

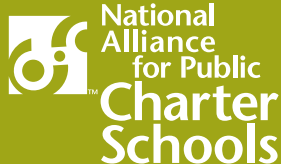
AN ACCIDENT OF HISTORY

Breaking the District Monopoly on
Public School Facilities



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The National Alliance for Public Charter Schools is the leading 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.



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EXECUTIVE SUMMARY

- Traditional public school districts hold a monopoly over the financing and ownership of public education facilities. With rare exceptions, public charter schools have no legal claim to these buildings.
- This monopoly is an accident of history. It would never have developed had there been substantial numbers of other public schools, not supervised by traditional districts, when public school facilities laws were written.
- The district model of facilities planning is not suited to a diverse portfolio of autonomous schools with distinct programs and life-cycles that require different spaces at different times.
- Districts have too often used their monopoly power to deny charters access to unused or underutilized buildings. But certain enlightened district leaders—in some cases subscribing to the Bill and Melinda Gates Foundation-sponsored “compacts”—are now taking a more constructive route.
- What public charter schools currently receive in facilities aid is simply inadequate. Of the 42 jurisdictions with charter laws, only 17 provide any kind of direct facilities aid, either capital grants or per pupil funding, and just three of those provide per-pupil capital funding of more than \$1,000.
- The *status quo* is costly both to public charter schools, which must use operating dollars to pay for facilities expenses, and to districts, which pay inordinate amounts to maintain vacant facilities and lose potential rental income in the process.
- Certain principles should guide the creation of a new system: It must serve all the children in a given community; treat all public schools as equal competitors for available space; make school performance an element in decisions about occupancy; only require payment for space if public facilities dollars are provided to schools; and free educators (in both charters and traditional schools) to focus on student achievement rather than facilities.
- Change must begin in the state capital by ensuring charters equitable access to both existing space and any state facilities revenue streams.
- Local leaders should make school facilities a municipal concern, rather than leaving it to school district officials.
- States and municipalities should consider at least three options for professional, third-party management of the public education facilities portfolio: real estate trusts; municipal construction authorities; and contracts with nonprofit corporations.
- The transition to new modes of ownership and financing will take time—but there is no excuse for inaction on facilities inequities, even within the current legal framework.



THE UNRECOGNIZED MONOPOLY

The ownership of school property is generally in the local school board or district as trustee for the public at large. School property is thus to be considered public property and is not to be regarded as the private property of the school district by which it is held or in which it is located.

—Louisiana Court of Appeals, 2000. 754 So. 2nd 291.

America hates monopolies, and we've developed a proud tradition of trust-busting. From Standard Oil to Microsoft, political leaders and the courts have intervened to ensure that established entities may not bar the doors of commerce to new entrants. Rarely do regulators dissolve a monopoly yet let it continue setting the terms of trade for its rivals. But that's just what has happened in public K–12 education, with a monopoly that has prevailed for nearly two centuries being permitted to deny a critical resource to a competitor that's been around only since 1991. This paper explores that monopoly: the iron grip that school districts enjoy over the financing, development, ownership, and deployment of public school facilities.

Public education sometimes seems to operate on its own planet, immune to the conventions that bind other areas of our economy and public life. So let's begin with a simple mental exercise: Consider how the world might look if we had treated other monopolies the same as we've treated the monopoly on public education facilities.

- As the popularity of television exploded at midcentury, the country was running out of stations in the original VHF range (channels 2–13). So, in 1952, the Federal Communications Commission (FCC) approved UHF broadcasting on 70 new channels, 14 to 83. Subsequent innovations included satellite broadcasting, dissemination of programming via fiber-optic cable, and high-definition TV.
 - *Suppose the FCC had said that new broadcasters were welcome, but granted ownership of the airwaves in perpetuity to the four original networks (ABC, NCS, CBS, and Dumont) and required local stations to pay them rent for access to the broadcast spectrum . . .*

- In 1982, federal judge Harold Greene ended the monopoly that allowed AT&T to provide nationally standardized telephone service under a single corporate umbrella. The decision ushered in the modern era of telecommunications, creating the “Baby Bells” and unleashing a torrent of cell phones, BlackBerrys, and iPads. Judge Greene observed that “the telephone industry grew up in the copper wire days when it was a natural monopoly, and . . . when microwaves made it possible to bypass the wooden pole network, the monopoly could not last.”¹
 - *Suppose Judge Greene had ruled that the Baby Bells could provide phone service, but they'd still have to rent their equipment from AT&T. Or they could build or purchase their own equipment, but on service rates that were 20 to 40 percent lower than those allowed to AT&T . . .*
- The Postal Reorganization Act of 1970 demoted the U.S. Postal Service from a Cabinet department to an independent executive agency, retaining its monopoly on first-class mail service but allowing other providers to deliver “urgent” mail. Federal Express, which incorporated in 1971 and originally served a tiny “niche” (delivering overnight checks for the Federal Reserve), began exploiting the “urgent” category more broadly and became a prime competitor to USPS.²
 - *Suppose the 1970 Act stipulated that other carriers had to use vacant post offices and rent space on USPS freight planes—and their rates were limited to 75 cents for every dollar the Post Office charged . . .*

In each of these fictitious examples, the government embraces competition, but then allows the existing monopoly to perpetuate its hold on a critical means of production—and widens the monopoly’s profit margin further by depressing revenues flowing to potential competitors.

Absurdly counterproductive, right? Yet that’s exactly what has happened in K–12 public education.

Until 1991, when Minnesota passed the first law permitting public charter schools, the school district held an exclusive franchise on public education services. A district could purchase textbooks or maintenance work from private vendors, could establish “alternative” schools, and might even contract out the management of individual schools. Some districts created magnet schools as a response to desegregation orders, featuring special programs that could enroll children from outside local attendance zones. But the district, generally answering to an elected board of education, retained its role as the sole incorporated entity delivering public education in a given community.

The advent of public charter schools changed that. Each is a nonprofit corporation governed by its own board of trustees (with some variation depending on the state), operating through a form of licensure known as a “charter” awarded by a state-designated authorizer. Even if that authorizer is a local or county school district, the charter school is a distinct, autonomous legal entity. Charter schools operate outside district control, and most can enroll students from all across town, not just those who live within neighborhood boundaries. (In big cities, charter operators can often boast of drawing attendance from every ward.) Virtual charter schools can attract students from all around the state, without regard to any traditional school-district boundary.

So in 41 states and the District of Columbia, the public-education monopoly has been broken. Parents have a choice; competition has arrived; and innovation can flourish.

But there’s a catch: Traditional public school districts still own the great majority of school buildings—and with rare exceptions, public charter schools have no legal claim to them. In city after city, charter schools are supplicants begging for district castoffs and being met with heated opposition. If they want to build their own facilities, they have no taxing power, no access to state capital budgets, and typically no bonding authority—the basic revenue sources that pay for public school construction. Just 10 states and the District of Columbia offer direct support for facilities expenses—and most provide so little that charter schools still must dip into operating funds to build, renovate, or lease space.³

Let’s call this situation by its rightful name. This is a monopoly, held by traditional school districts, on public education facilities

Yet there is little agitation about this hugely inequitable situation. Much as we applaud when enlightened superintendents and school boards agree to accommodate the needs of charter schools in the buildings they own, we fail to ask why they own them in the first place, and why they should retain sole proprietorship of buildings when they’ve lost the monopoly on delivery of public education.

The rules of facilities funding and ownership were made at a time when charter schools didn’t exist. For most of our history, there simply were no other public schools than those managed by school districts. Charter schools are a new kind of public school, their “public” nature affirmed in state laws and a string of court decisions. Yet the original proprietors still own, manage, and allocate school properties.

What justifies this continued monopoly? In truth, its greatest source of support is pure inertia. This is simply the way it’s been, farther back than anyone can remember, and no credible, sustained challenge has yet been raised.

If we were to debate the issue, it would be clear that the substantive arguments for the *status quo* are really quite unimpressive:

- *Districts have raised and invested the funding for buildings, therefore they deserve to control them.* Yes, but they were given that authority on behalf of public school students, not a legal abstraction called the “school district.”
- *Districts represent the great majority of students.* Yes, but in this era we don’t leave any students behind—and in many cities the district share of public school students is shrinking each year compared to charter school students.
- *Districts must protect the “patrimony” represented by their properties, especially if their own student population might surge.* That “patrimony” was paid by taxpayer dollars on behalf of public education. And how long should we wait for this “surge” to materialize before serving students who need that space today?

These are feeble claims, easily answered. Yet two decades have passed without any serious attempt to rethink our policies on ownership of public education facilities—and the charter movement itself has tacitly accepted the monopoly while seeking access to its castoff space. There has been remarkably little concerted effort to tackle the concentration of power over school facilities at its roots. This paper urges that we begin that effort in earnest.

It’s time to rewrite the rules to reflect the realities of 21st century public education.

The rules of facilities funding and ownership were made at a time when charter schools didn’t exist.

How We Got Here

Our school finance laws date to the Massachusetts Act of 1642, which empowered town selectmen to determine if parents and masters were attending to the educational needs of sons and servants. A subsequent Act of 1647* required that towns of 50 households or more should appoint a teacher of reading and writing, and that towns with more than 100 families should establish grammar schools for general instruction, with a fine of 5 pounds for towns that failed to do so.⁴ Intriguingly, that Act spoke directly to what we would now call inter-district finance equity: “Providing, those that send their children be not oppressed by paying much more than they can have them taught for in other towns.”⁵

As communities grew beyond easy walking distance, jurisdiction over schools began to be subdivided. In 1717, the Connecticut General Assembly required every parish to have a school. Twenty years later, the parish at Redding voted to establish its school, but stipulated “that said school be divided into three parts, that is to say, five months in that quarter called the Ridge, and five months on the West-side of the parish near the mill, and two months at Lonetown, understanding that the Centre of division is the meeting-house . . .” These were the town’s first three “school districts,” and a traveling schoolmaster attended to all three until the town made direct appropriations in 1742 to each school.

The Continental Congress’s Ordinance of 1785 provided that new Congressional townships in the western territories should be six miles square (or thirty-six square miles); the land would be surveyed and divided into thirty-six lots, each of one square mile. Towns could set aside the proceeds from lot number 16 to finance their public schools.⁶ In ensuing decades, states continued to rely on sale of public lands to finance schools, a method whose lifespan was eventually limited by the availability of wide-open spaces.⁷

Although New York State had supported local schools since 1795, relying on taxes and then a lottery, it created a Common School Fund in 1805, provisioned by sales of state lands and other assets. In acts passed in 1812 and 1814, the legislature mandated a system of common school districts, then directed state aid to districts that operated schools at least three months out of the year, with the state revenues being supplemented by local property taxes. This legislation established that “the school district—not the county or the town—is the primary administrative unit for public education.” By mid-century the state had over 10,000 such districts.⁸

In 1789, the Massachusetts legislature had required every community to provide a schoolmaster and tasked town selectmen with determining teacher qualifications and inspecting schools. The same law allowed towns to create districts if justified by population growth, and in 1800 the legislature permitted district citizens to tax themselves to fund construction and maintenance of schoolhouses. Districts were incorporated as of 1817, and then in 1827, required in all towns. The town would set tax rates and teacher qualifications, but the district would control teacher hiring and other school expenditures.⁹

According to journalist and school board member Gene Maeroff, these Massachusetts laws making a legal separation between the school committees and municipal governments paved the way “for the autonomous school districts that now exist in most states.”¹⁰

In the 1830s, the notion of the “common school” was advanced by Horace Mann, secretary of the Massachusetts board of education, and other reformers. Publicly funded, locally governed, offering a curriculum common to all students, such schools would advance democracy by creating a more unified population and helping to eliminate class differences, Mann and other reformers argued. These outcomes clearly merited public investment in education.¹¹

* The 1647 Act is best known as the Old Deluder Satan Act, a reference to the devil’s efforts “to keep men from the knowledge of the Scriptures.”

Raising Expectations: The Schoolhouse Then and Now

In Shepherdstown, West Virginia, there sits near the center of town a red brick building, about two windows wide and two deep. Built in 1848, it was the first “free school” in what is now the state of West Virginia and served generations of students until making way in 1881 for a “graded” school. It was one of 13 new school buildings that sprung up in Jefferson County in the months following an 1847 act of the Virginia legislature creating school districts and authorizing payment for facilities. There’s no direct record of construction costs, but the entire annual appropriation for the whole county system that year was \$10,000 (including 23 teachers who made a maximum of \$300 a year.)¹⁵ So it’s an understatement to say that building costs were “modest.” One wonders what the county commissioners might have made of the Robert F. Kennedy Community Schools complex in

Los Angeles, current holder of the national record for school-construction expense with \$578 million of food courts, lounges, and open park space.¹⁶



Yet the form of that investment, with its modern distinction between “operations” and “capital,” does not appear to have pertained in these early days. Districts built schools in the normal course of events, just as they hired more teachers and bought more books when student population grew. Putting up a one-room schoolhouse was no big deal—and was often a leap forward from borrowed, casual physical arrangements for schooling. In 1835, for example, a single female teacher from Joliet began teaching in the first public school in Lockport, Illinois, “a little room built by Capt. Sisson as an addition to his dwelling and intended for a kitchen, but surrendered...for school purposes.” When it was time for an actual schoolhouse, it was “built by the neighbors, en masse, and was a small log cabin. The work and material were donated—one man giving logs enough, delivered on the spot, for a side and an end, and another for a side, etc.”¹²

After passage of an 1855 law establishing a system of common schools, Illinois provided a “school, college, and seminary” fund amounting to 3 percent of the net proceeds from the sale of public lands, distributed to counties according to

the number of scholars in each. In the case of Will County, the fund provided nearly \$1,000 annually, supplemented by fines for misdemeanors that generated from \$200 to \$800 annually, depending on how well the citizens behaved in a given year.¹⁵ Another \$16,000 came from a general tax levied by the state for school purposes. But buildings remained a local concern, with each school district raising funds for schoolhouse construction and upkeep—except for incorporated cities, where the city corporation controlled the schools and assessed the needed tax.¹³

According to University of Florida professor David S. Honeyman: “Financing school construction was of little concern in the early years of our country. Schools were constructed by community members, and no thought was given to tax rates, bonds, or bond referendums Throughout the early 1900s, the major responsibility of financing the public school building rested with the local community. By the early 1940s, only 12 states had made some financial provision to assist school districts with the construction of school buildings.”¹⁴

As farms gave way to factories and population gravitated toward cities, growing student populations required newer and larger facilities. States also began making school attendance mandatory, with Massachusetts passing the first compulsory attendance law in 1852; by 1918 every state had such laws on the books.¹⁷ Enrollment growth also propelled a shift toward new and more consolidated governance structures, which inherited responsibility for buildings as well as academics.

In New York City, a Public School Society had been founded in the early 1800s by Quakers and civic leaders to serve children not educated in private schools. It received all of the city's state school aid and used part of it to build schools. After Catholics protested the Society's perceived Protestant bent, the legislature in 1842 established a separate system of publicly operated schools, overseen by a citywide board of education. This new system absorbed the Public School Society facilities in 1853.¹⁸ The law consolidating the two systems also provided for appointment of a City Superintendent of Schools and a Superintendent of School Buildings, suggesting a bifurcation of responsibility as the school population surged. Appointed to that post was Angus Macvey, who had served as "superintendent of the workshop" for the Public School Society.¹⁹

Chicago's earliest public schools were often parked in storefronts and buildings intended for other purposes. "The schoolhouse opened, [one correspondent wrote], "in a little log house outside the military reservation" (Fort Dearborn), and was "divided by calico curtains into two apartments, one for a schoolroom and the other for lodging." The city

built its first school building in 1845, and a quadrupling of the public school population between 1860 and 1870 led the state legislature to establish a board of education, with members appointed by the mayor.²⁰

Cleveland was incorporated in 1836 and empowered to create public schools supported by taxes. At first, its board of school managers simply took over private academies but by 1846 had opened Central High School—the first public high school west of the Alleghenies. The next year a citywide board of education was created to oversee the city's school district and in 1853 a school levy was authorized.²¹

These more formal structures were created not just for managerial convenience, but also for such worthy purposes as curbing political influence over schools and increasing the professionalization of administration. What emerged, however, was a kind of fiefdom within municipal governance, with its own policymaking and funding mechanisms. The tasks of financing and constructing schools were simply grafted onto academic responsibilities. Unlike fire and police stations and public hospitals, which were typically built by city governments through capital budgets, the public schools were financed and constructed by the public school system itself. It should surprise no one that today's school districts hold tight to their buildings; they've enjoyed uniquely insular ownership privileges for more than a hundred years.

Factory Owners

For most of the 20th century, public education was provided through a hierarchical structure resembling that of the pre-divestiture AT&T. School districts financed, built, and managed neighborhood schools that were essentially branches of the central office, holding exclusive rights within their respective zones. Within each city or county, under broad grants of authority from state policymakers, districts possessed an unquestioned monopoly over the content and tools of public education.

Current-day education reformers often refer to the “factory model” of education, but may not realize just how literally that phrase was originally meant, and how well it fit the assembly-line model of public education. In 1889, U.S. Commissioner of Education William T. Harris wrote:

*Our schools are, in a sense, factories in which the raw materials (children) are to be shaped and fashioned in order to meet the various demands of life. The specifications for manufacturing come from the demands of the twentieth century civilization, and it is the business of the school to build its pupils according to the specifications laid down.*²²

Likewise, the influential Stanford professor of educational administration Ellwood Cubberly wrote in 1934:

*The public schools of the United States are, in a sense, a manufactory, doing a two billion dollar business each year in trying to prepare future citizens for usefulness and efficiency in life. As such we have recently been engaged in revising our manufacturing, specifications and in applying to the conduct of our business some of the same principles of specialized production and manufacturing efficiency, which control in other parts of the manufacturing world.*²³

Not surprisingly, school buildings became tangible analogues of this vision. According to one recent commentary on the evolution of school design: “In the early 1900s, the prototype urban school was a two- or three-story building with dozens of identical classrooms lined on both sides of the corridors. In many ways, the structures looked like factories, and these structures were often called ‘egg crates.’”²⁴

Remember that in the industrial era, corporations were vertically integrated, with everything from the boardroom to the point of sale organized under one corporate umbrella. Standard Oil owned Esso (from “S”“O”) service stations; AT&T’s local Bell System companies owned the telephones in peoples’ homes; and not until the Supreme Court’s *Paramount* decision in 1948 were Hollywood studios required to sell off their local movie houses. In an era when businesses were thus organized, why would there be any question about who owned the factories of schooling? It would be the school corporation, whose assembly lines turned out new-model graduates each year.

Demand drives construction

As population grew, and as the 20th century economy posed new challenges, districts responded by building more schools and developing new ways to manage the throngs of students. America’s population increased by 68 percent between 1890 and 1918, but with the advent of urban growth and compulsory attendance laws, enrollment in high schools shot up by 711 percent. The “comprehensive” high school was developed as a way to accommodate this surge by offering “a vast array of different courses, programs, and resources to accommodate the diversity of student interests and the perceived variances in students’ academic capacities.”²⁵

Of course, this also meant bigger and bigger school buildings. Between 1929 and 1980, the number of secondary schools held nearly constant, but the number of students grew by 200 percent, from 4.4 million to 13.2 million, meaning that the average per-school enrollment boomed.²⁶ With rare exceptions, the dominance of big schools has held fast in the decades since. Buildings were proud, iconic, and permanent. Districts built new schools to be occupied at full capacity when population growth demanded it, and there seems to have been little thought given to the possibility of population loss.

But in recent decades, urban outmigration has left thousands of school buildings unused or under-populated, especially in the great cities of the northeast and Midwest. And the introduction of charter schools has thrown a different kind of monkey wrench into the district machinery.



While the need for a new district high school can generally be predicted by looking at elementary school demographics, housing demand, and local job markets, the authorization of a new charter high school introduces some wild cards. It may start with only a freshman class or with all four grades. It may not be able to pay for an entire building. It will probably take students away from neighboring district high schools. It may be authorized by someone other than the school board, and could grow substantially or close within a few years. It might even be a “hybrid” model, combining online home-based learning with teacher consultations and extracurricular activities that need a bricks-and-mortar site. The district planning system, which essentially places an existing program in larger quarters when population increases, is clearly unsuited to creating a diverse school portfolio with contingencies like these.

While districts remain glued to an archaic business model, they’re surrounded by a 21st-century economy that builds delivery systems reflecting dynamic demand. Real factories have changed far more than schools in the past century, and so have their facilities arrangements. The formidable structures that housed assembly lines in Buffalo and Pittsburgh and Dearborn have given way to nimble, decentralized, outsourced processes scattered over a larger landscape. Development authorities are investing in corporate incubators, recognizing the growth needs of startups.²⁷ As the mix of manufacturing and knowledge-based commerce fluctuates, so do decisions about whether employers build, buy, or lease space. Flexibility is the key.

So it should be with respect to school facilities. In communities where one-third of schools are charters, the diversity of needs cannot be served by ordering up one or two basic building models and setting them down in various neighborhoods. Some charters may be perfectly happy inhabiting retrofitted “egg crates,” but others will have the kind of hands-on, experiential models that demand flexible floor-plans. Startups will need space for two or three grade levels but eventually will need an entire building. A new way to meet these needs must be found.

The Trust Half-Busted

Since they've been a "disruptive innovation" in public schooling, why haven't charter schools been more successful in disrupting the monopoly that houses it? We can start by stating the obvious: The deck is stacked in favor of the existing system. Or to put it another way, "possession is nine-tenths of the law."

In the early days of the movement, charter activists knew that it might take years to scale the mountain of facilities law, and were impatient. They wanted to get started. They cared about kids and learning, not buildings. Better to get going now, even if in a storefront; the facilities thing would somehow work itself out.

And for all its entrepreneurial vigor, the charter movement was a weak political force, even as the charter wave cascaded into state after state in the mid-90s. Early activists had to accept certain bad bargains to get charter laws enacted: no money for textbooks, no reimbursement for transportation, denial of special education assistance routinely provided to district-run schools. Teacher unions and school board organizations, unable to kill charter bills outright, sought to weaken them by getting legislators to take one asset after another off the table.

A few charter advocates actually didn't mind. Some business-minded pioneers believed there was huge waste in district spending and thought that a charter's efficiencies could bank enough to pay for leasing and renovation. Other pioneers had a Panglossian faith in cooperation and perhaps assumed that districts would share space willingly. Still others had external resources or, like Edison Schools co-founder Chris Whittle, had the knack of attracting private funding to back their ventures.

Denial of Facilities Funding

The gravest omission from state charter laws, one that still produces persistent disparities in overall public revenues between charters and other public schools, is access to dedicated revenues for facilities. In most states, charters are barred from receiving state capital dollars, and also are denied tax-backed bonding authority used by local

school districts to finance facilities expenses. Just about every scheme for funding charter facilities involves some kind of detour around this enormous fiscal pothole: credit enhancements to sweeten private lending, federal incentives to encourage states to create charter-specific facilities programs, and a persistent, pervasive need for fundraising from private sources.

To learn what might account for this shutout, let's look at how facilities rules emerged in some of the original chartering states.

Minnesota set the pattern in 1991, when it enacted the nation's first charter school law. According to Ember Reichgott Junge, the Democratic legislator who wrote the law: "One influential senator . . . felt very strongly that charters should be in the business of education, not the business of real estate or facility management. Charters could not own buildings; they could only lease them. So there was no need for capital funds."²⁸

Joe Nathan of the Center for School Change, who helped shape the law, depicted the assumptions behind the political horse-trading: "Charters would receive the same per pupil dollars from the state as district schools received, but would not have access to local property taxes, which is where the predominant funds for capital funds come from. Also, special ed costs would come from the district where the student resided (a major tradeoff)."

Nathan consulted on charter law development in a number of other states, and notes that these early compromises were often reflected in those contests: "Many states didn't pay as high a percentage of the overall cost of schools from the state level as Minnesota did in the 1990s (we were at about 70 percent for a while) so other states looked at the option of allowing charters to levy local taxes. But that was a non-starter except when charters were essentially district schools, as they have been in some states."²⁹

California's law passed in 1992. Since it left chartering to local school districts, and since there was such wide variation among them, the framers did not push for any specific facilities provisions. According to Eric Premack of the Charter Schools Development Center, who worked for the law's

passage, there was no possibility of charters getting a share of districts' bond funding, and even the question of lease aid didn't get enough traction to be included in the measure.³⁰

Massachusetts passed its charter law in 1993 as part of the Massachusetts Education Reform Act, whose principal purpose was a major overhaul of the state's school finance system in response to a funding equity lawsuit. While charter schools were not exactly an afterthought (they enjoyed strong support from Governor Weld, the State Board of Education, and the state's business community) the charter provision was a small part of the reform bill, made literally smaller by a tight, 25-school cap demanded by the state teacher union. Although the financing scheme for charters was far fairer than in other states, providing a nearly level playing field on operating dollars, considerable disparity remained in facilities aid until it was directly addressed as a matter of equity in 2005.³¹

Georgia's law also passed in 1993—but since it limited chartering to conversion of existing public schools until amended in 1998, there appeared to be no need for capital funding.

What all these laws had in common was a set of beliefs and perceptions about charter schools, beginning with the unarguable fact that they were new and untried. It was hard to convince lawmakers that these curious new schools, which faced high-stakes renewal every five years or so, would have the financial reliability and simple longevity to justify asking voters for a hike in local taxes.

Especially in the early years, that was a tough argument to overcome, given the way capital funding is traditionally structured. A capital expenditure triggers a public interest in an asset that lasts as long as the instrument that generates the revenue. It's easy to see why a municipality might gladly float a 30-year bond for a school district to augment its building stock by one or two facilities—but might recoil from doing the same for an untried entity that could be closed after its five-year charter term.

In addition, many lawmakers (and plenty of operators) seemed to believe that charter schools would always fit comfortably at the margins of public education. Charters would be "laboratories for reform," delivering their findings to "the public schools" but never challenging their primacy. First-generation charter laws were written in this confining frame, and for a time, it seemed to fit. Small, community-based "Mom and Pop" schools, often starting with a grade or two, could find adequate startup space in church basements and storefronts. But as they expanded into a full range of grades, and needed to offer their students chem labs and playing fields, their facilities needs became more than an afterthought.

Put these factors together and you can see why Jim Griffin of the Colorado League of Charter Schools, who was active in getting that state's 1993 law passed, said "The complete retooling of local control and ownership of assets, upsetting all these apple carts, was just not in the cards."³²

And then in 1998, Don Shalvey, the former superintendent of California's San Carlos District, founded the first nonprofit charter management organization, Aspire Public Schools. It would revolutionize the movement and overturn previous perceptions about the scale and potential of charter schools. Now, a growing sector of charters would start up at full capacity, operate in networks that could provide centralized financing and support, and host not scores or hundreds, but thousands of students at a time.

So today we have a charter community that enjoys growing scale through larger schools, extensive networks, and impressive market share. Yet of the 42 jurisdictions with charter laws, only 17 provide some kind of direct facilities aid, either capital grants or per pupil funding, and just three of those provide per pupil capital funding of more than \$1,000.³³ And while states deliver straightforward capital support to districts, their support for charter facilities is often halfhearted and ineffective. Thirty-four states have conduit bond issuing agencies, but only a few have made the state's credit (either general obligation or moral obligation) available to charters. Only Colorado has done so at scale.

Times Have Changed

The charter landscape of 2011 is vastly different from that of 10 or 20 years ago. Each of these differences constitutes an argument for rethinking the fundamentals of public education facilities law.

It's official: Charter schools are public schools.

Because they're often not part of school districts, and usually are formed as nonprofit corporations, the nature of charter schools seems to perplex the average citizen nearly as much as it did two decades ago. But legislatures and courts have affirmed over and over again that charter schools are public schools. According to a state-by-state review of statute and case law conducted by the California Law Revision Commission: "There is a strong national trend toward treating charter schools as public entities for all purposes Thirty-one of the 39 jurisdictions surveyed follow that pattern. The staff did not find any jurisdiction expressly adopting the contrary view (that charter schools are not public entities). This is true even in most of the jurisdictions that allow or require charter schools to organize as some type of nonprofit corporation."³⁴

Charter schools are no longer marginal. If legislators originally believed that charters didn't deserve full capital support because they would serve just a sliver of student population, it's time to think again. In six major school districts (New Orleans, Louisiana; the District of Columbia; Detroit, Michigan; Kansas City, Missouri; Flint, Michigan; and Gary, Indiana), at least 30 percent of public school students are enrolled in public charter schools. Another 18 school districts enroll more than 20 percent of public school students in charter schools. Charter school students represent at least 10 percent of overall enrollment in nearly a hundred school districts.³⁵

Charter schools are a sound investment. Another early argument against capital support was that charters were inherently risky, combining the shakiness of all corporate startups with the potential for closure after a relatively brief charter term. But the record since is surprisingly strong. Charter schools have become serious and successful participants in the same bond markets that finance district facilities.

[Yet] Of the 42 jurisdictions with charter laws, only 17 provide some kind of direct facilities aid, either capital grants or per pupil funding, and just three of those provide per pupil capital funding of more than \$1,000.³³

Local Initiatives Support Corporation (LISC) looked at 229 rated charter school issuances and found only one default—a rate of 0.4 percent.³⁶ And a recent study by Ernst & Young examined 430 loan transactions by 15 community-development financial institutions (CDFIs), involving 336 charter schools and totaling \$1.2 billion. Of the loans in the dataset made since the year 2000, just 1 percent of the total ended in foreclosure, with a little over \$2 million reported as written off. (This compares favorably to an overall corporate debt-default rate of around 3 percent, according to Moody's Investors Service.)³⁷

Of particular interest in the Ernst & Young study is this finding: "Higher occupancy costs are associated with poorer loan performance." Where there is trouble fulfilling the debt obligation, it's often in newer schools with higher facilities costs—another argument for changing the public-facilities landscape so that access is wider and costs are lower for charters struggling to get established.³⁸

Charter schools have a life-cycle. Charter schools decouple the notions of "school" and "building." A school might live in one wing of a single building, or be spread across multiple campuses. It may be upstairs from a pharmacy, or occupy the eighth floor of an office building. Quite often, it will inhabit a series of different spaces as it grows to maturity. After two decades we know that charters can't be confined to static space arrangements; they need a range of housing options depending on age, type, and ambition.

Accountability is real. According to the National Association of Charter School Authorizers, a significant number of charter schools are not renewed at the end of their term. While the number varies by authorizer and has dipped overall from a high of 12.8 percent in 2008–2009 to the current 6.2 percent (which could indicate gains in quality or the impact of more rigorous application processes taking hold),

it's a sizeable chunk of schools.³⁹ But this begs a question that our traditional policies are ill-equipped to answer: What happens to the buildings, especially those that have been financed by private lenders (as must be the case when no public support is proffered)? Since the charter model relies on improving quality by periodically culling the herd, what kind of facilities policy might recognize the reality of closures with minimal disruption to students and families?

Bad policy is crimping good growth. The lack of available facilities is a direct and pressing constraint on the growth of high-quality charter schools. According to a recent survey by the National Charter School Research Project, scarcity of facilities was listed first among all reported external barriers to growth of charter management organizations, mentioned in 89 percent of responses.⁴⁰

It's not just about charter schools. The most compelling reason to break out of the school-district box can be summed up in a phrase: The march of time. The orderly paradigm of one building per neighborhood is being disrupted by new technologies, the trend toward personalized learning, population shifts, and other factors. According to the Center on Reinventing Public Education, the schools of the future may include the local library, community colleges sharing labs space with high schools, and classrooms located at a software developer's headquarters.⁴¹ In a mobile, technologically integrated world, does it make sense for school districts to have separate, unequal, and unquestioned jurisdiction over how to house learning? Doesn't it call for different boundaries, the fewer and broader the better?



In a mobile, technologically integrated world, does it make sense for school districts to have separate, unequal, and unquestioned jurisdiction over how to house learning?



SCHOOL DISTRICTS DRIVE THE FACILITIES BUS

The school-district facilities monopoly has weathered all kinds of external threats—fluctuations in revenues, a growing pro-charter federal presence, and two decades of robust growth in the charter movement itself. True, control has been wrested from local boards in a few cities and states—but for the most part decisions about school buildings remain in the hands of district school boards and superintendents.

Their deepest source of leverage is funding. Almost 90 percent of our 14,000 school districts are “fiscally independent,” which means that they can levy their own taxes to support school building projects. In a referendum, such districts ask voters for an increase in taxes to repay the principal and interest of bonds that will be issued to pay for the building projects. “Fiscally dependent” districts, the other 10 percent, require an appropriation from their municipality—which in turn must raise that revenue from other sources (for example, taxes, bond referenda, or state funds).⁴²

Although education policy is largely determined at the state level, states are often a weak partner when it comes to financing public school facilities. According to the 21st Century Schools Fund, “The average state share of spending on capital outlay for construction and land and building acquisition for the years 2005 to 2008 was 30 percent . . . Eleven states contributed nothing to local districts for capital outlay; 14 provided less than 20 percent; 12 states paid between 20 percent and 50 percent; and 13 states and the District of Columbia paid over 50 percent of the capital outlay facility costs incurred by local school districts.”⁴³

So, with power concentrated in the district office, it’s fair to ask who those offices serve, and whether school districts invest much effort on the facilities needs of schools not directly run by them? From the looks of things, the answer is no.

The National School Boards Association (NSBA) serves as both advocate and professional society for the trustees of America’s public school districts. NSBA has been notably lukewarm to charter schools, and its issue brief on the

subject basically says that charter schools are fine so long as they are authorized only by local school boards and subject to all the same laws and rules as district-run schools. The brief contains just two passages related to facilities: The first notes that “charter schools frequently take over closed public or private school buildings and renovate them” which “poses a special challenge for resolving school construction millage debt.” The second notes that charters often draw “disenchanted” students from traditional schools, who then become dissatisfied with the charter and “frequently want to return to the public school from whence they came. Most often there are not mechanisms in state school finance systems to provide per pupil financing for the returning pupils.”⁴⁴

NSBA offers little guidance about the challenge of charter school facilities. An article published in the organization’s journal in 2010 by Kelley D. Carey, a planning consultant to school districts, captures this posture of benign neglect. It outlines how boards should develop facilities master plans, and is full of sound advice such as “Have a citizens’ review committee in place from the start” and “Use computer mapping to determine where students attend school, and compare that location to where they should attend.” But one searches in vain for any reference to charter schools, although the piece stresses involving all of the district’s “stakeholders.”

The charter “stakeholders” are apparently not invited to the table, although nearly 90 percent of charter authorizers are Local Education Agencies—overseen by the members of the NSBA.⁴⁶

The District Fiefdom

The disparity in legal status between district-managed public schools and chartered public schools is greater than that of landlord and tenant. It is more like that of landowner and sharecropper, for in most cases there simply is no statutory or contractual right to the property. Charter schools only get access to this primary means of production if the landowners decide that it's in their interest.

Consider the following examples of misalignment between traditional facilities oversight and efforts to grow a vibrant new sector within public education:

- The Kansas City, Missouri school district holds back \$800 per student in charter school funding in order to defray its debt service. But the charter schools get basically nothing in return. They have no legal claim on the district's buildings, despite a massive recent downsizing that closed 54 of them.*
- In the Philadelphia school district, there are 70,000 vacant seats. One of every 5 dollars in local property taxes is funding an empty seat. Charters are hurting for space but have no legal access to the underpopulated school space.⁴⁷
- Milwaukee declared 27 school buildings surplus, 13 of them empty. But the district refused sales to charter schools because they would compete with the district for students. (In May 2011, the state legislature approved a measure allowing the city to sell the buildings despite the district's objections.)⁴⁸
- The great majority of Colorado charter schools are authorized by local districts, but charters have no recourse if districts deny them access to vacant space. In March 2011, the state legislature killed a measure that would have allowed access and created a path to petition the state board of education if districts refused the request.⁴⁹
- In December 2007, the Special Administrative Board of St. Louis Public Schools approved terms on the sale of the old Hodgen Elementary School building that included a 100-year deed restriction prohibiting leasing of the building to medical clinics, taverns, adult entertainment facilities, and . . . charter schools. The restriction was removed by the board in 2009 after the measure was held up to well-deserved ridicule.⁵⁰
- Despite closing 14 buildings in the past five years, Indianapolis Public Schools continued to operate far under capacity, according to the district's own estimates, with 16 of the district's schools planning to open the 2011–2012 school year at 70 percent of capacity or less. Rather than closing more buildings, the district announced a recruitment campaign.⁵¹
- In 2007, after decades of declining enrollment, San Francisco Unified School District acknowledged that one-fifth of its real estate holdings "had little or no educational use." It designated an additional 10 properties as "vacant or underused," estimating that selling the surplus inventory would bring in about \$134 million, plus millions more in property taxes. But there's been little action to sell or lease the properties since.⁵²
- In rural Pennsylvania, the Penns Valley Area School Board is leasing property for construction of a privately funded, \$5 million community center that will house a YMCA, the county office for the aging, and other agencies. However, included in the 30-year lease is the following clause: "No groups in direct competition with the District are authorized to use the facility. Those groups in competition are defined as entities that serve the same purpose of the District at the same age level, i.e., charter schools."⁵³

* This policy was overturned by the Missouri Board of Fund Commissioners in 2006, but the next year the U.S. Court of Appeals, 8th Circuit, ruled for the school district (*Jenkins v. Kansas City Missouri School District*, No. 06-3318).

Legal End Runs

Even when there is plain statutory language giving charter schools a share of district building stock, it is too often interpreted away—or just ignored.

In Ohio, state law gives charter schools first dibs on shuttered school buildings. But when a prime Columbus property went up for charter-school bids in 2010, the district’s general counsel averred that “the district is under no obligation to accept any of the bids . . . If it rejects all bids, the district can enter into a contract sale at a negotiated price with any buyer.”⁵⁴

When the District of Columbia School Reform Act was passed by Congress in 1996, it included language providing

that charter schools should have access to surplus public school buildings. A succession of D.C. superintendents and mayors (as well as the Financial Control Board that oversaw city government in the late 1990s) ignored or circumvented the law’s intent. The D.C. Council subsequently strengthened the guarantee, providing charters the right of first offer on sales and leases. But there remains a lack of transparency and much of the surplus inventory is not made available to charter schools. As my colleague, Maria Sazon, succinctly states: “On paper, the Washington D.C. statutory provision regarding surplus buildings is one of the strongest in the country. In practice, however, the Washington, D.C. government too often ignores it.”⁵⁵



The California Epic

The longest-running soap opera in this category is the resistance of California school districts to Proposition 39, the ballot measure passed in 2000 that requires the Golden State's public school facilities "to be shared fairly among all public school pupils, including those in charter schools."⁵⁶ The measure held that "Each school district shall make available, to each charter school operating in the school district, facilities sufficient for the charter school to accommodate all of the charter school's in-district students in conditions reasonably equivalent to those in which the students would be accommodated if they were attending other public schools of the district."

Since California law largely restricts chartering privileges to local and county school districts, it's no surprise that Prop 39 left district ownership of school property intact. But it was still a huge conceptual breakthrough, setting the stage for wholly new relationship around school property in the nation's largest chartering state.

However, initial exuberance has been tempered by the grudging reaction of California school districts, which immediately looked for wiggle room in the measure's language. The California Charter Schools Association (CCSA) has had to take both the San Diego and Los Angeles school districts to court to enforce compliance.⁵⁷ In July 2005, the California Court of Appeals issued a ringing ruling affirming that districts must consider the needs of charter students and district students equally—saying in effect that charter school students were the legal equivalent of district students for purposes of allocating facilities. But L.A. Unified's continued recalcitrance resulted in another CCSA lawsuit in 2010, this

time contesting the district's failures to comply with both Proposition 39 and a 2008 settlement agreement setting out conditions for the charter/district relationship. The association contended that in 2010, for example, the district issued just 45 final offers in response to 81 charter school requests for space.* None of the offers were in compliance with the law and fewer than half were accepted by the charter schools.

The legal wrangling over Prop 39 may obscure a more important fact—that it hasn't created a firestorm of similar legislation in other states. Apart from the few examples of truly evenhanded facilities administration discussed later in this paper, the landscape remains heavily tilted in favor of school districts and against charters. California remains the only state that requires, as a matter of law, provision of adequate school facilities for every charter school authorized. In most other locales, charters basically fend for themselves while school districts tend to their own.

The executive in charge of the Columbus district's school facilities stated the district-first policy clearly: "We have to make a value judgment on which sites are important to keep. If they're not important for the district to keep, then we will be recommending selling them."⁶⁰ Think what this means for the potential buyers. Even if charter schools get the green light, they're likely to be bidding on the most run-down, worn-out buildings in the district portfolio, inflating the cost of renovation.

* Those numbers improved dramatically in 2011, with 43 schools accepting offers. In response, CCSA agreed to stay its lawsuit in June 2011.

The Politics of School Property

It's not just school boards and superintendents that have a proprietary attitude about school facilities. Parents and community leaders often have a fierce personal and civic pride about "the school system" and don't want its assets diluted. Nowhere is this more apparent than in their reaction when a public school is threatened with closure and re-opening as a charter. Even if the district has created a long-term plan and presents it with a spiffy PowerPoint, the community forum where closures are announced is likely to resound with accusations, misinformation, and conspiracy theories. Many parents simply take for granted that the school district runs the public schools; tell them that a charter school is going to move in and they may mistakenly think they'll have to pay tuition or lose their child's seat.

When misinformation is compounded by agitation and stoked by emotion, the situation can become combustible. Opposition by some New York City parents to co-location of charter schools in district space blossomed into a lawsuit by the United Federation of Teachers, the NAACP, and the Alliance for Quality Education (an advocacy group), who sued the public schools chancellor and 16 charter schools to halt closures of low-performing district schools and prevent co-location of charters in district space.⁶¹ A separate lawsuit was filed specifically to halt co-location of the forthcoming Upper West Success Academy within the Brandeis Educational Campus on West 84th Street (where five other public schools are housed). It would be the first member of the Harlem Success Academy network to open in the relatively affluent Manhattan neighborhood; according to press accounts, parents who targeted the school "worry that the new school would siphon middle- and upper-middle-class families from struggling public schools in the neighborhood that greatly need them."⁶²

In their zeal to hold onto "their" public schools, the litigants miss a fairly obvious point: The Harlem Success network, created by former City Councilmember Eva S. Moscovitz,

has earned its spurs not by selecting able students, but by working educational wonders with low-income children who would otherwise attend district-run schools. In the most recent state exams, 94 percent of its Black and Hispanic students passed the language-arts exam, far surpassing not just city schools but the *statewide* mark of 73 percent.⁶³

New York is not the only place that teacher unions have fought to maintain the current system. When Boston superintendent Carol Johnson invited a group of charter leaders to talk about a range of potential cooperation, including some general discussion around potential use of buildings whose closure she was recommending, the teacher union president went ballistic. Flyers were distributed saying that charter school leaders "are salivating at the possibility of leasing 'surplus' Boston School buildings."⁶⁴

In cities with an overstock of district-owned space, superintendents face a thankless choice: either convince parents and school boards to close unused buildings or offer a rationale for holding onto them. There being no sound economic grounds for the latter course—and knowing that they will confront school board and council members who refuse to see schools closed in their own backyards—some superintendents simply predict that enrollments will rise again. So the district will hold onto them until that day comes.

Of course, it's especially difficult for district leaders to pivot toward sharing space when it will be occupied by the very competitors on whom they've laid blame for the district's decline.

It's important to note that there are glimmers of a different relationship between charters and districts on the horizon. Some enlightened district superintendents, such as the impressive line of succession in Denver from Michael Bennet to Tom Boasberg, simply view charters and district schools as threads in the same net of support for their city's children. Boasberg, for example, welcomed co-location of district and charter schools and planned in 2011 for "16 charter schools operating in district facilities, representing approximately

* In August 2011, State Supreme Court Judge Paul Feinman ruled that the plaintiffs opposing the Upper West Side Success Academy should pursue their cause with the state commissioner of education, rather than through the courts.

A Straw in the Wind: The Case of Paul Junior High

As a former charter authorizer in the District of Columbia, I had a front-row seat for one of the first instances in which a court was asked to rule directly on who had a right to a public school building.

In 2000, after a three-year fight, the D.C. Public Charter School Board approved a petition by the leadership of Paul Junior High to convert it to a charter school. D.C. Public Schools (DCPS) used various tactics to stall the conversion, such as refusing to grant the school a lease confirming “site control,” needed to permit city funds to flow to a charter school. (Paul secured a credit line from City First Bank to tide them over.)⁶⁵ The emergency board then overseeing D.C.’s

traditional public school system adopted a Solomonic position, accepting the conversion but giving the Paul apostates no claim on their building. The District’s Financial Control Board vetoed the idea, resulting in the mass resignation of the school-system oversight board. A group of neighborhood activists then sued to keep the building under control of DCPS and effectively thwart the conversion. After a trial rife with misinformation (one mother testifying she’d been told that charter schools don’t provide special education services), the judge upheld the Control Board’s stance, establishing (for D.C., at least) the principle that the building goes with the charter conversion.⁶⁶

48 percent of charter schools operating in the district, with 11 of these schools operating in a shared campus partnership.”⁶⁷ At the same time, though, he required that some of the charters accept all students within the district’s assigned attendance boundaries; so three co-located Denver charters have enrollment policies similar to neighborhood schools.⁶⁸

Cleveland has embraced the nascent Breakthrough Schools coalition, which united several high-performing charters within a common organizational structure. The district authorizes the schools, has agreed to help them expand, and recently sold them four vacant school buildings. The district’s chief operating officer Patrick Zohn, clearly saw an opportunity for the district in the \$1.5 million transaction: “There’s not really a robust aftermarket for pre-owned school buildings,” Zohn said. “Come on down. We’re dealing, dealing, dealing.”⁶⁹

The Bill and Melinda Gates Foundation has brokered “compacts” between districts and charter schools in 14 cities. Each city’s agreement lists a series of steps the parties will take to ensure equity in resources, enrollment, and services. Several of the compacts address facilities directly, and buildings will be provided at no or low cost for at least some charter schools in Denver; Hartford, Connecticut; Los Angeles; New Orleans; New York City; and other sites. The Nashville agreement, for example, promises to “include charter schools in the long-term strategic plans of the district including, but not limited to, student assignment planning and facility usage.”⁷⁰

Time will tell whether the compacts produce real change—and whether their good example spreads to other locales.

The Status Quo is Costly

We pay enormous amounts for public school facilities, but we do it in a way that is both inequitable and inefficient. According to the U.S. Census of Governments, school districts expended nearly \$210 billion in capital outlays for construction and land/building acquisition between 2005 and 2008. That's an average of \$52.6 billion per year, and on a per-capita basis it comes to \$1,086 per student.⁷¹

However, that average masks big peaks and valleys, even within the traditional public-school sector. According to a review of the Census of Governments data by the 21st Century School Fund, at the school district and zip code levels "there was tremendous disparity in the spending by school districts to provide healthy, safe, and educational adequate school facilities. Over the period from 1995-2004, the lowest income communities had by far the least spending."⁷² Consider how this affects charter schools, two-thirds of which are located in cities. Sluggish public investment hastens the deterioration of the public school building stock—which drives up the cost of renovation if charters can get access to those buildings.

Costs to Charters

When a district owns but doesn't share its buildings, charters have to look elsewhere, often leasing expensive commercial real estate or building their own buildings. But it's difficult to quantify any kind of average additional expense, since the numbers vary so much by location. One vivid comparison is available in a city that does provide space for most of its charter schools. In a recent report comparing funding for charter and traditional public schools, New York City's Independent Budget Office found a gap in public revenues of more than \$3,000 per pupil between charters housed in district school buildings and those housed in private space.⁷³

While that number reflects the extremely high costs of Big Apple real estate, there are stark gaps in other jurisdictions as well. In Georgia, an average-sized charter school using

a district facility saves over \$308,000 in facilities payments compared to one that builds or leases its own building.⁷⁴ According to a 2008 study by the Colorado League of Charter Schools, charters that have access to district buildings or land spend two-thirds less per student than schools that have bought or built buildings they now own.⁷⁵

Remember that most charters have no direct source of revenue to pay for their facilities needs. Money to pay for leases, renovations, and purchases comes out of their operating budgets—the funding that should be devoted to teaching and learning. Depending on the amount of revenue they receive from state and local sources, and depending on what it costs to build, buy, or lease a facility, charter schools may be diverting a quarter of their operating funds just to put a roof over their heads.

Critics often rail against charter schools for pursuing the support of investors and philanthropists, ignoring that most of those contributions are needed to make up the yawning gap in public support. An official at YES Prep, the high-performing Houston charter, put it succinctly in commenting on a Texas plan to buy and lease buildings to charters at market rates: "If we didn't have to do fundraising to build \$9 million buildings, we could spend more money on students in the classroom."⁷⁶

Costs to Municipalities

Maintaining the *status quo* is a drain on municipal budgets as well. Taxpayers are paying more than they should to house the enterprise of public education. Consider this cascade of expenses:

Exorbitant construction costs. Construction projects using federal funding must follow the 1931 Davis-Bacon law, which mandates that workers be paid the "prevailing wage" in that area, a rate determined by the U.S. Department of Labor. Many states have their own prevailing-wage laws for public projects, some that predate the federal law. There is lively and often partisan debate about whether and how much these laws add to school construction costs.*

* To the extent that they address prevailing wage, state laws tend to treat charters like other public entities subject to the same restrictions. But courts in Pennsylvania and New York have reached opposite conclusions on this question, the former finding charters subject to prevailing wage due to the charter law's statutory construction and the latter finding that charters did not fit the state's description of "public bodies." It remains to be seen whether charters have become more heavily subject to Davis-Bacon due to the availability of financing from federal School Construction Bonds under the 2009 economic recovery legislation.



However, it's clear that some innovative nonprofits doing charter school construction are bringing in their projects for a fraction of the cost, in part because they are simply faster and leaner than the combination of school district central offices and union labor that dominate most public school projects. While their buildings are typically smaller and less laden with bells and whistles than their big-district counterparts, making direct comparisons difficult, the difference in per-pupil costs is striking.

The Pacific Charter Schools Development Corporation is building schools for \$16,000 to \$20,000 per pupil, compared to \$80,000 to \$100,000 per-pupil for Los Angeles Unified.⁷⁷ In New York City, all-in costs for School Construction Authority projects amount to about \$1,180 per square foot, compared to about \$580 for charter schools.⁷⁸ In Washington, D.C., the nonprofit Building Hope renovates aging D.C. Public Schools buildings for about \$181 per square foot; new construction and full modernization in D.C. Public Schools have incurred a school-site average of \$362 per square foot between 2000 and 2011.⁷⁹

Maintaining closed buildings. In addition to costing more going up, school buildings can continue to drain the treasury long after the district needs them. According to an American Enterprise Institute paper by developer Himanshu Kothari, school districts often hold onto assets too long. "Buildings require regular and frequent capital improvement as a means to maintain functionality, quality, and prevent significant costs in the future, but schools often have little incentive or resources to fix these problems. By not having consistent proactive maintenance of buildings, schools have become worn down, safety threats lead to closing dangerous parts of the facility, and refurbishments grow more and more costly."⁸⁰

When districts do decommission school buildings but then hoard them, the costs can really start to mount:

- According to Pittsburgh's Urban Redevelopment Authority, it cost that city's school district \$2 million annually to maintain 18 school buildings that were closed after a "right-sizing" of the school portfolio in 2006.⁸¹

- The Portland, Oregon, school district spent approximately \$700,000 in maintenance, utilities, and insurance for a single empty school building, Whitaker Middle School, between 2002 and 2006 before deciding to raze it (which cost an additional \$2.1 million).⁸²
- According to an estimate by its facilities manager, the West Contra Costa, California, Unified School District was spending approximately \$475,000 annually to maintain five closed school buildings—including \$200,000 to repair damages from break-ins at one building.⁸³

Forgone cash flow. Instead of standing vacant and becoming neighborhood eyesores, those buildings could be earning lease money from charter schools, funded through a dedicated allotment for facilities. In this instance the best-case scenario is the District of Columbia, whose \$3,000 per pupil annual charter facilities allowance is roughly equivalent to what D.C. Public Schools spends *per capita* on facilities. The allowance goes directly into each charter school's operating fund and provides a healthy cash flow for lease and mortgage payments.

Inefficiency of two-tiered system. Because charter schools finance their facilities with per-pupil operating revenue rather than a general obligation pledge tied to taxing authority, they pay significantly higher interest rates on facility debt than their school district counterparts. Yet charter schools pay these higher rates with *public* dollars. LISC's recent study of charter school bond issuance estimates that charter schools are paying roughly \$90 million more annually than they would if their debt had been undertaken by a highly-rated municipal borrower.⁸⁴



REFRAMING THE DISCUSSION

Given the inadequacy of our current arrangements, what principles might form a solid foundation for a new approach to public school facilities?

Serve All The Kids

This is the bedrock on which a new facilities policy must rest, even if implementation looks different from place to place. In one jurisdiction, a traditional school district could operate a facilities office mandated by law to serve charter school students as well as those attending district schools (in the fashion of Proposition 39, but with tougher oversight). In another jurisdiction a citywide approach could be created and overseen by a municipal entity with a mayorally appointed board. In a third jurisdiction, construction and renovation could be done through a nonprofit serving the entire public school population.

What they have in common is a firm commitment, in state law, that every child will have a modern, healthy, and well-equipped learning environment, no matter what kind of public school that child attends. The same commitment should govern funding policies. States should not only guarantee that charter school students generate equitable levels of educational funding, but also that they bring facilities dollars to whatever schoolhouse their parents choose.

Treat All Public Schools the Same

In a recent blog, Peter Murphy of the New York State Charter Schools Association made a provocative point in reaction to a *New York Times* story about the difficulties charters face in finding space: “[T]he question is never really asked in the article about the conundrum—a scandal, really—of why any charter school should have to pay “rent” at all. Every district school is in “free” space, yet charter schools, none of which get facilities funding, must fight for this privilege, even as the state legislature has added more and more hurdles to obtaining district space.”⁸⁵

For two decades we have treated charters and district-run schools as entirely different types of legal entities. While charters are almost always incorporated as independent

nonprofits (even if authorized by local school boards), traditional public schools have no such status. It is the school *district* that is the incorporated entity, paying the bills, hiring contractors, and bearing liability for a slip-and-fall case. But district-run public schools exist as physical realities even while remaining legal fictions. They occupy finite space. They’ve never had to worry about rent because they were a branch of the corporation. And there were no competitors.

Now there are—but because of the way we organize facilities financing, one group pays while the other gets space for free.

We need to change the way we think about the costs of building and inhabiting public school facilities. Major capital expenditures (building a new middle school, replacing the roof on an aging high school) should be funded as much as possible through a facilities budget available to all kinds of public schools. Every public school should have access to those buildings on the same basis, paying rent derived from a public per-pupil allotment.

No Dollars, No Rent.

An argument can be made for charging lease fees if public funding provides a facilities allowance that approximates actual space costs. But there is no excuse for denying access to capital funding, providing no dedicated facilities revenue—and then allowing districts to charge rent for public education facilities.

The principle here is fair and simple. Either . . .

- The district (or some other entity) pays for facilities and public schools, both traditional and charter, get them for no cost except routine maintenance; or . . .
- The district/owner charges rent, which comes from a dedicated stream of public funding.

Let Educators Educate

The way we do things now, the quest for classroom space produces huge distractions in both the traditional and charter sectors, transporting skilled educators away from their area of professional expertise into a Twilight Zone of building codes, bond deals, and Qualified Zone Academy Bonds (QZABs). Of course, districts typically hire facilities managers to oversee buildings—but a superintendent who might have begun her career as a special-education teacher must know enough construction jargon to supervise a longtime civil engineer. There’s a real question whether the standard academic/career path equips superintendents for this role. According to University of Dayton professor Theodore J. Kowalski: “Compared to other elements of administrative practice—areas such as law, finance, and community relations—schoolhouse planning has generally received limited attention [in education schools] . . . The notion was principals and superintendents would learn to manage facilities through on-the-job experience. Today this idea is indefensible.”⁸⁶

In the charter sector, it’s not uncommon for facilities discussions to overwhelm trustee-school board agendas for years at a time, as long as it takes to complete a complex, privately financed deal. Boards comprised largely of parents and community representatives may spend the bulk of their time trying to fathom their choices among investment instruments and building materials.

While stipulating that there are some extraordinary people in both sectors who are as comfortable managing properties as they are organizing a class of fifth-graders, wouldn’t it make sense to let educators do what they were trained to do, and to let school boards focus on the quality of the education program? We should make the intentions of the charter movement’s founders real for all public schools—that they should be free to focus on children and learning rather than bricks and mortar. This argues for facilities that are publicly funded, managed by a third party, and easy to acquire, inhabit, and vacate when the time is right.

We need to keep in mind that more than 70 percent of charter schools are still independent and community-based.⁸⁷ For the remainder managed by for-profit firms or non-profit networks, or for the independent charters founded and led by people with a direct line to donors and investors, it may make perfectly good sense to build and own their own facilities. Ample resources, economies of scale, and dedicated staff can all help mitigate the burden of finding and financing buildings.

But these are exceptional situations, and it’s safe to say that most charter operators would grab at the chance to have someone else present them with tailored facilities solutions and the means to afford them.

Consider Performance

Allocation of scarce space can be done on the basis of school quality rather than sheer population bulge. One current example is legislation approved by Texas in late June 2011, extending use of Permanent School Fund assets to guarantee bonds issued by “charter districts” (i.e., charter schools or networks) for facilities needs. To qualify, charter district bonds must be rated investment-grade by a nationally recognized rating firm without the guarantee. While that provision refers most directly to financial soundness, it also means that approvable schools will have to demonstrate the kind of academic performance and market-worthiness that ratings companies demand.

Awarding public space only to high-performing schools is not a universally popular idea in the charter community. Such policies establish a more stringent standard for access than is required of district-run schools, which get space by right, with no performance expectations attached. They are hard to justify if space is ample.

Where space is tight and there are many contenders, however, it may make sense to award space to the highest-performing school rather than the one with the longest waiting list. But this should apply to all facilities allocation, not just charters. We’ve begun to see this happen in cities where long-dysfunctional schools are being closed and proven educational models are re-opening in the same buildings.

Building a New System

Who or what should succeed the school district as owner and manager of the public school real estate portfolio? In this section some potential models are considered. Alone or in combination, they might serve as the basis for pilot ventures that could demonstrate a workable, scalable new approach.

We begin by looking briefly at how the stage can be set for innovation through vigorous and visionary leadership at the state and local levels.



[T]he quest for classroom space produces huge distractions in both the traditional and charter sectors . . .

Change Begins in the State Capital

Although supported by federal start-up funding and organized by local initiative, charter schools are really a creature of state policy. The past few years have provided vivid illustrations of how state leadership can change long-established attitudes and practices with respect to managing the facilities portfolio.

In 2008, Louisiana used its massive post-Katrina settlement from the Federal Emergency Management Administration (FEMA) as core funding for a \$1.8 billion renovation program for public school facilities in New Orleans—and did so in a revolutionary way. In announcing the program, then-state superintendent of education Paul Pastorek said: “The proposal considers all public schools in New Orleans, without regard to governance . . . We’re not building schools for the OPSB [Orleans Parish School Board], we’re not building schools for the RSD [Recovery School District], nor

are we building schools for charters. We are building schools for the city of New Orleans.”⁸⁹ The RSD is now tasked with making decisions about which buildings to renovate and which schools get to occupy them and, of course, there is plenty of contention about these matters in the Crescent City. But the plan is a conceptual breakthrough because the state is creating a facilities portfolio for *all* public schools, rather than funding the district in the traditional way and then making separate provision for charter schools.⁹⁰

Farther north, Indiana governor Mitch Daniels got it exactly right when asked whether Indianapolis Public Schools should sell 13 closed buildings to charter schools. “Sell them? They should give them away!” he said, noting that charter schools are public schools and taxpayers have already paid for the buildings.⁹¹ On May 5, 2011, Daniels signed into law sweeping reform legislation that among other provisions, allows charters to lease or purchase for \$1 any unused, closed, or unoccupied school building that is maintained by a school corporation.⁹²



Yet there are regrettably few examples of such leadership. For states that have yet to level the playing field, here is a short to-do list:

Distribute the Surplus

We know that in countless cities, school buildings already paid for by tax dollars are sitting empty and deteriorating, while public charter schools are in urgent need of classroom space. A few school districts have displayed commendable openness to making such space available; Atlanta, for example, has cooperated with state and national charter organizations in evaluating the suitability of 14 closed properties for charter occupancy.⁹³

But should districts have the right to decide on disposition of properties that they have already conceded they will not need? Whatever the original ownership or cost, surplus properties should rightly be considered a good held in trust for the future student population of the entire city, not just those who will come up through district-managed schools. This calls for two kinds of actions:

- State legislatures should immediately transfer to municipal leaders authority to manage the disposition of any school space already declared “surplus” by a school district, giving right of first refusal to public charter schools for sale or lease at no cost.
- In cities with no officially declared surplus but pressing demand for charter-school expansion, state governments should commission third-party building audits to determine whether there is excess space. If there is sufficient space to provide for non district-managed schools, authority over that surplus should also transfer to the municipal authority.

There is welcome precedent for this move in the Milwaukee case cited on page 22. District officials rarely say out loud what Milwaukee held as a matter of policy—that *they’re just not gonna help the competition*—but that attitude certainly slows any effort to divest surplus properties. It’s up to state leaders to slice through the excuses with bold steps that address the urgent needs of non-district students.

Create Triggers

Another way of organizing the move toward facilities equity is to set quantitative guidelines. Within a decade, we may see charter schools delivering public education to a majority of students in five to 10 major cities. It would be strange indeed if the traditional districts in these cities still controlled access to the stock of public school buildings.

States should consider putting in place a series of trigger mechanisms such as the following: When charter school population reaches 10 percent of overall public school enrollment, a space audit is conducted and any excess is transferred to municipal authorities for disposition. When charter market share reaches 20 percent, the process of moving the entire stock of public school facilities to municipal hands begins.

Provide Equal Access to Existing Programs

States should also review their existing administrative and regulatory arrangements to make sure that they work for all public schools and not just those managed by districts. Their current role in supporting public school facilities financing is an ideal place to start.

Twelve states have some kind of “school construction authority” that provides financial support to local projects and may also house state functions such as setting contractor standards. Ten of these are in states with charter laws, and some of these allow limited charter-related functions. The Massachusetts School Building Authority, for example, has provided \$7.5 billion to cities, towns, and regional school districts for school construction projects—and it also allocates charter-eligible funding streams such as the Qualified School Construction Bonds that were made available through the 2009 economic recovery legislation.⁹⁴ Yet in most states, charters are simply precluded from getting support. For example, New Jersey’s Schools Development Authority proudly lists scores of projects it has backed, but due to statutory prohibition, none involve charter schools.⁹⁵

State legislatures should put the full faith and credit of the state behind all kinds of public schools, as has happened in Colorado and Texas. Governors and state superintendents

should use their own funding leverage in the way Louisiana is doing, sponsoring school projects that would serve the entire public-school portfolio and deciding further down the road which kind of schools will occupy which facilities.

Finally, state education agencies should make sure that charters are made aware of, and enabled to compete for, every available state facilities program, as well as an equitable share of any federal flow-through funding such as monies that were provided under the American Recovery and Reconstruction Act (ARRA).

Lengthen Charters

In addition to granting access to buildings and making facilities finance available, one other step could address the argument (noted earlier) that municipalities are less likely to support bonds for term-limited charters than for district schools that generally have an open-ended lifespan.

Most charters run for five years, at least initially. A few jurisdictions have modified that in order to make charters more attractive to lenders: Arizona and Washington, D.C., both have 15-year charter terms, with high-stakes reviews happening at least every five years, and Colorado charters can be granted 30-year terms. Other states are awarding 10-year charters after the first term, or experimenting with virtually automatic renewal for charters consistently meeting a high performance bar. All of these strategies make charter schools more appealing to lenders by aligning their legal lifespans more closely with that of mortgages and bonds. Longer charter terms can bring wary investors to the table, provided that there is also a strong oversight and accountability system in place.

Rethink the Overall Framework of School Finance

While this is not the place to address all the inequities in how we pay for public schooling, it's impossible to talk about dismantling the district facilities monopoly without acknowledging that it is reinforced by reliance on local property taxes as the basis of capital funding.

As school planner Paul Abramson puts it, “[O]ur local system of taxation is based on 19th-century concepts of wealth, not on 21st-century reality Property was the mark of wealth in the 19th century, and it probably made sense to raise funds for local concerns—and especially the schools—by levying a tax on real estate. Landowners made up the community, ran the community and had the resources to pay the community’s bills.”⁹⁶

While full-scale finance reform may not be a precondition for facilities reform, it would certainly promote district/charter equity by shifting the burden of capital finance to state-level revenue sources that can be allocated on the basis of student population and facilities needs.

Cities and Counties Have to Own the Problem

Go to any meeting of mayors or county executives and you will hear much palaver about education being the key to future economic prospects. Yet most of these civic chiefs are reduced to the status of “interested spectators” in actual decisions about school system policy, where real power is held by the superintendent and school board.

District leaders whose careers started in the classroom are fine with this arrangement. It makes sense for educators to be in charge of education, they argue. But even if that’s true, and mayors should keep their distance from oversight of curriculum and graduation requirements, it makes much less sense to bar them from a role in facilities, especially with there is so much overlap with the capital needs and organizational skills of general municipal government.

According to Jeffrey M. Vincent of the Center for Cities & Schools at the University of California-Berkeley, the separation of school planning from other municipal land use decisions “makes school facilities planning logistically difficult and politically contentious.” He also notes that in most states, school facilities funding is “designed around a suburban growth model that inadvertently prioritizes areas with rapid development and/or places high emphasis on the ability of development fees to fund local matches. These

scenarios make the financing of new schools in urban areas, with little new development to fund them, very difficult.”⁹⁷

Charters add another layer of complexity. Although they can enroll students citywide (which would argue for municipal planning), they confront a ward-governed, neighborhood-zoned school district when asking for a building. And with a majority of charters located in urban areas, they suffer disproportionate harm when planning strategies decapitalize urban school facilities. If they do get a chance to bid on buildings, they’re often left with deteriorated dregs.

In New York, Chicago, Boston, Cleveland, and a few other cities, the mayor exercises general authority over public schools, representing the long-term interests of the entire city rather than the proprietary interests of the school district. New York City Mayor Michael Bloomberg has made the boldest use of his office to lay out a welcome mat for high-quality charter schools. After gaining control of the school system in 2002, he agreed to house many charters in the New York City Department of Education space. While the policy has given rise to some predictable tensions (and could change when Bloomberg leaves office after the 2013 mayoral election), it makes clear that charters are just as deserving of New York City public-school space as are schools managed directly by the city’s school district. Co-location currently provides rent-free space to about 62 percent of New York City’s charter schools.⁹⁸

Mayoral control of public schools may or may not make sense in a given jurisdiction. But some kind of municipal authority over public school facilities may be the only way to ensure that all students are spoken for.



Three Management Models

With clear policy guidance from the state, and with local municipal authorities taking responsibility for implementation, there are many potential paths toward creating a new way of managing the public school facilities portfolio. Following are three possibilities, each representing a variation on some established or already-tried approach.

The Real Estate Trust

As with many notions that challenge the educational status quo, this one can be traced to Paul Hill, the protean researcher at the University of Washington's Center for Reinventing Public Education (CRPE). He consulted for the Education Commission of the States (ECS) in its landmark 1999 report *Governing America's Schools: Changing the Rules*, which envisioned systems of autonomous public schools whose operation and governance looked remarkably like those of charter schools. ECS proposed handling facilities needs through a "public schools real estate trust" described as follows: "In any locality, one or more real-estate trusts assume ownership of a community's public school buildings, sell the surplus buildings, and build or lease additional facilities in areas with insufficient space. Such trusts help schools find space, as well as tenants for space they no longer need." Facilities funding would flow directly to schools, which would then use it to lease from the trust.⁹⁹

Hill and his colleagues pursued the idea through a series of publications including a 2004 paper for the Brookings Institution by CRPE researcher Michael DeArmond. A trust's bottom line, he said, would be "to improve the management of district assets and ensure that facilities do not constrain the educational opportunities a district can offer its children."¹⁰⁰

New Schools Venture Fund endorsed the idea of nonprofit trusts, at least within the charter sector, in a 2006 paper: "By aggregating capital from multiple sources and consolidating expertise within the organization—rather than in the principal's office or the central office of a charter management organization—the trust would lower the financial and human cost of real estate development and enable greater access to facilities funding."¹⁰¹

The idea has gotten one rather bumpy road test. Portland, Oregon, created a trust as one outcome of its 2002 long-range facilities plan, initially charging it with disposition or redevelopment of its surplus properties. According to the Portland school board, the real estate trust was "a nonprofit, independent entity created by [Portland Public Schools], which could, at the board's discretion, be given title to property deemed "surplus" to either market or redevelop it on behalf of the school district." However, the trust was never asked to act in that capacity and devolved into an advisory body. The board finally amended its policies in early 2009 to formalize the trust's reduced status.¹⁰²

The trust had not, according to DeArmond, fulfilled "lofty expectations" about reforming facilities policy.¹⁰³ But how could it, with Portland Public Schools as its sole client? The City of Portland never insisted that the trust act as an independent municipal agency with real powers over property. This, in turn, may be one reason why charter schools have barely gotten a foothold there; just seven of Oregon's 102 charter schools are located in the state's largest city.¹⁰⁴

The idea of a public school real estate trust should be revived and retooled so that it serves all public school students.

Retrofitting the "Construction Authority"

A second approach would rely on existing or modified municipal authorities, with an eye toward New York City's experience. Its School Construction Authority is the rare local entity that has soup-to-nuts responsibility for financing, building, and overseeing public schools, largely because it is now controlled directly by the mayor.

Kansas City created a school district building corporation as a shell allowing the district to finance its bonds, and other districts and municipalities have created such corporate holograms for similar purposes. But what if they were more than processors of financial instruments? What if cities (rather than school districts) were to create such corporations, authorize them to do financing, and assign them the task of managing the public-school facilities portfolio so that both district and charter schools could be housed?

Let's call these public school building corporations PSBCs for short. And to be clear, these would be local bodies with local



The idea of a public school real estate trust should be revived and retooled so that it serves all public school students.

accountability. The state authorities discussed above should not get into the business of managing deals for local school construction, which could compromise their role as impartial investors of state funds.¹⁰⁵

Or cities could simply expand the portfolio of existing municipal building authorities to include schools. It's truly curious that such authorities exist in many jurisdictions, financing and putting up municipal and county hospitals and other complexes, while the school district operates in a totally separate bubble. Is there some special gene that equips financiers and engineers and architects to create schools—and if not, wouldn't it be far more efficient to consolidate their work with that of the general government?

Expanding Charter-based Models

Using a third strategy, municipalities would contract with nonprofits to take over and manage the entire school facilities process.

The District of Columbia tiptoed up to the edge of this idea in 2005, when then-superintendent Clifford Janey called for public-private partnerships to support improved school performance. One resulting project was EdBuild, sponsored by the Federal City Council (a business-based civic group). With a mission of “high-performing public schools, inside and out,” EdBuild sought to provide both facilities renovations and academic support to a group of low-performing schools in the District of Columbia, with a vision of eventually taking on a large swath of D.C. schools and creating space that could be used flexibly by both D.C. Public Schools and charter schools. The venture went under after critics raised questions about the political connections of its sponsors and the D.C. Council refused to fund its contract with the school system.¹⁰⁶

Given the perplexities of D.C. school politics, it's risky to draw lessons from this episode, but two things stand out. First, EdBuild's mission was unclear. Commendable as it might be to improve academic and facilities conditions concurrently, they involve very different skill sets. Second, it was inevitable that a startup with plentiful funding would run into a buzz saw of veteran contractors about

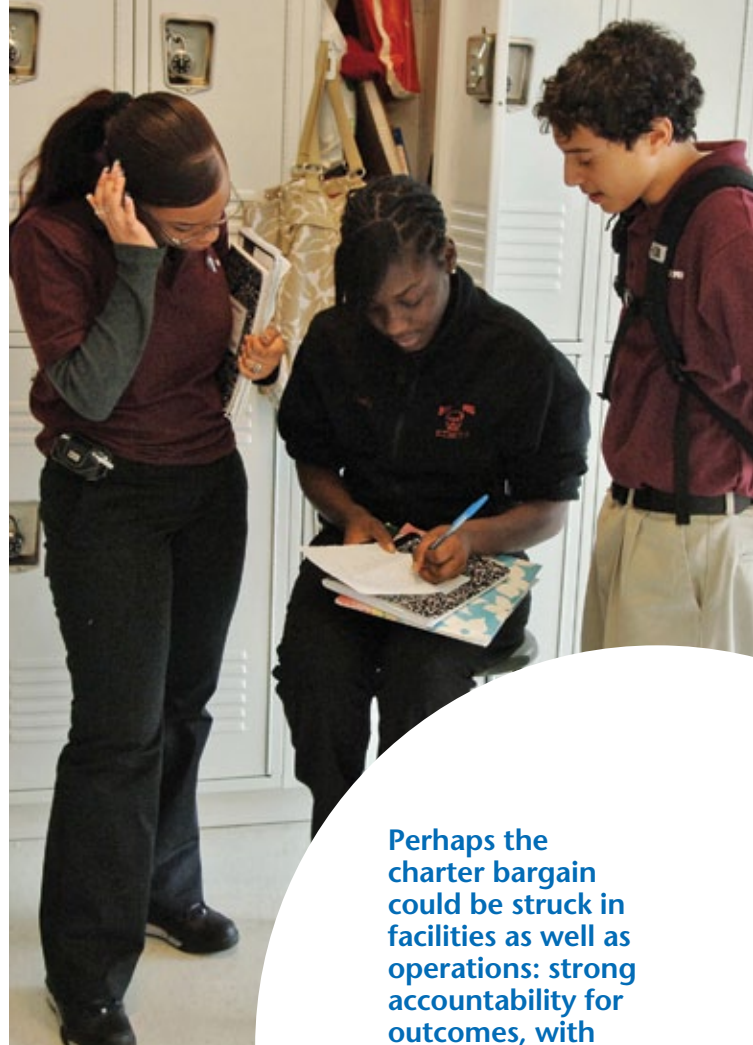
to be bypassed in the award of huge contracts. Any effort to supplant a large and well-established section of district operations needs to be rolled out with transparency and political astuteness.

There are a number of strong nonprofits currently serving the national charter community, operating at quite impressive scale and, as noted earlier, creating more efficient ways to meet school facilities needs. It is easy to imagine a city calling on one or more of these as “general contractors” for the combined facilities requirements of district and charter schools alike. Note that they differ from traditional district construction agencies by combining financing with a broader development role—serving, in effect, as both the “facilities office” and the chief financial officer in getting projects done.

- Civic Builders, based in New York, aggregates financing from a variety of sources, assembles a development deal, and retains ownership of the school building, leasing it to a charter school. It relieves school leaders of the burden of trying to navigate complex real estate transactions and mitigates risks for investors who may be skittish about a school with a five-year charter. Importantly, Civic Builders also requires tenants to maintain strong academic performance as a condition of occupancy.
- Building Hope, based in Washington, D.C., concentrates on supporting a school's own facilities transaction through consulting services, site acquisition, and credit enhancement. It has also created an incubator site enabling small charters to get a sound startup before moving into permanent homes—a critical problem for schools that start with just a few grades and may not have the cash flow needed to acquire a full-scale building.
- Los Angeles-based Pacific Charter School Development Corp. (PCSD) provides a range of development services and owns the resulting buildings during a charter school's first few years. It then works with the school to acquire long-term tax-exempt financing, enabling the school to purchase its campus from PCSD. It has created places for more than 15,000 students since 2004 and anticipates adding up to 4,000 more seats by 2013.¹⁰⁷

- In Albany, New York, the Brighter Choice Foundation (BCF) provides a range of services to 11 charters, including a KIPP school and other high-performing models. Among its suite of services is a facilities program that has created state-of-art buildings for its schools, both new construction and historic renovations. BCF turned a \$15 million program-related investment from the Walton Family Foundation into a revolving loan fund that according to BCF board chair Tom Carroll “allows us to build a facility and then take out a mortgage on it.” At full enrollment the school can then issue tax-exempt bonds and buy the building from BCF. After a turndown from the Albany Capital Resource Corporation, BCF won access to bond funding through the Phoenix, Arizona, Industrial Development Authority.¹⁰⁹
- Charter Schools Development Corporation provides a range of facility services for charter schools across the country, with a special focus on start-up and young schools that find facilities and financing very difficult to obtain. They have funded projects in 26 states to date.¹¹⁰

These and other nonprofits could surely serve a wider public, although there could be some tradeoff between their entrepreneurial culture and the demands of fully public administration. Perhaps the charter bargain could be struck in facilities as well as operations: strong accountability for outcomes, with public reporting to a mayor or city council, but far more latitude in matters of budgeting and labor.



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Critical Transition Issues

Transferring facilities authority from the current monopoly to any of these models starts with political will—but also involves some thorny practical issues, among them the following:

How will the properties be transferred?

The process would differ somewhat, according to the management form adopted. The public schools real estate trust proposed here would own public school real estate, but with a governance structure representing the entire jurisdiction. The school district would have to relinquish title to its properties. As Tina Turner might put it, this could be done one of two ways: “easy” or “rough.” The former would simply involve a handover of title, with the district acknowledging that times have changed and it’s time to accommodate all students. The latter would involve litigation, legislation, and demands for compensation.

In cities that already have mayoral control of schools, a public schools building corporation would simply consolidate authority over buildings in one semi-independent agency, with leadership appointed by the mayor and subject to legislative confirmation. In cities without such a governance arrangement, the corporation would require signoff by the school board. In either case, the corporation would be legally empowered to manage the building stock for the benefit of the entire student population. It might make sense to phase in this authority, with the corporation taking immediate title to surplus buildings and using its bonding authority to finance new buildings. The district could retain title of active sites until they reach the end of their usable life, or until operating costs outweighed the district’s ability to pay.

In turning to a non-profit solution, ownership is a less critical issue than the challenge of mobilizing a political compromise between the city and the district. The district would be required to award a long-term master contract to one of the charter-based nonprofits, which would also have to have access to public financing for renovation and

new construction. Any district could already take such an initiative on its own—but it would be far preferable for the municipality to lead, so that the terms of the agreement would respect the needs of the entire population.

Would the new authority have to buy the buildings from the districts at their market value? Would school districts be entitled to compensation when buildings are transferred to a non-district entity?

In an ideal world, school districts would simply acknowledge that charter schools are now entitled to a proportionate share of their holdings, and hand them over to some municipal authority for distribution. Or state legislatures would emulate Indiana and make buildings available for \$1 each.

But school district lawyers will surely go to court and demand that districts be compensated for the buildings’ current value and/or the costs they’ve sunk into them over the years. It’s not clear whether these arguments will prevail, considering the contrasting outcomes in the courts in two states:

In 2007, the Independence, Missouri, School District annexed eight schools that had been part of the Kansas City School District (KCSD), a move approved by voters in both communities. KCSD agreed to part with the schools, but went to the mat over the value of the school buildings. A district court approved the change in title only after Independence agreed to pay Kansas City \$12.8 million in compensation.¹¹¹

A similar Louisiana case yielded the opposite result. In 1995, the state approved creation of a new City of Baker School District, to be carved out of the East Baton Rouge Parish district. The Baker board sought a declaratory judgment that it should be considered the owner of school properties without payment of compensation to East Baton Rouge. The Louisiana Court of Appeals ruled for Baker, and one passage in the decision stands out:

The ownership of school property is generally in the local school board or district as trustee for the public at large. School property is thus to be considered public property

and is not to be regarded as the private property of the school district by which it is held or in which it is located. Moreover, while the Parish Board is no longer the title owner of the property, it also is no longer mandated to educate the children living within the boundaries of the Baker Board. The release of the obligation follows the transfer of legal title to the property.

Concerning the issue of compensation itself, the Court said, “We find none due the Parish Board. There has been no taking. The transfer of legal title from the Parish Board to the Baker Board is merely the transfer from one trustee to another. As stated above, the public owns the school property.”¹¹²

If the Louisiana logic is followed, the answer would seem to turn on whether a new authority or trust is truly created as a “trustee” for the public, rather than as a wholly private, market-based entity.

How would the new authority manage occupancy?

The authority would manage school facilities with an eye toward quality. It would post the availability of space and take bids to find tenants whose needs were a match for the space. For schools with an existing track record it could factor performance into its assessment of a school’s viability as a tenant. Schools with poor records, especially those on notice for potential closure, would be rated less favorably than those with strong records.

At the outset, district and charter schools would be grandfathered into their current space—but for district schools, a term lease would be created. If the school is closed by the district it would lose its lease, just as a charter school that fails to be renewed would lose its lease. Safeguards would have to be created to ensure that neither authorizers nor districts keep failing schools open for fear of losing the rights to a piece of real estate.

NAPCS Resources

The National Alliance for Public Charter Schools has produced two essential documents that can provide guidance to policymakers. The first is *A New Model Law for Supporting the Growth of High-Quality Public Charter Schools*. Released in 2009, it includes fiscal and facilities equity and contains legislative language that can easily be adapted by state legislators.¹¹³ These are its principal recommendations on facilities:

- A per-pupil facility allowance (equal to statewide average per-pupil capital costs)
- Facility grant and revolving loan programs
- A charter school bonding authority (or access to all relevant state tax-exempt bonding authorities available to all other public schools)

- The right of first refusal to purchase or lease at or below fair market value a closed or unused public school facility or property
- Clarity that no state or local entity may impose any facility-related requirements that are stricter than those applied to traditional public schools

The second publication, released in 2011, is *Making Room for New Public Schools*, documents how some districts are accommodating the needs of charter schools by sharing surplus space and other methods.¹¹⁴ States that are serious about serving the needs of all public schools will find in these two volumes both the principles that must be embraced and the practical steps that can be taken now.

Who would be responsible for costs associated with the buildings?

The authority would be responsible for major capital costs—building, renovation, and major capital repairs such as roofs and HVAC systems. Tenants would be responsible for routine maintenance. No matter which management model is adopted, the authority would need access to capital revenues that now flow only to school districts, so that it could instigate new construction and perform major renovations to keep buildings viable as long as possible.

All public schools would pay lease funds from their own budgets. Charters would use their own budgets as they do now; districts could either act as property agents for their schools, seeking space and paying rent on their behalf, or could transfer budget authority to the school level and let schools make their own decisions.

Schools themselves would be responsible for routine repairs and maintenance. Their operating budgets would reflect reasonable costs for fixing the plumbing and replacing light bulbs.

As noted earlier, it would be far preferable for all of this to be funded through a student-based formula, with charters and district schools receiving the same amounts on a per-pupil basis and having the same authority to spend operating funds as school needs dictate.

How can public accountability for the buildings be ensured?

Whether a real estate trust, a public school building corporation, or a charter-based nonprofit, the authority will be exercising major public responsibilities and handling vast sums of public dollars. It cannot be simply a “privatized” business, although it must have the kind of operational flexibility that private sector corporations enjoy. It must be transparent in its criteria and decisions, and must create processes that give the public (especially parents, neighborhood citizens, and others most directly affected) a voice in decision-making and recourse for appeals within a reasonable timeframe.

That means the board of the authority must meet and cast votes in public sessions, and its books must be subject to audit by public authorities (or by private firms they designate). There must also be some form of appeal available if the authority is found to have violated procedural rules, most likely through the municipal and state courts.

START NOW

The school district monopoly over public education facilities is an accident of history. It would never have developed had there been substantial numbers of other public schools, not supervised by traditional districts, when the laws were written. Now there are more than 5,000 such schools, with more than two million students in them—and we are overdue in finding an equitable solution to their facilities needs.

There may be another hundred ways of accomplishing the transformation away from monopoly. This paper argues that the best path involves policy and finance reform at the state level; municipal rather than district oversight; and a combination of entrepreneurial energy with appropriate public accountability.

While the proposals in this paper will generate dispute and require time to implement, there should be no further delay in creating state laws and regulations that level the playing

field between charters and other public schools. Even with existing rules of ownership, there is no excuse for bolting the doors to unused school buildings. There is no excuse for ignoring the fact that charter schools must take dollars out of classrooms to pay the rent.

At heart, this is not a management puzzle but a moral dilemma. We have accepted for far too long a legal and financial regime that entrusts an essential public asset to the longtime incumbent, and forces the newcomers—less numerous but presumably equal under the law—to beg and borrow for it.

Our challenge can be summed up in a memorable quote from Abraham Lincoln: *“As our case is new, so we must think anew, and act anew.”*¹⁵



ENDNOTES

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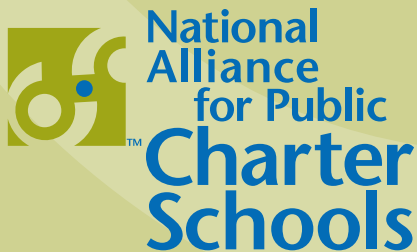
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