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## Charter School Funding Gap

Phillip Geheb and Spenser Owens

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# CHARTER SCHOOL FUNDING GAP

*Phillip Geheb\* & Spenser Owens\*\**

|  |     |
|--|-----|
| INTRODUCTION .....   | 73  |
| I. CHARTER SCHOOL MOVEMENT AND THE FUNDING GAP .....                     | 76  |
| A. The History and Legal Challenges to the Charter School Movement ..... | 76  |
| B. Money Matters: The Public Charter School Funding Gap .....            | 82  |
| II. NEGOTIATING FOR A CHARTER: AUTHORIZERS AND SCHOOL FORMS .....        | 88  |
| A. Charters and Authorizers.....   | 88  |
| B. Charter School Forms.....   | 91  |
| III. CHARTER SCHOOL FUNDING SOURCES.....                                 | 95  |
| A. Operations .....  | 96  |
| 1. Percentage of APPC .....  | 97  |
| 2. Administrative Fees and Impact Aid.....                               | 98  |
| 3. Funds Flow.....   | 100 |
| B. Start-Up Funding .....  | 102 |
| 1. Public Charter Schools Program .....                                  | 102 |
| 2. State Categorical Grants .....  | 103 |

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|   |     |
|---|-----|
| C. Facilities .....   | 104 |
| 1. Federal Programs .....   | 105 |
| 2. State Programs.....  | 108 |
| 3. Local Programs.....  | 110 |
| D. At-Risk Youth Programs .....   | 111 |
| E. Special Education.....   | 113 |
| F. Transportation.....  | 118 |
| IV. PROPOSALS.....  | 119 |
| A. Drafting Stronger Charter School Laws: Statutory<br>Language, Withholding Clauses, and Impact Aid..... | 120 |
| B. Improving Funds Flow: Local Education Agency<br>Status .....   | 122 |
| C. Strengthening the Role of Authorizers .....  | 124 |
| D. Categorical Grants: Start-Up and Facilities Funds .....  | 126 |
| E. Allow Local School Tax Revenues to Flow to Charter<br>Schools.....                                     | 126 |
| F. Litigate Under State Charter School Authorization<br>Laws and State Constitutions .....                | 127 |
| CONCLUSION.....   | 128 |

## INTRODUCTION

Charter schools are the fastest growing form of public education in the United States. Since the first charter school opened in Minneapolis, St. Paul in 1992, the charter school movement has grown to include forty-two states and the District of Columbia,<sup>1</sup> with over 6,004 charter schools educating 2.2 million students.<sup>2</sup> While school choice measures, such as vouchers and education tax credits, are often hotly debated,<sup>3</sup> the dramatic growth of charter schools over the past twenty-six years reflects a bipartisan acceptance of charter schools as

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1. CTR. FOR EDUC. REFORM, ANNUAL SURVEY OF AMERICA'S CHARTER SCHOOLS 2014 5 (Ted Rebarber & Alison C. Zgainer eds., 2014) [hereinafter ANNUAL SURVEY OF AMERICA'S CHARTER SCHOOLS].

2. *Id.*

3. See James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2063–85 (2002); Aaron Jay Saiger, *School Choice and States' Duty to Support "Public" Schools*, 48 B.C. L. REV. 909, 910–11 (2007). School choice programs permit parents to choose among a variety of non-tuition options if they are unsatisfied with the performance of their district public school. See Brian P. Marron, *The Final Reform: A Centrist Vision of School Choice*, 8 GEO. J. ON POVERTY L. & POL'Y 321, 327 (2001).

a viable and successful method for education reform in the United States.<sup>4</sup>

Notwithstanding this bipartisan support, there remains a powerful barrier to charter school formation and success: inequitable funding between charter schools and traditional public school.<sup>5</sup> The Center for Education Reform reports that charter schools receive on average roughly thirty percent less funding than local public schools.<sup>6</sup> In a 2005 report titled *Inequity's Next Frontier*, the Thomas B. Fordham Foundation found that charter schools in twenty-six out of twenty-seven communities received between \$1,000 to \$5,000 less per pupil than district-run public schools.<sup>7</sup> This funding disparity continued following the economic recession of 2007–2008, reaching roughly \$4,352 per pupil in 2011.<sup>8</sup> Coalitions of charter schools in several states have successfully sued local school districts under state education finance laws for inequitable distribution of federal and state funds.<sup>9</sup> Recent commentators also suggest that charter schools may have a claim under state constitutional “education clauses”<sup>10</sup> and the federal Equal Protection Clause.<sup>11</sup>

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4. During National Charter School Week, Presidents of the United States, from Presidents Clinton to Trump, have annually recognized the key role that charter schools play in empowering parents and systemically reforming education. See Press Release, President George W. Bush, National Charter Schools Week 2008 (May 2, 2008), <https://georgewbush-whitehouse.archives.gov/news/releases/2008/05/20080502-10.html> [<https://perma.cc/ADE7-XVD6>]; Proclamation 7297, President William J. Clinton, National Charter Schools Week 2000 (Apr. 28, 2000), <https://www.presidency.ucsb.edu/documents/proclamation-7297-national-charter-schools-week-2000> [<https://perma.cc/3E62-4VAD>]. In addition, through the 2008 presidential campaign, President Obama declared his support for expanding funding for charter schools. See David J. Hoff, *Obama Elected 44th President*, EDUC. WK. (Nov. 4, 2008), <https://www.edweek.org/ew/articles/2008/11/05/12obama.h28.html> [<https://perma.cc/49DC-NQLX>].

5. See generally CHESTER E. FINN, JR. ET AL., THOMAS B. FORDHAM INST., CHARTER SCHOOL FUNDING: INEQUITY'S NEXT FRONTIER 1 (2005) [hereinafter INEQUITY'S NEXT FRONTIER]; MEAGAN BATDORFF ET AL., UNIV. OF ARK. DEP'T OF EDUC. REFORM, CHARTER SCHOOL FUNDING: INEQUITY EXPANDS (2014) [hereinafter INEQUITY EXPANDS]; MEAGAN BATDORFF ET AL., BALL STATE UNIV., CHARTER SCHOOL FUNDING: INEQUITY PERSISTS (2010) [hereinafter INEQUITY PERSISTS].

6. See ANNUAL SURVEY OF AMERICA'S CHARTER SCHOOLS, *supra* note 1, at 9.

7. See INEQUITY'S NEXT FRONTIER, *supra* note 5, at VII.

8. See INEQUITY EXPANDS, *supra* note 5, at 8.

9. See, e.g., Balt. City Bd. of Sch. Comm'rs v. City Neighbors Charter Sch., 929 A.2d 113 (Md. 2007); Sugar Creek Charter Sch., Inc. v. Charlotte-Mecklenberg Bd. of Educ., 655 S.E.2d 850 (N.C. Ct. App. 2008); Foreman v. Chester-Upland Sch. Dist., 941 A.2d 108 (Pa. Commw. Ct. 2008), *cert. granted*, 951 A.2d 264 (Pa. 2008).

10. See Saiger, *supra* note 3, at 914; see, e.g., Robert J. Martin, *Charting the Court Challenges to Charter Schools*, 109 PENN ST. L. REV. 43, 45 (2004) (examining challenges to charter schools on state and federal constitutional grounds); Andrew

There are myriad sources of the charter school funding gap. Charter schools tend to have greater non-educational expenses related to transportation, facilities, and other administrative costs.<sup>12</sup> Using ambiguously worded state statutes, school districts have increasingly withheld funds to charter schools allowing for “administrative fees” or used their bargaining power to reduce funds and services to charter schools.<sup>13</sup> Unlike public schools, charter schools are often unable to access “top up” funds provided by local tax revenue and are barred from accessing public debt markets.<sup>14</sup> Additionally, in most states, charter schools cannot organize as their own Local Education Agency (LEA) and must therefore rely on the local school board, which could be hostile to the charter school, to appropriate funds.<sup>15</sup> Despite these challenges, charter schools flourished with the support of philanthropic foundations, corporate funding, and community support. However, donations, grants, and corporate funding are an unreliable source of revenue, and several charter school managers cite this reliance as a source of concern for charter school future operation and growth.<sup>16</sup> Lack of adequate funding and fiscal mismanagement are the primary reasons charter schools close — not failure to improve student achievement.<sup>17</sup>

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Broy, Comment, *Charter Schools and Education Reform: How State Constitutional Challenges Will Alter Charter School Legislation*, 79 N.C. L. REV. 493, 534 (2001).

11. See Greg Rubio, Note, *Surviving Rodriguez: The Viability of Federal Equal Protection Claims by Underfunded Charter Schools*, 2008 U. ILL. L. REV. 1643 (2008); Mark D. Evans, Comment, *An End to Federal Funding of For-Profit Charter Schools?*, 79 U. COLO. L. REV. 617 (2008). See also Learning Cmty. Charter Sch. v. Bd. of Educ. of Jersey City, No. A-5551-14T3, 2017 N.J. Super. Unpub. LEXIS 2276 (N.J. Super. Ct. App. Div. 2017) (state education clause challenge); J.D. *ex rel.* Scipio-Derrick v. Davy, 2 A.3d. 387 (N.J. Super. Ct. App. Div. 2010) (equal protection challenge).

12. See CTR. FOR EDUC. REFORM, SOLVING THE CHARTER SCHOOL FUNDING GAP (Shaka L.A. Mitchell & Jeanne Allen eds., 2005), <https://www.edreform.com/wp-content/uploads/2013/03/CER-CSFundingGap2005.pdf> [https://perma.cc/V8SL-9YKE] [hereinafter CHARTER SCHOOL FUNDING GAP].

13. *Id.*

14. INEQUITY’S NEXT FRONTIER, *supra* note 5, at vii, 3.

15. See CTR. FOR EDUC. REFORM, WHY CHARTER SCHOOLS SHOULD BE THEIR OWN INDEPENDENT LEA (2008), [https://www.edreform.com/wp-content/uploads/2013/03/CER\\_LEA\\_primer.pdf](https://www.edreform.com/wp-content/uploads/2013/03/CER_LEA_primer.pdf) [https://perma.cc/UR3Q-884J] [hereinafter CHARTER SCHOOL LEA].

16. See INEQUITY’S NEXT FRONTIER, *supra* note 5, at 2; INEQUITY EXPANDS, *supra* note 5, at 32.

17. ALISON CONSOLETTI, CTR. FOR EDUC. REFORM, THE STATE OF CHARTER SCHOOLS 8–12 (2011), [https://www.edreform.com/wp-content/uploads/2011/12/StateOfCharterSchools\\_CER\\_Dec2011-Web-1.pdf](https://www.edreform.com/wp-content/uploads/2011/12/StateOfCharterSchools_CER_Dec2011-Web-1.pdf) [https://perma.cc/P82T-B27E].

This Article examines the current public sources of charter school finance, explores the systemic reasons for the charter school funding gap, and proposes initiatives for narrowing this gap.<sup>18</sup> Part I gives a brief overview of the charter school movement and describes the charter school funding gap and its sources. Part II examines the process of charter school formation and maintains that authorizers and charter school models are determinative effects of funding disparities. Part III discusses the limited federal, state, and local education finance programs that charter schools are eligible for, and Part IV explores initiatives to narrow the charter school public funding gap.

## I. CHARTER SCHOOL MOVEMENT AND THE FUNDING GAP

Charter schools are a fairly recent phenomenon, gaining popularity in the early nineties and steadily gaining momentum in the public domain through the early 2000s and, in the present, surviving existential threats in the form of legal challenges and hostility from local, state, and federal officials. Ever present throughout the history of the charter school movement are conversations surrounding educational funding for public schooling generally, and, within such conversations, a debate as to whether charter schools ought to be funded at the same level as traditional public schools.

### A. The History and Legal Challenges to the Charter School Movement

Charter schools are independent, non-sectarian, tuition-free public schools that operate pursuant to a limited-duration charter, or contract, granted by a statutorily designated sponsoring organization (an “authorizer”).<sup>19</sup> Charter schools are a form of school choice program designed to give parents and students the ability to attend publicly funded alternative schools rather than traditional public schools.<sup>20</sup> A charter is a “performance contract” whereby a school receives “regulatory freedom in exchange for increased

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18. This Article will not examine judicial responses to the charter school funding gap. For a discussion of federal litigation of the charter school funding gap, see note 10. For a discussion of state litigation over charter schools, see note 9.

19. See Ryan & Heise, *supra* note 3, at 2074; Stephen D. Sugarman & Emlei M. Kuboyama, *Approving Charter Schools: The Gate-Keeper Function*, 53 ADMIN. L. REV. 869, 870 (2001).

20. See Ryan & Heise, *supra* note 3, at 2074.

accountability.”<sup>21</sup> The charter outlines the goals of the school, how student performance will be measured, what levels of achievement the school will attain, and the length of the charter (typically five years).<sup>22</sup> If a school succeeds in meeting its stated goals, it may be relieved from regulations concerning student recruitment, curriculum, budget, and staffing.<sup>23</sup> If at the end of the charter period the school fails to attract students and to abide by its governing rules, regulations, and procedures, violates other provisions of its charter, or generally fails to raise achievement among its students, it can be closed.<sup>24</sup>

The charter school concept appeals to the education reform community because it emphasizes choice, accountability, equity, and systematic change.<sup>25</sup> The relatively limited regulation that charter schools are subject to allows the schools to offer a wider array of educational programs for students, which can serve as new and innovative educational models, especially for at-risk youth.<sup>26</sup> Unlike traditional public or private schools, charter schools typically admit students on a lottery system whereby students who apply are admitted at random rather than through the results of a test, expanding student access to the schools.<sup>27</sup> The ability of an authorizer to close a school provides a strict mechanism for controlling the quality of the school — deficient schools that consistently fail to meet educational standards are removed from the educational marketplace. This quality control mechanism also provides a unique market exit strategy within the educational marketplace for schools by providing turnover for charter school managers and a means by which educational investors may “cash out” their investment.

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21. Judith Johnson & Alex Medler, *The Conceptual and Practical Development of Charter Schools*, 11 STAN. L. & POL’Y REV. 291, 291 (2000).

22. *Id.*; Kevin S. Huffman, *Charter Schools, Equal Protection Litigation, and the New School Reform Movement*, 73 N.Y.U. L. REV. 1290, 1291 (1998).

23. Johnson & Medler, *supra* note 21; *see also* Huffman, *supra* note 22.

24. Johnson & Medler, *supra* note 21.

25. *See id.* at 292.

26. *Id.*

27. *See* James Forman, Jr., *Do Charter Schools Threaten Public Education? Emerging Evidence from Fifteen Years of a Quasi-Market for Schooling*, 2007 U. ILL. L. REV. 839, 844–67 (2007) (reviewing charter school admissions policies and studies examining their effect).

The charter school movement developed in the early 1980s, in part as a response to a federal government study – *A Nation at Risk*<sup>28</sup> – that condemned the state of American public education. The charter school idea was also the product of several intersecting education reform principles that emphasized devolution of school control from central school districts to local schools and their communities, accountability based on measurable outcomes and universal academic standards, and the creation of an education marketplace that would empower parents through choice and improve schools through competition.<sup>29</sup> In 1988, former president of the American Federation of Teachers, Albert Shanker, first used the phrase “charter school” to describe publicly funded alternative independent schools.<sup>30</sup> Shanker contemplated an arrangement that would “enable any school or any group of teachers . . . within a school to develop a proposal for how they could better educate youngsters and then give them a ‘charter’ to implement the proposal.”<sup>31</sup>

The charter school movement is based on four core assumptions that emphasize choice, accountability, equity, and systemic change. First, that charter schools allow communities to create new public schools outside traditional structures. Second, charter schools strengthen accountability by giving sponsoring organizations the power to withdraw the charter based on measurable performance goals. Third, that charter schools maintain principles of equity and excellence in public education by providing tuition-free, non-sectarian education available to all students, including those with special needs. Finally, that charter schools drive broader change by serving as “educational laboratories” for innovative forms of teaching and by stimulating traditional schools to make positive changes.<sup>32</sup> These core assumptions are reflected in state enabling statutes whose

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28. See NAT’L COMM’N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983), [https://www.edreform.com/wp-content/uploads/2013/02/A\\_Nation\\_At\\_Risk\\_1983.pdf](https://www.edreform.com/wp-content/uploads/2013/02/A_Nation_At_Risk_1983.pdf) [<https://perma.cc/VX4V-47HL>].

29. See CHESTER E. FINN ET AL., *CHARTER SCHOOLS IN ACTION* 53–74 (2d ed. 2001); see generally JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA’S SCHOOLS* (1990) (arguing that government delivered education system is inefficient); ANDREW J. COULSON, *MARKET EDUCATION: THE UNKNOWN HISTORY* (1999).

30. Richard D. Kahlenberg & Halley Potter, *Restoring Shanker’s Vision for Charter Schools*, AM. EDUCATOR, Winter 2014–2015, at 4, <https://www.aft.org/sites/default/files/kahlenberg.pdf> [<https://perma.cc/7SRX-G84F>].

31. Albert Shanker, *Restructuring Our Schools*, 65 PEABODY J. EDUC. 88, 97–98 (1988).

32. See Johnson & Medler, *supra* note 21, at 292.



wording determines the vitality of the charter school movement in a particular state.<sup>33</sup>

The success of the charter school movement can be measured in several ways. First, state courts repeatedly approve of charter schools by rejecting challenges brought by teachers unions and local school boards, which often have claimed that charter schools are not public schools, so their funding violated public funds provisions of state constitutions.<sup>34</sup> Second, an increasing number of state and national studies are concluding that charter schools raise achievement, especially for socially and economically disadvantaged students.<sup>35</sup>

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33. For example, some states, such as Mississippi, place a cap on the number of charter schools that can open. Mississippi only allows fifteen charter schools to be formed in the state per year. MISS. CODE ANN. § 37-28-7. Arizona, by contrast, allows an unlimited number of charter schools and multiple authorizing agencies. See ARIZ. REV. STAT. § 15-181. Mississippi currently has one charter school in the state, while Arizona has 479. CTR. FOR EDUC. REFORM, CHARTER SCHOOL LAWS ACROSS THE STATES: RANKINGS AND SCORECARDS 3 (16th ed. 2015) [hereinafter CHARTER SCHOOL LAWS] (listing factors that make a charter school law strong). School caps have been heavily debated in the literature surrounding charter schools. See Andrew J. Rotherham, *Smart Charter School Caps: A Third Way on Charter School Growth*, in HOPES, FEARS, AND REALITY: A BALANCED LOOK AT AMERICAN CHARTER SCHOOLS IN 2007 65, 65-66 (Robin Lake ed., 2007), [https://www.crpe.org/sites/default/files/pub\\_hfr07\\_web\\_0.pdf](https://www.crpe.org/sites/default/files/pub_hfr07_web_0.pdf) [<https://perma.cc/BDD8-BYZU>]; LISA M. STULBERG, BEYOND THE BATTLE LINES: LESSONS FROM NEW YORK'S CHARTER CAPS FIGHT (2007), [https://www.crpe.org/sites/default/files/pub\\_ncsrp\\_battlelines\\_jun07\\_0.pdf](https://www.crpe.org/sites/default/files/pub_ncsrp_battlelines_jun07_0.pdf) [<https://perma.cc/KY8D-NA4D>]; Todd Ziebarth, *Peeling the Lid off State-Imposed Charter School Caps*, NAT'L ALLIANCE FOR PUB. CHARTER SCH. (Feb. 2007), [https://www.publiccharters.org/sites/default/files/migrated/wp-content/uploads/2014/01/file\\_Issue\\_Brief\\_3\\_09\\_07rgb\\_20110402T222331.pdf](https://www.publiccharters.org/sites/default/files/migrated/wp-content/uploads/2014/01/file_Issue_Brief_3_09_07rgb_20110402T222331.pdf) [<https://perma.cc/UFZ2-WNHM>].

34. See *State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Educ.*, 857 N.E.2d 1148 (Ohio 2006); *Bd. of Educ. No. 1 in the City and City of Denver v. Booth*, 984 P.2d 639 (Colo. 1999); *Council of Orgs. & Others for Educ. about Parochiaid, Inc. v. Engler*, 566 N.W.2d 208 (Mich. 1997); *Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 745 (Cal. Ct. App. 1999); *Utah Sch. Bds. Ass'n v. Utah State Bd. of Educ.*, 17 P.3d 1125 (Utah 2001); *In re Grant of Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 753 A.2d 687 (N.J. 2000).

35. See, e.g., Zachary Jason, *The Battle over Charter Schools*, HARV. ED. MAG. (Winter 2017), <https://www.gse.harvard.edu/news/ed/17/05/battle-over-charter-schools> [<https://perma.cc/6CD2-6YEJ>] (noting that, “[n]ationwide, low-income students, especially black and Hispanic, tend to benefit from charters the most”); CAROLINE HOXBY, *ACHIEVEMENT IN CHARTER SCHOOLS AND REGULAR PUBLIC SCHOOLS IN THE UNITED STATES: UNDERSTANDING THE DIFFERENCES 1* (2004), <https://www.innovations.harvard.edu/sites/default/files/4848.pdf> [<https://perma.cc/6B3K-BK2D>]; KEVIN BOOKER ET AL., *ACHIEVEMENT AND ATTAINMENT IN CHICAGO CHARTER SCHOOLS* (2008), [https://www.rand.org/pubs/technical\\_reports/TR585-1.html](https://www.rand.org/pubs/technical_reports/TR585-1.html) [<https://perma.cc/5Z2X-9WRL>]; U.S. DEP'T OF EDUC., *K-8 CHARTER SCHOOLS: CLOSING THE ACHIEVEMENT*

Third, surveys of public opinion toward charter schools show that a majority of people favor charter schools in their communities, including surveys conducted in the ten states where charter school statutes have not been adopted.<sup>36</sup> Additional studies also show an increased demand for charter schools among parents.<sup>37</sup> Finally, recent studies suggest that public school districts that coexist with charter schools for extended periods of time are positively influenced by the charter schools.<sup>38</sup> This indicates an increasing acceptance of charter schools as the primary driver of education reform in the United States.

Despite these successes, the charter school movement has been criticized on several grounds. Some commentators argue that increasing reliance on charter schools will encourage creeping privatization of public education.<sup>39</sup> Others argue that charter schools

GAP (2007), <http://www.ed.gov/admins/comm/choice/charterk-8/report.pdf> [<https://perma.cc/RSH6-KH24>].

36. See CTR. FOR EDUC. REFORM, AMERICA'S ATTITUDES TOWARD CHARTER SCHOOLS 5 (2008), [https://www.edreform.com/wp-content/uploads/2011/09/CST\\_poll20081.pdf](https://www.edreform.com/wp-content/uploads/2011/09/CST_poll20081.pdf) [<https://perma.cc/CET3-S36F>] (noting that more than 78% of adults support creating charter schools); William G. Howell et al., *The 2008 Education Next-PEPG Survey of Public Opinion*, 8 EDUC. NEXT 1, 3, 26 (2008), <https://www.educationnext.org/the-2008-education-nextpepg-survey-of-public-opinion/> [<https://perma.cc/6Y85-F3DF>].

37. BROOKE D. TERRY & MICHAEL ALEXANDER, TEX. PUB. POL'Y FOUND., POLICY PERSPECTIVE: CALCULATING THE DEMAND FOR CHARTER SCHOOLS (2008), <https://files.texaspolicy.com/uploads/2018/08/16092756/2008-08-PP14-charter-bt.pdf> [<https://perma.cc/K5U9-JHPA>]; Gary Larson, *Familiarity Breeds Content: As the Charter Movement Grows, So Does Public Approval*, NAT'L ALLIANCE FOR PUB. CHARTER SCH. (Feb. 2008), [https://www.publiccharters.org/sites/default/files/migrated/wp-content/uploads/2014/01/file\\_NAPCS\\_Familiarity\\_Breeds\\_Web\\_Version\\_2\\_20110402T222338.pdf](https://www.publiccharters.org/sites/default/files/migrated/wp-content/uploads/2014/01/file_NAPCS_Familiarity_Breeds_Web_Version_2_20110402T222338.pdf) [<https://perma.cc/JLC2-MM9D>].

38. See, e.g., Christine Campbell & Deborah Warnock, *Life After Charters: School Districts and Charter School Growth*, in HOPES, FEARS, & REALITY: A BALANCED LOOK AT AMERICAN CHARTER SCHOOLS IN 2006 11, 17–18 (Robin J. Lake & Paul T. Hill eds., 2006) (examining the Dayton School District and finding public school improvement with competition from charter schools); George M. Holmes et al., *Does School Choice Increase School Quality?* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 9683, 2003) (finding that the introduction of charter school in North Carolina affected the performance of traditional public schools even though students leaving the school district for charter schools were generally high performers).

39. See, e.g., Barbara Miner, *Keeping Public Schools Public: Exploding the Privatization Myth*, 21 RETHINKING SCHOOLS 14 (2006), [http://www.rethinkingschools.org/archive/21\\_01/expl211.shtml](http://www.rethinkingschools.org/archive/21_01/expl211.shtml) [<https://perma.cc/872C-FEH8>] (referring to incremental privatization of public functions); see also Richard Mora & Mary Christianakis, *Charter Schools, Market Capitalism, and Obama's Neo-Liberal Agenda*, 4 J. INQUIRY & ACTION EDUC. 93, 102 (2011).

are undoing the racial integration efforts of the 1970s and 1980s by admitting local students from a population that is homogenous.<sup>40</sup> Several states have attempted to address this issue by statutorily requiring racial balancing within charter schools.<sup>41</sup> Moreover, critics argue that because charter schools are under pressure to meet exacting state and federal accountability standards, they often “counsel out” students with disabilities or special needs, shifting the burden of high-cost, hard-to-educate students to public schools.<sup>42</sup> Some have also maintained that charter schools are guilty of “cream-skimming” — attracting motivated students with involved, supportive parents — while leaving public schools to educate the rest.<sup>43</sup>

Many of these criticisms are unwarranted. Several recent surveys indicate that the student body at most charter schools mirrors that in public schools of the host school district.<sup>44</sup> In fact, these studies show that because of parents’ frustrations with the public education system, charter schools attract even more socio-economically disadvantaged and special needs students than surrounding public schools.<sup>45</sup> Indeed, several state charter school laws direct authorizers to favor granting charters to schools that will serve at-risk youth.<sup>46</sup> In addition, some commentators have shown that charter schools prevent “cream-skimming” by relying on lottery admissions policies, such that the charter schools do not adversely affect neighboring public schools.<sup>47</sup> Lastly, it is of note that the aforementioned criticisms call into

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40. Andre Perry, *How Charter Schools Are Prolonging Segregation*, BROOKINGS INST. (Dec. 11, 2017), <https://www.brookings.edu/blog/the-avenue/2017/12/11/how-charter-schools-are-prolonging-segregation/> [<https://perma.cc/566V-A8UE>].

41. The constitutionality of such laws has yet to be tested under the Supreme Court’s recent decision in *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). See also Joseph O. Oluwole & Preston C. Green, III, *Charter Schools: Racial-Balancing Provisions and Parents Involved*, 61 ARK. L. REV. 1, 1 (2008); Julie F. Mead, *Conscious Use of Race as a Voluntary Means to Educational Ends in Elementary and Secondary Education: A Legal Argument Derived from Recent Judicial Decisions*, 8 MICH. J. RACE & L. 63 (2002).

42. See generally Clarisse C. Casanova, Note & Comment, *Charter Schools: A Step in the Right Direction or a Fourth Left Turn for Public Education?*, 7 WHITTIER J. CHILD & FAM. ADVOC. 231, 232 (2008) (arguing that charter school laws need to be reformed to account for special needs students).

43. See Forman, *supra* note 27, at 855–65 (reviewing charter school admissions studies).

44. *Id.*

45. *Id.*

46. F. HOWARD NELSON ET AL., *VENTURESOME CAPITAL: STATE CHARTER SCHOOL FINANCE SYSTEMS* 42 (2000) [hereinafter *VENTURESOME CAPITAL*] (providing examples of states, such as Colorado, Illinois, and Texas, that favor formation of charter schools for at-risk youth).

47. See Forman, *supra* note 27, at 865.

question whether charter schools are fair when compared with the progress of public schools — they do not impugn the success that charter schools themselves have had in raising student achievement.

In many ways, however, charter schools may also be victims of their own success. Charter schools educate roughly two percent of student public enrollment, but over twenty-five percent of charter school students reside in California, Arizona, Texas, and Washington, D.C.<sup>48</sup> Moreover, the Center for Education Reform, a charter school advocacy body, notes that many states place severe limitations on charter school funding and grant host school districts the power to withhold funds from charter schools.<sup>49</sup> On the federal level, charter schools are still subjected to the Every Student Succeeds Act,<sup>50</sup> which replaced No Child Left Behind, as well as other federal statutes and regulations. Like their public-school counterparts, charter schools must show improved educational outcomes through standardized testing. Additionally, charter schools tend to be located in large cities and attract a disproportionate number of poor, low-achieving, and African American students. All these practical hurdles stand in contrast with the movement's wide public exposure as an education reform model. This begs the question: What should the public at large, and parents with school-aged children in particular, truly expect from charter schools? To expect charter schools to outperform all public schools would be “nothing short of a miracle.”<sup>51</sup>

### B. Money Matters: The Public Charter School Funding Gap

In the background of the charter school movement's success are two interrelated problems endemic to any systemic educational reform: recruiting talented school leaders and teachers to produce quality charter schools, and receiving equal funding to traditional public schools for operational and facility expenses.<sup>52</sup> In the grand scheme of educational reform, it is true that teachers, and to some

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48. James E. Ryan, *Charter Schools and Public Education*, 4 STAN. J. C.R. & C.L. 393, 394 (2008) [hereinafter *Charter Schools and Public Education*].

49. See CHARTER SCHOOL FUNDING GAP, *supra* note 12, at 2 (stating that South Carolina school districts have chosen to withhold funding without challenge).

50. Every Student Succeeds Act of 2015, Pub. L. No. 114-95, 129 Stat. 1802. The purpose of ESSA, stated at § 1001 (20 U.S.C. § 6301), is to “provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps.”

51. *Charter Schools and Public Education*, *supra* note 48, at 399–400.

52. *Id.* at 400–01.

extent administrators, matter.<sup>53</sup> Yet the ability for charter schools to recruit teachers has led to the problem of teacher quality and academic improvement in the classroom, and this has led to the larger discussion of performance rates of charter schools in comparison to traditional public schools.<sup>54</sup> Unlike the overwhelmingly positive conversation regarding teachers, charter school finance programs have generated a heated debate on the importance of funding in education and how best to allocate scarce education-related dollars.<sup>55</sup>

Several studies have shown that charter schools receive less public education funding than their traditional public counterparts. Like public schools, charter schools receive funding from a mixture of federal, state, and local sources based on factors such as enrollment, student characteristics, and location.<sup>56</sup> In 2003, the American Federation of Teachers released a study of charter school finance entitled *Paying for the Vision*, which illustrates funding disparities between charter schools and traditional public schools ranging between \$549 and \$1,841 per pupil.<sup>57</sup> That same year, the RAND Corporation released a report on California charter schools, finding that “[c]harter schools have significantly lower participation than conventional public schools in categorical aid programs outside the block grant” and that “[t]he majority of charter schools are struggling

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53. *Id.* at 401; see Charles Clotfelter et al., *High-Poverty Schools and the Distribution of Teachers and Principals*, 85 N.C. L. REV. 1345, 1347–48 (2007) (discussing recent data on teacher and principal effectiveness on student success).

54. See *Charter Schools and Public Education*, *supra* note 48, at 402 (stating that charter schools may have an advantage in recruiting highly qualified teachers but data does not exist to support that this form of recruitment is the most effective way).

55. See, e.g., Craig Harris, *The Charter-vs.-District School Funding Debate: Who Gets More Money?*, ARIZ. REPUBLIC (July 12, 2018, 8:24 PM), <https://www.azcentral.com/story/news/local/arizona-education/2018/07/12/arizona-charter-schools-get-more-state-funding-pay-their-teachers-less/686900002/> [<https://perma.cc/A2E6-2YDY>]; Nic Garcia, *Charter School Funding Debate Takes Center Stage at Senate Education Committee*, CHALKBEAT (Feb. 9, 2017), <https://www.chalkbeat.org/posts/co/2017/02/09/charter-school-funding-debate-takes-center-stage-at-senate-education-committee/> [<https://perma.cc/BNE4-PFPZ>].

56. See generally *Charter Schools: Who Provides Charter Schools with Their Funding? 50-State Comparison*, EDUC. COMM’N OF THE STATES (Jan. 2018), <http://ecs.force.com/mbdata/mbquestNB2C?rep=CS1717> [<https://perma.cc/4NG6-BX68>] [hereinafter *50-State Comparison*]; *Charter Schools: How Is the Funding for a Charter School Determined?*, EDUC. COMM’N OF THE STATES (Jan. 2018), <http://ecs.force.com/mbdata/mbquestNB2C?rep=CS1716> [<https://perma.cc/XR28-4ZR7>]; VENTURESOME CAPITAL, *supra* note 46, at 1–7.

57. Eric Osberg, *Charter School Funding*, in CHARTER SCHOOLS AGAINST THE ODDS 46 (Paul T. Hill ed., 2006).

with acquiring and financing facilities.”<sup>58</sup> While these studies suggest that the gap between traditional and charter schools may be rather small, the methodology of these reports reflects what charter schools are *expected* to receive rather than calculating what charter schools *actually* receive.<sup>59</sup>

In a comprehensive study of charter school funding mentioned previously, *Inequity's Next Frontier*, the Thomas B. Fordham Foundation found disparities in actual revenue received by charter schools and public schools, between a \$245 per pupil (2.4% disparity) at its lowest and an estimated \$3,453 per pupil (39.5% disparity) at its highest.<sup>60</sup> The study examined sixteen states and the District of Columbia, encompassing 84% of the nation's charter school students during the 2002–2003 school year.<sup>61</sup> The greatest gaps were found in large urban school districts, where the average gap was \$2,256 per pupil (23.5%), while the range extended from \$766 (9.9%) per pupil in Albuquerque, New Mexico to \$3,369 (40.4%) per pupil in San Diego, California.<sup>62</sup> The effect of this funding gap on charter schools is substantial: In a charter school with 250 students enrolled and a funding gap of \$2,256 per pupil, the charter school is shortchanged \$564,000. While this data does not directly consider services and administrative fees that charter schools pay to local education agencies, the substantial funding gaps in most districts suggest that even a small change in funding would give charter schools greater access to operational funds they otherwise lack. Reports examining the funding disparities in Colorado, New York, Ohio, and Texas corroborate *Inequity's Next Frontier* findings, and show that funding disparities persist.<sup>63</sup> Additionally, studies subsequent to *Inequity's*

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58. Cathy Krop, *Charter School Finances and Facilities*, in CHARTER SCHOOL OPERATIONS AND PERFORMANCE: EVIDENCE FROM CALIFORNIA 113–14 (R. Zimmer et al. eds., 2003).

59. See Osberg, *supra* note 57, at 47.

60. *INEQUITY'S NEXT FRONTIER*, *supra* note 5, at 1.

61. *Id.*

62. *Id.* at 2–3.

63. See ROBIN JACOBOWITZ & JONATHAN S. GYURKO, CHARTER SCHOOL FUNDING IN NEW YORK: PERSPECTIVES ON PARITY WITH TRADITIONAL PUBLIC SCHOOLS 2 (2004), [https://steinhardt.nyu.edu/scmsAdmin/media/users/ggg5/Charter\\_School\\_Funding\\_in\\_New\\_York\\_-\\_Jacobowitz\\_Gyurko\\_Mar\\_2004.pdf](https://steinhardt.nyu.edu/scmsAdmin/media/users/ggg5/Charter_School_Funding_in_New_York_-_Jacobowitz_Gyurko_Mar_2004.pdf) [https://perma.cc/MFE6-BBJB] (noting that funding disparities exist between charter schools and traditional public schools at all levels of education and in both general and special education); COLO. LEAGUE OF CHARTER SCHOOLS, SHORTCHANGED CHARTERS: HOW FUNDING DISPARITIES HURT COLORADO'S CHARTER SCHOOLS 3, 9 (2008), [http://facilitiesinitiative.org/media/1231/shortchangedcharters\\_colorado.pdf](http://facilitiesinitiative.org/media/1231/shortchangedcharters_colorado.pdf) [https://perma.cc/5CZT-T4MZ]; *How Are Charters Funded?*, TEX. CHARTER SCH.

*Next Frontier*, published in 2010 and 2014, show that the funding disparity between traditional public schools and charter schools stands between 20% and 30%.<sup>64</sup> In each case, public schools receive more funding on a per-pupil basis than charter schools, creating a considerable funding gap between charter and public schools.

The funding gap can be partly attributed to two causes: the impact of claims made by early proponents of the charter school movement who downplayed the importance of funding, combined with the fears of education establishment advocates over having less money for public schools. Since the beginning of the charter school movement, advocates have argued that charter schools could do more with less — the charter school model allowed non-profit and for-profit management companies to streamline operations and cut out waste such as burdensome collective bargaining agreements or facilities service contracts.<sup>65</sup> Initially, charter schools were lauded not for student achievement, but for their ability to operate efficiently.<sup>66</sup> For-profit management companies like Edison Schools report of their ability to generate profit by taking public money and successfully running schools at lower costs.<sup>67</sup> Indeed, advocates for privatization of government services often cite charter schools as evidence that the private sector can provide services, such as public education, more efficiently than the government could.<sup>68</sup> These arguments were

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ASS'N, <http://www.txcharterschools.org/what-is-a-charter-school/how-are-charters-funded/> [https://perma.cc/Q46G-SKJW]. See also *Myths and Facts*, OHIO ALL. FOR PUB. CHARTER SCH., <http://oapcs.org/myths-and-facts/> [https://perma.cc/5ZM7-8EEN].

64. INEQUITY PERSISTS, *supra* note 5, at i (reporting on a subsequent study to INEQUITY'S NEXT FRONTIER, which revealed consistent findings using data from fiscal year 2006–2007); INEQUITY EXPANDS, *supra* note 5, at 5 (reporting consistent findings using data from fiscal year 2010–2011).

65. See, e.g., Corey A. DeAngelis & Ben DeGrow, *Charters Do More with Less*, DETROIT NEWS (Feb. 7, 2018), <https://www.detroitnews.com/story/opinion/2018/02/07/charters-less/110209770/> [https://perma.cc/UT95-2BMA]; CTR. FOR EDUC. REFORM, CHARTER SCHOOLS: TODAY, CHANGING THE FACE OF AMERICAN EDUCATION, STATISTICS, STORIES, AND INSIGHTS 7 (Anna Varghese Marcucio et al. eds., 2004); *Charter Schools: Finding out the Facts*, CTR. FOR PUBLIC EDUC. (Mar. 2010), <http://centerforpubliceducation.org/research/charter-schools-finding-out-facts-0> [https://perma.cc/74GR-A9DV].

66. See Chester E. Finn, Jr. et al., *Where Did They Come from?*, in CHARTER SCHOOLS IN ACTION: REVIEWING PUBLIC EDUCATION 53, 67–68 (2000).

67. See CTR. FOR EDUC. REFORM, *Charter Schools: Today, Changing the Face of American Education, Statistics, Stories, and Insights* 7 (Anna Varghese Marcucio et al. eds., 2004).

68. Sandra Vergari, *The Politics of Charter Schools*, 21 EDUC. POL'Y 15, 17 (2007).

bolstered by studies dating back to James Coleman's famous report, *Equality and Equal Education*, which found that student body characteristics exert greater influence on academic achievement than external inputs such as funding.<sup>69</sup> In short, the early charter school movement was sold on the premise that funding played a minimal role in promoting student achievement, and that innovative educational programs, teachers, and student body composition were primarily responsible for diminishing student risk factors.<sup>70</sup>

Simultaneously, education establishment advocates, local school boards, and teacher unions argued that funding for public schools mattered and that charter schools threatened to take desperately needed funds away from public schools.<sup>71</sup> Moreover, education establishment advocates maintained that public schools must educate every child, unlike charter schools that encourage high-cost students not to enroll or can simply drop them under the claim that they do not meet school specific criteria.<sup>72</sup> This practice, the argument goes, drives a disproportionate burden of high-cost students to public school districts, who must bear the added costs to provide special services that exceed state and federal aid.

There is a third cause of the funding gap that is important to consider — that education finance politics at the state and local level generally disfavor charter schools. Indeed, funding disparities between charter and public schools tend to be the greatest in states that rely primarily on local funding for education.<sup>73</sup> Some states attempt to offset this by denying access to local funds and apportioning larger amounts of state aid to charter schools; however, this often does not completely fill the gap and leaves charter schools

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69. See JAMES S. COLEMAN ET AL., *EQUALITY OF EDUCATIONAL OPPORTUNITY* 22, 29 (1966) (finding school environment (for example, integration) had a more influential effect on African-American educational achievement than facilities and curriculum. For a more modern take on this argument, see Eric Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423 (1991)).

70. See COLEMAN ET AL., *supra* note 69, at 22; James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 286–87, 291 (1999) [hereinafter *Schools, Race, and Money*].

71. See Matthew Arkin & Bryan C. Hassel, *The Bottom Line: Six Myths About the Financial Impact of Public Charter Schools*, NAT'L ALLIANCE FOR PUB. CHARTER SCHS. ISSUE BRIEF 1 (2007), [https://www.publiccharters.org/sites/default/files/migrated/wp-content/uploads/2014/01/Financial\\_Impact\\_of\\_Public\\_Charter\\_Schools\\_Brief\\_20110402T222342.pdf](https://www.publiccharters.org/sites/default/files/migrated/wp-content/uploads/2014/01/Financial_Impact_of_Public_Charter_Schools_Brief_20110402T222342.pdf) [https://perma.cc/2P6T-LWYT].

72. See Forman, *supra* note 27, at 840, 852.

73. Osberg, *supra* note 57, at 55–56.



vulnerable to state-level funding cuts.<sup>74</sup> The combined effect of the three reasons for the funding gap — charter school advocates arguing they can use funds more effectively and efficiently, public school establishment advocates urging that charter schools divert needed funds away from public schools, and anti-charter state and local education finance politics — result in state statutes that legally cement unequal funding schemes.<sup>75</sup> Thus, charter schools often fail simply because they are unable to finance basic educational programs.<sup>76</sup>

This has proven to be tremendously problematic. Despite early claims that funding does not matter, there is now data that suggests funding can affect student achievement, particularly for charter schools serving at-risk youth.<sup>77</sup> Charter schools, by and large, educate the same student population as public schools,<sup>78</sup> and in some districts they serve a disproportionate number of at-risk and special needs students. Allocating less funding to charter schools places them on unequal footing with traditional public schools, and subject charter schools to greater risk of failure should their alternative sources of funding run dry.<sup>79</sup> Moreover, studies have shown that, rather than decrease the amount of funds available to school districts, charter schools effectively increase public funds and increase overall community investment in public education through additional public and private donations.<sup>80</sup> Thus, there is an increasing consensus that

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74. INEQUITY'S NEXT FRONTIER, *supra* note 5, at 14; *see also* INEQUITY EXPANDS, *supra* note 5, at 23 (stating that charter schools face greater impact than district schools when state and local funds are cut).

75. *See* Vergari, *supra* note 68, at 22–24, 26.

76. *See* Arkin & Hassel, *supra* note 71, at 7.

77. *See Schools, Race, and Money*, *supra* note 70, at 285, 292, 296 (stating that disadvantaged youth cost more to educate, as they require additional educational programs and non-academic services. However, expenditures alone will not increase student performance. The greatest influence on achievement is student body composition.).

78. *See* Bruno V. Manno, *The Case Against Charter Schools: A Proponent Responds to the 10 Most Common Complaints About the Charter Movement*, AM. ASS'N OF SCH. ADM'RS, <http://www.aasa.org/SchoolAdministratorArticle.aspx?id=10850> [https://perma.cc/LJ34-ZJGY].

79. *Charter Schools and Public Education*, *supra* note 48, at 400–01 (noting that it is ironic that conservative think tanks, such as the Thomas B. Fordham Foundation, are now arguing that funding matters, given their traditional argument in school finance litigation that money is unrelated to student achievement).

80. *See, e.g.*, Arkin & Hassel, *supra* note 71, at 1–2 (stating that successful charter schools have the positive effects of improving local communities and increasingly cover education expenditures through private donations).

in order for charter schools to effectively compete and pursue innovative educational, management, and financial programs, they must be placed on equal footing with public schools and receive equal funding.

## II. NEGOTIATING FOR A CHARTER: AUTHORIZERS AND SCHOOL FORMS

To better understand the charter school funding gap, an analysis of the sources of revenue is needed. Parts II and III examine the charter approval process and charter school revenue sources. Part II describes the negotiation process and the inherently disadvantageous bargaining position charter schools find themselves in when applying for a charter, and how that affects their funding. Part III describes the most resource intensive activities of charter schools — operations, start-up funding, facilities, special education, at-risk youth programs, and transportation — and discusses different state approaches to charter school funding. These Parts provide a foundation for the state and local initiatives proposed in Part IV.

### A. Charters and Authorizers

Authorizers perform an essential “gate-keeping” function for the state. They decide which schools receive charters, enforce the terms of those charters, and evaluate whether the school can retain the charter after its expiration.<sup>81</sup> Authorizers also act as the bridge between the regulatory authority of the state and unregulated forms of education, such as private religious schools.<sup>82</sup> State statutes designate various kinds of authorizers, including local education agencies, the state education agency, specially created state charter school agencies, post-secondary institutions, and, in a small number of states, local elected officials.<sup>83</sup> The majority of states only give chartering authority to the local school district,<sup>84</sup> but states with

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81. Sugarman & Kuboyama, *supra* note 19, at 870.

82. *See id.* at 878. For an example of a state in which a local school board’s approval is required, see WYO. STAT. ANN. § 21-3-305(a) (2018). For an example of a state in which the state education agency acts as a statewide authorizer, see N.H. REV. STAT. ANN. § 194-B:3 (2018), and for an example of a specially created state charter school agency, see MISS. CODE ANN. §§ 37-28-5(c), -7(1) (2018). Michigan is one state in which post-secondary institutions, such as public universities, act as authorizers. MICH. COMP. LAWS ANN. § 380.501(2)(a)(iv) (2018). A mayor of a city in which a school district is located may also be an authorizer in Ohio. *See* OHIO REV. CODE ANN. § 3311.86(B) (LexisNexis 2018).

83. Sugarman & Kuboyama, *supra* note 19, at 880–82.

84. *See id.* at 884.

multiple authorizers tend to have the most robust charter school programs in terms of efficiency and quality.<sup>85</sup>

Generally, charter applicants must submit proposals to an authorizer.<sup>86</sup> Authorizers often publish guidelines with information regarding criteria for selecting initial applications, and several districts have offered workshops to help would-be applicants.<sup>87</sup> Once an applicant has passed an initial screening, the authorizer usually requests a more detailed proposal, which is then subjected to an intense qualitative screening in which the authorizer retains full discretion to reject the application.<sup>88</sup> The criteria for charter approval varies widely from state to state, in large part due to the vagueness of authorizing statutes.<sup>89</sup> If a charter is denied or not renewed, some states provide for an administrative appeals process that may, in turn, be appealed in state court.<sup>90</sup>

Authorizers play a key role in the success of a charter school. Through their application, renewal, and closure decisions, authorizers ensure that charter schools remain autonomous, while holding them accountable to federal and state education progress goals as well as the terms of the charter. Authorizers know their schools well, provide support for struggling programs, and effectively act as a “portfolio manager” to attract a diverse set of charter school applicants.<sup>91</sup> State education agencies could serve in this capacity as

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85. See CHARTER SCHOOL LAWS, *supra* note 33, at 3–4, 6.

86. See, e.g., ARIZ. REV. STAT. ANN. § 15-183(A) (2018).

87. See, e.g., N.H. DEP’T OF EDUC., CHARTER SCHOOL APPLICATION GUIDELINES (Mar. 2012), [https://www.education.nh.gov/instruction/school\\_improve/charter/documents/csoapp\\_guidelines\\_2012.pdf](https://www.education.nh.gov/instruction/school_improve/charter/documents/csoapp_guidelines_2012.pdf) [<https://perma.cc/HK8S-63CQ>]; Sugarman & Kuboyama, *supra* note 19, at 891.

88. Sugarman & Kuboyama, *supra* note 19, at 889–90 (describing Massachusetts’s application process).

89. See *id.* at 893–94 (discussing the conflict between state and local governments in deciding charter school approval criteria and the different values that such conflicts are fought over).

90. See, e.g., *James Acad. of Excellence v. Dorchester Cty. Sch. Dist. Two*, 657 S.E.2d 469, 471 (S.C. 2008); *Sch. Bd. of Volusia Cty. v. Acads. of Excellence, Inc.*, 974 So. 2d 1186, 1187 (Fla. Dist. Ct. App. 2008) (affirming reversal of denial of charter school application by Department of Education); *Cnty. Serv. Leadership Dev. Charter Sch. v. Pittsburgh Sch. Dist.*, 34 A.3d 919, 920 (Pa. Commw. Ct. 2012) (requiring state charter school appeal board to articulate deficiencies in charter school application); see also *In re Proposed Quest Acad., Charter Sch. of Montclair Founders Grp.*, 2014 WL 7671578, at \*1 (N.J. Super. Ct. App. Div. Jan. 26, 2015) (reviewing the fifth denial of a charter school application).

91. Katherine Destler, *Charter Authorizing: It’s a Dirty Job, but Somebody’s Got to Do It*, in HOPES, FEARS, & REALITY: A BALANCED LOOK AT AMERICAN CHARTER SCHOOLS IN 2006 49, 55, 57 (Robin J. Lake & Paul T. Hill eds., 2006).

well, but studies show that creating a competitive market for authorizing entities generates better schools with closer oversight, promoting investment from the authorizer, the charter school itself, and the community that the school serves.<sup>92</sup>

By contrast, local school boards generally do not make good authorizers because of the influence of local politics, inadequate infrastructure development, and their tendency to stress compliance-based accountability.<sup>93</sup> Further, public school districts cannot successfully act as authorizers because they have an inherent conflict of interest with charter schools — public schools directly compete with charter schools for enrollment and funding. There is a growing trend to open up the field of authorizers to alternative entities, such as independent charter school boards, universities or colleges, state boards, local mayors, city councils, non-profit organizations, and regional educational entities.<sup>94</sup> Such entities not only avoid the inherent conflict of interest between public school districts and charter schools, they can also stimulate beneficial competition in the authorizer field, thereby encouraging experimentation in charter authorizing and providing incentives for traditional public school districts to improve.<sup>95</sup> A mixture of diverse authorizers may thus not only improve the function of charter schools themselves, but also accelerate systemic reforms in public school governance.<sup>96</sup>

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92. BRYAN HASSEL ET AL., ECS ISSUE BRIEF: A STATE POLICYMAKER'S GUIDE TO ALTERNATIVE AUTHORIZERS OF CHARTER SCHOOLS (Sept. 2005), <https://files.eric.ed.gov/fulltext/ED489327.pdf> [<https://perma.cc/FDD9-TNRG>]; see also Marc J. Holley et al., *Competition with Charters Motivates Districts*, EDUC. NEXT (2013), <https://www.educationnext.org/competition-with-charters-motivates-districts/> [<https://perma.cc/4JG6-ABAG>].

93. LOUANN BIERLEIN PALMER & REBECCA GAU, CHARTER SCHOOL AUTHORIZING: ARE STATES MAKING THE GRADE? 1 (2003); see also U.S. GOV'T ACCOUNTABILITY OFFICE, D.C. CHARTER SCHOOLS: STRENGTHENING MONITORING AND PROCESS WHEN SCHOOLS CLOSE COULD IMPROVE ACCOUNTABILITY AND EASE STUDENT TRANSITIONS 3–4 (2005) (finding that the D.C. Public Charter School Board was more effective than the D.C. Public School Board at monitoring charter schools in the District of Columbia).

94. HASSEL ET AL., *supra* note 92, at 1–8 (evaluating different charter school authorizers); see also *supra* note 70.

95. HASSEL ET AL., *supra* note 92, at 1–8 (evaluating different charter school authorizers); see also *supra* note 70.

96. There is growing literature on what form of regulation ought to be used for authorizers — government or market based. See *supra* note 77.

## B. Charter School Forms

As discussed above, the authorizer overseeing the chartering process has a great effect on the success of a charter school. The application process for charter authorization is arduous, and most successful charter schools allow for at least a two-year buffer between announcing their intent to apply for a charter and the official opening of the school.<sup>97</sup> Part of what makes the chartering process so difficult is political, as charter school founders must garner support from community members, local politicians, and state education officials to successfully obtain authorization.

But another significant hurdle to opening a charter school is lack of start-up funds, leading to reliance on private sources of revenue.<sup>98</sup> Some authorizers provide a bridge loan or aid applicants in obtaining state and federal grants to cover start-up costs.<sup>99</sup> However, more often than not, the authorizer lacks the ability to aid the charter school financially, leaving applicants to seek out philanthropic or private corporate sponsorship.<sup>100</sup> This scarcity of funds inevitably influences the choice of form of the charter school. Charter school forms can be plotted on a continuum, from non-profit to for-profit. States tend to favor non-profit charter schools because of a perceived lack of a financial conflict of interest between the educational needs of the students versus the profit-driven motives of a corporation.<sup>101</sup> Charter school operators, however, have created innovative ways to combine for-profit and non-profit forms.<sup>102</sup>

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97. The most successful charter school programs, Knowledge is Power Program Network (KIPP) and Achievement First, invest one year in training school leaders in school management and designing successful charter schools, and the second year in building the school's organizational infrastructure, hiring teachers, finding a building, and working within a targeted community. *See generally* KNOWLEDGE IS POWER PROGRAM, <http://www.kipp.org> [<https://perma.cc/P686-2HN9>]; ACHIEVEMENT FIRST, <http://www.achievementfirst.org/> [<https://perma.cc/56QR-ZTLJ>].

98. VANDERBILT PEABODY COLL., *STARTING STRONG: BEST PRACTICES IN STARTING A CHARTER SCHOOL* 20 (2013).

99. NAT'L ASS'N OF CHARTER SCH. AUTHORIZERS & LOCAL INITIATIVES SUPPORT CORP., *CHARTER LENDERS & CHARTER AUTHORIZERS: CAN WE TALK?* 7 (2015).

100. *See generally id.*

101. *See* John Morley, Note, *For-Profit and Non-Profit Charter Schools: An Agency Costs Approach*, 115 YALE L.J. 1782, 1789 (2006) (discussing the dominance of non-profit charter holding entities); *see also* *Charter Schools FAQ*, TENN. DEP'T EDUC. (2018), <https://www.tn.gov/education/school-options/charter-schools/charter-school-faq.html> [<https://perma.cc/5X37-XYVL>] (noting that charter school entities must be non-profit entities that include parents in their governing bodies).

102. *See* Morley, *supra* note 101; *Charter School FAQ*, *supra* note 101.

Purely non-profit charter schools are organized under state laws as non-profit corporations that qualify for tax exemptions under Internal Revenue Code Section 501(c)(3).<sup>103</sup> The non-profit entity that holds the school's charter manages the overall strategy, day-to-day operations, and directly employs the teachers, administrators, and staff.<sup>104</sup> This form of charter school includes schools that are legally a part of the school district in which they operate, as well as schools operated by non-profit management entities hired by the non-profit corporation.<sup>105</sup> This structure minimizes profit as a motive for the school, by having either a government entity or a non-profit manage the charter school. On the opposite end of the continuum are for-profit business entities that hold the charter and manage the school's operations.<sup>106</sup> Such for-profit schools are very rare and are often prohibited by state law.<sup>107</sup>

In the middle are "hybrid" schools: a non-profit entity receives and holds the school's charter and then contracts with a for-profit firm to manage the school's operations.<sup>108</sup> Hybrid schools attempt to circumvent state laws that deny for-profit entities from holding a school's charter by having a non-profit entity hold the charter instead. In addition, the hybrid model avoids the Department of Education's policy that federal funds only go to non-profit charter schools.<sup>109</sup> Nationally, approximately fourteen to nineteen percent of non-profit

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103. See Morley, *supra* note 101; *Charter School FAQ*, *supra* note 101. Organizations that receive a 501(c)(3) designation by the IRS are treated as exempt from federal taxation, and donations to such organizations are tax deductible for the donor.

104. See Morley, *supra* note 101.

105. See, e.g., Sandra Vergari, *The Regulatory Styles of Statewide Charter School Authorizers: Arizona, Massachusetts, and Michigan*, 36 EDUC. ADMIN. Q. 730, 736 tbl.2 (2000); U.S. DEP'T OF EDUC., EVALUATION OF THE PUBLIC CHARTER SCHOOLS PROGRAM 32–33 (2004) [hereinafter PCSP EVALUATION].

106. Only six states allow a for-profit entity to hold the school's charter and operate the school: Arizona, California, Colorado, Delaware, Virginia, and Wisconsin. See *generally* CHARTER SCHOOL LAWS, *supra* note 33.

107. With the exception of the six states listed in note 42, all other states bar a for-profit entity from holding a school's charter. However, only four states currently outright bar for-profit management of a non-profit charter school: Hawaii, Iowa, Mississippi, and Tennessee. See *generally* CHARTER SCHOOL LAWS, *supra* note 33.

108. Morley, *supra* note 101, at 1790.

109. See Evans, *supra* note 11 (discussing 9th Circuit's upholding Department of Education's policy).

charter schools contract with for-profit management firms for at least some services.<sup>110</sup>

Hybrid schools can lean toward the non-profit or for-profit ends of the charter school form continuum. This depends on two considerations — the extent of the services provided by the for-profit management firm, and the fee arrangement between the for-profit firm and the non-profit entity that holds the charter. In terms of the kinds of services provided by for-profit firms, some hybrids only contract for limited logistical services or curriculum outlines, and thus fall closer to the non-profit end. The Department of Education has found, however, that 71% of hybrid schools hired for-profit firms to “manag[e] the overall operation or administration of [the] school.”<sup>111</sup> This means that, at least when considering the services provided by for-profit firms, most hybrid schools lean towards the for-profit end of the spectrum.

A hybrid school’s fee arrangement may vary depending on whether the school’s operating costs are included in the management firm’s fee.<sup>112</sup> A for-profit management company may receive a fixed fee calculated per student, per school, or according to some other method.<sup>113</sup> The difference between the arrangements centers on when operating costs are paid by the management company and what effect such costs have on the fee. Under an arrangement whereby operating costs are paid by the charter holding entity in addition to the fixed fee, a management company would have little incentive to cut costs or quality, except that overspending may render the non-profit insolvent.<sup>114</sup> This is because the management company would need to pay the school’s operating costs using a portion of their management fees — they receive a fixed fee before such costs are paid, regardless of how high or low the operating costs are. Including operating costs within the management firms fixed fee, however, gives a for-profit company the greatest incentive to cut costs, since it receives the remaining surplus, making the “cost-included” fee

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110. *Id.*; Morley, *supra* note 101, at 1790 (citing studies by Arizona State University in the early 2000s that examined the market share of for-profit charter schools and that, notably, did not consider hybrid schools to be “for-profit”).

111. PCSP EVALUATION, *supra* note 105, at 34 exhibit 3–14. Sixty-four percent have the for-profit firms direct curriculum and instruction, and sixty percent had the firms hire staff. *Id.* Sixty-four percent of non-profit charter-holding entities in hybrid schools also receive seed or start-up money from their for-profit managers. *Id.*

112. Little is known about fee arrangements since most for-profit entities are not subject to public reporting requirements. *See* Morley, *supra* note 101, at 1792.

113. *Id.*

114. *Id.*

arrangement the preferred arrangement for for-profit management companies.<sup>115</sup> This is because the operating costs that the management company would need to pay are already built into the fee that they receive, so the management company receives the benefit of reducing operating costs as much as it can.

Non-profit charter holders used to dominate the charter school market.<sup>116</sup> However, a for-profit entity's ability to "raise capital and [to] exploit economies of scale" provides them with significant advantages compared to purely non-profit models.<sup>117</sup> Whereas purely non-profit firms must rely on federal and state grant programs and on philanthropic grants, loans, or private donations for start-up money, for-profit firms may receive more readily available start-up funds from a corporate parent. As a result, hybrid schools are beginning to become popular in the charter school market.<sup>118</sup>

This raises a fundamental question: To what extent should public charter schools be operated or influenced by non-community members? Early charter school advocates hailed charter schools as a return to community-based schooling, with control maintained by a cadre of committed education professionals directly accountable to parents.<sup>119</sup> It is now more likely, however, that a charter school has a relationship with a for-profit manager or outside philanthropist, who has specific ideas about the structure and function of the school.<sup>120</sup> While this private funding has certainly increased overall investment in public education over the past three decades, policymakers must ask themselves whether this form of investment compromises the goals of public education. This is because, to a large extent, private

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115. *Id.*

116. *Id.* at 1794–95. Morley points to several explanations, including contract failure theory for non-profit organizations, high monitoring costs for charter schools by parents, donors, and governments, and the non-distribution constraint on non-profits to self-regulate. *Id.* at 1795–1810.

117. *Id.* at 1811.

118. *See generally* Alan Singer, *Big Profits in Not-for-Profit Charter Schools*, HUFFINGTON POST (Apr. 7, 2014), [https://www.huffingtonpost.com/alan-singer/charter-school-executive-profit\\_b\\_5093883.html](https://www.huffingtonpost.com/alan-singer/charter-school-executive-profit_b_5093883.html) [https://perma.cc/U4CV-JB28].

119. *See generally supra* note 28.

120. Several philanthropists have given large amounts of money to finance charter school formation, such as the Walton family (Walmart), the Fisher family (the Gap), and the Bill and Melinda Gates Foundation. *See, e.g.*, Bryan C. Hassel & Thomas Toch, *Big Box: How the Heirs of the Wal-Mart Fortune Have Fueled the Charter School Movement*, AM. INST. FOR RES. (Nov. 7, 2006), <https://www.air.org/edsector-archives/publications/big-box-how-heirs-wal-mart-fortune-have-fueled-charter-school> [https://perma.cc/Q56C-AGT8].



funding of charter schools has directly filled the void made by policymakers when they inequitably fund charter schools through public resources. Understanding the specific sources of public funding for charter schools, and how they create a gap, illustrates that state policymakers increasingly allow and encourage private investment in public schools.

### III. CHARTER SCHOOL FUNDING SOURCES

Like district public schools, charter schools receive a mixture of federal, state, and local funds. For school districts with over fifteen-thousand students, the federal, state, and local governments provided for, on average, 8.4%, 46.5%, and 45% (respectively) of the district's funds for the 2014–2015 school year.<sup>121</sup> Schools receive money from the federal government through the Elementary and Secondary Education Act (ESEA),<sup>122</sup> which was substantially modified by the No Child Left Behind Act (NCLB),<sup>123</sup> the Individual with Disabilities Education Act (IDEA),<sup>124</sup> and the Every Student Succeeds Act (ESSA).<sup>125</sup> Typically, a state education system consists of a state education agency (SEA) that determines education standards, and controls access to federal and state funds. The SEA often creates, evaluates, and distributes funds to local education agencies (LEA), also referred to simply as local school districts. In several states, charter schools can organize as their own LEAs. When doing so, charter schools agree to be held directly accountable to certain federal and state regulations that attach to specific funding sources.

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121. See NAT'L CTR. FOR EDUC. STAT., REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY EDUCATION: SCHOOL YEAR 2014–15 (FISCAL YEAR 2015) 4 tbl.1, <https://nces.ed.gov/pubs2018/2018301.pdf> [<https://perma.cc/JM72-BEMK>]. The Department of Education estimated for FY 2009 that it needed to disburse \$14.3 billion in Title I funds and \$12.1 billion in IDEA funds. U.S. DEP'T OF EDUC., FUNDS FOR STATE FORMULA-ALLOCATED AND SELECTED STUDENT AID PROGRAMS (2010), <https://www2.ed.gov/about/overview/budget/statetables/11stbystate.pdf> [<https://perma.cc/KJ7V-DQ4U>]. Charter schools must be treated as other public schools for the purpose of distributing ESEA and IDEA funds. U.S. DEP'T EDUC., Nonregulatory Guidance, 34 CFR Part 76, Subpart H (Dec. 2000), <https://www2.ed.gov/policy/elsec/guid/cschoools/cguidedec2000.doc> [<https://perma.cc/7S7V-UW4X>].

122. Elementary and Secondary Education Act of 1965, 79 Stat. 27.

123. See generally No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

124. See generally 20 U.S.C. § 1400 *et seq.*

125. See generally Every Student Succeeds Act of 2015, Pub. L. 114-95, 129 Stat. 1802. It is important to note that ESSA substantially modified and replaced significant portions of NCLB.

The majority of states funnel charter school funding through school district LEAs, which are statutorily allowed to withhold and negotiate administrative or in-kind service fees, and to charge market rates for renting school district property.

This Part examines the distinctions between funding sources available to charter schools against those available to traditional public schools even when the two address the same expenditures. These expenditures include operation, start-up funding, facilities, programs for at-risk youth and special education, and transportation. Compared to traditional public schools, charter schools are at a disadvantage in covering all these expenditures because traditional public schools simply have access to better funding sources or can limit their expenditures in ways that charter schools cannot.

### A. Operations

General operational funding refers to fungible sources of money that public schools can use to pay for instruction, student services, administration, facilities maintenance, food services, and other support services at the school.<sup>126</sup> School funding formulas for general operations are notoriously complex. Generally speaking, they depend on whether the state primarily relies on local tax revenues or state education expenditures to fund public schools.<sup>127</sup> The majority of states employ a traditional model of school finance: local tax revenues account for the majority of school funding, and the state provides aid to equalize disparities between districts.<sup>128</sup> Some states, such as Michigan, use alternate sources of revenue for school funding (such as sales taxes or gambling taxes), which are distributed by the SEA to the various school districts according to complex funding formulas that weigh student characteristics, geography, and other factors.<sup>129</sup>

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126. For the most recent statistics on how each these sub-functions of a school breakdown, see NAT'L CTR. FOR EDUC. STAT., REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY EDUCATION: SCHOOL YEAR 2013–14 (FISCAL YEAR 2014) 10–11 tbl.4, <https://nces.ed.gov/pubs2016/2016301.pdf> [<https://perma.cc/RG65-W7A6>].

127. See generally *50-State Comparison*, *supra* note 56.

128. See generally MANDELKER ET AL., STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 749–56 (8th ed. 2014) (describing the primary approaches to state appropriation of aid to school districts based on the amount of money they can raise locally).

129. See C. PHILIP KEARNEY & MICHAEL F. ADDONIZIO, A PRIMER ON MICHIGAN SCHOOL FINANCE (4th ed. 2002) (describing changes in Michigan school funding formulas).

To fund charter schools, nearly all states provide state and local funding based on an average per-pupil cost (APPC) approach.<sup>130</sup> APPC is calculated by combining the funds that the local school district receives from the SEA and from local taxes and dividing that sum by the school district's enrollment. The resulting dividend travels with the student to the charter school. The rationale behind this funding mechanism is that APPC successfully approximates both the cost to the state and local government of the student's education, and the amount property-owning parents pay in taxes.

In theory, when parents choose to send their child to a charter school, they shift money away from the sending public school to the receiving charter school. Thus, the rationale goes, the charter school should receive the same amount that the state would have spent on the child if she had attended a traditional public school. States differ in how they allocate APPC funds, mainly in the percentage of APPC to which charter schools are entitled, what "administrative fees" a sending school district may be entitled to withhold, whether a sending school district should receive "impact aid," and who controls the flow of funds to schools.

### 1. *Percentage of APPC*

State enabling statutes generally take one of three approaches in allocating APPC to charter schools. The majority of states allocate 100% of all state and local education funds based on APPC to charter schools.<sup>131</sup> Eight states set statutory minimums for APPC allocations, the lowest at 75%, but give discretion to school districts and the SEA to exceed the minimums up to the full amount of APPC funding.<sup>132</sup> Finally, some states give maximum discretion to school districts and state education agencies by requiring charter school applicants to negotiate the level of public funding they need for the school.<sup>133</sup> In Wisconsin and Florida, the negotiation process may be beneficial to charter schools, as state statutes authorize school districts to exceed public school funding levels.<sup>134</sup> Finally, some states distinguish between granting state aid versus local property tax revenue,

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130. *50-State Comparison*, *supra* note 56.

131. CHARTER SCHOOL LAWS, *supra* note 33.

132. *See generally id.* (Colorado, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Oregon, and Pennsylvania).

133. *See generally id.* (Arizona, Arkansas, Connecticut, Georgia, Hawaii, Illinois, Kansas, and Virginia).

134. *See generally id.* (Wisconsin and Florida).

depending on whether the charter school was authorized by a state agency versus a school district or local entity.<sup>135</sup>

There are several flaws with APPC systems. First, as analyzed below, even states that can (or must) provide full funding often do not do so. For example, California schools must receive “operational funding that is equal to the total funding that would be available to a similar school district serving a similar pupil population.”<sup>136</sup> But charter schools have administrative fees, rent, and other processing costs that traditional public schools do not have to pay. If the initial funding provided is equal per the clause quoted above, but charter schools bear costs public schools do not, this results in a 29.3% funding gap between charter schools and public schools in California.<sup>137</sup>

A second flaw is found in states that require charter school applicants and the local school board or SEAs to negotiate over the appropriate funding level. This structure ignores the inherent power imbalance between the applicant and the government entity.<sup>138</sup> Since local school boards and charter schools compete for funding and students, the local school board has a direct interest in underfunding the charter school by requiring payment of high fees for its services.<sup>139</sup> Moreover, because state laws are either vaguely drafted or designed to protect public schools from losing money, charter schools are often shortchanged.<sup>140</sup> Thus, while APPC may be the best proxy to determine the appropriate level of operational funding for a charter school on a theoretical level, in reality it often leaves charter schools without the funds they need to flourish.

## 2. *Administrative Fees and Impact Aid*

States’ enabling statutes differ on the extent to which a school district can withhold administrative costs from the APPC. Administrative costs include reasonable fees for using school district services to operate the charter school, such as processing reporting requirements, providing tests, and other services that must be administered by the school district. Six states currently permit

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135. *See generally id.* (Texas, South Carolina, and Georgia).

136. CAL. EDUC. CODE § 47630(a) (West 2008).

137. INEQUITY EXPANDS, *supra* note 5, at 15.

138. CHARTER SCHOOL FUNDING GAP, *supra* note 12, at 5–6.

139. *Id.*

140. *Id.* at 4.

withholding up to 5% of the APPC for administrative fees.<sup>141</sup> In states that require the local school board or SEA to negotiate appropriate funding levels with the charter school, such administrative fees are presumed to be negotiated.<sup>142</sup>

When a charter school enrolls a student that previously attended a public school, the school district may lose operational revenue it needs to pay for fixed contracts and other long-term expenditures.<sup>143</sup> To combat this problem, several states have enacted “impact fees,” which require the SEA to continue funding both the sending public school and receiving charter school, while it slowly reduces the level of aid to the sending public school over a period of three years.<sup>144</sup> Such laws are designed to soften the financial blow to public schools for students choosing charter schools.

In addition to the bargaining power issue raised above, states often take administrative fees at face value rather than requiring an actual accounting of school district expenditures for services provided to a charter school.<sup>145</sup> Some school districts, especially those who act as the LEA for the charter school, must prepare reports for state and federal agencies regarding school progress and administration.<sup>146</sup> In reality, charter school operators often prepare some portion of these reports, yet charter schools must pay the school district administrative fees for the whole report.<sup>147</sup>

Another funding challenge charter schools face is “hold harmless” clauses, which allow school districts to withhold funds allotted to a charter school if the school district finds that it is owed payment for administrative costs.<sup>148</sup> These costs can be substantial; for example,

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141. CHARTER SCHOOL LAWS, *supra* note 33 (Rhode Island, Oklahoma, Ohio, New Mexico, Maryland, and Florida).

142. *See supra* notes 108 and 109.

143. *See supra* notes 57 and 58.

144. CHARTER SCHOOL LAWS, *supra* note 33 (Florida, Massachusetts, New York, Rhode Island, and Utah).

145. *See generally* CAL. STATE AUDITOR, CHARTER SCHOOLS: SOME SCHOOL DISTRICTS IMPROPERLY AUTHORIZED AND INADEQUATELY MONITORED OUT-OF-DISTRICT CHARTER SCHOOLS (2017), <https://www.bsa.ca.gov/pdfs/reports/2016-141.pdf> [<https://perma.cc/YBM2-FE2J>].

146. *Frequently Asked Questions*, CAL. CHARTER SCHOOLS ASS'N, <http://www.ccsa.org/understanding/faqs/> [<https://perma.cc/2SAS-78MG>].

147. John Fensterwald, *The Big Burden of Charter School Oversight*, EDSource (Dec. 6, 2016), <https://edsources.org/2016/big-burdens-of-charter-school-oversight-ccsa-carsnet/573868> [<https://perma.cc/XAU2-LY9E>].

148. *See School Funding Practices Keep Dollars in Districts for “Phantom Students,”* EDUC. NEXT (May 1, 2013), <https://www.educationnext.org/school->

charter schools in St. Louis have reported a 15% shortfall in funding as a result of administrative fees withheld by the local school board.<sup>149</sup> Moreover, courts have held that charter schools must share the cost of remedial orders, such as desegregation orders, that were in effect at the time the school received its charter.<sup>150</sup> Because state statutes do not penalize school districts for withholding funds, charter schools are left with little administrative or private remedy.

Ultimately, all these clauses, fees, and impact aid erode the general purpose of charter schools: to force traditional public schools to innovate and become more competitive. By effectively giving traditional public schools more money when a student transfers to a charter school, school districts have little financial incentive to restructure.

### 3. Funds Flow

State APPC allocations can also be distinguished by considering who controls the flow of funds. State education agencies receive a significant amount of money from programs tied to federal legislation, such as Title I of the ESEA, IDEA, and other general block grants from the federal government.<sup>151</sup> State legislatures also allocate general funds to support education, which are distributed through state education agencies.<sup>152</sup> Finally, local governments in some states levy property and other taxes, and distribute such revenues to local school districts.<sup>153</sup> This amalgamation of funding sources and schemes has generated a variety of flow structures for charter school funding.

The majority of states allocate all federal and state aid to LEAs, who then allocate the funds through APPC to charter schools.<sup>154</sup> A

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funding-practices-keep-dollars-in-districts-for-%E2%80%9Cphantom-students%E2%80%9D/ [https://perma.cc/QDE5-GQWX].

149. See David Hunn & Steve Geigerich, *Charter, Public Schools in Funding Dispute*, ST. LOUIS POST-DISPATCH (Dec. 3, 2007) [https://perma.cc/AS9Z-A3BH].

150. See *Jenkins v. Kan. City Mo. Sch. Dist.*, 516 F.3d 1074 (8th Cir. 2008).

151. U.S. DEP'T OF EDUC., FISCAL YEARS 2017–2019 STATE TABLES FOR THE U.S. DEPARTMENT OF EDUCATION (2018), <https://www2.ed.gov/about/overview/budget/statetables/index.html> [https://perma.cc/25FB-A8LX].

152. Nat'l Ctr. for Educ. Statistics, *Public School Revenue Sources*, in THE CONDITION OF EDUCATION (2018), [https://nces.ed.gov/programs/coe/indicator\\_cma.asp](https://nces.ed.gov/programs/coe/indicator_cma.asp) [https://perma.cc/JV7U-5NGU].

153. *Id.*

154. See CHARTER SCHOOL LAWS, *supra* note 33 (California, Iowa, District of Columbia, Florida, Idaho, Illinois, Kansas, Maryland, New Jersey, New Mexico, New

minority of states take the opposite approach and rely solely on the SEA to allocate funds to charter schools.<sup>155</sup> Several states bifurcate state and local APPC allocations, requiring both the state and local school district to give charter schools their respective share.<sup>156</sup> Other states allocate funds depending on whether the authorizing entity was a SEA, a local school district, or private entity.<sup>157</sup> Finally, some states authorize charter schools to form as their own LEA, allowing them to receive federal and state aid directly, even in states that place control of the funds flow in the hands of the school district.<sup>158</sup>

Several studies have found that the flow of funds a charter school receives greatly impacts the equity of a charter school's funding, especially for federal funds. Among states that grant full local education agency status to charter schools are Minnesota and the District of Columbia, where charter schools received \$1,083 and \$1,448 per pupil in federal aid, respectively.<sup>159</sup> In 2011, Minnesota's charter schools received \$1,167 per pupil in federal funding,<sup>160</sup> while charter schools in the District of Columbia received \$3,016 per pupil in federal funding.<sup>161</sup> By contrast, states such as Colorado, Florida, and Illinois, where charter schools cannot form as local education agencies, received \$412,<sup>162</sup> \$645,<sup>163</sup> and \$922,<sup>164</sup> respectively, per pupil in federal aid in 2011. Missouri provides an even better example of the importance of local education agency status for charter schools: prior to amending its charter school law in 2006 to allow charter schools to form as local education agencies, Missouri charter schools received 28.8% percent less funding than traditional public schools.<sup>165</sup> After the amendment, Missouri charter schools received 3% more funding compared to traditional public schools in 2011.<sup>166</sup> Charter schools that become LEAs take on greater responsibility to educate

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York, Oklahoma, Pennsylvania, South Carolina, Tennessee, Virginia, Wisconsin, and Wyoming).

155. *Id.* (Delaware, New Hampshire, Hawaii, Minnesota, Nevada, and Ohio).

156. *Id.* (Indiana, Louisiana, Massachusetts, North Carolina, Rhode Island, Texas, and Utah).

157. *Id.* (Georgia, Missouri, Michigan, Connecticut, Colorado, Arkansas, Arizona, and Alaska).

158. Osberg, *supra* note 57, at 59.

159. *Id.*

160. INEQUITY EXPANDS, *supra* note 5, at 223.

161. *Id.* at 359.

162. *Id.* at 83.

163. *Id.* at 118.

164. *Id.* at 161.

165. INEQUITY'S NEXT FRONTIER, *supra* note 5, at 1.

166. *Id.* at 15.

students with special needs and socioeconomic challenges and are subject to greater reporting requirements, but the difference in funding is profound.

## B. Start-Up Funding

### 1. Public Charter Schools Program

ESSA gives states the flexibility to adopt a variety of assessments while preserving NCLB's annual assessment requirement.<sup>167</sup> Charter schools in each state can be held accountable to goals and progress targets set by the state.<sup>168</sup> Under ESSA, schools that fail to meet the state's benchmarks will face intervention, and possible closure, according to the state's charter school law.<sup>169</sup> ESSA is intended to remove, to the greatest extent possible, federal micromanagement of state charter school accountability standards.<sup>170</sup> These accountability measures for failing charter schools focus on a policy holding that parents deserve to choose where their child is educated, which is different from other reform efforts that target desegregation and equitable school funding.<sup>171</sup>

To improve school choice, the Public Charter Schools Program (PCSP) provides competitive grants to SEAs who, in turn, allocate these funds to LEAs to help the planning, program design, and initial implementation of new charter schools.<sup>172</sup> The federal Department of Education provides dissemination grants to charter schools that have "demonstrated 'overall success,' including academic achievement, high level of parental satisfaction, and strong management and leadership."<sup>173</sup> If the SEA chooses not to

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167. Every Student Succeeds Act of 2015, Pub. L. 114-95 §1111(b)(2), 129 Stat. 1802.

168. Every Student Succeeds Act of 2015, Pub. L. 114-95 §1111I(4)(C), 129 Stat. 1802.

169. Every Student Succeeds Act of 2015, Pub. L. 114-95 §1111(d)(1)(B), 129 Stat. 1802.

170. See 20 U.S.C. § 7371 (2015).

171. See Joseph O. Oluwole & Preston C. Green, III, *Charter Schools Under the NCLB: Choice and Equal Opportunity*, 22 ST. JOHN'S J. LEGAL COMMENT. 165 (2007) (arguing that charter schools represent a new paradigm for equal protection).

172. U.S. DEP'T OF EDUC., EVALUATION OF THE PUBLIC CHARTER SCHOOLS PROGRAM: FINAL REPORT (2004), <https://www2.ed.gov/rschstat/eval/choice/pcsp-final/finalreport.pdf> [<https://perma.cc/A8S2-TKLE>].

173. *Id.*



participate in the PCSP, individual charter school developers may apply directly to the Department of Education for a grant.<sup>174</sup>

The ESSA expanded state-level charter school grants by creating a competitive application process for state education agencies.<sup>175</sup> Through the competitive grants, state education agencies are encouraged to adopt ambitious charter school objectives and to give charter schools a greater degree of flexibility.<sup>176</sup> In 2016, the Department of Education awarded \$206 million in grants under this competitive grant program, resulting in the expansion of charter school programs in California, Florida, Georgia, Massachusetts, Tennessee, and Washington.<sup>177</sup> The competitive grant process will ideally result in greater public awareness of the mission of the charter school movement, which is to improve school choice for students and parents and to achieve equitable funding for charter schools on par with traditional public schools.

## 2. State Categorical Grants

Many studies have identified inadequate start-up funding for textbooks, computers, and equipment as a barrier to charter school creation.<sup>178</sup> Lack of start-up funding especially hurts charter schools created by parents and communities, because they often lack the resources of large network charter schools or those managed by better-financed private companies.<sup>179</sup>

Federal funding under the PCSP has alleviated some of the concerns over start-up funding and, with the exception of Maryland and Missouri, every state and the District of Columbia offer federal start-up funds.<sup>180</sup> To supplement PCSP grants, some state education agencies also provide grants<sup>181</sup> or low- or zero-interest loans.<sup>182</sup> For

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174. *Id.*

175. 20 U.S.C.A. § 7221b(b) (West 2018).

176. 20 U.S.C.A. § 7221b(g) (West 2018).

177. *Charter School Program State Educational Agencies (SEA) Awards*, U.S. DEP'T EDUC. OFF. INNOVATION & IMPROVEMENT, <https://innovation.ed.gov/what-we-do/charter-schools/charter-school-program-state-educational-agencies-sea/awards/> [<https://perma.cc/V2MD-Q9CP>].

178. VENTURESOME CAPITAL, *supra* note 46, at 7.

179. *Id.* at 19.

180. *Charter Schools: Does the State Provide Start-Up or Planning Grants to New Charter Schools? 50-State Comparison*, EDUC. COMMISSION OF THE STATES (Jan. 2018), <http://ecs.force.com/mbdata/mbquestNB2C?rep=CS1718> [<https://perma.cc/KVM7-RWMZ>].

181. *Id.* (Arizona, Florida, Georgia, Hawaii, Idaho, Massachusetts, Minnesota, and Utah).

example, Minnesota charter schools are eligible for aid to pay start-up costs and additional operating costs in the amount of \$500 per student, in addition to a minimum of fifty thousand dollars \$50,000 per school.<sup>183</sup> In Arizona, New Mexico, and Oklahoma, state legislatures created a state stimulus fund for charter school start-up and facility's needs.<sup>184</sup> Indiana also awards grants to new charter schools and charter schools with growing enrollments to allow the school to scale up.<sup>185</sup> Some states provide aid contingent upon a lack of available federal funds.<sup>186</sup> However, due to the existence of federal aid, at least one state legislature has declined to fund these programs.<sup>187</sup>

### C. Facilities

The rising costs of facilities for charter schools have garnered increased attention because of the schools' lack of financing options.<sup>188</sup> Facilities can be a costly problem for charter schools for several reasons. First, former public-school buildings that are in good condition and a suitable location are rarely available. Second, such buildings must often be remodeled or otherwise adapted to the needs of the charter school. Many charter schools start with one grade and plan to expand incrementally until they can serve a full range of grades; moving locations repeatedly is a costly distraction, and schools would be better served by settling into a long-term lease.

Another set of issues arises when it comes to large-scale financing. Low-cost, low-rate loans and mortgages for large sums of money are often hard to come by,<sup>189</sup> and charter schools are perceived as a risk in the public capital market, adding additional expenses.<sup>190</sup> Charter

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182. *Id.* (California, Illinois, Louisiana, New York, New Mexico, and Oklahoma).

183. *Id.*; see also MINN. STAT. § 124E.20 (2018).

184. ARIZ. REV. STAT. ANN. § 15-188 (2018); N.M. STAT. ANN. § 22-8B-14 (West 2018); OKLA. STAT. ANN. tit. 70, § 3-144 (West 2018).

185. IND. CODE ANN. § 20-49-9-1 *et seq.* (West 2018) (Charter and Innovation School Advance Program).

186. See 16 R.I. GEN. LAWS § 16-77.1-4 (West 2018).

187. See, e.g., N.Y. EDUC. CODE § 2856 (West 2018).

188. See N.Y. UNIV. STEINHARDT SCH. OF EDUC. INST. FOR EDUC. & SOC. POLICY, THE FINANCE GAP: CHARTER SCHOOLS AND THEIR FACILITIES (2004), <https://steinhardt.nyu.edu/scmsAdmin/uploads/001/117/FinanceGap.pdf> [<https://perma.cc/76HF-9LKK>].

189. KAUFFMAN FOUND., DEBUNKING THE REAL ESTATE RISK OF CHARTER SCHOOLS (2005), <https://www.edreform.com/wp-content/uploads/2013/03/Debunking-Real-Estate-Risk-Charter-Schools.pdf> [<https://perma.cc/DKK8-4X9D>].

190. *Id.* at 1–2.

schools attempting to obtain funding in order to improve existing facilities or begin construction on new ones are hindered by perceived risks in granting bond financing, by inequities and ambiguities in statutes and tax regulations, and by hostile or unsupportive political environments.<sup>191</sup> A private non-profit lending sector has emerged to cope with the increasing capital demands of charter schools, but it is still small, and non-profit lenders remain just as wary as for-profit lenders about charter school stability.<sup>192</sup> This has led the federal government and several states to develop state charter school facilities aid programs and to establish public-private partnerships to create innovative financing models.

### 1. Federal Programs

Charter schools rely on several federal programs to improve or build facilities. The Department of Education operates two grant programs: the Credit Enhancement for Charter School Facilities Program (Credit Enhancement program)<sup>193</sup> and the State Charter School Facilities Incentive Grants Program (Incentive Grants program).<sup>194</sup> Additionally, PCSP provides leverage funds through the Credit Enhancement for Charter School Facilities Program.<sup>195</sup> Under the Credit Enhancement program, public and nonprofit entities can compete to receive and leverage federal funds to help charter schools obtain school facilities through purchase, lease, donation, construction, and renovate of school facilities.<sup>196</sup> Grant recipients may, among other things, receive funds to guarantee and insure physical plant debt and leases for personal and real property. They also help obtain financing for a charter school's facilities by

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191. INEQUITY'S NEXT FRONTIER, *supra* note 5, at 13–15; INEQUITY EXPANDS, *supra* note 5, at 34–37.

192. See LOCAL INITIATIVES SUPPORT CORP., 2014 CHARTER SCHOOL FACILITY FINANCE LANDSCAPE 2 (2007), [http://www.lisc.org/media/filer\\_public/59/38/5938b90b-07cc-411c-845f-431f50a4682e/2014csflandscape.pdf](http://www.lisc.org/media/filer_public/59/38/5938b90b-07cc-411c-845f-431f50a4682e/2014csflandscape.pdf) [<https://perma.cc/CP97-BN3E>].

193. 20 U.S.C. § 7221c (2018); see also 2014 CHARTER SCHOOL FACILITY FINANCE, *supra* note 192, at 3.

194. *Id.*

195. *Credit Enhancement for Charter School Facilities Program Description*, U.S. DEP'T EDUC. (2018), <https://innovation.ed.gov/what-we-do/charter-schools/credit-enhancement-for-charter-school-facilities-program/> [<https://perma.cc/F2XS-SYCM>]. This program gives charter schools money for the sole purpose of guaranteeing the school's debts, so that the school is a more acceptable credit risk for potential lenders. *Id.*; see also 2014 CHARTER SCHOOL FACILITY FINANCE, *supra* note 192, at 29.

196. *Credit Enhancement for Charter School Facilities Program Description*, *supra* note 195.

identifying potential lending sources, by encouraging private lending, and through other similar activities. Finally, they establish charter school facility “incubators” that new charter schools can use until they acquire a facility of their own.<sup>197</sup> The program is designed to meet the perceived lack of facilities funding available to charter schools.<sup>198</sup>

The federal government also operates the State Charter School Facilities Incentive Grants program to assist charter schools with facility costs. Through the Incentive Grants program, the federal government provides funds to states so that they can establish and administer per-pupil facilities aid programs.<sup>199</sup> Currently, fourteen states provide some form of per-pupil facilities aid for charter schools.<sup>200</sup> The Incentive Grants program is intended “to encourage more states to develop and expand per-pupil facilities aid programs” by covering a part of the states’ share in the costs associated with charter schools facilities funding.<sup>201</sup> The Center for Education Reform has hailed a per-pupil expenditure as a model aid to encourage development of charter school facilities.<sup>202</sup>

In addition to the two grant programs administered by the Department of Education, the federal government oversees various other programs for charter schools to tap into to finance facilities’ needs. Many charter schools receive distributions from the Treasury Department’s New Markets Tax Credit Program (NMTC), which

197. *Id.*

198. *See* U.S. DEP’T OF EDUC., A COMMITMENT TO QUALITY: NATIONAL CHARTER SCHOOL POLICY FORUM REPORT 4 (2008), <https://www2.ed.gov/admins/comm/choice/csforum/report.pdf> [<https://perma.cc/JJD2-WC7C>] (calling for additional facilities financing for charter schools); *see also* 2014 CHARTER SCHOOL FACILITY FINANCE, *supra* note 192, at 29.

199. U.S. DEP’T OF EDUC., STATE CHARTER SCHOOL FACILITIES INCENTIVE GRANTS PROGRAM DESCRIPTION, <http://www.ed.gov/programs/statecharter/gtepstatecharter.pdf> [<https://perma.cc/CXL9-Z4SX>].

200. *See* CAL. EDUC. CODE §§ 17078.52–.66 (West 2018); D.C. CODE § 38-2908 (2018); MINN. STAT. ANN. § 124E.22(d) (West 2018); UTAH CODE ANN. § 53G-5-103 (West 2018); AK STAT. ANN. § 14.11.126 (West 2018); ARIZ. REV. STAT. § 15-188 (West 2018); COLO. REV. STAT. § 22-43.7-110.3 (West 2018); FL. STAT. ANN. § 1013.62 (West 2018); GEORGIA STAT ANN. § 20-2-2068.2 (West 2018); IDAHO CODE ANN. § 33-5208 (West 2018); IND. CODE § 20-24-7-11 and § 20-24-12-5 (West 2018); LA. CODE § 3995 (West 2018); MASS. GEN. LAWS 69 § 1M (West 2018); MISS. STAT. §37-41-1 *et seq.* (West 2018); OHIO REV. CODE § 3318.50 (West 2018); OK. STAT. ANN. § 3-144 (West 2018); 24 PENN. STAT. § 17-1731-A (West 2018); TENN. CODE § 49-13-112 (West 2018).

201. *See supra* note 157.

202. CHARTER SCHOOL FUNDING GAP, *supra* note 12, at 5.

encourages private sector investments in distressed communities.<sup>203</sup> Operated through the Community Development Financial Institutions Fund (CDFI), NMTC provides a credit against Federal income taxes for investors that make “qualified equity investments” in “community development entities” (CDE).<sup>204</sup> CDFI allocates a certain number of tax credits to CDEs who, in turn, offer the credits to investors in exchange for a “qualified equity investment” in the CDE.<sup>205</sup> The CDE then uses the proceeds of these investments to make “qualified low-income community investments” in “qualified active low-income community businesses” (QALICB), which are typically businesses and real estate projects located in targeted low-income communities.<sup>206</sup> Out of the \$3.5 billion that the Treasury Department allocated to various CDEs for distribution in 2017, CDFI allocated \$800 million to eight non-profit lenders that have funded charter schools as QALICBs for capital improvement projects.<sup>207</sup> The General Accounting Office credited NMTC for increasing private investment in low-income communities.<sup>208</sup> NMTC allows charter schools located in low-income communities a route to attract investors and receive low-cost private financing. Since 2008, the

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203. Community Renewal Tax Relief Act of 2000, Pub. L. No. 106-554, §121 (West). NMTC is codified in § 45D of the Internal Revenue Code.

204. The credit is taken over a seven-year period, amounting to five percent for the first three years and six percent for the final four, totaling a substantial 39% of the total original investment. I.R.C. § 45D(a). For example, if CDFI allocates \$1 million to a CDE, who offers the tax credit to investor for a \$1 million equity investment in a QALICB, the investor will receive a \$50,000 tax credit for the first three years and a \$60,000 tax credit for the next four, totaling \$390,000 in total tax credits over the life of the investment. See CMTY. DEV. FIN. INSTS. FUND, NEW MARKETS TAX CREDIT PROGRAM 2017 APPLICATION INSTRUCTIONS (2017), <https://www.cdfifund.gov/Documents/2017%20Online%20Application%20Instruction%20s.pdf> [<https://perma.cc/DEY3-MPDA>].

205. I.R.C. § 45D(b).

206. I.R.C. § 45D(d) (“qualified low-income investment”); I.R.C. § 45D(d)(2) (QALICB); I.R.C. § 45D(e) (defining “low-income community” to mean any census tract if (a) the poverty rate is at least 20%, (b) if tract not located in metropolitan area, the median family income does not exceed 80% of statewide median family income, or (c) if tract located in metropolitan area, the median family income does not exceed 80% of the statewide or metropolitan family income).

207. See 2014 CHARTER SCHOOL FACILITY FINANCE LANDSCAPE, *supra* note 192, at 34.

208. U.S. GOV’T ACCOUNTABILITY OFFICE, NEW MARKETS TAX CREDIT APPEARS TO INCREASE INVESTMENT BY INVESTORS IN LOW-INCOME COMMUNITIES, BUT OPPORTUNITIES EXIST TO BETTER MONITOR COMPLIANCE 4 (2007), <http://www.gao.gov/new.items/d07296.pdf> [<https://perma.cc/J4J7-RJLS>].

NMTC program has injected over \$1.894 billion into charter schools in low-income communities.<sup>209</sup>

Finally, the Department of Agriculture's Rural Development's Community (RDC) Program provides loans, guarantees, and grants for essential community facilities in rural areas and in towns up to 20,000 in population.<sup>210</sup> Guaranteed and direct loan funds may be used for construction, renovation, or improvement of facilities, as well as refinancing in certain cases.<sup>211</sup> As of 2013, the RDC has provided loans, guarantees, and grants totaling \$510.1 million for charter school projects in thirteen states.<sup>212</sup>

## 2. State Programs

State facilities funding programs come in a variety of forms. States usually require either the SEA or local school districts to maintain a list of vacant or underutilized buildings suitable to house charter schools.<sup>213</sup> Some states, such as Delaware, have enacted provisions that require the government entity that owns the building to give charter schools the right of first refusal for purchase and lease.<sup>214</sup> These provisions also often include clauses that require the government owner to negotiate "in good faith" or use the "fair market value" when selling, purchasing or leasing the property.<sup>215</sup> The District of Columbia, for example, gives charter schools a 25% discount from the "non-profit rate" when selling vacant or unused buildings to charter schools.<sup>216</sup> Florida gives land developers the option of providing charter school facilities in a new development as an alternative to paying impact fees to the local school district.<sup>217</sup> Further, several states require that school districts provide

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209. *Charter School Facility Financing: New Markets Tax Credit Program*, LOCAL INITIATIVES SUPPORT CORP. (2017), <http://www.lisc.org/charter-schools/funding-options/us-department-treasury/new-markets-tax-credit-program/> [<https://perma.cc/J5UW-WLP3>].

210. See Consolidated Farm and Rural Development Act of 1972, 7 U.S.C. § 1926(a)(1) (2018).

211. See 2014 CHARTER SCHOOL FACILITY FINANCE LANDSCAPE, *supra* note 192, at 35.

212. *Id.*

213. CHARTER SCHOOL LAWS, *supra* note 33 (Arizona, Arkansas, Delaware, District of Columbia, Florida, Louisiana, Nevada, New York, Oregon, South Carolina, and Virginia).

214. DEL. CODE ANN. tit. 14, § 504A(6) (West 2018).

215. *Id.*

216. D.C. CODE § 38-1802.09 (2018).

217. FLA. STAT. ANN. § 1002.33(18)(f) (West 2018).

“equivalent facilities” to charter schools and public schools, which allows charter schools to pay only ordinary maintenance costs and possibly below market rent.<sup>218</sup> More often than not, all of these various aid programs apply only to charter schools that utilize old school district buildings. These policies are intended to place underutilized school and government building back in productive use, as well as to help charter schools with their facilities financing.

Despite policies that make unused school buildings available to charter schools, possibly free of charge, facilities maintenance, repair, and renovation can still be costly. To address this, several states created programs that grant aid to charter schools on a per-pupil basis, which is intended to cover the cost of rent, maintenance, and repair.<sup>219</sup> For example, Minnesota provides the lesser of \$1,314 per pupil or 90% of the actual lease costs in order to cover their facilities expenditures.<sup>220</sup> Other state aid programs target renovation, remodeling, and new construction costs by providing grants to charter schools directly.<sup>221</sup> Alternatively, rather than create a separate charter school facilities aid program, Hawaii and North Carolina permit charter schools to apply for facilities aid normally reserved for public schools.<sup>222</sup>

Finally, the state might help charter schools with facilities funding by granting charter schools limited access to public debt financing. Some states have given special state governmental authorities the power to issue low interest loans or bonds on behalf of a charter school.<sup>223</sup> Other states have authorized local government units, mostly school districts and cities, to issue bonds on behalf of the

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218. CHARTER SCHOOL LAWS, *supra* note 33, at 14 (California’s Proposition 39).

219. *See id.* at 15, 17, 27, 49, 57, 63, 65, 73, 75, 91 (California, Colorado, Georgia, Minnesota, New Hampshire, New York, North Carolina, Pennsylvania, Rhode Island, and Wyoming).

220. MINN. STAT. § 124E.22(c) (West 2018).

221. *See generally* ARIZ. REV. STAT. § 15-188 (2018); COLO. REV. STAT. § 22-30.5-402 (2018); N.M. STAT. ANN. § 22-8B-14 (West 2018); OKLA. STAT. ANN. tit. 70, § 3-144 (West 2018).

222. HAW. REV. STAT. § 302A-1502.4(b) (2018) (allowing non-profit and for-profit entities to apply for an allocation through Hawaii’s 3R’s school repair and maintenance fund); N.C. GEN. STAT. § 159D-35 *et seq.* (2018) (Private Capital Facilities Finance Act allows non-profit elementary and secondary schools to apply for facilities grants and low-cost loans).

223. *See, e.g.*, COLO. REV. STAT. § 23-15-101 *et seq.* (2018) (Colorado Educational and Cultural Facilities Authority); CONN. GEN. STAT. § 10a-176 *et seq.* (2018) (Connecticut Health and Educational Facilities Authority); 20 ILL. COMP. STAT. 3501/805-5 (2018) (Illinois Finance Authority Act); MICH. COMP. LAWS § 12.192(VI)(A) (2018) (Michigan Public Educational Facilities Authority).

charter school.<sup>224</sup> Alternatively, states might allow charter schools to participate in local bond elections for public school facilities.<sup>225</sup> Finally, Arizona and Delaware consider charter schools as economic development programs and allow them to apply for industrial development bonds through the local government.<sup>226</sup> All of these policies allow charter schools to access public debt by creating or utilizing an intermediary governmental authority for the purpose of securing issued bonds.

### 3. Local Programs

Public school districts typically rely on local taxes for a significant portion of their budgets, and on bonds issued by the local school district for financial capital improvements to facilities. By contrast, charter schools receive almost 70% of their funding from the state, on average, with the remainder coming from federal funds distributed through state education authorities.<sup>227</sup> Several states even deny charter schools access to local funds, though they attempt to compensate for this by granting access to state funds.<sup>228</sup> In *Inequity's Next Frontier*, *Inequity Persists*, and *Inequity Expands*, the authors found that, in practice, most local governments do not allow charter schools to access local tax revenue for operational or facilities funds.<sup>229</sup> As discussed above, states have attempted to make up for this gap by providing additional funds and debt financing methods, but states still grant only partial access to local funding.

An interesting public-private partnership has developed in Indianapolis, Indiana. Indianapolis is the only city in the country where the mayor's office acts as the primary authorizer of local charter schools.<sup>230</sup> In 2002, the Indianapolis Mayor's Charter Schools Office and the Indianapolis Local Public Improvement Bond Bank, in partnership with the Annie E. Casey Foundation, JPMorgan Chase Bank, and Local Initiatives Support Corporation (LISC), developed a

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224. See, e.g., COLO. REV. STAT. § 22-30.5-404(2)(a) (2018).

225. See, e.g., COLO. REV. STAT. § 22-30.5-404(1)(a) (2018).

226. See, e.g., ARIZ. REV. STAT. ANN. tit. 35 (West 2018) (allowing counties, cities, school districts, and other political subdivisions that support industrial development to represent a charter school); DEL. CODE ANN. tit. 29, § 5051 *et seq.* (West 2018) (Delaware Economic Development Authority).

227. Osberg, *supra* note 57, at 55, 58–59.

228. *Id.* at 55–56.

229. See INEQUITY'S NEXT FRONTIER, *supra* note 5, at 15–16; INEQUITY PERSISTS, *supra* note 5, at 11–13; INEQUITY EXPANDS, *supra* note 5, at 34–36.

230. See IND. CODE §§ 20-24-2.3-3.1 to -3.5 (2018).



facilities loan program for Mayor-sponsored charter schools.<sup>231</sup> The Bond Bank serves as a conduit for a \$20 million loan from JPMorgan Chase Bank and relends the proceeds to individual schools.<sup>232</sup> The City of Indianapolis attaches a moral obligation clause to guarantee all of the loans made to charter schools, while LISC and the Annie E. Casey Foundation provide additional limited guarantees — this gives charter schools access to tax-exempt debt at rates that benefit from the City’s AAA credit rating.<sup>233</sup> This type of partnership between non-profit, for-profit, and government entities may be a sign of future integration between private and public debt markets to support public initiatives.

#### D. At-Risk Youth Programs

Charter schools typically serve a disproportionate number of socio-economically disadvantaged students that qualify for both federal and state aid programs.<sup>234</sup> Despite this, charter schools receive less of the funding attached to federal and state aid programs because local school districts control the flow of funds as LEAs or state grant recipients, leaving charter schools in a poor negotiating position to ask for increased funding.<sup>235</sup>

Title I of the ESEA establishes a framework for federal support, and creates accountability for schools, LEAs, and SEAs.<sup>236</sup> It offers financial support for schools educating children from low-income families<sup>237</sup> and is one of the most heavily funded federal education programs. Because of the high correlation between poverty and low academic achievement, supporting economically disadvantaged students is a central concern of the government.<sup>238</sup> The purpose of Title I is “to provide all children significant opportunity to receive a fair, equitable, and high-quality education[.]”<sup>239</sup>

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231. 2014 CHARTER SCHOOL FACILITY FINANCE LANDSCAPE, *supra* note 192, at 48.

232. *Id.*

233. *Id.*

234. *See Improving Basic Programs Operated by Local Educational Agencies (Title I, Part A) Program Description*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/programs/titleiparta/index.html> [<https://perma.cc/LAU3-7K6J>] [hereinafter *Improving Basic Programs*].

235. *See id.*

236. *See generally id.*

237. *See id.*

238. *See id.*

239. 20 U.S.C. § 6301 (2018).

Title I grants funding that may be used for additional staff, professional development, extended-time programs, and other strategies that raise student achievement in high-poverty schools.<sup>240</sup> Schools are not required to participate in Title I unless they want to receive additional funds. Grants are made to LEAs based on the number of economically disadvantaged children in each education agency's school district.<sup>241</sup> Recent studies have found that grants to SEAs vary between states, and that grants to LEAs within states also differ, creating wide disparities in Title I funding for at-risk youth.<sup>242</sup>

Title I defines charter schools as including both elementary and secondary schools.<sup>243</sup> However, the Court of Appeals for the Ninth Circuit validated a Department of Education policy that declared for-profit charter schools ineligible to receive federal funding under IDEA and ESEA.<sup>244</sup> As discussed earlier, whether a charter school can organize as a LEA has a profound effect on the amount of money it will actually receive in Title I funds: charter schools tied to LEAs receive around 4% more money than unassociated charter schools.<sup>245</sup>

State programs vary depending upon the infrastructure of at-risk youth programs already in place. Some states require the school district to administer all categorical aid programs to charter schools, who must negotiate the appropriate level of service and the extent to which the charter school itself will provide services.<sup>246</sup> This is particularly the case for free-and-reduced lunch programs as some charter schools lack the facilities necessary to house a cafeteria. Other states allow charter schools to compete with other public schools for categorical funds that target at-risk youth.<sup>247</sup> Finally, very few states have at-risk youth programs specifically for charter schools,

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240. See generally *Improving Basic Programs*, *supra* note 234.

241. 20 U.S.C. § 6333(a), (c) (2018). Local education agencies are a “public board of education or other public authority legally constituted within a State for either administrative control or direction of . . . public elementary schools or secondary schools.” 20 U.S.C. § 7801(30)(a) (2018); see also *supra* Section III.A.

242. See Goodwin Liu, *Improving Title I Funding Across States, Districts, and Schools*, 93 IOWA L. REV. 973, 993–94 (2008).

243. 20 U.S.C. § 7801(19), (45) (2018).

244. See *Ariz. State Bd. for Charter Sch. v. U.S. Dep’t of Educ.*, 464 F.3d 1003, 1010 (9th Cir. 2006); see Evans, *supra* note 11, at 640. While the ruling only applies to for-profit charter schools, there is some question as to whether the Department’s policy will chill the growth of charter schools across the country. See *id.* at 641–43.

245. See *supra* Section III.A.3.

246. See, e.g., MASS. GEN. LAWS ch. 71B, § 14 (2018); see generally MASS. GEN. LAWS ch. 71, § 89 (2018).

247. See, e.g., *ESEA Competitive Grant Programs*, WIS. DEP’T PUB. INSTRUCTION, <https://dpi.wi.gov/esea/historical/funding/competitive> [<https://perma.cc/6XUD-3SD6>].

which allow charter schools to have automatically increased funding for students that qualify for such aid. Such programs typically exist in states where charter schools serving at-risk youth are favored over schools serving non-qualifying students.

### E. Special Education

IDEA provides the framework within which public schools provide special education. IDEA is premised on the fact that it is almost twice as expensive to educate a child with special needs compared to a child without such needs.<sup>248</sup> To ease this financial burden, IDEA facilitates distribution of federal funds to SEAs based on a state appropriation formula.<sup>249</sup> The SEAs then make sub-grants to LEAs to pay for “free and appropriate public education” (FAPE) for special needs children.<sup>250</sup> While state participation in the program is not mandatory, the federal government provides a significant financial incentive for states to participate by subsidizing the cost of providing FAPE for children with disabilities.<sup>251</sup>

To be eligible for IDEA funds, state and local education agencies must ensure that all eligible students are receiving FAPE.<sup>252</sup> Local school officials must work together with parents, counselors, and other professionals to create an “individualized education plan” (IEP) for every qualifying student.<sup>253</sup> Students must also be taught in the “least restrictive environment” such that, to the maximum extent appropriate, children with disabilities should be educated alongside children without disabilities.<sup>254</sup> IDEA thus obligates school districts to support education for students with disabilities even if the cost of doing so is far higher than the cost of supporting non-disabled students. IDEA has generated a considerable volume of litigation.<sup>255</sup>

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248. See NANCY LEE JONES ET AL., *INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): BACKGROUND AND ISSUES* 117 (2004).

249. 20 U.S.C. § 1411(d) (2018); see JONES ET AL., *supra* note 248, at 45.

250. 20 U.S.C. § 1411(f)(1), (3) (2018); see JONES ET AL., *supra* note 248, at 87.

251. See 20 U.S.C. § 1400(d)(1)(A)–(2) (2018); see also Dixie Snow Huefner, *Updating the FAPE Standard Under IDEA*, 37 J. L. & EDUC. 367 (2008) (examining the Supreme Court’s Rowley decision’s impact on the FAPE standard); H. RUTHERFORD TURNBULL, III, *FREE APPROPRIATE PUBLIC EDUCATION: THE LAW AND CHILDREN WITH DISABILITIES* (4th ed. 1993).

252. *Grants to States for Education of Children with Disabilities Program Description*, U.S. DEP’T OF EDUC. (2016), <https://www2.ed.gov/programs/oseppts/index.html> [<https://perma.cc/H7NS-QS4V>].

253. 20 U.S.C. § 1414(d)(1)–(2)(A) (2018).

254. 20 U.S.C. § 1412(a)(5)(A) (2018).

255. See generally Huefner, *supra* note 251.

Similar to ESEA, IDEA includes public charter schools in its definitions of “elementary school” and “secondary school,”<sup>256</sup> but the Department of Education has promulgated regulations limiting the act to cover only non-profit charter schools.<sup>257</sup>

Money allocated under IDEA is distributed from the federal government to SEAs, which allocate the funds to the LEAs responsible for providing the special education services to students.<sup>258</sup> At the local level, the challenge of implementing special education in charter schools stems from an inherent tension between special education and parental choice — how to reconcile parent choice with centralized special education team decision making. This is exacerbated by special education regulations and charter school laws that exempt charter schools from regulations.<sup>259</sup> Special education funding is a sensitive topic in school finance, and the various mechanisms designed by state legislatures to fund special education reflect the underlying frustration of school districts, who pay a significant portion of special education costs from general operation funds because special education resources are essentially underfunded by state and federal mandates.<sup>260</sup>

Due to their small size, low enrollments, limited staff, and targeting of at-risk youth, charter schools may be disproportionately affected by the costs associated with special education.<sup>261</sup> The high costs of special education could diminish, if not altogether destroy, a charter school’s ability to operate effectively.<sup>262</sup> Expenditures for “high need” or “high cost” students can exceed thirteen times that of a general education student.<sup>263</sup> Also, because most charter school

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256. 20 U.S.C. § 1401(6), (27) (2018).

257. *See supra* note 27.

258. *See* CTR. FOR IDEA FISCAL REPORTING, QUICK REFERENCE GUIDE ON THE ALLOCATION OF IDEA PART B SUBGRANTS TO LOCAL EDUCATION AGENCIES 1 (2017), <https://cifr.wested.org/wp-content/uploads/2017/09/CIFR-ORG-LEA-Allocations.pdf> [<https://perma.cc/J347-VGKV>].

259. *See* EILEEN M. AHEARN ET AL., PROJECT SEARCH: SPECIAL EDUCATION AS REQUIREMENTS IN CHARTER SCHOOLS, FINAL REPORT OF A RESEARCH STUDY 43 (2001), <http://www.nasdse.org/Portals/0/Documents/ProjectSearch.pdf> [<https://perma.cc/UW2S-FTVH>] [hereinafter PROJECT SEARCH].

260. VENTURESOME CAPITAL, *supra* note 46, at 38.

261. *See* PROJECT SEARCH, *supra* note 259, at 4–5.

262. *See id.* at 38; *see also* J.P. Heubert, *Schools Without Rules? Charter Schools, Federal Disability Law, and the Paradoxes of Deregulation*, 32 HARV. C.R.-C.L. L. REV. 301 (1997).

263. OFFICE OF SPECIAL EDUC. AND REHAB. SERVS., U.S. DEPT. OF EDUC., A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES (2002),

admissions use a lottery system and target at-risk youth, a school may have a disproportionate number of special needs or undiagnosed special needs applicants compared to other schools in the state or district.<sup>264</sup> While some states have special funds for high-cost students, a significant portion of the underfunded costs are borne by the school.<sup>265</sup> As a result, several studies have documented that charter schools “struggle to amass the fiscal and human capacity” to comply with federal and state law.<sup>266</sup>

State statutes often do not explicitly dictate how special education funds should be distributed to charter schools. In ten states, the charter school law is silent regarding special education funding.<sup>267</sup> A slew of state laws simply reiterate IDEA’s language mandating that students with disabilities receive a “proportionate” or “commensurate” share of federal and state special education funds.<sup>268</sup> Some states take a different approach. Massachusetts, for example, has specific provisions that limit a charter school’s fiscal responsibility for students who attend the school but do not require placement in a separate day or residential living environment.<sup>269</sup> All states use various funding formulas based on the number of special education children in the school, the type of disability, grade, level of service needs, or total student population.<sup>270</sup> Barring specific language, the flow of special education funds largely depends on whether a charter school is organized as a LEA.

States have developed three models to fund special education in charter schools, which depend on whether the school is chartered as a

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[http://ectacenter.org/~pdfs/calls/2010/earlypartc/revitalizing\\_special\\_education.pdf](http://ectacenter.org/~pdfs/calls/2010/earlypartc/revitalizing_special_education.pdf)  
[<https://perma.cc/93AQ-EXTK>].

264. See LAUREN M. RHIM & MARGARET J. McLAUGHLIN, CHARTER SCHOOLS AND SPECIAL EDUCATION: BALANCING DISPARATE VISIONS 4 (2000), <https://files.eric.ed.gov/fulltext/ED444297.pdf> [<https://perma.cc/VP4D-JQNM>].

265. See MICHAEL GRIFFITH, STATE FUNDING PROGRAMS FOR HIGH-COST SPECIAL EDUCATION STUDENTS (2008), <http://www.ecs.org/clearinghouse/78/10/7810.pdf> [<https://perma.cc/3ZMB-WBZS>].

266. See, e.g., PROJECT SEARCH, *supra* note 259, at 33; Cassandra Guarino & Derrick Chau, *Special Education in Charter and Conventional Public Schools*, in CHARTER SCHOOL OPERATIONS AND PERFORMANCE: EVIDENCE FROM CALIFORNIA 161–73 (R. Zimmer et al. eds., 2003).

267. Lauren M. Rhim et al., *Charter School Statutes and Special Education: Policy Answers or Policy Ambiguity?*, 41 J. SPECIAL EDUC. 50, 57 (2007) (Arkansas, Hawaii, Iowa, Kansas, Michigan, New York, Oklahoma, Tennessee, Texas, and Wisconsin).

268. *Id.*

269. See, e.g., MASS. GEN. LAWS ANN. c. 71, § 89 (West 2018).

270. PROJECT SEARCH, *supra* note 259, at 23.

LEA.<sup>271</sup> If a charter school is its own LEA, or operates independently from the local school district, then it assumes the full fiscal and programmatic responsibility for special education, and has “no link” to the local school district’s special education services.<sup>272</sup> Such charter schools, however, remain responsible for evaluating the kinds of services required by special needs students. This evaluation carries with it the risk of having to educate a large number of “high cost” students. Some “no link” states have developed programs to reduce this risk. Indiana charter schools may join a cooperative that provides special education support.<sup>273</sup> Ohio employs program support run by governmental entities that provide all public schools with special education services, called Educational Service Centers.<sup>274</sup> Rhode Island requires charter schools to inform parents of “high costs” students that they will have difficulty meeting the child’s needs, and, in some cases, requires the school to pay for such a student’s enrollment in a private school that provides adequate special education services, if requested by the student’s parents.<sup>275</sup>

271. *See id.* at 13. States with charter school laws often mix the three policies as a part of a comprehensive charter school policy, depending on whether a charter school may be chartered as a LEA. For example, if a California charter school organizes as a LEA, then it is subject to “no link” provisions. If it does not organize as a LEA, the charter school is governed on a “partial-link” basis. *See* PROJECT SEARCH, *supra* note 259, at 13; *see also* Lauren M. Rhim & Margaret J. McLaughlin, *Special Education in American Charter Schools: State Level Policy, Practices and Tensions*, 31 CAMBRIDGE J. EDUC. 373 (2001); *see generally* JULIE F. MEAD, PRIMERS ON IMPLEMENTING SPECIAL EDUCATION IN CHARTER SCHOOLS, CHARTER SCHOOLS DESIGNED FOR CHILDREN WITH DISABILITIES: AN INITIAL EXAMINATION OF ISSUES AND QUESTIONS RAISED (2008), <http://www.uscharterschools.org/cs/spedp/query/q/2057> [https://perma.cc/UK9B-W4AS] [hereinafter, PRIMERS ON IMPLEMENTING SPECIAL EDUCATION] (providing a list of policies by state).

272. States that have adopted a “no link” statute include: Delaware, Indiana, Missouri, North Carolina, Ohio, Pennsylvania, and Rhode Island. Several states provide that if a charter school organizes as an LEA, then it shall operate under “no link” principles: Arizona, Arkansas, California, District of Columbia, Georgia, Idaho, Illinois, Massachusetts, Michigan, New Mexico, Oklahoma, Texas, Utah, and Wisconsin. *See* PRIMERS ON IMPLEMENTING SPECIAL EDUCATION, *supra* note 271.

273. *See* IND. CODE § 20-35-5-1 *et seq.*; *see also* Jane Ammeson, *Northwest Indiana Special Education Cooperative Opens Doors for Children with Disabilities*, NORTHWEST IND. TIMES (Sept. 20, 2018), [https://www.nwitimes.com/niche/northwest-indiana-special-education-cooperative-opens-doors-for-children-with/article\\_cd09d7f8-0682-5841-b895-d62cfc3ca1cd.html](https://www.nwitimes.com/niche/northwest-indiana-special-education-cooperative-opens-doors-for-children-with/article_cd09d7f8-0682-5841-b895-d62cfc3ca1cd.html) [https://perma.cc/2T4V-6Q75].

274. OHIO REV. CODE § 3313.843, § 3313.845. Educational Service Centers serve multiple schools within a given district, including charter schools, and are funded according to the funding levels of the schools they serve.

275. R.I.G.L. § 16-24-1; R. I. REGULATIONS § 300.131–§ 300.144.

If a charter school is part of a LEA, usually the local school district, then the fiscal and programmatic responsibilities may be provided solely by the LEA (“total link”) or shared between the LEA and the charter school (“partial link”).<sup>276</sup> In total link states, the LEA (without the charter school) provides all special education services and funding. Generally, total link states follow one of three models: a strict oversight and control model, a contract model, or an insurance model.<sup>277</sup> Under the strict oversight and control model, states such as Hawaii and Kansas allocate per-pupil funds directly to the LEA, who is then solely responsible for providing all special education services directly to charter schools.<sup>278</sup> Strict oversight states often have highly centralized education systems that protect charter schools from incurring high special education costs. Under the contract model, LEAs may contract special education services to the charter schools who become de facto agents of the LEA.<sup>279</sup> The charter school is free to hire special education teachers and provide services, but is also directly accountable to the LEA’s director of special education for state and federal compliance.<sup>280</sup> Finally, in some states, such as Colorado, local education agencies employ the insurance model, which requires charter schools to pay a flat per-pupil fee to districts in order to insure against the possibility of having to educate a high-cost student.<sup>281</sup> At the end of the school year, the local education agency may return unused premiums or hold them in case of future deficits for high cost special needs students.<sup>282</sup>

In partial-link states, the charter school and LEA negotiate the appropriate level of services and funding they will jointly provide.<sup>283</sup>

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276. See PROJECT SEARCH, *supra* note 259, at 12.

277. See EILEEN M. AHEARN ET AL., RESEARCH REPORT #1: STATE LEGISLATIVE REVIEW 17 (2005) (Total Link only: Colorado, Connecticut, Hawaii, Kansas, Mississippi, Nevada, New Hampshire, Oregon, Virginia, Wyoming; Total Link if not LEA: Georgia, Idaho, Illinois, Massachusetts, Michigan, South Carolina, Tennessee, Texas, Wisconsin).

278. HAW. REV. STAT. ANN. § 302D-30 (West 2018); KAN. STAT. ANN. § 72-3409 (West 2018).

279. PROJECT SEARCH, *supra* note 259, at 24.

280. *Federal Policy 104: Oversight of Federal Funds in Charter Schools*, NAT’L ASS’N CHARTER SCH. AUTHORIZERS, <https://www.qualitycharters.org/research-policies/archive/federal-policy-104-oversight-of-federal-funds-in-charter-schools/> [<https://perma.cc/HXC7-M2GN>].

281. PROJECT SEARCH, *supra* note 259, at 25.

282. *Id.*

283. *Id.* See PRIMERS ON IMPLEMENTING SPECIAL EDUCATION, *supra* note 271 (Partial-Link Only: Alaska, Florida, Iowa, Louisiana, Maryland, Minnesota, Nevada, New Jersey, New York; Partial-Link if not LEA: Arizona, California, District of Columbia, New Mexico, Oklahoma, South Carolina, Tennessee, and Utah).

Such arrangements usually involve a mixture of special education services provided by the LEA and the charter school, with the LEA disbursing funds, minus administrative fees, to the charter school only for services directly provided.<sup>284</sup> For example, in Florida, it is common for a LEA to assign a liaison between the agency and the charter schools within its boundaries; the liaison is responsible for coordinating special services and maintaining all IEPs.<sup>285</sup> Similarly, in Iowa, the charter school and LEA are required to coordinate with the Area Education Agency with regards to special education services.<sup>286</sup> Tennessee, in 2012, granted LEAs the authority to withhold education funds to cover insurance and other retirement obligations, or to withhold up to 1% of educational funds to cover services not contracted from the local education agencies.<sup>287</sup> The partial-link model provides charter schools some insurance from the high costs of special needs education: charter schools who are unable to provide certain expensive services may negotiate with a LEA, which presumably has the infrastructure to take on a portion of those costs. However, as discussed earlier, charter schools often lack bargaining power in these negotiations, and so may be saddled with a larger portion of the expenditures if they cannot provide the services directly.

## F. Transportation

School transportation is one of the most contentious issues for school budgets. Transportation is often a barrier for parents attempting to exercise school choice, especially for low-income families.<sup>288</sup> The transportation costs for charter schools are typically higher than for local school districts, because the charter schools typically draw students dispersed over a larger area.<sup>289</sup> States such as

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284. PROJECT SEARCH, *supra* note 259, at 39.

285. *Id.* at 13.

286. *Id.* at 25.

287. See Regina Umpstead et al., *Charter Schools and the Law: Current Issues in U.S. Courts and Legislatures*, 298 ED. LAW. REP. 657, 667 (2014) (citing TENN. CODE ANN. § 49-13-101 *et seq.* (West 2013)).

288. See PAUL TESKE ET AL., CTR. ON REINVENTING PUB. EDUC., DRIVERS OF CHOICE: PARENTS, TRANSPORTATION, AND SCHOOL CHOICE 24 (2009), [https://www.crpe.org/sites/default/files/pub\\_dscr\\_teske\\_jul09\\_0.pdf](https://www.crpe.org/sites/default/files/pub_dscr_teske_jul09_0.pdf) [<https://perma.cc/T5YS-2YKX>].

289. See generally Jon Valant & Jane Arnold Lincove, *The Barriers that Make Charter Schools Inaccessible to Disadvantaged Families*, BROOKINGS INST. (Mar. 16, 2018), <https://www.brookings.edu/blog/brown-center-chalkboard/2018/03/16/the-barriers-that-make-charter-schools-inaccessible-to-disadvantaged-families/> [<https://perma.cc/QXS3-EEBL>].



Arizona and Delaware provide state transportation aid to charter schools that are not chartered by a local school board.<sup>290</sup> California law provides that charter schools are entitled to transportation services by the local school district at no cost because if the students attended a district public school, the district would bear the costs of providing transportation anyway.<sup>291</sup> Other state enabling statutes do not address transportation, leaving charter schools to negotiate with local school districts for transportation services.

#### IV. PROPOSALS

The foregoing illustrates the intricate, difficult hurdles charter schools face in their plight for equitable funding. Many states require that funds go through an intermediary, often the hosting district, but charter schools lack bargaining power against SEAs and LEAs. In order to secure funds, states need to anchor public funds to a stable public institution that has access to public debt markets. Lastly, charter schools struggle the most at their beginnings, as they lack sufficient start-up funds and adequate facilities. Charter schools have unique financial needs and must rely on public assistance to preserve the public character of the charter school movement.

A number of reforms, most at the state level, are necessary in order to close the charter school funding gap. First, states should strengthen charter school bargaining positions by revising their charter school laws to provide specific guidance as to mandatory funding levels and to remove provisions that hamstring charter schools, such as “hold harmless” clauses. Second, states should streamline the funding process and give charter schools greater autonomy over their funds by allowing charter schools to organize as their own LEA. Third, expanding the field and role of authorizers will spur innovation in charter school models and will ease the workload of overburdened state and local education agencies who currently act as authorizers. Fourth, states should fund initiatives that provide charter schools access to startup and facilities funding. Fifth, states should rebalance their priorities when it comes to distributing funds to charter schools; charter schools should be funded from the same local sources as traditional public schools rather than relying on state funds. Finally, charter schools should fight for equal funding on

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290. ARIZ. REV. STAT. ANN. § 15-185(D) (2018); DEL. CODE ANN. tit. 14, § 508 (West 2018).

291. CAL. EDUC. CODE § 42238.03 (West 2018).

their own behalf by pursuing litigation under their respective state's "adequate education" constitutional provisions.

**A. Drafting Stronger Charter School Laws: Statutory Language, Withholding Clauses, and Impact Aid**

As discussed above, charter school statutes are often poorly drafted, vague, and give little bargaining power to charter schools who must negotiate with public school districts.<sup>292</sup> When states use words such as "commensurate" or "equitable" to describe funding levels with no particular definition, they give hosting school districts the ability to define the terms to their advantage. Moreover, charter school statutes often include "hold harmless" clauses, which permit hosting school districts to withhold funds that should follow a student if that student transfers to a charter school.<sup>293</sup> Such provisions essentially force taxpayers to fund that student's education twice — once to the school district and again to the charter school. Further, states provide "impact aid" to public schools to cushion the financial blow from transferring students.<sup>294</sup> This often includes fees that charter schools must pay to the district for services normally provided on a non-fee basis, such as administrative or transportation "reimbursements."<sup>295</sup> These kinds of fee provisions not only cut into the already slim funds charter schools rely on to provide education programs, but they also give school districts the power to essentially determine the financial viability of charter schools.

There are several amendments that ought to be made to charter school statutes in order to level the playing field. First, charter school statutes should specify the funding levels of charter schools and provide clear parameters for charter-district negotiations. For example, a statute could expressly dictate that charter schools should receive an amount equal to the per-pupil expenditure on students in all district public schools. Further, permissive language such as "may" or "ought" should be replaced with mandatory language such as "must" or "shall." Studies suggest that charter schools in states with enabling statutes that use stronger funding language receive an average of 4% more funds than charter schools in states with weaker language.<sup>296</sup> While these amendments may not ensure equal funding

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292. *See supra* Section III.A.1.

293. *See supra* Section III.A.2.

294. *See supra* Section III.A.

295. *See supra* Part III.

296. *See supra* Section III.A.

to charter schools, specifying an amount will at least allow charter schools to plan with a more accurate idea of the public funding they will receive. Specific language will provide charter schools increased access to legal recourse if a school district does not give the funding specified in the statute.

Second, state legislatures should consider doing away with “hold harmless” and “impact aid” provisions. School districts argue that they have larger fixed costs, such as a collective bargaining agreement with a teacher’s union, that prevent them from cutting costs as easily as a charter school could.<sup>297</sup> But “hold harmless” and “impact aid” provisions essentially let the school district shirk its responsibility to subsidize the costs of students that attend charter schools, and stall necessary systemic reform. It is widely accepted that the school finance structures are moving toward a per-pupil model, which require districts to realistically predict the number of children they are likely to serve.<sup>298</sup> Eliminating a district’s perverse financial incentives to fight against this reform would encourage better educational outcomes and reduce the burden on taxpayers.

Third, state legislatures should consider enacting legislation that penalizes school districts that withhold funds from charter schools, or that exclude them from categorical aid programs intended for all public schools within the district. This can be done in various ways. For example, school districts that arbitrarily withhold money from charter schools could be assessed a penalty by SEAs. Alternatively, the statute could authorize a punitive damages award for charter schools that pursue judicial remedy. These kinds of penalties would give charter schools an advantage both in negotiating service contracts with school districts and when enforcing the terms of these contracts.

Finally, improving charter school access to non-profit credit and public debt markets would start to even the playing field between charter schools and traditional public-school districts. States can provide legislative incentives, such as tax credits similar to those in the NMTC, to lenders who invest capital in charter schools in certain demographic areas.<sup>299</sup> This incentive would lead to more private funds being used to construct and maintain new charter schools without getting the school district involved. Similarly, states can act to improve charter schools’ ability to raise funds at interest rates

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297. *See supra* Section I.B.

298. *See supra* Section III.A.1.

299. *See supra* Section II.B.

similar to those of public-school district tax-exempt bonds. This would allow charter schools to more effectively compete with traditional public-school districts. State legislatures could achieve this goal in a number of ways, including enacting state-level credit enhancement programs, whereby a charter school that meets certain performance targets receives the state's credit rating (either through a guaranty or a subsidy) for purposes of obtaining capital financing.

Drafting stronger charter school laws that more clearly define charter school funding levels and eliminate LEAs' incentives or excuses to withhold funds from charter schools would greatly reduce the funding gap, by giving charter schools more negotiating power and the ability to pursue legal remedies against non-compliant local school boards.

### **B. Improving Funds Flow: Local Education Agency Status**

In order to equalize state and federal funding between charter schools and public schools, state legislatures increasingly allow charter schools or authorizers to organize as their own LEAs, rather than organizing the charter school under the hosting school district. A LEA receives federal funds directly from the state and is responsible for administering these funds to schools.<sup>300</sup> The local education agency is responsible for overseeing all activities funded by federal dollars, to assure delivery of applicable services and inclusion of qualified students, to provide training in compliance with federal law, and to communicate with state and federal education units.<sup>301</sup> LEA status is controlled by state law, twenty-five states currently allow charter schools or their authorizers to organize as LEAs.<sup>302</sup>

When a charter school gains LEA status, it can effectively cut out the intermediary when receiving federal dollars that are properly allocated to it. There are several benefits to this, both for the charter school and the federal government. The charter school does not have to negotiate with the hosting school district for federal money properly allocated to it. Further, charter schools that have LEA status are generally more autonomous and receive more money than charter schools in states where they cannot organize as a LEA. For the federal government, charter schools with LEA status have more flexibility in administering federal funds, which allows them to

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300. *See supra* Part III.

301. *See supra* Part III.

302. *See* CHARTER SCHOOL LAWS, *supra* note 33.

innovate and improve delivery of services to at-risk youth under Title I or special needs students under IDEA.

States have adopted several different models to grant LEA status to charter schools. Some states allow charter schools to become full-fledged LEAs, which means they also assume all responsibility for complying with federal guidelines.<sup>303</sup> These states also parcel out state dollars according to LEA status, thus improving access to state programs. Other states allow more flexibility for charter schools to negotiate with host school district LEAs for some partial support, diverting some of the administrative burdens to the district.<sup>304</sup> New York grants limited local education agency status to charter schools, which allows them to apply only for federal funds.<sup>305</sup> Regardless of the model, when charter schools can gain LEA status they can compete with the hosting district and recoup the funds that would have been withheld to cover administrative costs.

With LEA status, however, comes the burdens of reporting to state and federal education units.<sup>306</sup> Education reporting requirements are notoriously difficult to manage and often require a specialist to organize the data and deadlines for a particular school. Single charter schools are at a significant disadvantage because they often lack the expertise to comply with reporting requirements on their own, but do not have the budget to hire a specialist. Additionally, single charter schools do not enjoy the economy of scale of a large school district that oversees dozens of schools. Even if a charter school hires a specialist, the money would likely come out of operational funding at the expense of education programming.

That said, by becoming their own LEAs charter schools can eliminate the inefficient education bureaucracies attached to large school districts and create more efficient ways for single schools to manage reporting requirements. Charter schools might also find that contracting with a private company that manages the reporting requirements for several charter schools is more cost-efficient than having contracted with the host school district to do so. This supports the education reform goals of charter schools, because bureaucracies often stifle innovation and create more overhead, which inevitably has a detrimental impact on student achievement.

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303. *Id.* at 12.

304. *See supra* Part IV.

305. *See* CHARTER SCHOOL LAWS, *supra* note 33, at 62.

306. *See, e.g.*, Every Student Succeeds Act of 2015, Pub. L. 114-95 § 1413, 129 Stat. 1802.

Another problem with charter schools acting as LEAs is that they balkanize the education finance landscape, creating autonomous agencies within larger school districts. Increasing the number of LEAs in the state necessarily increases the administrative burden on SEAs to monitor them for compliance. While an audit of a single school LEA takes less time than auditing a large school district, the initial audit by an intermediary (a school district) would be missing. In some states, authorizers perform this intermediary audit, but these powers are often relatively weak compared to a state regulatory authority.

The concept of charter schools as LEAs is an easy fix for improving the flow of federal funds, but it does not work for all state charter school schemes. Many states, such as Massachusetts, allow only the SEA to charter a new school.<sup>307</sup> In those states, the advantages of allowing the charter school to organize as a LEA would be nil, because the school already receives its federal and state funds directly from the state. In addition, several states allow only local school districts to charter new schools.<sup>308</sup> LEA status for charter schools in these states would have benefits, but the local school district would never allow it, as it has a vested interest in collecting administrative fees. Charter school LEAs would work best in states that allow for different kinds of non-district authorizers, because this would give the charter school financial and programmatic control in federal programs while preserving some level of oversight to the authorizer. This reform, of encouraging multiple and alternative authorizers, is discussed below.

### C. Strengthening the Role of Authorizers

As the intermediary between state education agencies and charter schools, authorizers are in a unique and pivotal position. As previously discussed, SEAs and local education boards often make poor authorizers: state agencies are generally overburdened and local education boards have a vested interest in withholding funds from charter schools.<sup>309</sup> Allowing more diversity in the kinds of authorizers would promote a competitive market for authorizers, and generate more efficient and innovative methods of evaluating charter school progress.<sup>310</sup> Moreover, alternative authorizers may act as de-

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307. *50-State Comparison*, *supra* note 56.

308. *Id.*

309. *See* Section II.A.

310. *See* CHARTER SCHOOL LAWS, *supra* note 33, at 5.

facto school boards for charter schools, and state legislatures could empower authorizers to administer categorical grants and state aid directly to charter schools. As the entities responsible for monitoring charter school progress, authorizers are in the best position to determine whether the money that charter school received has been effectively spent. In essence, the authorizer would act as the LEA for the charter schools it oversees.

There are several other advantages to having a more diverse authorizer pool. First, like charter school LEAs, an alternative authorizer would prohibit the local school district from arbitrarily withholding funds, thereby improving the flow of funds to charter schools. Second, authorizers have the distinct advantage of being able to create a more efficient system to manage federal and state compliance because they already serve in a monitoring role for a host of charter schools but are not themselves responsible for reaching educational outcomes. Third, authorizers typically have greater access to institutional resources to assist charter schools in meeting educational, financial, and managerial targets.

Most states, in lieu of allowing alternative authorizers, allow local school boards to retain control over the funds but require that the authorizer monitor the charter school's progress. This separation of control not only exacerbates the funding inequities between charter schools and public schools, it does not allow the authorizer to adequately gauge the effectiveness of a particular charter school model because the school itself is underfunded. A better solution would be to allow the authorizer to control both the monitoring and financial aspects of the charter school as a disinterested third party.

Elevating the role of authorizers to monitor funds may have some unintended consequences. Rather than creating innovative financing and accountability measures, the authorizers may simply fall back on traditional methods used by public school districts, which will only maintain the status quo. Furthermore, many authorizers, such as private universities and non-profit organizations, lack public accountability. While it is true that charter schools themselves remain accountable to the parents, who can remove their children from the school, there will be ineffective oversight of authorizers as a group if the state fails to regulate authorizer activity. Despite these challenges, granting authorizers the power to become, in effect, a LEA would likely improve funding equity and allow charter schools to thrive.

#### D. Categorical Grants: Start-Up and Facilities Funds

Studies examining barriers to emerging charter schools repeatedly find that one of the main hurdles preventing new charter schools from forming is lack of start-up and facilities funds.<sup>311</sup> These are unique funding challenges for charter schools that public schools typically do not have to worry about. Even assuming that charter schools receive equal funding, those funds are intended to maintain an educational program, not start a new one or pay for rent and facilities maintenance. As discussed above, many charter school organizations are sponsored by for-profit or non-profit entities that provide seed money to start the school and find a suitable building.<sup>312</sup> Additionally, authorizers typically compete for these programs in order to open charter schools in their districts because of their reputation for success.<sup>313</sup> The charter schools that are left out are smaller, community-based schools that often have the most innovative models for reaching at-risk students. These localized charter schools rely heavily on private donors or corporations for funds.<sup>314</sup> As discussed, there are a variety of methods that states can adopt to provide start-up funds and facilities access. What is essential is that state legislatures allocate state tax revenue to these initiatives rather than leave them underfunded.

#### E. Allow Local School Tax Revenues to Flow to Charter Schools

The majority of public-school funding comes from local property and sales taxes, yet the majority of charter school funding comes from state aid.<sup>315</sup> This likely reflects a political balance within particular states — state legislatures favor charter schools and local school communities (and school districts) resist them. Yet, in order for charter schools to fairly compete with public schools, they need to have access to the same amount of funding, regardless of the source.

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311. *See supra* Section III.B.2.

312. *See supra* Section II.B.

313. *See supra* Part III.

314. *See supra* Section II.B.

315. *See supra* Section III.A.



#### F. Litigate Under State Charter School Authorization Laws and State Constitutions

Since 2007, there has been a movement of charter schools seeking equal funding through the court system.<sup>316</sup> Beginning with Maryland<sup>317</sup> and seen recently in North Carolina<sup>318</sup> and Texas,<sup>319</sup> some charter schools sue their authorizers and LEAs to receive the same funding as traditional public schools. These suits rely on language in state constitutions providing for “adequate” education, or on statutory language that expressly or impliedly requires commensurate or proportional funding between traditional public schools and charter schools.<sup>320</sup> These lawsuits have had mixed success, with charter schools in Maryland and North Carolina prevailing<sup>321</sup> and charter schools in New Jersey and Texas failing in their endeavors.<sup>322</sup>

Interestingly, the Texas Supreme Court rejected a challenge brought by a charter school under the “adequacy” clause of the Texas state constitution because, in the court’s view, the Texas constitution did not require “adequate” funding to achieve the “general diffusion of knowledge.”<sup>323</sup> The court reasoned that educational spending does not necessarily determine the adequacy of an education, so judicial mandates that the legislature allocate specific amounts of money are inappropriate.<sup>324</sup> This proposition, however, is known to be untrue — funding for education, especially when related to facilities and special services, is critical to providing an adequate education.

As states revisit their charter school laws and debates around the merits of the school choice movements continue, public policy discussions surrounding equal funding for charter schools and

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316. See Jeanette M. Curtis, Note, *A Fighting Chance: Inequities in Charter School Funding and Strategies for Achieving Equal Access to Public School Funds*, 55 HOW. L.J. 1057, 1076 (2012).

317. See *Balt. City Bd. of Sch. Comm’rs v. City Neighbors Charter Sch.*, 929 A.2d 113, 131–32 (Md. 2007).

318. See *Sugar Creek Charter Sch., Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 673 S.E.2d 667, 669 (N.C. Ct. App. 2009).

319. See *Morath v. Tex. Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826 (Tex. 2016).

320. See *City Neighbors*, 929 A.2d at 131; *Sugar Creek*, 673 S.E.2d at 669; *Morath*, 490 S.W.3d at 850.

321. See *City Neighbors*, 929 A.2d at 131–32; see generally *Sugar Creek*, 673 S.E.2d 667.

322. See generally *J.D. ex rel. Scipio-Derrick v. Davy*, 2 A.3d 387, 393 (N.J. Super. Ct. App. Div. 2010); *Morath*, 490 S.W.3d at 850–51.

323. See *Morath*, 490 S.W.3d at 849–50; see also TEX. CONST. art. 7, § 1.

324. *Morath*, 490 S.W.3d at 850–51.

traditional public schools, along with equal funding litigation, will surely continue. Adopting the proposals above will give charter schools a better bargaining position vis-à-vis traditional public schools when negotiating for their share of federal, state, and local funding, and will improve the flow of funds from these sources to charter schools. Additionally, these proposals will, if adopted, broadly change the education finance landscape, as charter schools would be funded at levels similar to traditional public schools. This increased funding will allow charter schools to effectively compete with — and continue to innovate — the educational sphere, which can translate into better outcomes for students, families, and even school districts.

### CONCLUSION

The charter school movement represents a new hope for equal opportunity to receive a quality education. Charter schools themselves are places of instructional and managerial innovation, and the process of creating a charter school, with its layers of oversight between authorizers, state education agencies, and local school districts, is a mold-breaking reform in governance. But the charter school movement is relatively young, especially when compared with the traditional public-school model. States, school districts, and charter schools are only now discovering how to structure rules, regulations, and controls in order to make the charter school formula successful.

Advocates from all ends of the political spectrum seem to agree with this basic proposition: charter schools should receive the same funding as traditional public schools. This premise is grounded in the original ethos that inspired the charter school movement — that small, independent schools could do more with the money they receive from the government because they would not be hindered by the bureaucratic red-tape that prevents traditional public schools from pursuing innovative ideas. Providing equal funding to charter schools will place them on even footing with traditional public schools, which will give parents more choices in what school is best for their child. This, in theory, will force the public education bureaucracy to change. However, as this Article describes, charter schools are woefully and purposefully underfunded, inhibiting the market from truly reforming public education.

Furthermore, denying charter schools equal funding inhibits public schools and charter schools from advocating together for greater investment in America's schools and communities. Rather than taking money away from traditional public schools, charter schools

actually increase overall investment in education by tapping into outside sources of funding to supplement public education. Equalizing funding will enhance overall investment of both private and public dollars in education, which will allow charter schools and public-school districts to come together to advocate for greater government investment in schools. The broad solution to this problem is to reform state charter school laws so they provide equal funding for charter schools. Practically, this solution will play out differently in each state, as laws must be tailored to the state and local context in which the charter school will function.

Money alone will not raise achievement in public or charter schools. More than anything else, public and charter schools need dedicated, quality educators and school leaders to teach, inspire, and motivate students to reach their potential. But research has shown that every student is different. Thus, in order to promote students' growth into the citizens of tomorrow, innovative and different educational environments need to be created. Funding plays a critical role in creating these innovative contexts in charter schools.