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Deconstructing a Decade of Charter School Funding Litigation: An Argument for Reform

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DECONSTRUCTING A DECADE OF CHARTER SCHOOL FUNDING LITIGATION: AN ARGUMENT FOR REFORM*

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For over a decade, North Carolina's charter schools and traditional public schools have been embroiled in litigation over access to local public funding. This litigation shows no sign of abatement. In fact, disputes between charter schools and traditional public schools over local funds are likely to continue until the North Carolina legislature revisits the state's charter school funding statute and modifies the means by which local funds are transferred to charter schools.

This Article deconstructs the state's charter school funding statute, the decade-long series of appellate decisions interpreting it, and the administrative and legislative responses to each appellate decision. It contends that the source of disputes over local funding is found, at least in part, in the statutory method by which these funds are distributed to charter schools through the accounts of local boards of education.

This Article ultimately proposes a fundamental revision to North Carolina's charter school funding statute to allow charter schools to receive their statutory allocation of local public funds directly from the source of those funds, eliminating local boards' responsibility to serve as intermediaries in the transfer of those funds to charter schools. This change facilitates charter schools' ability to enjoy the independence envisioned by their authorizing legislation and eliminates comingling of charter school and traditional public school funding in local boards' accounts. With greater independence and without comingled funds, disputes

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between the two types of public schools are less likely to arise, and educational resources are more likely to be applied directly toward education rather than toward litigation.

INTRODUCTION

The number of American children attending charter schools has increased by approximately 160,000 students each year for the last five years.[1] During the 2010–2011 school year, nearly two million children[2] attended 5,259 charter schools across the country.[3] In North

1. Press Release, Nat'l Alliance for Pub. Charter Sch., U.S. Education Secretary Arne Duncan Urges Public Charter School Supporters to Demand Quality (June 22, 2011), *available at* http://www.publiccharters.org/PressReleasePublic/?id=525.

2. Nat'l Alliance for Pub. Charter Sch., *Students Overview: 2010-2011 National*, PUB. CHARTER SCHS. DASHBOARD, http://dashboard.publiccharters.org/dashboard/students/page/overview/year/2011 (last visited Aug. 20, 2012) (noting more specifically that 1,826,021 children were enrolled in charter schools in the 2010–2011 school year).

3. Nat'l Alliance for Pub. Charter Sch., *Schools Overview: 2010-2011 National*, PUB. CHARTER SCHS. DASHBOARD, http://dashboard.publiccharters.org/dashboard/schools/page/overview/year/2011 (last visited Aug. 20, 2012).

Carolina alone, 42,141 students[4] attended ninety-nine charter schools.[5]

This recent growth in the number of charter schools and in the number of students attending those schools shows no immediate sign of abatement.[6] Political momentum in support of charter school education now crosses party lines.[7] In the summer of 2011, several states, including North Carolina, passed bipartisan-supported legislation that expanded opportunity for new charter schools.[8]

From its beginning, North Carolina's charter school movement has marched in step with the larger national one. In 1996, North Carolina participated in the first nationwide surge of charter school-

4. Nat'l Alliance for Pub. Charter Sch., *Students Overview: 2010-2011 North Carolina*, PUB. CHARTER SCHS. DASHBOARD, http://dashboard.publiccharters.org/dashboard/students/page/overview/state/NC/year/2011 (last visited Aug. 20, 2012).

5. Nat'l Alliance for Pub. Charter Sch., *Schools Overview: 2010-2011 North Carolina*, PUB. CHARTER SCHS. DASHBOARD, http://dashboard.publiccharters.org/dashboard/schools/page/overview/state/NC/year/2011 (last visited Aug. 20, 2012).

6. *See id.* (showing a growth of 2.1% in 2010–2011). Broad support of charter schools and parental interest in charter schools arises from a conviction that charter schools offer opportunities to "(1) Improve student learning; (2) Increase learning opportunities . . . ; (3) Encourage the use of different and innovative teaching methods; (4) Create new professional opportunities . . . ; (5) Provide parents and students with expanded choices . . . ; and (6) Hold the schools . . . accountable for meeting measurable student achievement results." N.C. GEN. STAT. § 115C-238.29A (2011).

7. In the summer of 2011, congressional Republicans sponsored federal legislation calling for expansion of successful charter schools. *See* Press Release, Educ. & the Workforce Comm., Committee Approves Second Education Reform Bill (June 22, 2011), *available at* http://edworkforce.house.gov/News/DocumentSingle.aspx?DocumentID=248066. At the same time, Democratic President Barack Obama's Secretary of Education, Arne Duncan, spoke in support of charter schools at the 2011 National Charter Schools Conference, and former Democratic President Bill Clinton received a Lifetime Achievement Award in June 2011 from a national charter school advocacy organization for his "ongoing support of public charter schools spanning more than twenty years." Press Release, Nat'l Alliance for Pub. Charter Sch., *supra* note 1 (reporting that Secretary Duncan stated, "I look forward to working with leaders in the charter school community, both to broaden their impact . . . and to enhance quality and accountability throughout the charter school sector.").

8. Rob Christensen, *Perdue Signs Law Lifting Cap on Charter Schools*, NEWS & OBSERVER (Raleigh), June 17, 2011, http://www.newsobserver.com/2011/06/17/1281620/perdue-signs-law-to-end-charter.html (recognizing that North Carolina's 2011 charter school legislation passed by a wide margin and with bipartisan support); *see also, e.g.*, Act of May 5, 2011, § 20, 2011 Ind. Acts 996, 1012 (codified at IND. CODE ANN. § 20-24-7-13 (LexisNexis Supp. 2012)) (authorizing creation of virtual charter schools to serve children throughout Indiana regardless of where they live); Act of May 5, 2011, ch. 414, 2011 Me. Laws 997 (codified at ME. REV. STAT. ANN. tit. 20, §§ 2401–2415 (West Supp. 2011)) (authorizing creation of new charter schools in Maine); Act of June 10, 2011, 2011 Tenn. Pub. Acts ch. 466, § 4 (codified as amended TENN. CODE ANN. § 49-13-106 (Supp. 2011)) (eliminating the cap on charter schools in Tennessee).

friendly legislation[9] when its General Assembly initially authorized the state's new "system of charter schools."[10] Fifteen years later, on June 17, 2011, North Carolina positioned itself firmly atop a second wave of charter school-friendly legislation spreading across the country[11] when its legislature expanded the state's "system of charter schools" to an unlimited size, eliminating the 100-school cap previously imposed.[12]

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9. *See* BRYAN C. HASSEL, THE CHARTER SCHOOL CHALLENGE 1 (1999) (noting that the first wave of charter school legislation swept across the country in the 1990s).

10. *See* Charter Schools Act of 1996, ch. 731, § 2, 1996 N.C. Sess. Laws 424 (codified at N.C. GEN. STAT. § 115C-238.29A (2011)). Forty-one states and the District of Columbia have authorized the creation of publicly-funded charter schools. *Understanding Charter Schools*, NAT'L CHARTER SCH. RESOURCE CENTER, http://www.charterschoolcenter.org/priority-area/understanding-charter-schools (last visited Aug. 20, 2012); *see also* ALASKA STAT. § 14.03.260 (2010) (providing public funding for charter schools in the state); ARIZ. REV. STAT. ANN. § 15-185 (2010) (same); ARK. CODE ANN. § 6-23-501 (Supp. 2011) (same); CAL. EDUC. CODE §§ 47630, 47636 (West 2010) (same); COLO. REV. STAT. § 22-30.5-112 (2011) (same); CONN. GEN. STAT. ANN. § 10-66ee (West 2010) (same); DEL. CODE ANN. tit. 14, § 509 (2007) (same); D.C. CODE § 38-1804.01 (Supp. 2011) (same); FLA. STAT. §§ 1002.33, 1011.62 (2000) (same); GA. CODE ANN. § 20-2-2068.1 (2009) (same); HAW. REV. STAT. ANN. § 302B-12 (LexisNexis Supp. 2011) (same); IDAHO CODE ANN. § 33-5208 (2008) (same); 105 ILL. COMP. STAT. ANN. 5/27A-11 (West 2006) (same); IND. CODE ANN. §§ 20-24-7-2, -6 (LexisNexis Supp. 2011) (same); IOWA CODE § 256F.4(7) (Supp. 2012) (same); KAN. STAT. ANN. § 72-6409 (Supp. 2011) (same); LA. REV. STAT. ANN. § 17:3995 (Supp. 2011) (same); ME. REV. STAT. ANN. tit. 20A, § 2413 (West Supp. 2011) (same); MD. CODE ANN., EDUC. § 9-109 (LexisNexis 2008) (same); MASS. ANN. LAWS ch. 71, § 89 (LexisNexis Supp. 2012) (same); MICH. COMP. LAWS ANN. § 380.1215 (West 2005) (same); MINN. STAT ANN. §§ 124D.10, .11 (West Supp. 2012) (same); MISS. CODE ANN. § 37-165-13 (West Supp. 2011); MO. ANN. STAT. § 160.415 (West 2010) (same); N.C. GEN. STAT. § 115C-238.29H (2011) (same); NEV. REV. STAT. ANN. § 387.124 (LexisNexis Supp. 2011) (same); N.H. REV. STAT. ANN. § 194-B: 11 (LexisNexis 2011) (same); N.J. STAT. ANN. § 18A: 36A-12 (West Supp. 2012) (same); N.M. STAT. ANN. §§ 22-8B-13, 22-8-15 (West 2011) (same); N.Y. EDUC. LAW § 2865 (McKinney Supp. 2012) (same); OHIO REV. CODE ANN. § 3314.08 (LexisNexis Supp. 2012) (same); OKLA. STAT. ANN. tit. 70, § 3-142 (West Supp. 2012) (same); OR. REV. STAT. §§ 338.155–.185 (2010) (same); 24 PA. CONS. STAT. ANN, § 17-1725-A (West Supp. 2011) (same); R.I. GEN. LAWS §§ 16-77-6, 16-77.1-1 (2001 & Supp. 2011) (same); S.C. CODE ANN. § 59-40-140 (Supp. 2011) (same); TENN. CODE ANN. § 49-13-112 (Supp. 2011) (same); TEX. EDUC. CODE ANN. § 12.106 (West Supp. 2011) (same); UTAH CODE ANN. §§ 53A-1A-513, -515 (LexisNexis Supp. 2011) (same); VA. CODE ANN. §§ 22.1-212.5:1, -212.14 (2011) (same); WIS. STAT. ANN. § 118.40 (West Supp. 2011) (same); WYO. STAT. ANN. § 21-3-314 (2011) (same).

11. *See, e.g.*, Act of May 5, 2011, § 20, 2011 Ind. Acts at 1012 (authorizing creation of virtual charter schools to serve children throughout Indiana regardless of where they live); Act of May 5, 2011, ch. 414, 2011 Me. Laws 997 (authorizing creation of new charter schools in Maine); Act of June 15, 2011, 2011 Tenn. Pub. Acts ch. 466, § 4 (eliminating the cap on charter schools in Tennessee).

12. When North Carolina originally authorized the creation of charter schools, the legislature imposed a cap on their number. *See* Charter Schools Act of 1996, ch. 731, § 2, 1996 N.C. Sess. Laws at 427 (repealed 2011). On June 17, 2011, the North Carolina General Assembly lifted that cap, effectively authorizing an unlimited number of

Despite the generally warm embrace of charter schools across the country and within North Carolina, these schools also have attracted controversy.[13] Popular "[c]riticism centers on the resources charters take away from traditional public schools; the ease with which [charter schools] can fire teachers; the concern that the presence of charters creates two tracks within the public school system; and the [charter] schools' possible failure to serve students with special needs."[14] At least one comprehensive empirical study of charter school efficacy "reveal[ed] in unmistakable terms that, in the aggregate, charter students are not faring as well as their [traditional public school] counterparts. Further, tremendous variation in academic quality among charters is the norm, not the exception."[15]

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independently-operated charter schools in the state. *See* Act of June 17, 2011, ch. 164, § 2.(a), 2011 N.C. Sess. Laws 647, 647 (deleting the former N.C. GEN. STAT. § 115C-238.29D(b), which provided that "[t]he State Board shall authorize no more than 100 charter schools statewide"). The potential increase in the number of charter schools entitled to local funding increases the need for clarity in the law with respect to the distribution of those funds.

13. *See* THE CIVIL RIGHTS PROJECT, CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS 1 (2010), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report/frankenberg-choices-without-equity-2010.pdf ("The charter school movement has been a major political success, but it has been a civil rights failure.").

14. Kay Madati, *Building Charter Schools While Questioning the Movement*, HUFFINGTON POST (June 24, 2011, 9:42 AM), http://www.huffingtonpost.com/2011/06/24/kay-madati-charter-schools-movement_n_883583.html/; *see also* Robert A. Garda, Jr., *Culture Clash: Special Education in Charter Schools*, 90 N.C. L. REV. 655, 659 (2012) ("[C]harter schools struggle to enroll and appropriately serve students with disabilities such as mental retardation; serious emotional disturbance; autism; specific learning disabilities; and hearing, speech, language, or orthopedic or visual impairments. The harm to disabled students is obvious: they are denied equal educational choices and opportunities in violation of their civil rights."); Kevin S. Huffaman, *Charter Schools, Equal Protection Litigation, and the New School Reform Movement*, 73 N.Y.U. L. REV. 1290, 1302–03 (1998) (recognizing the argument that charter schools will "siphon" financial and human resources from traditional public schools leaving those students in "underfunded, low-quality schools"); Martin H. Malin & Charles Taylor Kerchner, *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship?*, 30 HARV. J.L. & PUB. POL'Y 885, 894 (2007) ("Charter school jobs are much less secure than those in traditional public schools. Some charter schools use employment-at-will contracts, and only thirty-four percent of charter school teachers report that they hold tenure."); *Florida Public Charter School Linked to Scientology*, HUFFINGTON POST (Feb. 28, 2012, 11:41 AM), http://www.huffingtonpost.com/2012/02/28/florida-public-charter-sc_n_1307034.html; Joy Resmovits, *Charter School Segregation Target of New Report*, HUFFINGTON POST (Feb. 22, 2012, 8:09 PM), http://www.huffingtonpost.com/2012/02/22/charter-school-education-segregation-equity-race-legislation_n_1295043.html.

15. CTR. FOR RESEARCH ON EDUC. OUTCOMES, STANFORD UNIV., MULTIPLE CHOICE: CHARTER SCHOOL PERFORMANCE IN 16 STATES 6 (2009), http://credo.stanford.edu/reports/MULTIPLE_CHOICE_CREDO.pdf. This report also

The most significant controversy for purposes of this Article, however, is the ongoing dispute in North Carolina over the source of and mechanism for local public funding of charter schools.[16] This dispute has generated much litigation between North Carolina's charter schools and traditional public schools over the last decade.[17] Now that the state's legislature has repealed the 100-school limit previously imposed on charter schools, the number of charter schools in the state may increase. Should the number of charter schools increase, disputes over local funding for public schools may also increase. The origins of and solutions to these local funding disputes are the focus of this Article.

The North Carolina legislature's expressed goal in establishing and expanding its system of charter schools was similar to that of legislatures across the country: "to provide opportunities for teachers, parents, pupils, and community members to establish and maintain

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recognizes that while it provides the "first results of a national analysis of charter school impacts on student achievement" and "shows that in the aggregate charter schools are not advancing the learning gains of their students as much as traditional public schools," *id.* at 9, "charter schools are just beginning to come into their own." *Id.* at 6. Thus, as charter schools become more established and move farther from the "first-year effect" on student performance, *id.* at 7, these results could change.

16. *See infra* notes 61–120 and accompanying text (introducing the local funding litigation in North Carolina). While this Article focuses on local funding issues in North Carolina, other charter school funding issues have arisen and are being debated across the country. *See generally* GARY MIRON & JESSICA L. URSCHEL, EDUC. & THE PUB. INTEREST CTR., EQUAL OR FAIR?: A STUDY OF REVENUES AND EXPENDITURE IN AMERICAN CHARTER SCHOOLS (2010), *available at* http://nepc.colorado.edu/files/EMO-RevExp.pdf (finding that "because of their unique funding formulas, states differ dramatically in the amount, sources, and patterns of revenues that both charter schools and traditional public schools receive" and that "charter schools receive private revenue that is largely absent from the national data"); F. HOWARD NELSON ET AL., VENTURESOME CAPITAL: STATE CHARTER SCHOOL FINANCE SYSTEMS (2000), *available at* http://www2.ed.gov/rschstat/eval/choice/charterfin.pdf (summarizing and analyzing charter school finance laws, regulations, and practices in twenty-three states, the District of Columbia, and Milwaukee, focusing on the 1998–1999 school year). Within North Carolina, debates about *other* sources of charter school funding are also arising. *See, e.g.*, Sugar Creek Charter Sch., Inc. v. State, __ N.C. App. __, __, 712 S.E.2d 730, 732–33 (2011) (addressing charter schools' complaint regarding access to capital outlay funds), *disc. rev. denied*, No. 347P11, 2012 N.C. LEXIS 526 (N.C. June 13, 2012). However, on the issue of local funding addressed in this Article, both charter schools and traditional public schools recognize that charter school funding mechanisms, like the one in North Carolina, that funnel charter school funding through traditional public schools' accounts complicate efficient access to charter school resources. *See* THOMAS B. FORDHAM INST., CHARTER SCHOOL FUNDING: INEQUITY'S NEXT FRONTIER 16 (2005), *available at* http://www.edexcellencemedia.net/publications/2005/200508_charterschoolfunding/Charter%20School%20Funding%202005%20FINAL.pdf (stating that "when funding flows through LEAs, it often complicates the process, resulting in delays or confusion").

17. *See infra* notes 61–120 and accompanying text.

schools that operate independently of existing schools."[18] To advance this goal, North Carolina's legislature provided that charter schools would be governed by "private nonprofit corporation[s]" rather than by locally-elected boards of education.[19] In authorizing *privately*-operated charter schools,[20] the North Carolina General Assembly also affirmatively established, as is common in charter school legislation generally,[21] that the state's charter schools would be "*public* school[s]."[22] Toward this end, the North Carolina General Assembly provided them with both "[s]tate and local" public funding.[23]

The plain language of North Carolina's charter school funding statute appears, at first glance, relatively straightforward. However, the implementation of this funding statute has proven to be anything but straightforward. Three recent North Carolina Court of Appeals decisions—*Francine Delany New School For Children, Inc. v. Asheville City Board of Education*,[24] *Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Board of Education* ("*Sugar Creek I*"),[25] and the follow-up case of the same name, *Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Board of Education* ("*Sugar Creek II*")[26]—broadly interpreted the public's local funding obligation

18. N.C. GEN. STAT. § 115C-238.29A (2011).

19. *Id.* § 115C-238.29E(b). The General Assembly also relieved charter schools of the obligation to comply with most public school laws of the state. *See id.* § 115C-238.29E(f) ("Except as provided in this Part and pursuant to the provisions of its charter, a charter school *is exempt* from statutes and rules applicable to a local board of education or a local school administrative unit." (emphasis added)).

20. *See id.* § 115C-238.29E(b) ("A charter school shall be operated by a private nonprofit corporation . . . .").

21. *See, e.g.*, ALASKA STAT. § 14.03.260 (2010) (providing public funding for charter schools in the state); ARIZ. REV. STAT. ANN. § 15-185 (2010) (same); ARK. CODE ANN. § 6-23-501 (Supp. 2011) (same); CAL. EDUC. CODE §§ 47630, 47636 (West 2010) (same).

22. *See* N.C. GEN. STAT. § 115C-238.29E(a) (2011) ("A charter school that is approved by the State shall be a *public* school within the local school administrative unit in which it is located." (emphasis added)).

23. *Id.* § 115C-238.29H.

24. 150 N.C. App. 338, 563 S.E.2d 92 (2002).

25. 188 N.C. App. 454, 655 S.E.2d 850 (2008) [hereinafter *Sugar Creek I*].

26. 195 N.C. App. 348, 673 S.E.2d 667 (2009) [hereinafter *Sugar Creek II*]. A third lawsuit brought by Sugar Creek Charter School challenged the provision of capital outlay funding, rather than local operational funding, to charter schools. *See* Sugar Creek Charter Sch., Inc. v. State, __ N.C. App. __, __, 712 S.E.2d 730, 732 (2011), *disc. rev. denied*, No. 347P11, 2012 N.C. LEXIS 526 (N.C. June 13, 2012); *Sugar Creek Charter School, Inc. et al. v. State of North Carolina et al.*, N.C. INST. FOR CONST. L., http://www.ncicl.org /litigation/21 (last visited Aug. 20, 2012) (explaining the allegation in the lawsuit filed by the North Carolina Institute for Constitutional Law on behalf of seven North Carolina charter schools).

toward charter schools[27] in a manner that prompted responsive action from the North Carolina Department of Public Instruction ("DPI")[28] and General Assembly.[29] Unfortunately, neither the recent spate of appellate decisions nor the administrative and legislative action taken in response to these decisions addresses the essence of the local funding conflict between the state's public schools, and neither is likely to bring an end to disputes over access to and control of local funding for public schools.[30] Instead, the cycle of litigation between North Carolina's public schools will likely continue until the legislature substantially restructures the *manner* through which local funds are provided to charter schools.[31]

In light of the continuing confusion over the proper allocation of local funding to North Carolina's charter schools, this Article examines the statutory root of the state's charter school funding disagreements as well as the judicial, administrative, and legislative involvement in those disputes. It argues that a change in the manner by which the legislature requires local funds to be distributed to charter schools, to avoid comingling of charter and traditional school funds in accounts of traditional public school systems, will eliminate the basis for litigation between charter and traditional public schools and permit both to apply their resources toward educating the children they serve rather than in litigation against one another.

More particularly, Part I of this Article examines the plain language of the state's charter school funding statute as the statutory

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27. The North Carolina Court of Appeals reached decisions in two additional charter school funding decisions in 2011. *See* Thomas Jefferson Classical Acad. v. Rutherford Cnty. Bd. of Educ., __ N.C. App. __, __, 715 S.E.2d 625, 632 (2011) (addressing the permissibility of a local board's "purported retroactive amendment to the . . . budget shifting funds . . . to avoid the holdings of this Court in *Delany* and *Sugar Creek I* and *II*"); *Sugar Creek Charter Sch., Inc.*, __ N.C. App. at __, 712 S.E.2d at 732 (addressing charter school access to capital outlay funds), *disc. rev. denied*, No. 347P11, 2012 N.C. LEXIS 526 (N.C. June 13, 2012). Neither of these decisions alters the law established in *Delany*, *Sugar Creek I*, and *Sugar Creek II*.

28. *See infra* notes 131–40 and accompanying text (detailing the DPI's prompt administrative response to these three court of appeals decisions).

29. *See* Act of July 18, 2003, ch. 423, 2003 N.C. Sess. Laws 1248 (codified as amended at N.C. GEN. STAT. § 115C-238.29(H)(b) (2011)); Current Operations and Capital Improvements Appropriations Act of 2010, ch. 31, § 7.17.(a), 2010 N.C. Sess. Laws 36, 65 (codified as amended at N.C. GEN. STAT. § 115C-426(c) (2011)).

30. *See infra* notes 150–57 and accompanying text.

31. *See infra* notes 156–81 and accompanying text; *see also* Emery P. Dalesio, *State Appeals Court to Weigh Charter School Funding*, NEWS & RECORD (Greensboro), Feb. 8, 2011, http://www.news-record.com/content/2011/02/08/article/state_appeals_court_to_weigh_charter_school_funding (reporting on one of the current local funding lawsuits pending as of the date of this Article before the North Carolina Court of Appeals).

source of local funding confusion and the basis for the ensuing litigation. It then deconstructs the recent "series of cases"[32] interpreting that legislation in which North Carolina courts attempted to resolve disagreement, focusing on the most recent in the series, *Sugar Creek II*.

The Article then identifies and examines in Part II the responses of the North Carolina DPI and the North Carolina General Assembly to the judicial interpretations of the funding legislation. It argues that while these administrative and legislative responses mitigated the effects of the state's appellate decisions, they did not eliminate the likelihood of ongoing conflict between charter and traditional public schools over access to local educational funding. The current statute, even as altered by administrative and legislative responses to recent judicial decisions, continues to encourage disagreement over entitlement to comingled charter and traditional public school resources. These disagreements harm the public interest by encouraging charter and traditional public schools to invest portions of their limited resources in judicial resolution through litigation rather than directing those dollars towards their education mission.

Finally, in Part III, this Article proposes a fundamental revision to North Carolina's charter school funding statute. More specifically, it proposes a new method of delivering local funding to charter schools, directly from boards of county commissioners or their equivalent, rather than through the accounts of traditional public schools, to reduce the frequency of funding litigation that pits North Carolina's public schools against one another. This solution would enable all public schools, both charter and traditional, to redirect educational resources toward education, rather than litigation, and better serve the children of the state.

I. DECONSTRUCTING NORTH CAROLINA'S CURRENT CHARTER SCHOOL FUNDING LEGISLATION

A. The Plain Language of the Legislation

Section 115C-238.29H of the General Statutes of North Carolina establishes the state's public funding obligations toward its charter schools. Two components of this funding legislation warrant close examination: the component that defines the *type* of funds to be provided to charter schools and the component that establishes the

32. *Thomas Jefferson Classical Acad.*, __ N.C. App. at __, 715 S.E.2d at 628.

means through which those funds must be transferred to charter schools. This Section of the Article examines each component in turn.

The section of North Carolina's charter school legislation titled "State and Local Funds for a Charter School" ensures provision of "equal" amounts of "per pupil" public allocations to all public school students in kindergarten through grade twelve ("K–12").[33] It contains two primary subsections: one on state allocations[34] and the other on local allocations.[35]

The charter school funding provision does not include any public obligation to provide private funding or federal funding.[36] Instead, charter schools, like traditional public schools, may independently solicit private contributions without state or local governmental oversight,[37] and federal law permits charter schools, like traditional public schools, to solicit federal grants independently.[38]

Recognizing that North Carolina's charter school legislation requires the distribution of "[s]tate and local funds for a charter school" raises the following question: Which state and local funds must be distributed? The statute prescribes first that charter schools must receive *state* funds "equal to the average per pupil allocation" provided to traditional public schools on behalf of their students.[39] The statute dictates next that charter schools must receive *local* funds "equal to the per pupil local current expense appropriation . . . for the fiscal year."[40] In a nutshell, on its face, the charter school funding legislation provides charter schools with equal proportionate amounts

33. N.C. GEN. STAT. § 115C-238.29H (2011).

34. *Id.* § 115C-238.29H(a).

35. *Id.* § 115C-238.29H(b).

36. *See id.* § 115C-238.29H (requiring distribution of specified state and local public "per pupil" allocations to charter schools, but declining to mention any obligation to transfer privately-generated resources, federally-assigned resources, or restricted-use funding to charter schools).

37. *Id.* § 115C-238.29J(b) ("Private persons and organizations are encouraged to provide funding and other assistance to the establishment or operation of charter schools.").

38. *See, e.g.*, 20 U.S.C. § 7221a (2006) (authorizing a charter school grant program).

39. N.C. GEN. STAT. § 115C-238.29H(a) (2011).

40. *Id.* § 115C-238.29H(b). This is true even though charter schools are free from most governmental constraints. *See id.* § 115C-238.29E(f) ("Except as provided in this Part and pursuant to the provisions of its charter, *a charter school is exempt from statutes and rules applicable to a local board of education or local school administrative unit.*" (emphasis added)). Additionally, this remains true even though charter schools are privately operated and may receive private funding. *See id.* § 115C-238E(b) (providing that charter schools shall be independently operated); *id.* § 115C-238.29J(b) (encouraging private people and organizations to provide resources and support directly to individual charter schools).

of those state and local public appropriations that are available generally to all K–12 students on a "per pupil" basis.[41] On an intuitive level, this makes sense. Most agree that all public schools, whether charter or traditional, should receive equal general per pupil funding. But even those who agree on this basic point may disagree about what qualifies as general per pupil funding.[42]

In addition to the *type* of funds provided for charter schools, the *manner* by which these funds are transferred to them is significant. The statute provides different routes through which state funds and local funds are transferred to charter schools. In other words, although charter schools receive the same type of state and local funding—equal amounts of per pupil K–12 appropriations—these funds take different paths on their way to charter schools' accounts. Specifically, state funds travel directly to charter schools from the state.[43] Local funds, on the other hand, travel first into the accounts of local boards of education, and local boards must then transfer them to charter schools.[44] While this method of local funding for charter schools is not uncommon across the country,[45] it is inconsistent with North Carolina's goal of independent charter schools and has created confusion and controversy in this state.[46]

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41. *Id.* § 115C-238.29H. Significantly, the charter school funding legislation does *not* provide that privately-generated funds or particularly-earmarked (restricted-use) funds or funds from the federal government be redistributed to charter schools from the budgets of either the State Board of Education or any local board of education. *See id.* This is significant because the interpretation of this statute by the court of appeals requires such redistribution of these funds if they are budgeted in the local current expense fund, which was established in the School Budget and Fiscal Control Act ("SBFCA") long before the charter school funding legislation was enacted. *See id.* § 115C-424 (recognizing that as of July 1, 1976—which was twenty years before the charter school legislation became law—the SBFCA became effective); *see also Sugar Creek II*, 195 N.C. App. 348, 358, 673 S.E.2d 667, 674 (2009) (emphasizing and repeating that *Sugar Creek I* required that charter schools receive a per pupil portion of "all money contained in the local current expense fund").

42. *See infra* notes 67–123 and accompanying text.

43. § 115C-238.29H(a).

44. § 115C-238.29H(b).

45. *See, e.g.*, ALASKA STAT. § 14.03.260 (2010) (requiring that local school boards provide charter schools with an annual program budget for operating expenses); CAL. EDUC. CODE § 47636(a) (West 2006) (providing that charter schools may negotiate with local boards of education for a share of operational funding from sources not otherwise specified in the funding statute); GA. CODE. ANN. § 20-2-2068.1(c) (2009) (recognizing that there is an administrative cost to local boards of education administering local funding for charter schools and permitting local boards of education to retain a percentage of charter schools' per pupil share of funding for administrative costs).

46. *See generally Sugar Creek II*, 195 N.C. App. 348, 673 S.E.2d 667 (resolving a dispute between a charter school and a local board of education over the local board's transfer of local funding to charter schools); *Sugar Creek I*, 188 N.C. App. 454, 655 S.E.2d

State funds travel directly to charter schools under the express language of North Carolina's charter school funding statute: "The State Board of Education shall allocate to each charter school . . . [a]n amount equal to the average per pupil allocation for average daily membership from the local school administrative unit allotments in which the charter school is located for each child attending the charter school."[47] To comply with this mandate, the State Board of Education must deduct the charter school's "per pupil allocation" from the appropriate traditional public school system's "allotment" (the state funding reserved for the traditional public school system that would educate the child in the absence of the charter school) and send it directly to the receiving charter school.[48] In this manner, this state funding is attached to the child, and it follows the child even if he attends a charter school outside the county from which his allotment was taken.[49]

Unlike state funding, local funds do not travel directly to the receiving charter school from their source, typically a board of county commissioners. Instead, local funding for *all* public schools—charter schools *and* traditional public schools—is provided to the local board of education. Then, the charter school statute requires the local board of education to "transfer to the charter school an amount equal to the per pupil local current expense appropriation to the local school administrative unit for the fiscal year."[50]

This statutorily-created intermingling of local funding for charter schools and traditional public schools in the accounts of the local boards of education appears inconsistent with the statutory goal to authorize charter schools that would "operate independently of

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850 (2008) (same); Francine Delany New Sch. for Children, Inc. v. Asheville City Bd. of Educ., 150 N.C. App. 338, 563 S.E.2d 92 (2002) (same).

47. N.C. GEN. STAT. § 115C-238.29H(a)(1) (2011). While equal operational (non-capital) funding is generally provided to all public schools on behalf of their students regardless of whether the students attend a traditional public or charter school, the state provides additional amounts to the charter school for each child with disabilities and/or with limited English proficiency educated by that school. *Id.* § 115C-238.29H(a)(2)–(3).

48. *Id.* § 115C-238.29H(a).

49. *Compare id.* (providing that state "per pupil allocation[s]" travel with the child to the charter school of his or her choice), *with id.* § 115C-238.29H(b) (providing that local "per pupil . . . appropriation[s]" travel with the child to the charter school of his or her choice *except* that "revenue derived from supplemental taxes shall be transferred only to a charter school located in the tax district for which these taxes are levied and in which the student resides").

50. *Id.* § 115C-238.29H(b). However, "[t]he amount transferred under this subsection that consists of revenue derived from supplemental taxes shall be transferred only to a charter school located in the tax district for which these taxes are levied and in which the student resides." *Id.*

existing schools."[51] More significantly, it creates an environment ripe for disputes between charter schools and traditional public schools over access to and allocation of those local funds. This is because local boards of education receive and manage a variety of funding types in their accounts, including, for example, federal funds, private donations, private payments for particular services (such as after-school care, summer school, etc.), state appropriations, restricted-use moneys, the traditional public schools' local appropriations, and, under the charter school funding statute, the charter schools' local "per pupil . . . appropriation."[52] Of all the varied types of revenue in local boards' accounts, the charter school statute explicitly requires the transfer of only one type of money: the local "per pupil . . . appropriation" for each student the charter schools educate in an amount equal to the "per pupil . . . appropriation" allocated to each traditional public school student.[53] Once charter schools' local public money is mixed with the local boards' own revenue from a variety of sources in accounts under the local boards' control, however, the door is open for disagreement over the accounting for these resources as each entity attempts to protect its proper portion of the local, public "per pupil . . . appropriation."[54]

Almost immediately after the North Carolina General Assembly authorized the creation of charter schools and established this local funding structure, charter schools raised questions about local boards' transfer of local funds.[55] Disputes ripened into litigation in short

51. *Id.* § 115C-238.29A; *see also supra* notes 16–23 and accompanying text.

52. *See generally* N.C. DEP'T OF PUB. INSTRUCTION, FINANCIAL POLICIES AND PROCEDURES MANUAL FOR LOCAL EDUCATION AGENCIES (1997) [hereinafter FINANCIAL POLICIES AND PROCEDURES MANUAL, 1997] (formalizing the financial policies and procedures to which local boards of education were required to comply throughout the charter school funding litigation described in this Article and requiring that this variety of moneys be accounted for in the local current expense fund).

53. § 115C-238.29H(b).

54. This Article from time to time refers to "per pupil . . . appropriation" rather than "per pupil local current expense appropriation" as appears in the charter school funding statute. *See id.* This is for reasons of economy and because the omitted words, "local current expense," have little impact on the analysis here and may create confusion by tempting a false sense of symmetry between the phase "local current expense appropriation" and "local current expense fund" when the distinction between the words "appropriation" and "fund" are a focus of this Article.

55. In fact, charter schools had sought and obtained an attorney general's opinion on a dispute over a local board's administration of local funding for a particular charter school within two years of the passage of the original charter school legislation. *See* Charter School's Entitlement to Supplemental Tax Funds, 1998 Op. N.C. Att'y Gen. no. 381 (Sept. 23, 1998). The questions raised by charter schools relied on the premise that local boards of education had resources in their accounts that they were not transferring to charter schools. If the charter school funding statute did not require charter school funds

order.[56] This litigation produced three North Carolina Court of Appeals decisions that expanded, in some cases temporarily,[57] the *types* of funds that local boards must transfer to charter schools as a result of the *means* by which local boards of education account for their revenue. Under these decisions, the public—via the local board of education—must provide to charter schools an equal amount of a variety of unlikely resources, including, inter alia, restricted-use funds authorized for a pre-school program for at-risk children not educated by charter schools[58] and private donations or payments to local boards of education for specific programs not offered at the charter school,[59] when they are accounted for in the local board's local current expense fund. Ultimately, the court of appeals interpreted the statutory obligation of the local board of education to transfer to charter schools "an amount equal to the per pupil . . . appropriation . . . for the fiscal year" to include an equal per pupil portion of *all money*—regardless of source or type—placed by local boards of education for accounting purposes in their local current expense funds.[60] This Article next considers in depth the judicial attempt to resolve local funding disagreements by equating local "appropriations" under the charter school funding statute with the

to be transferred through the accounts of local boards of education, charter schools would not have any claim to resources in the accounts of local boards of education. Instead, questions about appropriate local allocations would be directed at the source of the local allocations, boards of county commissioners or their equivalent. The county commissioners, unlike local boards of education, have power to tax citizens when additional resources are necessary for funding of charter schools. *See infra* notes 167–68 and accompanying text.

56. *See* Francine Delany New Sch. for Children, Inc. v. Asheville City Bd. of Educ., 150 N.C. App. 338, 340, 563 S.E.2d 92, 92 (2002). *Delany* was the first of multiple North Carolina lawsuits between charter schools and traditional public schools over local funding. *See infra* notes 60–121.

57. *See* Current Operations and Capital Improvements Appropriations Act of 2010, ch. 31, § 7.17.(a), 2010 N.C. Sess. Laws 36, 65 (codified as amended at N.C. GEN. STAT. § 115C-426(c) (2011)) (expanding the means through which local boards may avoid the effect of the charter school funding trilogy of *Delany*, *Sugar Creek I*, and *Sugar Creek II*); *see also infra* notes 123–42 and accompanying text. While recent revisions to section 115C-426(c) ensure a means through which local boards of education *may* protect such funds from transfer to charter schools going forward, these revisions do not entirely overrule the holdings of the *Delany*, *Sugar Creek I*, and *Sugar Creek II*. *See infra* notes 141–53 and accompanying text. If local boards of education do not manage their accounting carefully, any funds, including those listed in the statute, that remain in the local current expense fund must still presumably be transferred to charter schools on a per pupil basis.

58. *Sugar Creek I*, 188 N.C. App. 454, 461, 655 S.E.2d 850, 854 (2008).

59. *Sugar Creek II*, 195 N.C. App. 348, 358, 673 S.E.2d 667, 674 (2009).

60. *See id.*

local current expense "fund" under the School Budget and Fiscal Control Act ("SBFCA").

B. *The Meaning of "Per Pupil . . . Appropriations" After* Delany, Sugar Creek I, *and* Sugar Creek II

Two early appellate decisions on local public funding of charter schools—*Delany* in 2002 and *Sugar Creek I* in 2008—set the stage for the expansive *Sugar Creek II* application of *Delany*'s holding that the public's local funding obligation to charter schools requires local boards to transfer to charter schools an equal per pupil portion of *all money*, regardless of source or type, accounted for in a local board's local current expense fund.[61]

In *Francine Delany New School for Children v. Asheville City Board of Education*, the North Carolina Court of Appeals entered the dispute over local funding of charter schools for the first time.[62] When *Delany* arose in the trial court in September 1999,[63] and when it reached the court of appeals in 2002,[64] the courts could have deferred for initial consideration to the state agency with expertise on charter school funding: the State Board of Education.[65] When the General

61. *Id.* at 358, 673 S.E.2d at 674.

62. 150 N.C. App. 338, 563 S.E.2d 92 (2002).

63. *Id.* at 340, 563 S.E.2d at 94 ("Delany School filed a complaint in the Superior Court of Buncombe County on 7 September 1999 . . . .").

64. The court of appeals could have returned the *Delany* complaint to the State Board of Education for initial resolution even though the trial court had already decided this issue. This question of subject matter jurisdiction—whether a court has authority to address the subject of a particular dispute—may be raised and asserted at any point in the proceedings. *See* Forsyth Cnty. Bd. of Soc. Servs. v. Div. of Soc. Servs., 317 N.C. 689, 692, 346 S.E.2d 414, 416 (1986).

65. Provision of an administrative channel through which charter schools and traditional public schools may resolve their disputes appears in other states' charter school legislation as well. *See, e.g.*, MASS. ANN. LAWS ch. 71, § 89(x) (LexisNexis Supp. 2011) (providing that Massachusetts charter schools' complaints about disproportionate budgetary allocations may be appealed to the commissioner, not a court); MO. ANN. STAT. § 160.415 (West 2010) (providing that disputes between local boards of education and charter schools regarding funding in Missouri "shall be resolved by the department of elementary and secondary education" as an administrative matter prior to consideration by courts); 24 PA. CONS. STAT. ANN. § 17-1721-A (West Supp. 2012) (establishing a Pennsylvania State Charter School Appeal Board to consider a range of issues associated with charter schools); UTAH CODE ANN. §§ 53A-7-101 to -102 (LexisNexis 2009) (providing for a mediation and administrative hearing process to resolve disputes in Utah rather than permitting courts to consider disagreements between charter schools and local boards of education in the first instance). Directing funding disputes between the states' public schools to the administrative agency overseeing those schools is a rational mechanism for dispute resolution. In North Carolina in particular, the State Board of Education enjoys specific statutory, N.C. GEN. STAT. § 115C-238.29G(b) (2011), and constitutional, N.C. CONST. Art. IX, §§ 4, 5, authority to administer similar matters. If the

Assembly established charter schools in 1996, it contemplated that the State Board of Education, rather than the courts, would be the first to hear and resolve such administrative disputes.[66] North Carolina's charter school legislation has required from its inception that "[t]he State Board of Education shall develop and implement a process to address . . . grievances between a charter school and . . . the local board of education."[67] The North Carolina State Board of Education complied with this legislative mandate initially by establishing a Charter School Advisory Committee to do just that.[68]

State Board of Education had been given the opportunity to oversee the funding disputes addressed in this Article, those disputes likely could have been resolved with greater efficiency given its unique expertise in public school operations. *See infra* note 153. Recently, in the context of resolving whether a virtual charter school could open without approval of the North Carolina Board of Education, a lower court recognized the unique value of the State Board of Education's participation in resolving such matters. *See* N.C. Bd. of Educ. v. N.C. Learns, Inc., 12-CVS-7272 (N.C. Super. Ct. June 29, 2012) (noting that the significant costs associated with opening a virtual charter school, "along with issues of content, methodology, and quality control militates heavily in favor of the [State Board of Education] fulfilling its constitutional and practical role" of overseeing the operation of charter schools).

66. *See* N.C. GEN. STAT. § 115C-238.29G(b) (2011); *see also* Baltimore City Bd. of Sch. Comm'rs v. City Neighbors Charter Sch., 929 A.2d 113, 125–26 (2007) (recognizing the authority and discretion of the state board of education in interpreting laws providing for charter school funding in Maryland).

67. § 115C-238.29G(b).

68. *See* N.C. STATE BD. OF EDUC., POLICY MANUAL NO. EEO-U-005 (June 2005) [hereinafter POLICY MANUAL] (creating the Charter School Advisory Committee in the original, now eliminated, State Board policy manual). On April 7, 2007, the State Board of Education decided to consolidate some of its advisory committees and move their responsibilities to newly-structured standing committees. *See* N.C. DEP'T OF PUB. INSTRUCTION, MINUTES OF THE NORTH CAROLINA STATE BOARD OF EDUCATION MEETING APRIL 4–5, 2007, at 23 (2007) [hereinafter MINUTES OF BOARD OF EDUCATION MEETING APRIL 4–5, 2007], *available at* http://www.ncpublicschools.org/docs/stateboard/meetings/2007/minutes/final/04fminutes.pdf. As part of this reorganization, the State Board eliminated the then-existing Charter School Advisory Committee, and made select representation from that committee a part of the Leadership for Innovations Committee. *Id.* "[A]ll policies, procedures, and requests concerning Charter Schools would be included as part of the Leadership for Innovation Committee's work." *Id.* The State Board emphasized that this change would "allow for more in-depth involvement of the [State Board of Education] in working with the Office of Charter Schools and individual schools in governance, finance, and . . . eliminating duplication of spending." *Id.*; *see also* 16 N.C. ADMIN. CODE 06G.0502 (2011); Provisions Acad. v. State Bd. Of Educ., 24 N.C. Reg. 969, 972, 979 (July 27, 2009) (recognizing that after elimination of the Charter School Advisory Committee, the Leadership Innovation Committee became the primary committee to which the Office of Charter Schools reported, although there was some confusion about this fact when it was communicated to charter schools). Thus, through the Charter School Advisory Committee originally and the Leadership for Innovations Committee beginning in 2007, the State Board of Education had a committee to hear grievances between charter schools and local boards of education on, inter alia, matters of "governance, finance, and

In 2007, this committee was abolished and folded into the State Board of Education's Leadership for Innovation Committee with continued responsibility to "sit either as a whole or in panels designated by its chair to hear grievances between or among charter schools . . . and local boards of education."[69]

Despite the statutory requirement that the State Board provide a process to resolve disputes between charter schools and local boards of education, the charter school plaintiff in *Delany* bypassed State Board participation in the resolution of its dispute with the Asheville City Board of Education. The *Delany* plaintiff went to the courts with its local funding question[70] immediately after seeking preliminary guidance from the North Carolina Attorney General about that office's understanding of the charter school funding provisions.[71] As a consequence, North Carolina's courts addressed a question of first impression without the benefit of State Board input: whether revenues from supplemental taxes and fines and forfeitures collected in the City of Asheville count as "per pupil . . . appropriation[s]" and therefore must be transferred out of the city board of education's accounts and into the accounts of a charter school existing outside the city.[72] In answering this question, the court of appeals adopted the argument advanced by the charter school plaintiff and concluded that

. . . eliminating duplication of spending." MINUTES OF BOARD OF EDUCATION MEETING APRIL 4–5, 2007, *supra*, at 23.

69. POLICY MANUAL, *supra* note 68. On April 7, 2007, the State Board of Education decided to consolidate some of its advisory committees and move their responsibilities to newly-structured standing committees. *See* MINUTES OF BOARD OF EDUCATION MEETING APRIL 4–5, 2007, *supra* note 68.

70. Today, the provision in the charter school funding legislation requiring the State Board of Education to provide a means through which charter schools and local boards of education could resolve their disputes administratively before a body of educational experts is moot as to funding disputes. *Delany* did not address this provision of the charter school legislation and decided the case without administrative guidance. Later, in *Sugar Creek II*, the court attempted to explain the decision to forgo administrative guidance and ultimately decided that refusing to recognize jurisdiction in the State Board of Education "is in keeping with prior decisions of this Court, though the specific issue of subject matter jurisdiction . . . was not raised in those opinions." 195 N.C. App. 348, 356, 673 S.E.2d 667, 673 (2009).

71. *See* Charter School's Entitlement to Supplemental Tax Funds, 1998 Op. N.C. Att'y Gen. no. 381 (Sept. 23, 1998). While the North Carolina Attorney General represents the State Board of Education, the charter school's choice to seek an attorney general's opinion rather than to present their local funding question to the Charter School Advisory Committee of the State Board of Education prevented all interested parties from contributing to the development of the opinion and pushed its issuance without the guidance of the educators and policymakers on the committee.

72. Francine Delany New Sch. for Children v. Asheville City Bd. of Educ., 150 N.C. App. 338, 339, 563 S.E.2d 92, 93 (2002).

revenue from the city's supplemental taxes and fines and forfeitures must be transferred from the city board of education to the county charter school, even though the charter school was outside the tax district from which the funds arose.[73]

Delany's holding regarding revenue from penal fines and forfeitures and supplemental taxes is not remarkable, but its reasoning is. The revenue at issue in *Delany* was of the *type* typically "appropriated" locally to the public schools on a "per pupil" basis for all K–12 students, not of the *type* earmarked for a particular use.[74] Therefore, the court's ultimate conclusion is consistent with the statute's instruction that equal amounts of all per pupil appropriations be transferred from local boards of education to charter schools. The court's reasoning, however, laid the foundation for future funding litigation because the court did not reach its conclusion based solely on a consideration of the *type* of funding sought by the charter school from the local board of education's accounts; instead, the court focused on the *method* by which the local board of education processed those funds in its budget.

The *Delany* court initially determined that "the phrase 'local current expense appropriation' in the Charter School Funding Statute . . . is synonymous with the phrase 'local current expense fund' in the [SBFCA]."[75] It then reasoned that "there is no material distinction between 'local current expense fund' in the [SBFCA] and 'local current expense appropriation' in the Charter School Funding Statute."[76] As a consequence, according to the *Delany* court, if local boards of education processed funds through the local current expense fund under the SBFCA, those funds must be "per pupil . . .

73. *Id.* at 346, 563 S.E.2d at 97. The argument advanced by the Delany School was modeled after an advisory opinion issued by the attorney general's office years earlier. *See* Charter School's Entitlement to Supplemental Tax Funds, 1998 Op. N.C. Att'y Gen. no. 381 (Sept. 23, 1998).

74. *See* N.C. CONST. art. IX, § 7 (providing that revenue from fines and forfeitures shall be "appropriated" for "maintaining free public schools"); N.C. GEN. STAT. § 115C-452 (2011) (providing that "[f]ines and forfeitures shall be apportioned according to the projected average daily membership of each local school administrative unit" or according to the projected number of students—per pupil count—of each school unit for the school year); *id.* § 115C-501 (providing that supplemental tax revenue "shall be apportioned among the local school administrative units in the county pursuant to [section] 115C-430," which requires apportionment on a per pupil basis "according to the membership of each unit").

75. *Delany*, 150 N.C. App. at 347, 563 S.E.2d at 98.

76. *Id.* at 346, 563 S.E.2d at 97.

appropriations" to be shared with charter schools under the charter school funding statute.[77]

The *Delany* court's analysis relied on two *different* phrases about public school revenues in two *different* articles in North Carolina's public school laws. Asserting that these phrases were synonymous, the court reasoned that because charter schools are entitled to a proportionate share of local per pupil "appropriations" to school boards under the charter school funding statute in article 16, they are entitled to a proportionate share of *all* money accounted for in the local current expense "fund" established under the SBFCA in article 31.[78] Under this reasoning, the court ruled that local boards of education must transfer revenue from penal fines and forfeitures and supplemental taxes to charter schools because the local boards accounted for such revenue in the local current expense fund established in the SBFCA, *not* because these sums were per pupil appropriations in form or substance before entering the local current expense fund.

In response to the *Delany* decision, the North Carolina General Assembly took action. However, it did not clarify the substantive meaning of "per pupil . . . appropriations" provided to charter schools in the charter school funding statute in article 16 as distinct from all other resources contained in the local current expense "fund" established in the SBFCA in article 31. Instead, the legislature ignored the reasoning of *Delany* and simply nullified one of the decision's central holdings by adding a provision to the charter school funding statute to clarify that "supplemental taxes shall be transferred only to a charter school *located in the tax district* for which these taxes are levied and in which the student resides."[79]

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77. *Id.*

78. As noted, this Article refers to "per pupil . . . appropriation" rather than "per pupil local current expense appropriation" as appears in the charter school funding statute. *See* N.C. GEN. STAT. § 115C-238.29H(b). This is in the interest of economy and because the omitted words, "local current expense," have little impact on the analysis here and may create confusion by tempting a sense of symmetry between the phrase "local current expense appropriation" and "local current expense fund," when the distinction between the words "appropriation" and "fund" is the appropriate focus.

79. Act of July 18, 2003, ch. 423, § 3.1, 2003 N.C. Sess. Laws 1284, 1285 (codified as amended at N.C. GEN. STAT. § 115C-238.29H(b)) (emphasis added). This amendment to the local funding provisions made sense. Taxpayers are not likely to support an increase in their taxes to support schools in *other* taxpayers' communities. Thus, as incentive for taxpayers to support supplemental school taxes, the legislature made clear that revenue from supplemental school taxes would remain within the district paying the tax—even if some children in the district chose to attend school elsewhere. In other words, those who

The court's initial mix-and-match of words from different locations within chapter 115C, along with the legislature's implicit acceptance of that interpretive framework, set the stage for continued litigation between charter schools and local boards of education. Within three years of the *Delany* decision, a new set of charter school plaintiffs raised new questions about the types of funding included as "per pupil ... appropriations" under the charter school funding statute.[80] Six years after the decision in *Delany*, a new lawsuit, *Sugar Creek I*, reached the court of appeals.[81]

In *Sugar Creek I*, the charter school plaintiffs sought a per pupil portion of two additional sources of funding from local boards of education. First, they sought a per pupil portion of funding earmarked for Bright Beginnings, a special pre-school program serving a student population not served by the charter school plaintiffs.[82] Second, charter schools sought revenue from a High School Challenge program with restricted use for three specified underachieving high schools (none of which was a charter high school).[83] Neither of these funding sources was intended for all K–12 students in the county's traditional public schools on a general "per pupil" basis.[84] In requiring the local school board to provide the charter schools with a portion of these restricted revenues, the *Sugar Creek I* court relied on the *Delany* court's reasoning. *Sugar Creek I*

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pay the tax keep its benefit for schools in their community. Those who do not pay the tax do not get the benefit of the tax for schools in their community.

80. *See Sugar Creek I*, 188 N.C. App. 454, 456, 655 S.E.2d 850, 852 (2008) (recognizing that the Sugar Creek Charter School filed this lawsuit in May 2005, three years after publication of the *Delany* decision in May 2002).

81. *Id.* at 454, 655 S.E.2d at 850.

82. *Id.* at 456, 655 S.E.2d at 852.

83. *Id.*

84. *See, e.g.*, N.C. GEN. STAT. §§ 115C-423 to -514 (2011) (comprising the general budgeting provisions applicable to traditional public schools, including section 429(b), authorizing specific-use funding, and section 433, recognizing that local boards must satisfy certain requirements and in many cases obtain county commissioner approval before transferring special-use funding to some other purpose); *see also, e.g.*, *Sugar Creek I*, 188 N.C. App. at 456, 655 S.E.2d at 852 (recognizing that the "appropriation" to the Charlotte-Mecklenburg Public Schools at issue in the case included an "allocation *for the purpose* of funding a pre-kindergarten program called Bright Beginnings" and a grant "to assist students *at three under-achieving high schools*" (emphasis added)). When the court ordered that these restricted-use funds be shared, local boards could not share those particular dollars, which could be used solely for their designated purpose. Instead, local boards of education would have to take general "per pupil" funding in an equivalent amount to distribute to charter schools. This "extra" amount of general "per pupil" revenue transferred to charter schools in place of these restricted-use funds would reduce the general "per pupil" funding available to traditional public school students below the amount of general "per pupil" funding provided to charter students.

repeated that "the phrase 'local current expense *appropriation*' in the Charter School Funding Statute . . . is synonymous with the phrase 'local current expense *fund*' in the [SBFCA]."[85]

Although *Delany*'s reasoning may have flown under the radar of many in the public education community, *Sugar Creek I* got attention. The *Delany* resources, fines, forfeitures and supplemental taxes, were general resources "appropriated" by the boards of county commissioners for all public school children.[86] In contrast, the *Sugar Creek I* resources, pre-school funding and targeted High School Challenge funding, were not general resources appropriated for use by all public K–12 students. They were understood as earmarked for specific purposes not fulfilled by the charter schools.[87]

This factual difference in *Sugar Creek I*, as compared to *Delany*, clarified the imposition of the court's holding on local boards of education. The court held that special-purpose funds must be transferred from the accounts of local boards of education providing the services for which the funds were specifically authorized to the accounts of charter schools not providing these specific services. Thus, in determining whether a particular resource must be transferred from a local board to a charter school, *Sugar Creek I* made clear that the local board's method of accounting mattered more than the type of money under scrutiny.

Recognizing that the *Sugar Creek I* holding might create budgeting problems for local boards of education, the court hinted that local boards of education might utilize creative accounting practices to avoid the hardship of the *Sugar Creek I* holding. The court suggested that local boards of education set up "special" funds, rather than relying upon the local current expense fund, to avoid an obligation to transfer per pupil portions of restricted-use funds to

85. *Sugar Creek I*, 188 N.C. App. at 460, 655 S.E.2d at 854 (emphasis added).

86. *See supra* note 74 and accompanying text; *see also, e.g.*, Francine Delany New Sch. for Children v. Asheville City Bd. of Educ., 150 N.C. App. 338, 339, 563 S.E.2d 92, 93 (2002) (recognizing that revenue from fines and forfeitures and supplemental taxes was "included in the per pupil funding to non-charter public schools" even prior to the funding litigation at issue). *See generally* FINANCIAL POLICIES AND PROCEDURES MANUAL, 1997, *supra* note 52 (formalizing the financial policies and procedures to which local boards of education were required to comply throughout the charter school funding litigation examined in this Article).

87. *See Sugar Creek I*, 188 N.C. App. at 456, 655 S.E.2d at 852 (recognizing that the revenue sought by the charter high school plaintiff included an "allocation *for the purpose* of funding a pre-kindergarten program called Bright Beginnings" and a grant "to assist *the three [under-achieving] schools*" (emphasis added)).

charter schools.[88] In so doing, the court effectively created an affirmative accounting requirement where none existed previously. The court elevated the discretionary option provided in the SBFCA that "other funds *may* be required" to account for items outside the local current expense fund[89] into an absolute requirement for any funds that traditional public schools did not believe should be transferred to charter schools.[90] For example, the court explained that the local board must share Bright Beginnings pre-school resources only because the local board "failed" to "set up and maintain a separate special fund for the Bright Beginnings program."[91] Similarly, it reasoned that the High School Challenge resources at issue must be transferred to charter schools on a per pupil basis because the local board again "failed to set up the *required* separate special fund . . . [and] the High School Challenge money became part of the local current expense fund . . . [of which] Charter Schools were entitled to a *pro rata* share."[92]

Under the unstated implication of this reasoning, the local board could have avoided the funding transfer required in *Sugar Creek I* through use of the alternative accounting practice identified by the

88. Despite this accounting advice from the court, many local boards of education and the DPI continued to operate under and utilize the accounting practices critiqued by the court even after *Sugar Creek I*. *See, e.g.*, Thomas Jefferson Classical Acad. v. Rutherford Cnty. Bd. of Educ., __ N.C. App. __, __, 715 S.E.2d 625, 627 (2011) (providing an example of a local board, the Rutherford County Board of Education, subject to litigation for continued use of the DPI accounting guidelines after *Sugar Creek I*); *Sugar Creek II*, 195 N.C. App. 348, 349, 673 S.E.2d 667, 669 (2009) (providing another example of a local board, the Charlotte-Mecklenburg Board of Education, that continued to employ the DPI accounting guidelines subjecting itself to a second charter school funding lawsuit).

89. N.C. GEN. STAT. § 115C-426(c) (2009) (emphasis added) (providing that local boards "shall" utilize three specified funds, including the local current expense fund, and allowing that local boards "may," but are not required, to use other funds as well), *amended by* Current Operations and Capital Improvements Appropriations Act of 2010, ch. 31, § 7.17.(a), 2010 N.C. Sess. Laws 36, 65 (amending this portion of section 115C-426(c) to emphasize its non-mandatory nature and to expand the types of resources that may be placed in "other" funds).

90. *See Sugar Creek I*, 188 N.C. App. at 460, 655 S.E.2d at 855.

91. *Id.* Significantly, in reaching this conclusion, the court rendered mandatory a permissive statute in the SBFCA. The court of appeals stated that local boards were "required" to set up special funds (outside the local current expense fund) under section 115C-426(c). *Id.* This was not the case under the plain language of the statute, which stated that local boards "may . . . use[]" such other funds. N.C. GEN. STAT. § 115C-426(c) (2009), *amended by* Current Operations and Capital Improvements Appropriations Act of 2010, ch. 31, § 7.17 (a), 2010 N.C. Sess. Laws 36, 65. The statute did not require that local boards "shall" use these funds for special program revenue. This requirement was interpreted into the statute for the first time in the charter school funding cases examined in this Article.

92. *Sugar Creek I*, 188 N.C. App. at 463, 655 S.E.2d at 856 (emphasis added).

court.[93] Simply by creating a "special" fund to account for the Bright Beginnings pre-school revenue and High School Challenge resources, according to the court's analysis, the local board could have avoided transferring any of those moneys to charter schools.[94]

Ultimately, *Sugar Creek I*, like *Delany*, emphasized that the public's obligation to fund charter schools depends not upon the type of revenue designated for public charter schools' use, but instead on the process by which local boards of education account for any and all types of revenue in their budgets. According to the *Sugar Creek I* analysis, if local boards had managed their budgets through creation of "special funds," rather than through the local current expense fund, then local boards would not have been required to transfer any portion of the pre-school or High School Challenge revenue to charter schools.[95] In the end, *Sugar Creek I* sweepingly concluded that charter schools "are entitled to an amount equal to the per pupil

93. Of course, this suggestion by the court that the local boards made the funding bed in which they lie through their "failed" accounting practices is misleading and wrong for two reasons. First, although section 115C-426(c) permitted local boards to establish "other" funds at the time, nothing required use of such funds, and the DPI regulations required the funds at issue to be placed in the local current expense fund. The defendant local board was at the time in compliance with the DPI's accounting obligations for local boards of education in accounting for these funds in the local current expense fund. *See infra* notes 108–16 and accompanying text. Second, the creation of multiple "special" funds for purposes of avoiding transfer of resources to charter schools is unlikely to finally resolve the question of whether those newly-designated "special" resources must be transferred to charter schools. Instead, it is likely to create new litigation focused on whether funds may be properly placed in a special fund and avoid transfer to charter schools. In fact, the *Sugar Creek I* decision sets up this new phase of litigation by suggesting that the trial court properly held (after a fact-based consideration of the means through which the county commissioners allocated funds to the Charlotte-Mecklenburg Board of Education) that Bright Beginnings pre-school money was "special," but also suggesting (without deciding) that the High School Challenge resources may not be "special." *See Sugar Creek I*, 188 N.C. App. at 460–63, 655 S.E.2d at 854–56. Thus, savvy, new accounting measures are unlikely to resolve funding disputes or end the litigation cycle between charter schools and traditional public schools. *See infra* notes 146–162 and accompanying text. Nonetheless, a local board of education's *manner* of accounting, not the *type* of funding, now determined the public's local funding obligation to charter schools.

94. *See Sugar Creek I*, 188 N.C. App. at 460–63, 655 S.E.2d at 854–56.

95. The court's emphasis on form (or process) rather than substance (or type of funding) seems at odds with the statutory notion of "equal" funding for all public school students. By focusing on form, the court creates the likelihood that local boards in different counties could be required to share different funds with charter schools depending upon how each of the 115 school systems across the state *processes* its revenue.

amount of *all money* contained in the local current expense fund."[96] In this manner, *Sugar Creek I* broadened *Delany*'s effect.[97]

Armed with *Delany* and *Sugar Creek I*, charter schools returned to court in *Sugar Creek II* and sought equal per pupil amounts of every dollar in the Charlotte-Mecklenburg Board of Education's local current expense fund.[98] The charter schools sought a portion of the local board's fund balance funds (those funds that a local board of education "saves" through its own frugal spending over the course of a year), federal Hurricane Katrina relief funds, sales tax reimbursements from the local board's expenditures of its resources, pre-school program funding, donations from private individuals and organizations for specific programs and schools, the value of state textbooks, and other revenues.[99] The charter schools claimed entitlement to these funds under *Delany* and *Sugar Creek I* because the local board of education accounted for them pursuant to the SBFCA in the local current expense fund.[100]

The Charlotte-Mecklenburg Board of Education argued that even though it had accounted for these funds in its local current expense fund, it should not be required to transfer any portion of them to charter schools as "per pupil ... appropriations."[101] The Board of Education asserted not only that the resources now sought by the charter schools were not public appropriations available to all students on a per pupil basis, but also offered alternative substantive bases upon which each sought-after resource ought not be transferred

96. *Sugar Creek I*, 188 N.C. App. at 460, 655 S.E.2d at 854 (emphasis added).

97. Significantly, however, this decision also demonstrates that the court effectively shifted responsibility to local boards of education to determine what local funds qualify as the *type* of local funds to be shared with charter schools. Local boards of education make this determination when they decide the process through which they will account for all of their revenue in their budgets. At the time *Sugar Creek I* was decided, however, this posed a problem for local boards because state law and regulation required many non-sharable funds to be accounted for in the local current expense fund. *See supra* notes 49–60 and accompanying text and *infra* notes 116–22 and accompanying text.

98. *Sugar Creek II*, 195 N.C. App. 348, 349, 673 S.E.2d 667, 669 (2009). Charter schools raised challenges in other places, too. *See, e.g.*, Thomas Jefferson Classical Acad. v. Rutherford Cnty. Bd. of Educ., __ N.C. App. __, __, 715 S.E.2d 625, 632 (2011) (addressing the permissibility of a local board's "purported retroactive amendment to the ... budget shifting funds ... to avoid the holdings of this Court in *Delany* and *Sugar Creek I* and *II*"); Sugar Creek Charter Sch., Inc. v. State, __ N.C. App. __, __, 712 S.E.2d 730, 732 (2011) (addressing charter school access to capital outlay funds), *disc. rev. denied*, No. 347P11, 2012 N.C. LEXIS 526 (N.C. June 13, 2012).

99. *Sugar Creek II*, 195 N.C. App. at 358–62, 673 S.E.2d at 674–78.

100. *See id.* at 357–58, 673 S.E.2d at 674.

101. *See id.* at 358–62, 673 S.E.2d at 674–77.

from local board accounts to charter schools.[102] For example, the Board of Education argued that the charter school plaintiffs were not accepting or educating students relocated following Katrina and therefore were not qualified for federal Hurricane Katrina relief funds.[103] The school board also argued that the charter schools had no basis to claim a portion of donations from private individuals and organizations for specific programs and schools within the traditional public school system because the charter schools were authorized by statute to solicit and retain their own private donations (to which traditional public schools have no claim).[104]

In response, the court of appeals in *Sugar Creek II* once again repeated that the phrase "local current expense appropriation" in the charter school funding statute is synonymous with the phrase "local current expense fund" in the SBFCA.[105] And once again, it avoided a meaningful substantive analysis of whether the types of funds at issue were general K–12 appropriations for shared use by all public school students. Sidestepping the difficult substantive question, the court stated simply and with emphasis: "*[T]he Charter Schools are entitled to an amount equal to the per pupil amount of all money contained in the local current expense fund.*"[106]

The type of money contained in this fund became irrelevant to the determination at issue under these appellate decisions. As in *Sugar Creek I*, the *Sugar Creek II* court advised that "money made available to [the Charlotte-Mecklenburg Schools] by the Board [of County Commissioners] for special programs *shall* be deposited into funds specifically established for those special programs,"[107] not as otherwise provided by DPI Guidelines into the local current expense fund.[108]

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102. *See* Brief of Defendant-Appellant at 29–36, *Sugar Creek II*, 195 N.C. App. 348, 673 S.E.2d 667 (2009) (No. 08-516), 2008 N.C. App. Ct. Briefs LEXIS 729, at *36–43.

103. *Id.* at 32, 2008 N.C. App. Ct. Briefs LEXIS 729, at *38–39; *see also supra* note 38 and accompanying text (recognizing that charter schools may independently apply for and receive federal grant money for those federal programs fulfilled at the charter schools).

104. Brief of Defendant-Appellant, *supra* note 102 at 34–35, 2008 N.C. App. Ct. Briefs LEXIS 729, at *42; *see also* N.C. GEN. STAT. § 115C-238.29H(a) (2011) (authorizing charter schools to solicit private funding without sharing those funds with traditional public schools).

105. *Sugar Creek II*, 195 N.C. App. at 358, 673 S.E.2d at 674 (quoting *Sugar Creek I*, 188 N.C. App. 454, 459–60, 655 S.E.2d 850, 854 (2008)).

106. *Id.*

107. *Id.* at 357, 673 S.E.2d at 674 (quoting *Sugar Creek I*, 188 N.C. App. at 458, 655 S.E.2d at 854) (emphasis added).

108. *See generally* FINANCIAL POLICIES AND PROCEDURES MANUAL, 1997, *supra* note 52 (formalizing the financial policies and procedures with which local boards of

In reaching this holding, the *Sugar Creek II* court, like the *Delany* and *Sugar Creek I* courts before it, did not have the benefit of State Board of Education input and did not address the already-existing DPI requirements that local school boards account for a wide variety of funds, including funding types that are decidedly not per pupil appropriations, in the local current expense fund.[109] The DPI, in its then-effective Financial Policies and Procedures Manual, directed local boards of education to place each of the following in the local current expense fund at the time *Sugar Creek II* was decided:

- Privately-paid fees collected by local school boards for summer school, out-of-unit enrollment, and after-school-care programs;[110]
- Interest on the local school boards' own investments;[111]
- Revenue from the rental of local school boards' own property;[112]
- Contributions and donations made by private citizens to the local school boards;[113]
- Appropriated fund balances, which are revenues appropriated to local school boards in previous years that were saved by the local school board through their own efficient operation and from which charter schools received their per pupil share in previous years;[114]
- Indirect costs for which local school boards are reimbursed in exchange for their operation of federal grants and the Child Nutrition Fund[115]; and

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education complied throughout the charter school funding litigation described in this Article).

109. *See* N.C. DEP'T OF PUB. INSTRUCTION, BUSINESS RULES CHART OF ACCOUNTS (Mar. 17, 2009), *available at* http://www.ncpublicschools.org/docs/fbs/finance/reporting/coa/2009/businessrulescoaedits.pdf (stating that "LEAs are required" to comply with the standard chart of accounts). This court did, however, address for the first time the question of subject matter jurisdiction and reasoned, inter alia, that the state's courts "maintain jurisdiction to hear disputes between charter schools and their local boards of education . . . in keeping with prior opinions of this Court, though the specific issue of subject matter jurisdiction . . . was not raised in those opinions." *Sugar Creek II*, 195 N.C. App. at 356, 673 S.E.2d at 673.

110. FINANCIAL POLICIES AND PROCEDURES MANUAL, 1997, *supra* note 52, at 12-33, -34.

111. *Id.* at 18-10.

112. *Id.*

113. *Id.*

114. *Id.* at G-18, 18-10.

115. *Id.* at 18-15.

- "Textbook expenditures . . . includ[ing] the State Textbook Allocation even though no local agency receives cash for the textbooks."[116]

Without acknowledging these DPI guidelines, *Sugar Creek II* concluded that local boards of education were required by the charter school funding statute to distribute to charter schools an equal per pupil amount of *all* money contained in the local current expense fund—regardless of the type, source, or purpose of the money contained in that fund—except the "revenue line for State textbooks."[117]

After *Sugar Creek II*, local boards of education faced a difficult choice: Comply with the DPI's guidelines and account for a wide variety of revenues in the local current expense fund, absorbing the associated cost of transferring a portion of all such revenues to charter schools. Or disregard the DPI's authority and establish a series of "special" funds (as recommended by the *Sugar Creek* decisions) in which to deposit *types* of money not understood as general per pupil appropriations intended for shared use by all K–12 students.

The relevant statute of limitations magnified the significance of this choice. In *Sugar Creek I*, the court applied a three-year limitations period on charter schools' claims for per pupil portions of funds established as subject to transfer.[118] Applying that three-year period after the February 2009 *Sugar Creek II* decision, charter

116. *Id.* at 18-9. Curiously, the *Sugar Creek II* court carved a narrow exception to its general rule that "all money" in the local board's account must be shared with charter schools when it provided that the "revenue line for State textbooks" reflected in the local current expense fund need not be shared with charter schools because, according to the court of appeals, local boards "do not have any authority or means to convert this 'value' to their own purposes." 195 N.C. App. 348, 359–60, 673 S.E.2d 667, 675 (2009). Although in certain circumstances the line item for textbooks may be converted into value for the local board's purposes, that reality was not recognized in the court of appeals' analysis. *See, e.g.*, N.C. GEN. STAT. § 115C-105.25(b)(2) (2011) (allowing, in certain circumstances, the conversion of textbook credit into value for the "purchase of instructional supplies, instructional equipment, or other classroom materials").

117. *Sugar Creek II*, 195 N.C. App. at 359–60, 673 S.E.2d at 675 (stating with respect to textbook revenue that because "Defendants do not have any authority or means to convert this 'value' to their own purposes" it "does not constitute moneys contained in Defendants' local current expense fund that must be shared with Plaintiff [charter schools]"). The logic supporting the exception for textbook credits was not entirely sound, of course, as it rested on the inaccurate premise that the textbook credit cannot be converted into value. *See, e.g.*, § 115C-105.25(b)(2) (allowing in certain circumstances the transfer of textbook credit into value for the "purchase of instructional supplies, instructional equipment, or other classroom materials").

118. *Sugar Creek I*, 188 N.C. App. 454, 465, 655 S.E.2d 850, 857 (2008).

schools could recover a share of *all* revenue accounted for by a local board of education in the local board's local current expense fund going back three years.[119] In other words, as of *Sugar Creek II*'s publication, charter schools could seek and recover "*Sugar Creek II* funding" that had been budgeted (and often spent) three years earlier. In a time of already-significant economic hardship,[120] local boards would face considerable challenge in determining whether and how they might recover money in the present year's budget sufficient to satisfy these newly-defined claims for funds from prior years' budgets.

The DPI recognized this accounting and financial conundrum and provided prompt, though incomplete,[121] relief by beginning to resolve inconsistencies between *Sugar Creek II*'s accounting expectations and the DPI's accounting requirements for local boards of education. In relatively short order, the North Carolina General Assembly also acted to revise the SBFCA to recognize local boards' authority to account for their resources in the manner recommended by the court of appeals. While these actions resolved one battle in the litigation war between charter schools and traditional public schools over local funding, neither brought complete peace to the litigants.

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119. *See id.* at 465–66, 655 S.E.2d at 857–58.

120. *See, e.g.*, Lynn Bonner & Rob Christensen, *House Democrats Push Back on Education*, NEWS & OBSERVER (Raleigh), Feb. 25, 2011, at 3B, *available at* http://www.newsobserver.com/2011/02/25/1012537/house-democrats-push-back-on-education.html#storylink=misearch (discussing the concern of some North Carolina representatives that the 2011–2012 fiscal year education budget cuts were too large and would "devastate public education"); Jane Stancill, *Judge Issues No Ruling on Budget Cuts*, NEWS & OBSERVER (Raleigh), June 24, 2011, at 1B, *available at* http://www.newsobserver.com/2011/06/24/1296614/judge-issues-no-ruling-on-budget.html (recognizing that the North Carolina budget for the 2011–2012 fiscal year contains significant cuts to education and that a number of school systems are challenging those cuts as unconstitutional because the budget leaves them without the means to provide a sound basic education to their students); Adam Owens, *School Leaders Predict Bleak Future for Public Education*, WRAL.COM (June 14, 2010), www.wral.com.news/education/story/7783041 (discussing the perspectives of school superintendents on proposed educational budget cuts for the 2011–2012 fiscal year).

121. One particular gap in the relief merits mentioning here: the DPI could not revise the accounting obligations of local boards of education for the three previous years. Thus, the past-due *Sugar Creek II* funds that were required under state regulations to be accounted for in the local current expense fund could not be "recovered" through action by the DPI. *But see* Current Operations and Capital Improvements Appropriations Act of 2010, ch. 31, § 7.17.(b), 2010 N.C. Sess. Laws 36, 66 (allowing traditional school systems that did not fund charter schools under section 115C-238.29H(b) as it was interpreted in *Sugar Creek I* and *Sugar Creek II* to pay past-due amounts over a period of three years rather than all at once from the current year's budget).

II. EXAMINING THE DEPARTMENT OF PUBLIC INSTRUCTION'S AND THE GENERAL ASSEMBLY'S RESPONSES TO THE LEGAL LANDSCAPE AFTER *SUGAR CREEK II*

Sugar Creek II drew attention to the accounting and budgeting practices that were in place well before the General Assembly authorized creation of charter schools.[122] It also made continued compliance with the DPI's accounting requirements financially burdensome.[123] The basic financial burden arose from the decision's failure to reconcile its holding with the existing accounting guidelines. The DPI's accounting guidelines at the time obligated local boards to use the local current expense fund, occasionally referred to as Fund 2, not a "special" fund, for each of the moneys at issue in *Sugar Creek II*.[124] The *Sugar Creek II* decision required local boards to transfer a per pupil portion of all money in the local current expense fund to charter schools.[125] When restricted-use moneys for support of particular students (such as those displaced by Hurricane Katrina or those entitled to public pre-school) or privately-paid moneys (for summer school or after-school care), for example,[126] were placed in Fund 2 for accounting purposes as required by the DPI,[127] *Sugar Creek II* required that those moneys be transferred in part to charter schools.[128] Depletion of these restricted-use and privately-paid funds through transference of a portion of them to charter schools risked rendering operation of the special programs and services supported by them financially impractical—especially when the special programs and services operated on a tight budget. Alternatively, in cases where restricted-use funds could not be transferred to charter schools given the restrictions on the funds, local boards faced the possibility of disproportionately depleting the per pupil funds for their own general education students in order to transfer the required per pupil amounts of restricted or private funds to charter schools.[129]

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122. *See* N.C. GEN. STAT. § 115C-424 (2011) (recognizing that as of July 1, 1976—twenty years before the initial charter school legislation became law—the SBFCA became effective).

123. "[Local Education Agencies] are required to use" the DPI's accounting guidelines and to follow the DPI's chart of financial accounts in recording their finances. *See* N.C. DEP'T OF PUB. INSTRUCTION, *supra* note 109, at 1 (stating that "LEAs are required" to comply with the standard chart of accounts).

124. *See supra* notes 108–15 and accompanying text.

125. *See Sugar Creek II*, 195 N.C. App. 348, 357, 673 S.E.2d 667, 673–74 (2009).

126. *See id.* at 360–61, 673 S.E.2d at 676.

127. *See supra* notes 108–15 and accompanying text.

128. *Sugar Creek II*, 195 N.C. App. at 357, 673 S.E.2d at 673–74.

129. Thomas Jefferson Classical Acad. v. Rutherford Cnty. Bd. of Educ., __ N.C. App. __, __, 715 S.E.2d 625, 631 (2011) ("[W]e acknowledge that the inclusion of 'restricted

Given the significance of these realities, heightened by the three-year statute of limitations permitting charter schools to recover these funds going back three years,[130] the DPI needed to take action to reconcile local boards' regulatory accounting requirements with the court of appeals decision.

Within one month of *Sugar Creek II*'s publication, the DPI created a temporary, partial "fix" for local boards. On March 19, 2009, the DPI sent an email to local boards' finance officers identifying a newly-activated Fund 8—a fund for "*Other* Local Current Expense Funds"[131]—to account for some revenues previously accounted for in the original local current expense fund, Fund 2.[132] According to the March 19, 2009 email from the DPI, the Business Rules for Chart of Accounts Edits for Local Education Agencies ("LEAs") and Charter Schools had been revised to include Fund 8 edits, allowing local boards to begin using Fund 8 promptly.[133] The DPI explained that "Fund 8 [(the newly-activated fund)] is very similar to [F]und 2 [(the existing local current expense fund)]. The major difference between Fund 8 and Fund 2 is the type of funding that will be located within each fund . . . ."[134] In essence, the DPI created a new "other" local current expense fund and encouraged local school boards to modify their accounting practices as directed by the court of appeals to account for certain nontransferable funds in the new Fund 8, rather than in the original Fund 2.

Within nine months of the *Sugar Creek II* decision, the DPI formally introduced and fully established Fund 8 as a permanent fixture in the Chart of Accounts.[135] It also recharacterized Fund 8 as the "other restricted funds" fund, although it retained the name "other local current expense" fund on the revised Chart of

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funds' in the 'local current expense fund' will result in a larger per pupil appropriation to the charter school . . . .").

130. *See supra* notes 117–20 and accompanying text.

131. E-mail from Roxane L. Bernard, Fin. Reporting Coordinator, N.C. Dep't of Pub. Instruction, to Robyn Presley (March 19, 2009, 04:01 EST) (emphasis added) (on file with the *North Carolina Law Review*) (introducing Fund 8 to school system finance officers as the "Other Local Current Expense Fund" and recognizing that the DPI would "like the LEAs to be able to use this fund as soon as possible").

132. *Id.*

133. *Id.*

134. *Id.*

135. E-mail from Philip Price, Chief Fin. Officer, N.C. Dep't of Pub. Instruction, to School Finance Officers (Dec. 16, 2009, 04:03 EST) (on file with the *North Carolina Law Review*).

Accounts.[136] The DPI sent an email to local school finance officers on December 16, 2009, explaining:

> Establishment of Other Restricted Funds - Fund 8:
>
> Representatives from DPI and the Local Government Commission met last week to discuss the establishment of a fund into which local school systems may deposit monies designated for restricted purposes. This new fund, Fund 8, will allow LEAs to separately maintain funds that are restricted in purpose and not intended for the general K–12 population in the LEA. These are funds that may legitimately be kept separate from the local current expense fund.
>
> Examples of funds that may be placed in Fund 8 are:
>
> (a) State funds that are provided for a targeted non-K–12 constituency such as More-at-Four funds [pre-school programming];
>
> (b) Funds targeted for a specific, limited purpose, such as a trust fund for a specific school within the LEA [restricted-use funds, private payments for a particular purpose, or private donations for a particular purpose, for further example];
>
> (c) Federal or other funds not intended for the general K–12 instructional population, or a sub-group within that population, such as funds for a pilot program [federal grant funds];
>
> (d) Indirect cost, such as those associated with a federal grant that represent reimbursement for costs previously incurred by the LEA.
>
> The decision of *which funds may legitimately be placed in Fund 8 remains a local decision*, to be made after consulting with the LEA attorney if necessary.[137]

In other words, within nine months of the *Sugar Creek II* mandate, the DPI had taken steps to make local boards' compliance with that mandate more practical. The DPI firmly and formally

136. *See* N.C. DEP'T OF PUB. INSTRUCTION, *supra* note 109, at 2 (identifying Fund 8 as the "Other Local Current Expense" fund).

137. E-mail from Philip Price, Chief Fin. Officer, N.C. Dep't of Pub. Instruction, to School Finance Officers, *supra* note 135 (emphasis added) (on file with the *North Carolina Law Review*).

established a new fund into which it encouraged local boards of education to place special-use revenues that could not be allocated on a "per pupil" basis for the "general K–12 population."[138]

This new fund permitted local boards of education to remove nearly all local revenues, including nearly all of the resources that the *Sugar Creek I* and *Sugar Creek II* courts required the local boards to redistribute to charter schools, from the now less-significant local current expense fund.[139] With only a few small exceptions, most notably with respect to fund balance funds and interest income,[140] the DPI had redesigned its accounting requirements to reflect the court of appeals' accounting vision in the *Delany*, *Sugar Creek I*, and *Sugar Creek II* decisions.

Though the General Assembly did not respond to *Sugar Creek II* with the administrative expediency of the DPI, it did respond efficiently. On June 30, 2010, one year and four months after publication of the *Sugar Creek II* decision, the General Assembly approved a revision to the SBFCA to expressly authorize "other funds . . . to account for reimbursements, including . . . fees for actual costs, tuition, . . . sales tax refunds, gifts and grants restricted as to

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138. *Id.*

139. *See id.*

140. For example, fund balance funds remained difficult to account for properly under *Sugar Creek II* and the DPI requirements (though they were addressed in a subsequent amendment to the SBFCA. *See* The Current Operations and Capital Improvements Appropriations Act of 2010, ch. 31, § 7.17.(a), 2010 N.C. Sess. Laws 36, 65 (codified as amended at N.C. GEN. STAT. § 115C-426(c) (2011)). Fund balance funds are those that a local board of education "saves" through their own frugal spending over the course of the year. They are funds awarded to the local board of education, but not spent. To the extent that these funds are saved from the local board's general "per pupil . . . appropriation" in a particular year, the local board will have already transferred the charter school's portion of those funds to the charter school for that year. At the end of the year, when the local board has saved a portion of those funds to which it alone is entitled, those funds are accounted for, still, in the local current expense fund. This means that in the subsequent year, the charter school will "double dip" into that money and take a second helping out of the local board's savings, even though the charter school would have kept for itself 100% of any savings it generated out of its "per pupil . . . appropriation" from the prior year. *See, e.g.*, Thomas Jefferson Classical Acad. v. Rutherford Cnty. Bd. of Educ., __ N.C. App. __, __, 715 S.E.2d, 625, 631 (2011) (acknowledging that the court's interpretation of the charter school funding statute, particularly with respect to the requirement that "restricted funds" budgeted in the local current expense fund be shared with charter schools, "will result in a larger per pupil appropriation to the charter school" as compared to the traditional public school required to transfer those funds out of its accounts to the charter school); *Sugar Creek II*, 195 N.C. App. 348, 360, 655 S.E.2d 667, 675 (2009) (recognizing the argument by the local board that transferring fund balance funds would allow the plaintiff to "double dip," but rejecting it in favor of the charter school appellee's position that all money contained in the local current expense fund must be counted toward "equal" per pupil funding for charter schools).

use, trust funds, federal appropriations made directly to local school administrative units, funds received for pre-kindergarten programs, and special programs."[141] In this manner, the General Assembly reinforced the DPI's administrative action in establishing Fund 8, the "other" local current expense fund, for broad use and eliminated any question about legitimate use of that fund going forward.

Additionally, the General Assembly took care of the fund balance and interest income accounting problems that had not been resolved through the DPI's efforts. The General Assembly made clear that "double dipping" into these resources by charter schools was not permissible. The June 2010 revision to the SBFCA specifically stated "the appropriation or use of fund balance or interest income by a local school administrative unit shall not be construed as a local current expense appropriation," regardless of which fund is used to account for that appropriation or use.[142] Effectively nullifying one of the specific holdings in *Sugar Creek II*,[143] the new legislation clarified that even when these funds are accounted for in the local current expense *fund* pursuant to the SBFCA, they are not local current expense *appropriations* required for transfer on a per pupil basis to charter schools under the charter school funding statute.[144]

Together the court of appeals decisions in *Delany*, *Sugar Creek I*, and *Sugar Creek II*, along with the subsequent administrative action by the DPI and the 2010 amendments to the SBFCA, increased operational understanding of the legislature's expectations about local funding of charter schools. However, they also left in place a method of distributing that funding to charter schools that sets the stage for continued disagreement between charter schools and local boards of education about those funds.

It is now clear that all revenue—except fund balance or interest income,[145] textbook revenue,[146] and in some cases supplemental tax

141. Current Operations and Capital Improvements Appropriations Act of 2010, ch. 31, § 7.17.(a), 2010 N.C. Sess. Laws 36, 65 (codified as amended at N.C. GEN. STAT. § 115C-426(c)(3) (2011)).

142. *Id.*

143. *Sugar Creek II*, 195 N.C. App. at 360, 673 S.E.2d at 675.

144. Current Operations and Capital Improvements Appropriations Act of 2010, ch. 31, § 7.17.(a), 2010 N.C. Sess. Laws 36, 65 (codified as amended at N.C. GEN. STAT. § 115C-426(c) (2011)) (declining to specify how local boards of education must account for fund balance or interest income and establishing that under no circumstance shall "the appropriation or use of fund balance or interest income . . . be construed as a local current expense appropriation" as required for transfer under the charter school funding statute).

145. *Id.*

money[147]—contained in a local board of education's local current expense fund must be transferred in proportionate per pupil amounts to charter schools.[148] But it is also certain that local boards of education may account for many additional resources in "other" funds to avoid mandatory transfer.[149] It is less apparent where the line between the original local current expense fund and the new "other" funds may be drawn. For example, while both the DPI and the legislature provide that "special" funding may be accounted for in the "other" fund, neither defined what makes a program "special" such that revenue to support it may be accounted for outside the local current expense fund and avoid proportionate transfer to charter schools. Charter schools and local boards of education are likely to disagree about that definition.

III. ANALYZING THE FUTURE OF LOCAL FUNDING FOR CHARTER SCHOOLS AND PROPOSING LEGISLATIVE REFORM TO END THE CYCLE OF LITIGATION BETWEEN CHARTER SCHOOLS AND LOCAL BOARDS OF EDUCATION

North Carolina's charter school legislation set out to establish schools that would "operate independently" of local boards of education.[150] Under the current local funding structure, however, charter schools remain dependent upon local boards of education for their local public funding.[151] After the court of appeals' charter school-funding trilogy and the subsequent regulatory and legislative changes to the SBFCA, the base amount of local per pupil funding for charter schools may fluctuate depending upon how local boards of education account for "other" funds.

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146. *Sugar Creek II*, 195 N.C. App. at 359–60, 673 S.E.2d at 675.

147. N.C. GEN. STAT. § 115C-238.29H(b) (2011).

148. *See id.* §§ 115C-238.29H, 115C-426(c). Fund balance or interest income by a local board of education need not be transferred to a charter school even if it is accounted for in the local current expense fund. *See id.* § 115C-426(c). Supplemental tax revenue need not be transferred to an out-of-county charter school. *See id.* § 115C-328.29H(b).

149. *See id.* § 115C-426(c) (stating that "other funds may be used to account" for a variety of resources).

150. *See id.* § 115C-238.29A.

151. *See id.* § 115C-238.29H(b). This is not a critique of the 2010 amendments to the SBFCA. The North Carolina General Assembly acted quickly, properly, and out of necessity in passing the 2010 amendments to the SBFCA to mitigate the effects of the charter school funding trilogy (*Delany*, *Sugar Creek I*, and *Sugar Creek II*). Without these amendments, the budgets of traditional public school systems from which a sizeable number of children leave to attend charter schools were unsettled. However, this necessary legislation is unlikely to end the disagreements—or the litigation—between charter schools and local boards of education over local funding because their local funds remain comingled in local boards' accounts.

For example, if local boards of education place "other" funds in Fund 8, those funds now enjoy apparent protection against transfer to charter schools. On the other hand, if local boards place these funds in Fund 2, they must be shared with charter schools on a per pupil basis. Thus, when local boards err on the side of accounting for funds in Fund 2, charter schools receive greater local funding than they do when local boards err on the side of accounting for funds in Fund 8. This accounting reality gives charter schools a strong incentive to remain actively involved with the business practices of local boards of education.

Most significantly for purposes of this Article, however, continued comingling of charter schools' funding with traditional public schools' funding in local boards' accounts—in an environment in which these schools have competing interests in the same dollars—invites continued disagreement about placement of resources in Fund 8 or Fund 2 and the transfer of "proper" statutory sums to charter schools. This outcome, contrary to the legislative purpose for charter schools, binds charter schools and traditional public schools together rather than allowing either the freedom to "operate independently."[152]

There are two reasonable approaches to solving this ongoing conundrum.[153] First, the legislature could shift focus away from accounting decisions as determinative of the source of local revenue available for charter schools and establish a clear substantive definition of "per pupil . . . appropriations" under the charter school funding statute. Second, the legislature could remove local boards' responsibility over charter school funds entirely, requiring instead that county commissioners calculate per pupil funds for all public

152. *See id.* § 115C-238.29A (stating that North Carolina's charter schools would "operate independently of existing schools").

153. In revisiting the charter school legislation, the North Carolina General Assembly should also restore the State Board of Education's role as the entity with initial, primary jurisdiction over disputes between charter schools and local boards of education to avoid the inefficiency exposed through this Article. Had the initial funding disputes between charter schools and local boards of education been brought before the State Board of Education, instead of the courts, the State Board would have recognized the administrative accounting obligations imposed on local boards of education and likely would have taken them into consideration. This could have avoided the inefficiency of administrative and legislative "corrections" flowing from judicial decisions that did not take those accounting obligations into account. *See generally* John Dayton & Ann Dupre, *School Funding Litigation: Who's Winning the War?*, 57 VAND. L. REV. 2351, 2394 (2004) (questioning whether judges have the expertise "and authority to make . . . detailed [education] policy and administration decisions," leaving the administrative and legislative branches to reconcile policies with predicted judicial mandates).

schools (both charter and traditional) and distribute those funds directly to the deserving schools. This Article argues that the second option is optimal. While these options are not mutually exclusive, the latter, even on its own, is most likely to accomplish both the legislative goal of providing equal local funding for all public schools and the practical goal of reducing litigation between charter schools and traditional public schools.

The first option—obtaining a more precise legislative or judicial definition of those resources that qualify as "per pupil ... appropriations" for transfer by local boards to charter schools—will likely prove incapable of ending the litigation between charter schools and traditional public schools, so long as local funds remain comingled. Clarifying the now-critical line between Fund 2 and Fund 8 has proven difficult. Both the DPI and the General Assembly have tried. Each has delineated specified types of funds that may be placed in the non-transferring Fund 8.[154] Unfortunately, however, neither list is without ambiguity. For example, the SBFCA specifies that funds for "special programs" may be placed in the "other" fund outside Fund 2.[155] The statute does not, however, define "special programs." This lack of definition leaves room for disagreement over meaning. In fact, charter and traditional public schools have disagreed about the meaning of "special programs" before. In *Sugar Creek I* they disagreed about whether the High School Challenge program at issue in that case was a "special program."[156] In this context, although the parties raised questions about the meaning of this phrase, the court did not answer them.[157]

In *Sugar Creek I*, the court determined that establishing the meaning of "special program" was unnecessary because the local board of education had accounted for the High School Challenge funds at issue (whether special or not) in Fund 2, making them

154. *See, e.g.*, § 115C-426(c) (providing that local boards may use "other funds ... to account for reimbursements, including indirect costs, fees for actual costs, tuition, sales tax revenues ..., sales tax refunds, gifts and grants restricted as to use, trust funds, federal appropriations made directly to local school administrative units, funds received for prekindergarten programs, and special programs"); E-mail from Philip Price, Chief Fin. Officer, N.C. Dep't of Pub. Instruction, to School Finance Officers, *supra* note 135 (providing examples of revenues that could be accounted for in Fund 8).

155. *See* § 115C-426(c).

156. *Sugar Creek I*, 188 N.C. App. 454, 463, 655 S.E.2d 850, 856 (2008) (recognizing that the "trial court determined that the High School Challenge was not a special program," and declining to affirm that determination stating that it "need not address whether the trial court was correct in deciding that this was not a special program").

157. *See id.*

subject to transfer regardless of type.[158] In *Sugar Creek II*, the court hinted at a circular, accounting-based understanding of "special program," observing without explanation that "special program" revenue is that money "deposited into funds specifically established for those special programs."[159] This apparent uncertainty about the substantive meaning of "special program" exemplifies the likelihood of continued confusion about what might qualify as a "special program" in future cases. At a time when funding for education is shrinking across the state for all types of programs,[160] each classification is increasingly significant.

While it is true the DPI gave local boards discretion to determine whether to account for particular resources (including "special program" resources) in Fund 8,[161] charter schools need not accept the outcome of local boards' exercise of that discretion. Charter school acceptance is doubtful given that the amount of charter schools' local funding may be adversely affected by local board decisions and the court of appeals has interpreted the charter school funding statute to contain a private right of action to challenge funding decisions.[162] Thus, disagreement about local boards' discretionary use of Fund 8 could once again result in litigation about whether local boards are fulfilling their statutory obligation to transfer "equal" portions of "per pupil ... appropriations" to charter schools under the charter school funding statute.

When such litigation arises, of course, North Carolina's public school local funding dispute will have come full circle. Once again, local boards and charter schools will be asking the courts to resolve on a case-by-case basis the *types* of moneys that must be transferred to charter schools as "per pupil ... appropriations." The updated question for the court's consideration would be similar to the one it avoided in the initial funding trilogy: Is the money at issue a *type* that may be accounted for in Fund 8, where it may be retained exclusively for use by the local board of education, or is it a *type* that must be placed in the local current expense fund, Fund 2, where it must be shared by the local board with charter schools on a per pupil basis?

158. *See id.*

159. *Sugar Creek II*, 195 N.C. App. 348, 357, 673 S.E.2d 667, 674 (2009) (quoting *Sugar Creek I*, 188 N.C. App. at 458, 655 S.E.2d at 854).

160. *See supra* note 120 and accompanying text.

161. E-mail from Philip Price, Chief Fin. Officer, N.C. Dep't of Pub. Instruction, to School Finance Officers, *supra* note 135 (confirming the choice of "which funds may legitimately be placed in Fund 8 remains a local decision, to be made after consulting with the [local education agency] attorney if necessary").

162. *Sugar Creek II*, 195 N.C. App. at 357, 673 S.E.2d at 674.

Reflecting on this cycle of litigation, one cannot avoid considering whether this "new" question would be best resolved in a new way. The first lawsuit brought by a charter school against a local board of education over local funding was filed in 1999[163] and similar litigation over local funding remains active today.[164] The time and money spent on this ongoing litigation could be spent more constructively on educational goals.

Recognizing this, the current local funding challenge is to establish the means by which future litigation might be avoided through an evolution in the system of local funding so that both types of public schools comfortably accept funding with confidence that they have gotten their due: equal per pupil appropriations. This goal requires consideration of the second possible resolution to this local funding conundrum.

To end the cycle of litigation between charter schools and traditional public schools over "who gets what" from the local funding pot, the General Assembly should revisit the *manner* through which local funds are provided to charter schools. As the charter school funding legislation and its implementing regulations now provide, local boards of education must interpret the new statutes and regulations to determine—against their own interests—which revenue and how much revenue will be placed in the local current expense fund for transfer to charter schools on a proportionate, per pupil basis. As this Article illustrates, making this decision with consistency and clarity has proven elusive and controversial. Placing this administrative burden, with the risk of costly and time-consuming litigation, on local boards of education is not necessary.

Not all jurisdictions require local boards of education to establish and administer charter schools' local funding. In Washington, D.C., for example, the mayor establishes (with the assistance of the District of Columbia Council and specified school officials) the total local funding for charter schools and traditional schools and transfers those moneys directly to the deserving schools or school systems.[165] In the

163. *See* Francine Delany New Sch. for Children, Inc. v. Asheville City Bd. of Educ., 150 N.C. App. 338, 340, 563 S.E.2d 92, 94 (2002).

164. *See, e.g.*, Thomas Jefferson Classical Acad. v. Rutherford Cnty. Bd. of Educ., __ N.C. App. __, __, 715 S.E.2d 625, 627(2011); Sugar Creek Charter Sch., Inc. v. State, __ N.C. App. __, __, 712 S.E.2d 730, 732 (2011), *disc. rev. denied*, No. 347P11, 2012 N.C. LEXIS 526 (N.C. June 13, 2012).

165. D.C. CODE § 38-1804.01 (Supp. 2012) (stating that "the Mayor shall make annual payments" directly to charter schools rather than requiring that local boards of education manage funding for charter schools in their accounts). Washington, D.C. offers a solid model for municipal government organization, demonstrating that the model works even

District of Columbia, charter schools do not receive any funds that belong to traditional schools, and traditional schools do not receive any funds that belong to charter schools. There is no comingling.

North Carolina should consider a similar model and eliminate the statutory requirement that local boards of education serve as the intermediary in the distribution of local funding to charter schools. Removing local boards' responsibility to manage and transfer charter schools' local funding would reduce disputes between the two types of public schools, shift determination of appropriate "per pupil" appropriations to a disinterested entity, and serve the statutory interest in development of "independent" charter schools.

If North Carolina adopted the District of Columbia funding model, the mayor and city council or board of county commissioners, whichever entity provided local funding for the North Carolina school district, would distribute local funds directly to the school or school system operating within its jurisdiction and entitled to those funds. Local boards of education would benefit from this change because they would be relieved of the expense and obligation to manage charter schools' local funds. Charter schools would benefit as well because they would gain their statutorily-mandated independence from local boards. Under the District of Columbia model adapted to North Carolina's school systems, there would be no comingling of moneys for use by multiple local educational units. Without comingled funds, neither the charter schools nor the local boards of education would have a claim to money found in the other's accounts. This should reduce the litigation between the two types of schools over local funds.[166]

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in very large communities. Even in a community as large as Washington, D.C., no charter school funding litigation had been filed as of the date of this Article. *See generally* Bill Turque, *Gray Proposes Extra Funding for D.C. Charters*, WASH. POST, Mar. 29, 2012, http://www.washingtonpost.com/blogs/dc-schools-insider/post/grat-proposes-extra-funding-for-dc-charters/2012/03/29gIQAnXMijS_blog.html (discussing that after political pressure from charter school leaders, the mayor of D.C. provided supplemental funding to charter schools). Other jurisdictions establish charter school funding sums in contracts negotiated between charter schools and traditional public schools. *See, e.g.*, VA. CODE ANN. § 22.1-212.14 (Supp. 2012). This does not offer the same opportunity as the D.C. model to eliminate disputes between these traditional public schools and charter schools. The idea is that public educational institutions should not compete directly against one another for funds. Instead, they should advocate together for appropriate and sufficient per pupil amounts for all. They should independently make the substantive case for restricted purpose funds when they can. The county commissioners will be politically responsible for their decisions if they do not act in a manner consistent with the expectations of those who elected them.

166. As of this writing, there have been no reported cases in which a District of Columbia charter school has sued the traditional public schools over distribution of local

While any public school (charter or traditional) might find cause to dispute the decisions of the mayor, city council, or county commissioners with respect to distribution of local funds, these disputes could be resolved through the well-established administrative budget-dispute-resolution process in the SBFCA.[167] When either a local board of education or a charter school might disagree with the local appropriation provided by the county commissioners, either entity could meet and engage in a budget negotiation directly with the county commissioners. As the Act recognizes, these direct budget negotiations "promote greater mutual understanding of immediate and long-term budgetary issues" facing all public schools,[168] and they would encourage openness about local choices with respect to educational spending.

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funding. Like in D.C., litigation arising from the funding system of traditional public schools in North Carolina where funding is established and distributed directly between public schools and the source of their funds occurs infrequently due to the multitude of opportunities for communication between relevant parties (including the interested public) in the development of appropriation amounts. *See* N.C. GEN. STAT. § 115C-428 (2011) (establishing the process by which public schools prepare a draft of their formal budget); *Id.* § 115C-428 (providing that the draft budget be made available for public inspection and comment); *Id.* § 115C-429 (establishing that the draft budget be formally submitted for a funding appropriation decision by the source of the local funds requested in the budget after public inspection and comment). Additionally, an established process for resolution of disagreements as a prerequisite to litigation further decreases the likelihood of litigation. *See id.* § 115C-431. Litigation remains a possibility, of course, and it has occurred in a handful of instances between traditional public schools and the source of their funds in North Carolina, despite the participatory local funding process and established dispute resolution process. *See, e.g.*, Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs, 363 N.C. 500, 501–02, 681 S.E.2d 278, 280 (2009) (addressing a protracted school budget dispute after multiple mediation attempts failed); Cumberland Cty. Bd. of Educ. v. Cumberland Cty. Bd. of Comm'rs, 113 N.C. App. 164, 167, 438 S.E.2d 424, 426 (1993) (recognizing that "[t]he budgetary process requires harmonious cooperation" for the benefit of public schools and dismissing a budget appeal as moot under the then-existing statutory framework for resolution of such disputes).

167. *See* § 115C-431 (establishing the procedure for resolution of disputes between local boards of education and county commissioners over the appropriation of money by the county commissioners to local boards of education).

168. *See id.* § 115C-426.2 (recognizing that the statutorily-encouraged joint planning between local boards of education and boards of county commissioners will accomplish these goals). Charter schools, unlike local boards of education, are not required to comply with the majority of the provisions in chapter 115C. But, if charter schools were to elect to meet with the county commissioners to discuss budget issues, they would likely benefit from the "greater mutual understanding of immediate and long-term budgetary issues" that results from the dialogue. Charter schools would have a greater incentive to meet with county commissioners should the charter school funding legislation be revised to require county commissioners to send charter schools' local funding directly to charter schools rather than to local boards' accounts, even if not required to do so under current law.

Revision of the charter school funding statute to require the county commissioners, rather than local boards of education, to establish and distribute charter schools' local per pupil appropriation in this manner is consistent with the North Carolina Constitution and other statutory provisions on local funding of public schools in the state. Article IX, section 2 of the North Carolina Constitution provides that "[t]he General Assembly may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate."[169] North Carolina's charter schools, while governed by "private nonprofit corporation[s],"[170] are "public school[s],"[171] and children may attend without payment of tuition. As such, the state constitution authorizes the General Assembly to assign to local governments responsibility for their support.

The North Carolina Constitution also explains that when the General Assembly assigns this funding task to county governments, "[t]he governing boards of units of local government . . . may use local revenues to add to or supplement any public school or post-secondary program."[172] Thus, under the plain language of the North Carolina Constitution, the General Assembly could assign boards of county commissioners responsibility to establish the local per pupil appropriation for each charter school (as well as for each traditional public school system) and to disperse those appropriations to each school or school system directly,[173] while continuing to designate

169. N.C. CONST. art. IX, § 2, cl. 2.

170. N.C. GEN. STAT. § 115C-238.29E(b) (2011).

171. *Id.* § 115C-238.29E(a). This is true even though charter schools are largely "exempt from statutes and rules applicable to a local board of education." *Id.* § 115C-238.29E(f).

172. N.C. CONST. art. IX, § 2, cl. 2; *see also* Hughely v. Cloninger, 297 N.C. 86, 88, 253 S.E.2d 898, 900 (1979) (recognizing that although a county has no power to appropriate funds without authorization from the General Assembly, counties may appropriate funds once the General Assembly establishes "the purposes for which a county may appropriate funds, which funds shall be utilized, and the manner in which appropriations are to be made").

173. *Hughely*, 297 N.C. at 88, 253 S.E.2d at 900 ("The General Assembly determines the purposes for which a county may appropriate funds, which funds shall be utilized, and the manner in which appropriations are to be made."). Recognizing that a charter school may draw students from multiple counties across the state, the county commissioners or the equivalent in each county from which a charter school draws students would, under this proposal, appropriate funds to each charter school serving the county's students in amounts corresponding to the number of students drawn to the school from that county—not for the charter school's total enrollment unless a school's total enrollment is drawn from a single appropriating county. A charter school would amass operational funding for its total enrollment after compiling the per pupil funding received from all counties from which the charter school draws students. In this manner, the proposal offered in this

other revenue for special programs at particular schools. It is not constitutionally necessary for local boards of education to serve as intermediaries to transfer charter schools' local funding to the charter schools.

The North Carolina General Assembly has, in fact, already imposed a similar obligation on boards of county commissioners in counties in which there are multiple traditional public school systems serving students in the county.[174] "If there is more than one [traditional] local school administrative unit in a county, all appropriations *by the county* to the local current expense funds of the units . . . must be apportioned according to the membership of each unit."[175] In other words, the North Carolina legislature has already established that local governmental units must prevent comingling of local funds for traditional public school systems by requiring local governments to provide local funding directly to each board of education for each traditional public school system funded by the county.

In the context of funding for traditional public schools, the General Assembly even has specified the means through which the local governmental units ought to calculate per pupil appropriations, or "apportion[ments] according to . . . membership" as the concept is expressed in this statute. The statute explains that "[c]ounty appropriations are properly apportioned when the dollar amount obtained by dividing the amount so appropriated to each unit by the

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Article is analogous to the current local funding mechanism with one key distinction. Under the current funding structure, charter schools compile their total operational funding from those *local boards of education* that would have otherwise educated the charter school students. *See supra* note 50 and accompanying text. Under the proposal in this Article, however, charter schools would receive appropriations directly from the original source of those funds, the county commissioners or their equivalents, in the multiple counties from which the charter schools draw students.

174. *See* N.C. GEN. STAT. § 115C-430 (2011) (imposing apportionment obligations on county governments in situations where "there is more than one local school administrative unit in a county").

175. *Id.* (emphasis added). The ellipsis in the quote above deletes an exception for funding arising from "supplemental taxes levied less than countywide pursuant to a local act." *Id.* This exception is not relevant to the discussion at issue here, but it is worth noting that this exception is consistent with the current language of the charter school funding statute (as revised after *Delany* to nullify a portion of that decision) that does not permit supplemental tax revenue to be transferred to an out-of-district charter school. *See id.* § 115C-238.29H(b). It also merits mention that this statute already envisions a system in which the county apportions funds according to student membership. Accordingly, charter schools could be included in this calculation and the county could transfer funds to charter schools according to the membership drawn from the county in the same manner that it transfers funds to traditional public school systems according to their membership drawn from the county.

total membership of the unit is the same for each unit."[176] The statue defines "total membership" as "the unit's average daily membership for the budget year."[177]

With constitutional authority and an already-existing process by which local governments establish and distribute local per pupil appropriations to multiple educational units within the county, it would be no stretch for the General Assembly to require county governments to include charter schools in their calculations and distributions of per pupil appropriations. Rather than attributing charter school students to the local board of education that would otherwise educate those children in the absence of charter schools and requiring local boards to calculate and transfer the relevant funds to charter schools, the General Assembly can require county governments to include charter schools in their calculations and to distribute charter schools' funds directly to those schools.

In fact, there are advantages to modification of the state's charter school funding statute in this manner. Eliminating local board involvement in the calculation and provision of local funding to charter schools avoids the stain of self-interest associated with local boards' decisions in this context. Additionally, it would encourage all public schools to negotiate with popularly-elected county commissioners to achieve educational outcomes in the interests of the entire community. The commissioners' paramount priority ought to be to meet the needs of all their constituents and advance the mission of all the public schools in their districts, both charter and traditional, within the constraints of the resources available. Constituents could then express their satisfaction (or lack thereof) with the funding decisions of the county commissioners through the political process, ensuring that the expectations of the community are met over time.[178]

176. *Id.* § 115C-430.

177. *Id.* For the purposes of funding charter schools, this definition must recognize that "total membership" of a charter school seeking funds from a particular board of county commissioners or the equivalent would include only average daily membership derived from the county from which the funding originates. In other words, no county would provide a charter school with funding for students drawn from communities outside its borders.

178. While it is true that the statutory dispute resolution process between local boards of education and boards of county commissioners may ultimately end up in a court, *see id.* § 115C-431, there are ample, reasonable opportunities to resolve such disputes outside the courts first. The parties first meet together in a joint meeting prepared by a trained mediator in "a good-faith attempt to resolve the differences that have arisen between them." *Id.* § 115C-431(a). If that does not work, the parties may submit to a formal mediation with effective working groups prepared to resolve the dispute. *Id.* § 115C-431(b). If mediation is unsuccessful, then "[w]ithin five days after an announcement of no

CONCLUSION

Disagreements over local educational funding for North Carolina's charter schools continue in the state's legislature and courts. In February 2011, the General Assembly revisited the June 2010 revisions to the SBFCA to tweak local boards' accounting obligations and clarify the type of local funding required for transfer to charter schools.[179] No consensus emerged, however, on how to improve the existing statutory obligations with respect to these revenues, and no statutory changes were made in this context this session.[180] In North Carolina's courts, charter school funding litigation presses on. Most recently, the court of appeals resolved a dispute over a local board's use of the newly-established "other" local current expense fund to retroactively account for special use revenues[181] and another dispute over the state's distribution of capital outlay funding.[182]

These local funding disagreements—in the legislature, in courts, and among public educators across the state—are likely to continue until the legislature modifies the *means* through which local funds are transferred to charter schools. For this reason, and in the interest of maximizing resources available for the education of all public school children, it is time to consider eliminating local boards as "middle men" in the provision of local funding to charter schools. City councils or boards of county commissioners, rather than local boards of education, are better positioned to establish the practical meaning of "per pupil ... appropriations" each year through their budget choices as they distribute local funding either as equal per pupil

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agreement by the mediator, the local board of education may file an action in the superior court division of the General Court of Justice." *Id.* § 115C-431(c).

179. *See* S.B. 8, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011) (Version 3; Version Date: Feb. 22, 2011), *available at* http://www.ncga.state.nc.us/Sessions/2011/Bills/Senate/PDF/S8v3.pdf.

180. *See* Act of June 17, 2011, ch. 164, 2011 N.C. Sess. Laws 647 (containing the final approved version of Senate Bill 8 and no longer containing any revisions to the designated funds that may permissibly be accounted for in one of the "other" funds outside the local current expense fund).

181. Thomas Jefferson Classical Acad. v. Rutherford Cnty. Bd of Educ., __ N.C. App. __, __, 715 S.E.2d 625, 632 (2011).

182. Sugar Creek Charter Sch., Inc. v. State, __ N.C. App. __, __, 712 S.E.2d 730, 736 (2011). Given that the Supreme Court of North Carolina denied the charter school's petition for discretionary review in this capital outlay funding litigation, charter schools may continue to press their position on access to capital outlay funds in lower courts. *See* Sugar Creek Charter Sch., Inc. v. State, No. 347P11, 2012 N.C. LEXIS 526, at *1–2 (N.C. June 13, 2012).

appropriations directly to each eligible school or school system or as specially-earmarked local funding for particular purposes.

Should the legislature revisit the charter school funding statute to relieve local boards of education of their current obligation to receive, calculate, and transfer charter schools' local funds, both charter schools and local boards of education would benefit. In North Carolina, this change would make the provision of local funds to charter schools analogous to the provision of state funds to charter schools[183] as well as to the provision of local funds to traditional public school systems in those counties in which there are multiple traditional public school systems receiving equal proportionate shares of local public funding.[184] Additionally, this change would place responsibility for local charter school funding in an entity with the taxing authority and political responsibility necessary to secure the funds required for this public enterprise. Finally, without the distraction and expense of local funding litigation, public educators in both charter and traditional public schools could re-focus time and resources on the administration of the education under their control. Ideally, they could work together to secure the greatest possible benefits for each public school child in the community—regardless of whether the child attended a charter or traditional public school.

183. Charter schools in North Carolina have not challenged the provision of state funding under this manner of distribution.

184. *See* N.C. GEN. STAT. § 115C-430 (2011); *supra* notes 176–77 and accompanying text.