National Alliance for Public Charter Schools

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Toward an Equitable Future:
Charter Schools and School-Funding Litigation

This issue brief examines the charter school funding landscape among the states, discusses whether charter schools receive equitable funding and draws parallels with school finance cases.

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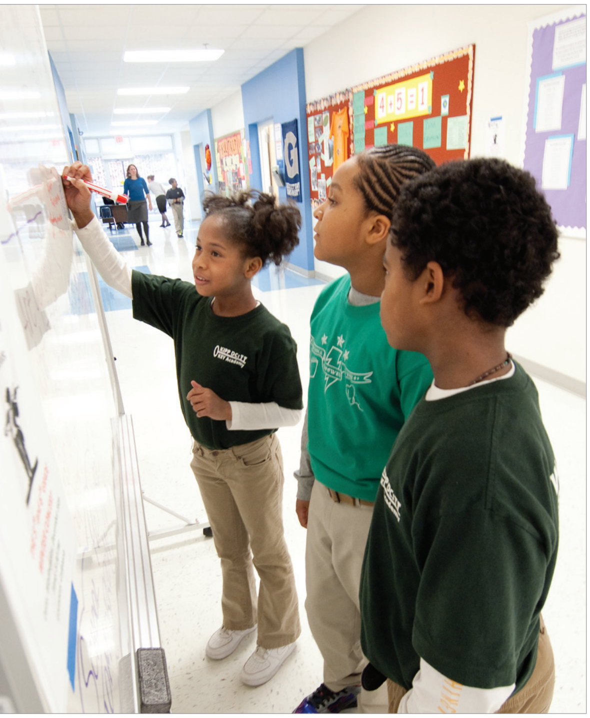
During the past two decades, school-finance lawsuits have reshaped the school-funding landscape in the majority of the 50 states. In some of the most high profile of these efforts, court rulings have influenced appropriations decisions made by state legislators, either indirectly in the form of judicial pressure or directly in the form of commandments to the legislature. At the same time, state legislators in 40 states have authorized the creation of public charter schools, independent public schools that are free to be more innovative and are held accountable for improved student achievement. Until recently, there has been little connection between adequacy lawsuits seeking enhanced funding for public schools and the burgeoning field of charter school funding disputes. That is poised to change.

In the past three years, charter-funding advocates have won victories in California, North Carolina, Maryland and Missouri. Current litigation is pending in more than 10 states, including Arizona, Georgia, North Carolina, Maryland, Missouri, California, Michigan, Tennessee, Florida and Arkansas. Extending these efforts to additional states has the potential to transform the charter sector. Based on a



recent national study, charter schools in 2010 educated 1,525,000 students and experienced an average funding deficit of $2,247 per student. Accordingly, the annual national funding deficit is now $3.4 billion, a figure that compounds every year charter schools are not equitably funded.

With a U.S. President uncommonly supportive of charter schools, a U.S. Department of Education Secretary with unprecedented financial backing, and a Race to the Top federal grant competition advancing education-reform efforts nationwide, now is the right time to assess the role strategic school-funding litigation can play in ensuring charter schools have access to equitable resources.

This issue brief examines the charter school funding landscape among the states, discusses whether charter schools receive equitable funding and draws parallels with school finance cases. This paper is not designed to be an academic treatise. The focus here is on practical lessons that can be learned by charter advocates, with particular emphasis on encouraging charter schools, charter support organizations and charter networks to determine the potential benefits (and limitations) of litigation efforts.

I. Charter School Funding Landscape and Disparities

Among the debates that surround the establishment of charter schools, perhaps none is more contentious or pitched than those over resources. While there are variations among states in the mechanics of charter-school funding, the basic concept is the same. Public charter schools, like district public schools generally, are funded based on student-enrollment and other characteristics.

Consider the following scenario. A charter school enrolls six students who would otherwise attend the traditional public school across the street. Assume that each of these students, if enrolled in the traditional public school, would earn $10,000 for the school based on relevant state, local and federal funding formulas and grant programs, providing a net funding amount of $60,000 for the school. When those six students enroll in the charter school, they are deemed enrolled in the charter school for funding purposes and the $60,000 that once flowed to the district school is now passed through to the charter school. In theory, this is how charter funding is supposed to work. In practice, however, charter schools rarely receive funding in this manner.

A growing body of research has documented the disparity in funding between traditional public schools and their charter school peers. Two representative studies, one by the American Federation of Teachers ("AFT") and one by the Fordham Institute, two organizations with vastly divergent perspectives on charter schools, concluded that charter schools were not receiving equitable funding when compared to traditional public schools. The AFT's 2003 report details expenditures in 11 states and found the gap between charter and district school funding ranged from $549 to $1,841 per pupil.[1]

The Fordham Institute's 2005 report found a dramatic and pervasive underfunding of charter schools in almost all of the 17 jurisdictions studied. The study found a national average underfunding of charter schools of $1,801 per pupil. The actual underfunding levels varied significantly among the states, ranging from a slight benefit to charter schools in Minnesota to a severe underfunding in Missouri, Wisconsin, Georgia, Ohio, California and South Carolina. The report also discovered funding gaps are most severe in urban areas.

Most recently, the 2005 analysis was updated in 2010 by Ball State University and a similar pattern emerged. In this report, the authors conclude the national funding disparity amounts to $2,247 per pupil annually. The results of this report are included in Table 1. As in the earlier Fordham study, the funding disparities varied by state and were most pronounced in urban areas where most charter schools are located. Furthermore, because the Ball State study included funding from private foundations in its calculations, this shortfall actually undercounts the extent of the funding disparity, suggesting the shortfall from public sources is even more dramatic.

II. School Finance Litigation: Relevant Legal Background and Principles

As noted, the rise of the charter school movement as a school-improvement strategy over the past twenty years has coincided with a rapid expansion of public school funding lawsuits. These funding lawsuits, which have several distinct variations, are challenges to state-funding formulas and the degree to which they provide the resources necessary to provide a sufficient education. Scholars have elsewhere described the contours of these lawsuits in great detail,[5] but they generally fall into one of two categories: (1) *Equity suits* where plaintiffs contend that the state-funding formula at issue does not provide equitable funding among students living in different parts of the state (these suits are generally an attack on a system that allows variations in local property tax to have an impact on student expenditures); and (2) *Adequacy suits* where plaintiffs contend that the total resources made available for education are not sufficient to allow students to meet required standards, even if the state-funding formula provides for sufficient equity among districts. Adequacy suits are currently the predominant form of school finance case.

These lawsuits, while based on notions of educational quality, are grounded in legal language that appears in state

District-Charter Funding Disparities Using Revenue Data Unadjusted for Charter Enrollment Concentration, Fiscal Year 2006-07

State	District Per-Pupil Revenue*	Charter Per-Pupil Revenue	Funding Disparity	Funding Disparity as a Percent of District Per-Pupil Revenue
Arizona	$9,577	$7,597	($1,980)	(20.7%)
California	$10,559	$9,987	($572)	(5.4%)
Colorado	$9,763	$8,306	($1,457)	(14.9%)
Connecticut	$14,742	$12,631	($2,110)	(14.3%)
Delaware	$13,655	$9,990	($3,665)	(26.8%)
Florida	$10,966	$8,195	($2,771)	(25.3%)
Georgia	$9,892	$8,880	($1,011)	(10.2%)
Idaho	$8,108	$6,178	($1,930)	(23.8%)
Illinois	$11,478	$10,616	($862)	(7.5%)
Indiana	$7,047	$9,328	$2,281	32.4%
Louisiana**	$10,327	$9,971	($357)	(3.5%)
Massachusetts	$15,396	$12,838	($2,558)	(16.6%)
Michigan	$10,341	$8,652	($1,689)	(16.3%)
Minnesota	$11,250	$11,081	($169)	(1.5%)
Missouri***	$14,200	$10,085	($4,115)	(29.0%)
New Jersey	$17,110	$12,442	($4,669)	(27.3%)
New Mexico	$10,149	$9,240	($909)	(9.0%)
New York	$19,518	$12,908	($6,610)	(33.9%)
North Carolina	$8,995	$8,065	($930)	(10.3%)
Ohio	$9,779	$8,190	($1,589)	(16.2%)
Pennsylvania	$12,004	$10,230	($1,774)	(14.8%)
South Carolina(est.****)	$10,165	$8,396	($1,769)	(17.4%)
Texas	$9,773	$9,141	($631)	(6.5%)
Washington, D.C.	$29,808	$17,525	($12,283)	(41.2%)
Wisconsin (est.****)	$13,295	$10,422	($2,872)	(21.6%)
Average* (Weighted for Enrollment)	$11,252	$9,469	($1,783)	(15.8%)
*	Total district revenue statewide divided by total number of district students.			
**	Louisiana re-opened schools for the first time after Hurricane Katrina in FY 2006-07. As a result, its school funding streams were highly unusual and not representative of the ongoing funding disparity in the state. We therefore excluded Louisiana from the national average.			
***	Includes just Kansas City and St. Louis.			
****	In South Carolina and Wisconsin, we were unable to obtain statewide data on charter and / or district revenues. In those states, we used data from districts as a proxy. Full details on this calculation appear in the Methodology and those state chapters.			

constitutions. Every state constitution contains language obligating the state government to provide public education. At first review, the language seems advisory, requiring the legislature to provide for a "sound basic, education," a "system of free common schools," a "thorough and efficient education," a "complete and appropriate education," or some similar standard. While it may seem difficult to divine from this language a substantive educational standard—how one would define what qualifies as a thorough and efficient education or determine whether a state has provided a sound, basic education—courts have had no such difficulty.

In New York, for instance, courts have engaged in litigation for over a decade and ultimately entered judgments calling for dramatic increases in state expenditures. Examining the constitutional language, New York has one of the weakest substantive adequacy clauses among the states, requiring only that the legislature "provide" for a "system of free common schools."

After years of protracted litigation and appeals, New York's highest court issued a final liability finding in 2003. Thereafter, the court reviewed various cost studies designed to determine the cost to fund an adequate education in New York. The plaintiffs' study recommended an *annual* increase in funding between $6.6 billion and $9.1 billion. The governor released a competing study that called for an annual increase between $2.5 billion and $5.6 billion. Two other studies, one conducted by a masters panel appointed by the court itself, recommended an annual funding increase between $5.6 billion and $6 billion range. In a subsequent March 2006 study, the court directed the legislature to "consider" new funding in the range of $4.7 billion to $5.6 billion. So, in rather short order, the court interpreted the constitutional language requiring the provision of a "system of free common schools" to establish an adequacy standard that in turn required dramatically increased expenditures. It is no coincidence that New York and New Jersey—two states with long histories of school-finance litigation—are currently the highest spending states in the country, spending $15,981 and $15,691 per pupil respectively.[7]

This scenario has played out in dozens of states over the past decade, following a predictable path. While a pitched debate is raging over the relative merits of these suits and whether the ordered remedies will result in improved student achievement, a separate question about charter school funding is rarely asked: Will adequacy and related school-finance lawsuits have some influence on the burgeoning area of *charter school* funding disputes? If recent rulings are any indication, the answer is yes.

III. Applying School-Finance Theories to Charter Schools

The question for charter school advocates is whether a similar school-funding strategy might be able to address charter-funding inequities. In empirical terms, the foundation for such an application is straightforward. Unlike school adequacy lawsuits that are based on judicial interpretation of vague language, charter schools have a statutory right to a specific percentage of funding. While there may be issues with respect to how these statutes are interpreted, as a judicial matter the question of funding is one of fact more than interpretation.

The core question presented by an adequacy claim–is funding for public schools adequate and, if not, how much would be adequate–relies largely on a theory between spending and achievement. There must be some level of funding that defines adequacy, even if finding that number is the subject of intense disagreement. When courts are confronted by competing expert claims that vary by billions of dollars (much like those noted above in the New York case), even the most optimistic of school finance experts must concede that such calculations are an imprecise measure of adequacy.

This problem is largely cured in the charter school funding context. Charter school funding disputes usually do not depend on notions of adequacy or pure equity. Instead, they often depend on an interpretation of the funding levels required by the charter school statute. Thus, in the charter funding context, unlike the adequacy context, the real issue is usually compliance. That is to say, in charter school funding cases, the crux of the issue is often whether the district (or appropriate authorizer) is passing on the required amount of funding.

It must be noted that the charter funding studies noted above generally do not distinguish between sources of revenue for which charter schools are eligible under state charter statutes and those for which charter schools are expressly ineligible. Instead, they focus on absolute differences between schools. This difference is crucial to the legal analysis because under state law some sources of funds are *properly* withheld from charter schools. For instance, many charter school statutes allow districts or other authorizers to retain a certain portion of funding (typically 3 percent or 5 percent) to cover the administrative costs of approving and overseeing charter schools. Similarly, some charter schools are deemed part of a Local Education Agency (LEAs) under state law. As a result of this designation, some categorical funds that are required to flow through LEAs may properly be retained by the authorizing district if services are provided directly to the charter school.

Based on existing research and several recent lawsuits, it is difficult to dispute that charter schools in many states are not receiving their full share of required funding, even after taking into account sources of revenue that are excluded from state-funding formulas. Courts are beginning to recognize this funding disparity by awarding substantial judgments to charter schools in funding cases. Additionally, there have been new lawsuits challenging the differences in funding between charters and districts on more of a pure equity angle, but the results of these efforts remain uncertain.

IV. Charter School Funding Litigation Results

The evidence of underfunding is bolstered by recent litigation in which charter schools have succeeded in challenging the funding provided by districts. In 2005, a Maryland Appeals Court issued an opinion that grappled with the value of "in-kind" services provided to charter schools and whether such costs were properly deducted. Under Maryland law, a local board of education must:

[D]isburse to a public charter school an amount of county, state and federal money for elementary, middle and secondary students that is commensurate with the amount disbursed to other public schools in the local jurisdiction.

The Baltimore City School Board authorized a payment to the plaintiff charter schools in the amount of $7,954 per pupil, approximately 75 percent of the average per pupil funding for traditional public schools, which amounted to $10,956. In addition, the district valued in-kind services provided to the charter school at $2,943 per pupil, reducing the actual cash payment to the charter schools to $5,011 per pupil, less than half the allotment for traditional public schools in the district. Under these facts, the court determined the district had not met its obligation to disburse an amount of funding "commensurate with the amount disbursed to other public schools in the local jurisdiction" and upheld the judgment against the district.

Likewise, in February 2008, a North Carolina trial court ruled in favor of five charter schools that alleged the Charlotte school system was not passing on certain sources of revenue. Under North Carolina law:

[I]f a student attends a charter school, the local school system in the county in which that child resides shall transfer to the charter school an amount equal to the per pupil local current expense appropriation by the county government of that school system.

The Charlotte charter schools made two separate arguments: (1) the district used a pupil enrollment counting mechanism that, as applied to charter schools, undercounted actual enrollment; and (2) the district refused to provide certain sources of categorical revenue for which the charter schools qualified.

The court focused principally on the second issue, ruling that the district had failed to provide the charter schools with funding for special programs, including Bright Beginnings (a grant program designed to assist early elementary students) and the High School Challenge (a program that provides funding to improve graduation rates). The judgment awarded approximately $2 million for the five plaintiff charter schools.

There is ongoing charter funding litigation in California, Arizona, Missouri, North Carolina and Georgia, among other states. The potential for additional suits is tremendous.

Consider the following scenario, which is consistent with existing data:

- Assume a state with a $2,000 per pupil funding shortfall when comparing charter schools with similarly situated traditional public schools.
- Assume further that $500 of that per pupil amount is properly withheld under the terms of the state charter

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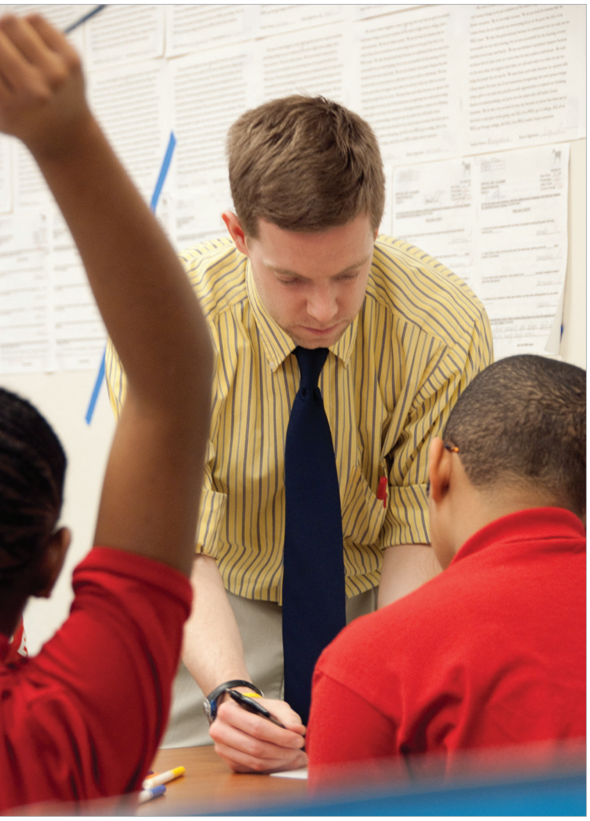


statute, which allows an authorizer to retain up to 3 percent of total funding. This leaves an improper underfunding of $1,500 per pupil.

- In a state with 50,000 charter school students enrolled (currently 16 states enroll that number of charter students or more), the potential liability is $75,000,000 annually.
- If one factors in a limitations period of six years, a common statutory period for contract remedies, the plaintiff charter schools stand to benefit from a judgment of $450,000,000.

Further, the $1,500 funding shortfall appears modest given existing research and recent cases. Indeed, the Ball State report found an average charter school underpayment of $2,247 per pupil. The Maryland court found an even more startling level of underfunding—more than $5,000 per pupil, which includes the value of the in-kind services withheld from the charter schools. And in Albany, New York, according to the report, the funding gap was more than $9,000 per pupil. Several other major districts withheld between $4,000 and $10,000, including: Cleveland ($4,085); Atlanta ($4,483); St. Louis ($4,743); Los Angeles ($5,541); San Diego ($5,654); New York ($6,553); Buffalo ($7,018) and Pittsburgh ($8,078).

V. Charter School Litigation Considerations

Given the potential unfunded liability, one might question why charter school lawsuits have been somewhat rare and, even when pursued, are not done so on a systemic level. There are several explanations, many of which serve as structural barriers to charter school funding lawsuits.

Cost. Charter schools are typically start-up operations and have little additional funding to support a lawsuit and even less interest in pursuing protracted litigation. Foundation and philanthropic dollars are generally focused on starting new schools and replicating existing charter networks, not funding lawsuits.

Length. Charter school finance lawsuits can take years to prosecute successfully and it is rare that a charter school or network is willing to incur the opportunity costs of filing a suit for an unspecified benefit years in the future.

Hesitation to sue district authorizers. In many cases, the defendant is the same party that authorized the charter school. Since the charter school is subject to renewal of its contract at the end of the charter term, many schools are unwilling to sue a district, believing such a suit will make renewal more difficult.

Difficulty in understanding state-funding formulas. State funding formulas are complex. In most states, the charter school funding statute is an overlay to the existing formula, making the application of the proper funding for charter schools even more complicated.

Other priorities for the charter movement. Charter school advocates have been more engaged in legislative activities designed to broaden the charter movement (*e.g.*, lifting legislative caps, securing alternative authorizers) and have not focused on funding equity.

In deciding whether to bring a case, charter schools, charter support organizations and charter networks should take into account several considerations. Cost and the ability to successfully prosecute the case are perhaps the most important considerations. But charter schools should also place a litigation strategy in the larger political context in a given state. While school-funding lawsuits have the potential to result in enormous additional resources for charter schools, they can also have potential drawbacks. For instance, a school-funding lawsuit that alienates legislative champions, leads to a legislative backlash limiting facilities access or adds cumbersome regulations to charter schools is certainly not an outcome charter proponents would welcome. The growing political strength of the charter community may mitigate this risk somewhat, but charter coalitions are still fragile enough in most states such that potential negative outcomes must be considered.

Charter coalitions also can learn lessons from more general school-finance litigation. The traditional school-finance sector has been filled with litigators from major law firms willing to take funding challenges on a pro bono basis. Similar counsel working for charter schools would be able to focus directly on litigation and related public relations efforts and not be distracted by the task of running a school or association. Furthermore, engaging pro bono counsel would dramatically reduce potential costs.

Once the decision to file a lawsuit is made, there are several relevant litigation considerations. These considerations include:

Determine the proper claims.

- Charter schools and their counsel must first distinguish between a factual claim under current state funding statute and a constitutional claim under the state constitution. Choosing claims is a critical consideration because it will help guide the charter school as it gathers evidence in advance of the court filing. For example, schools will need to gather all relevant funding information, including overall payment amounts, federal allocations and special-education reimbursements.

Determine the proper plaintiffs.

- Charter schools must consider which schools should serve as lead plaintiffs. These plaintiffs must have legal standing to bring the claims (that is why charter school students and families are typically joined with charter schools as parties) and the charter schools selected should be organizationally strong and meeting their charter obligations.

Hire experienced counsel.

- Charter schools must identify legal counsel with substantial education law and litigation experience. Too often charter schools rely on attorneys on their boards, many of whom have limited litigation or school-finance experience. Charter school attorneys should be experienced in litigation and school finance, be able to prioritize the litigation, willing to dedicate sufficient resources to its prosecution and should not have potential conflicts that preclude representation.

Consider the importance of getting to discovery and depositions.

- From the onset of litigation, charter schools must consider the likelihood that the school district defendants will file a motion to dismiss or other dispositive motion. Charter schools should always include claims involving factual disputes, which make it more likely that the lawsuit will survive a motion to dismiss and move into discovery. Getting to discovery enhances settlement leverage on behalf of the charter school, allows for depositions of key school district personnel (*e.g.*, a district's Chief Financial Officer and budget staff) and allows charter schools access to key documents necessary to prove the case.

Consider the proper use of evidence in the case.

- Assuming charter schools survive an early motion to dismiss, they should consider using expert witness testimony to establish the extent of the underfunding. School district personnel have familiarity with funding formulas that charter advocates often lack and expert witnesses can close this knowledge gap. Additionally, charter schools should consider the use of video and photographic evidence, which can be exceptionally useful at trial, especially for schools struggling with facilities.

Understand that legal victory is not always necessary to force legislative movement.

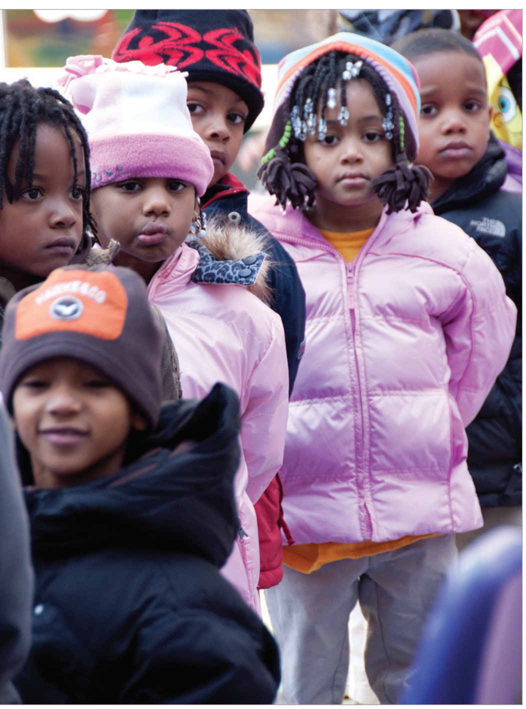
- While charter schools litigate with the hope of remedying funding inequities, a win in court is not always necessary to have substantial impact. Public knowledge of charter schools is still uneven as many individuals do not know charter schools receive lesser funding and typically have to arrange for facilities access out of their diminished revenues. A high profile lawsuit can help establish these facts more clearly and can lead to ancillary benefits, including enhanced local support and potential legislative victories.

Engage in a companion legislative strategy.

- Charter schools must realize these suits can be political in nature and that legislative leadership may react negatively to the lawsuit. Accordingly, savvy charter litigators implement a public relations and legislative strategy early in the process to help frame the main issue – whether charter school students should have access to similar resources as students in traditional public schools. Allowing opponents of the funding equity suit to frame the issue typically impedes the litigation effort.

Given the relatively wide disparities in funding between traditional public schools and charter schools, school-funding challenges by charter schools will likely increase. Though structural barriers have limited such litigation, these barriers are falling across the country. Over the past few years, foundations and philanthropic partners have increasingly viewed charter school replication as one strategy for dramatically improving educational outcomes. Without a companion effort to ensure that authorized charter schools are funded fairly, however, such replication may stall. After all, the goal of charter philanthropy should be to assist charter schools in becoming self-sufficient, not to continue to make up for funding gaps caused by a failure to properly fund schools.

While charter funding cases themselves are relatively new, the historical record demonstrates that a systematic, targeted approach to litigation may yield success. Beginning in the late 1930s, the NAACP brought desegregation cases in varying jurisdictions and factual contexts, starting with public accommodation cases. From there, the organization moved to challenging state universities from barring African-Americans from law school and bringing targeted voting-rights cases. The cumulative result of these efforts – stretching over more than 20 years – laid the groundwork for the ultimately successful effort to desegregate public schools. If education is the civil rights movement of the twenty-first century, as we have heard so frequently recently, then charter school advocates must consider targeted litigation as a means to reaching fiscal equity.



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The National Alliance for Public Charter Schools (NAPCS) is the national nonprofit organization committed to advancing the charter school movement. Our mission is to lead public education to unprecedented levels of academic achievement for all students by fostering a strong charter sector. The Alliance provides assistance to state charter school associations and resource centers, develops and advocates for improved public policies, and serves as the united voice for this large and diverse movement. NAPCS represents more than 1.8 million students enrolled in more than 5,000 charter schools across 40 states and the District of Columbia.

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