling, arguing that the court had breached the principle of the division of powers by interfering in matters that are the preserve of the political branches of government. This position follows what has traditionally been called the political questions doctrine — the idea that courts, lacking direct popular legitimacy, should not engage in policy making or in any matter that is essentially political. These arguments have been successful in other cases in Argentina and elsewhere and are certainly valid when the issue at stake is a public policy decision that is essentially distributive in character and hence requires a political process.

This argument, however, did not apply to ACIJ's case. The court was not asked to make any distributive decisions, nor was it called upon to design education policies. It was only asked to make the government comply with its own commitments, its own policies, and its own budgets and laws. In a sense, ACIJ was not asking the judiciary to tell elected officials what to do, but only that they do what they had already decided the state should do with public resources.

In March 2008 the court of appeals confirmed the previous judgment and rejected the government's appeal, setting the stage for a final hearing by the city's highest court.

The Highest Court

During this stage, ACIJ strengthened its dissemination strategy in order to garner support by means of *amici curiae* briefs.ⁱⁱ The court received these presentations in support of ACIJ's lawsuit from several civil society organizations and experts in education. Although the *amici* briefs were rejected by the High Court on procedural grounds, ACIJ members believe nevertheless that these briefs played an important role in bolstering their case.

While the file was studied by the High Court justices, conversations between the plaintiffs and the government took place. This dialogue was promoted by a member of the Public Ministry who had intervened in the case believing that it was in the interest of both parties to reach an agreement outside of the courts. Then unexpectedly, a new Minister of Education, who was more willing to negotiate, took office. The High Court — reluctant to issue a judgment on the case — formally encouraged this emerging dialogue.

Seven months of negotiations between numerous state agencies, public officers, and ACIJ members resulted in a draft agreement, which was put before the High Court. The agreement contained a clear statement that ACIJ's demands were legitimate, which was celebrated by all the relevant actors

in the case. Both parties agreed to carry out a sustainable work plan, and the government committed to take action in order to meet all space needs at existing early educational facilities (prioritizing those districts that showed a higher demand), as well as to comply with a work plan to create new spaces. Deadlines were set both for finishing and submitting the plan to the court and for concluding all planned works. The government also committed to guaranteeing that the budget resources required for the completion of the work plan would be available and that it would include specific budget items earmarked for fulfilling new needs in every budget put before the legislature. The agreement established the government's commitment to carrying out several other actions directed at increasing early education spaces, such as implementing a digital system to centralize and systematize all information related to the shortage of early education spaces. Moreover it established a working forum, as well as appointing a special master in charge of monitoring the execution of the work plan.

In response to ACIJ's request, the High Court set up a public hearing to discuss the agreement, which took place in February 2011. This was a major achievement for ACIJ because it was the first public hearing ever held by the city's highest court. The hearing gathered all relevant actors in the education community and engaged them in a fruitful and enriching public debate. At the hearing, support for the draft agreement was almost unanimous; the only dissenting voice was the Attorney General of the city, who still insisted that the judiciary was overstepping its jurisdiction.

WERE THE CHANGES DUE TO THE CAMPAIGN?

ACIJ's strategy was highly successful in changing the government's attitude toward a long-standing deficiency in its early education policy. Litigation was successful in this case because the political process had already proven to be unresponsive to the problem and because of the legal opportunity created by the city's exceptional constitutional framework.

Although ACIJ was well suited for its litigation strategy — i.e., it had experience in both class action cases and budget analysis — there are other examples of grassroots organizations that have successfully incorporated litigation into campaigns to ensure that public resources are used to meet the priorities and needs of society. In this case, ACIJ was an experienced actor in public debates; it had well-established contacts with

the education community and journalists; and its staff includes attorneys who were more willing to negotiate and were experienced in both class-action litigation and budget analysis.

Indeed, the litigation strategy succeeded because of the incorporation of budget analysis — an innovative approach for Argentina's legal practice that no organization in either the legal or the education community had pursued before.

Proof of budget underspending provided the key counter-argument to the government's claims that the judiciary lacked the jurisdiction to address political questions or make decisions about budget allocation. With the shortage of school spaces clearly linked to an inefficient administration of resources, the judiciary did not have to intervene to rewrite public policy — only to force the government to execute a legislative act.

CONCLUSION

Since the implementation phase has only just begun, it is too early to assess the agreement's impact on the situation of the number of available spaces for early education. However, for several reasons it is fair to regard ACIJ's agreement with the government as a huge achievement. First, the government acknowledged the existence of a legitimate demand. This means that it acknowledged not only that there is a collective right to education but also that this right is judicially enforceable.

Beyond the value of the government's words, the High Court retained jurisdiction in order to intervene at a future date should either party fail to comply with the agreement. This means that implementation will be monitored by judicial oversight, which may distinguish this case from other examples of attempted reform that have foundered due to a lack of compliance.

Finally, ACIJ's litigation-based approach can be considered a success for the path it paved for others who seek redress for rights violations. In this case, budget analysis revealed itself to be a useful tool for social rights litigation. When it is used well, it can provide arguments for courts that are willing to enforce the law but are reluctant to intervene in public policy debates. This case also demonstrates the importance of a well-planned litigation strategy. It highlights the value in collecting all relevant evidence and reveals how freedom of information regulations and mechanisms play a significant role in achieving this aim.

ⁱ The City of Buenos Aires has the same degree of autonomy from the federal government as Argentina's other 23 provinces.

ⁱⁱ An *amicus curiae* brief is a presentation from an individual or an organization which is not part of the case, with the objective of providing further arguments or specialized knowledge about subject matter relevant to the court's decision.

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