

Mediate, Don't Litigate

by John B. Stephens and Matthew J. Michel

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School Funding Disputes

A local school board wants greater county funding for operation of the public schools. The county commissioners are amenable to granting a small increase in their appropriation for the schools but are unwilling to meet the school board's entire budget request. The school board determines that the amount appropriated is not sufficient to support the public schools.

Impasse?

The General Assembly, in Section 115C-431 of the North Carolina General Statutes, has laid out a procedure for resolving the dispute, a procedure that moves through stages of mediation to, if necessary, a trial by jury. In that trial, the question to be presented to the jury is what amount of money is needed from sources under the control of the commissioners to maintain a system of free public schools.

In the following article, John Stephens and Matthew Michel look at the recent experiences of three counties in using the procedures as modified in 1997.

In an accompanying article, Tom Powell traces the legal history of the development of this dispute resolution procedure, from its underpinnings in the early part of this century through major changes enacted in 1997. (See ["Development of the Law"](#).)

The level of county funding for schools has been a flash point of conflict in county after county for years. County commissioners uniformly recognize the value of public education. At the same time, county officials face numerous funding requirements, many of them set by state and federal agencies: schools are important, but so are roads, law enforcement, solid waste disposal, job training, and many other services for citizens who do not have children in public schools. Frequently the same voters put into office commissioners devoted to low taxation and school board members devoted to high quality education. After the North Carolina General Assembly decides on the level of state funding for local school systems, each board of county commissioners allots the local funds that will determine the final level of resources available to school boards for educating the children of the county.

The system for addressing school funding disputes has evolved over many decades. For years the system called for the clerk of court to decide the dispute. The clerk had seven days to intervene, but he or she could decline to become involved and the case would then proceed to trial before a superior court judge. Clerks were reluctant to become involved, and the entire system came to be seen as unworkable. In 1996 the General Assembly introduced into the system the use of a mediator [\[1\]](#) to help the two boards seek a resolution rather than having a school board file suit against the commissioners. (See [“Development of the Law”](#) by Thomas Powell.)

In June 1997 the statute governing how boards of county commissioners and local boards of education address budget disputes was revised, with the support of the North Carolina School Boards Association and the North Carolina Association of County Commissioners. This article describes and analyzes the use of the modified mediation procedures in three North Carolina counties in 1997. It discusses the effectiveness of, and issues raised by, the new procedures. The article also offers some tentative guidelines to assist public officials in using the new procedures effectively.

The main provisions of the 1997 Act, codified at Section G.S. 115C-431 of the North Carolina General Statutes (hereinafter G.S.), are as follows:

A seven-day period following the commissioners’ adoption of their budget for the next fiscal year, during which time the board of education must determine whether the amount appropriated to it is sufficient to support a system of free public schools and, if not, to so notify the commissioners. The chairs of the two boards must arrange for and hold a joint meeting of the two boards within this period. Appointment of a mediator to work with the boards in two phases: working as a facilitator during the public, joint meeting of the two boards and, if that does not produce a resolution, private mediation with specified elected officials and staff of the two boards. Selection of the mediator may be by agreement of the two boards. If the two boards cannot agree on a mediator, the senior resident superior court judge will appoint one. After the joint meeting of the two boards, mediation sessions among working groups consisting of the board chairs or either’s designee; the county manager and the superintendent or either’s designee; and the attorneys and finance officers for each board. Other participants may be added by agreement of these eight people. The mediation sessions of the working groups are closed and information disclosed during mediation proceedings is privileged and confidential. Mediation

proceeds until a resolution is reached, until August 1, or until the mediator determines that an impasse has been reached. Mediation may continue beyond August 1 if the two sides agree. However, if mediation goes beyond August 1, the commissioners will appropriate and begin payment of an amount equal to the previous fiscal year's appropriation to the schools. The mediator may not disclose any information about the mediation and may not make any recommendations or statements of findings or conclusions. The two boards share equally the mediator's compensation and expenses.

Use of the New Procedure in 1997

Many counties have informal mechanisms that help to prevent differences over the level of county funding from resulting in legal action. In some counties members of the two boards attend each other's meetings or exchange information and views on a regular basis. In others, the board of county commissioners hears oral presentations of the school board's budget request. In still others, the school system is asked only for a written submission, and communication between members of the boards is minimal. In essence the 1997 Act created a mechanism that comes into play only when the regular give and take of argument and compromise has failed.

Some efforts stand out from the regular give and take. In Cabarrus County in 1994–95, for instance, following the defeat of a construction bond referendum in the county, the chair of the board of county commissioners was instrumental in initiating an education summit to address concerns about the county having two separate school districts. In Orange County the local dispute settlement center has facilitated meetings on county funding of schools on two occasions. In 1992 members of the county's two school boards met together with the county commissioners and reached a compromise wherein the county put forward a bond issue, which voters ultimately approved, and in 1997 a task force composed of the three boards' appointees again addressed capital needs and a bond issue. In Catawba County in 1988 the county commissioners and the three boards of education signed the "Catawba Compact," designed to reward school systems for improving student achievement. The commissioners challenged the school systems to move into the top 10 percent of North Carolina's highest achieving systems by 1992 and to issue an annual public report. The challenge heightened local awareness of student achievement and brought about continuous improvements in the three school systems. As student test scores rose, the per-pupil funding level set by the county commissioners increased almost 90 percent. The higher level of per-student spending placed Catawba County in the top 10 percent of the state.

In 1993 county budget differences in [Bladen, Brunswick, and Cumberland](#) counties were mediated under a pilot mediated-settlement conference program then in effect in those counties. Now adopted in all judicial districts, the program allows superior court judges to assign cases to mediation by a mediator who is certified by the North Carolina Dispute Resolution Commission. [2] J. Anderson Little mediated the disputes. Settlements were reached in two of the three cases.

In 1997 school boards in several counties considered using the procedures established by the 1997 Act. In Granville and Wayne counties tensions were addressed through meetings that did not involve a mediator, and no suits were filed. The procedures of the act were actually invoked in three counties: Lee, Pamlico, and Wake.

Lee County

In Lee County the new law was invoked, but negotiations resulted in a resolution without a meeting of the two boards convened by a mediator. In early 1997 the county manager requested that the superintendent follow an accelerated schedule for submitting the school board's budget request to the commissioners. The superintendent did not meet the deadline, and the county manager went forward with a recommended budget that proposed a school funding level that was the same as the previous year. When the commissioners convened to adopt their budget ordinance on June 21, the superintendent and members of the school board were present. The county manager reported that, based on his estimates, there was enough revenue to allow for an increase in funding to the school board. The commissioners nonetheless decided to leave the allocation for schools at the same level as the previous year and to cut the property tax rate.

At its July 8 meeting, the school board voted to authorize its chairman to initiate the mediation process provided for in the 1997 Act. The chair of the commissioners concluded that the request was not timely, that is, that it did not meet the seven-day provision of the statute. The school board filed a petition in superior court for a writ of mandamus to compel the two boards to meet according to the provisions of the statute. The chair of the commissioners offered to have the county manager and the school superintendent meet in order to explore a possible resolution of the dispute without a mediator. The two met and reached a settlement, in large part patterned on the outcome of the Wake County mediation (See "[Wake County](#)" below), and the school board agreed to file a dismissal of the mandamus petition. Thus the county did not need to file a formal response, and no mediator was involved. The settlement called for the commissioners to provide an estimate of revenue to the school system in February 1998.

Pamlico County

For the three previous budget years Pamlico County had had the same funding level for its county departments and schools. A slow economy had kept county revenues low. (Because of the county's small industrial tax base, tax revenues are generated disproportionately by taxes on residential property and residents were unusually vulnerable to tax increases.) Over those three years, the school board had accepted the economic constraints in the county and devised a different way to address the need for increases in per-pupil current expense account spending. The board received approval from the commissioners to divert budgeted capital outlay funds to the current expense account. Such redirection allowed the school system to augment the per-pupil funding level.

The process of preparing the Pamlico County budget had traditionally involved informal meetings between the budget committee members of the board of county commissioners and the school board. County commissioners often were given a school facilities tour, too. During preparations for the 1997–98 budget, the school and county financial officers communicated regularly, but there was no joint meeting of the budget committees and no facilities tour.

In 1995 state inspectors had determined that the elementary school building in the town of Arapahoe was unsafe. The school board had responded with plans to build a new school located closer to the center of the county, well away from Arapahoe. In reaction to the board's plan, some Arapahoe citizens formed the Arapahoe School Group (ASG) and sued the school board to try to stop them from

closing the school. The suit failed. The ASG then applied to the State Board of Education to form a charter school using the old building. The school board viewed the ASG as adversarial in its pursuit of maintaining Arapahoe's community school. Meanwhile the county, which had entered into a \$4 million installment contract on behalf of the school board to build the new school, reimbursed the school for the building sales tax and permit fees.

The commissioners wanted to upgrade the old school building and use it to relieve overcrowding in county departments and for recreation programming. Yet they were willing to allow the school board to lease the building to the ASG first in order to generate additional revenue for the school system. The school board would not agree to lease the building, however, because of its unsafe condition.

The county and school system staffs met—with a new county manager and a newly promoted county finance director—in the spring of 1997 to begin developing the 1997–98 school budget. The county asked the school board to prioritize its requests, and the county and school board proposals were brought closer together. The county postponed adopting its budget for a week in order to continue its negotiations with the board of education. The two staffs worked out a proposal calling for per-pupil funding of \$610 for operating expenses and no new funds for capital outlay. The proposal was not acceptable to the school board, however, because it was unwilling to accept the commissioners' requirement that the board lease the Arapahoe building to the county. A closed, joint meeting of the boards was proposed, but an open meeting was held. The school board asked to have its attorney—who had previously advised the school board about the new mediation law and what would occur if it were invoked—participate in the negotiation. Thus the chair of the board of county commissioners, the school board chair, the school superintendent, the county manager, and attorneys for each board met to negotiate the school budget.

In the negotiation the county offered a package that included increased per-pupil funding, an additional capital allocation, and a lease of the Arapahoe school building by the school board to the county. The school board rejected the offer because of the lease contract provision. Leasing the Arapahoe school was not a reasonable consideration in the eyes of the school board because of its disrepair. Another lingering possibility was that the school system might need the Arapahoe school for an additional year if the new building was not finished on time.

The school board attorney recommended beginning the budget-dispute mediation process under the new statute. [3] The county withdrew its offer and adopted a budget with a per-pupil funding level for operating expenses that was slightly higher than that of the previous year but with no additional capital outlay. At the meeting in which the county commissioners adopted their budget, school board members expressed their disappointment in the commissioners' appropriation to the school system.

Nature of the Issues

The commissioners wanted to help the new charter school group by allowing them to lease the Arapahoe school building, reasoning that the arrangement would provide revenue for renovation of the building. More importantly, the commissioners wanted to rebuild the county fund balance, which had fallen over previous years. To increase the fund balance, they charted a conservative fiscal growth plan for the county budget.

For the school board, the potential impact of the charter school was great. The ASG hoped that nearly

all of the former Arapahoe school students would attend the charter school. If that occurred, the school system would lose 10 percent of its state funding, since under the charter school statute the funding would follow the students. With no increases in school funding, and with the impact of a charter school looming, the school board felt compelled to request a per-pupil funding increase as well as a capital outlay increase in order to replenish the funds that had been diverted in previous years.

Selection of the Mediator

J. Anderson Little, a full-time mediator from Chapel Hill, was contacted by the school board attorney. Little had worked with the attorney on another school budget dispute under superior court mediated-settlement conference rules (see [“Bladen, Brunswick, and Cumberland”](#) counties above). He also had worked with one of the county attorneys on a case several years previously. The county agreed to use Little because of his mediation experience, his participation in the Institute of Government’s 1997 school-budget mediation training seminar, and his having no prior history of representing a school system or county agency. Before the meeting of the two boards, Little talked with the boards’ attorneys about the history of relations between the two boards.

Joint Board Meeting

On the day of the joint board meeting, Little met with both attorneys first. He then brought in the board chairpersons, and all five people discussed how the joint meeting would proceed. Little talked about potential impediments to the process and how everyone would be physically situated in the meeting. He cautioned that some posturing would probably take place and informed the participants of the techniques he would use to clarify issues and prevent antagonistic rhetoric.

Little also met alone with the two newspaper reporters in attendance. He explained that the mediation process is different in every case, told them how he became involved in mediating the dispute, and described the process and context of the mediation. Little also tried to instill a notion of privacy by telling “war stories” that illustrated the potential negative impact of inappropriate press reporting before the mediation had concluded.

The school board had retained, at the suggestion of their regular school attorney, an attorney from Raleigh with experience in school budget disputes. For the joint meeting, the school board appointed their Raleigh attorney as their spokesperson. The county manager was the primary spokesperson for the county commissioners. That board had decided to have the county manager rather than the board attorney act as spokesperson because in their eyes the facts seemed to speak for themselves.

The joint meeting began with the mediator establishing ground rules for the process—everyone present was permitted to speak during the open time; there was no overall time limit; one speaker spoke at a time; and the mediator summarized the previous speaker’s statement before moving to the next speaker. The school attorney and county manager each made a presentation. A county commissioner also added comments during the discussion. As this part of the meeting progressed, the dialogue developed into a point-counterpoint exchange about whether the county would revise its revenue estimates upward in order to accommodate the school board’s operating and capital spending requests. The school board heard something new from one county official: the county anticipated higher revenues due to a budgetary recalculation. The joint meeting lasted approximately one hour. The audience was mostly in support of the school board but did not participate in the open meeting

except to applaud the school board attorney's presentation.

Private Meetings

After the joint meeting, on the same day, Little met with each four-person working group separately in caucuses. He helped each working group focus on the fundamental issues pertaining to its respective board. He moved between the caucuses several times and each time probed their core concerns and issues. In later interviews, several caucus members reported that they felt that the clarification afforded by a neutral participant allowed them to focus on the essential elements of an acceptable agreement, dispelled misconceptions, and softened positions.

Outcome

After these caucuses, the full school board voted unanimously in a closed session to accept a per-pupil amount for operating expenses that was comparable to the amount worked out earlier by the two staffs but that additionally included new funds for capital outlay and contained no provision requiring a lease of the Arapahoe building. When the two boards met again in joint session, it was not clear which board would move first to confirm the agreement. The county commissioners convened their meeting to accept the agreement, and the school board followed. One county commissioner dissented.

Wake County

Wake County, a rapidly growing, mainly urban county, provides a clear contrast to Pamlico County. [4] Wake voters had recently approved \$400 million in school construction bonds. While five charter schools were being planned for operation in the 1997–98 school year, the budget dispute did not focus on school buildings and charter schools. And instead of a process in which the joint meeting of the boards and the private mediation sessions took place on the same day, the Wake County process lasted more than two weeks and involved three private mediation sessions.

Background

Wake County is experiencing the benefits, and strains, of economic growth and a rapidly increasing population. County tax revenues are increasing, as are demands for services and infrastructure. The number of students in the Wake County public schools is increasing rapidly. The school board believed that the funding appropriated by the commissioners had not kept pace with that growth. In particular, allocations for operating expenses over the previous two budgets were seen as being substantially less than the student population growth rate, which exacerbated a bad situation in the eyes of the school board. As one interviewee with the school system put it, 1997 was a “do or die year” in which they had to get education funding back on track or be forced to cut the muscle out of the system's delivery of education. A county interviewee reported that until 1995, county allocations for schools had been pretty generous. In his view, the seeds of the 1997 budget dispute were sown when the board of county commissioners “flattened out” the allocation to the school district in 1995.

The commissioners held retreats in February 1996 and 1997 to do broad-based planning. They decided to use a formula for estimating the amount of county moneys to be allocated to the schools. The formula considered current per-pupil expenditures, inflation, and the projected increase in the school district's student population. At the February 1997 retreat the commissioners also factored in

increased funding beyond the formula, with a goal of an 8 percent increase above the formula over three years. While a formula in itself may be a reasonable way to plan for one segment of the county's budget, several school officials believed that a formula made the process of their submitting a budget request to the county irrelevant. To them, the formula approach seemed to say that the commissioners had made their decision on appropriation for schools without a considered, specific judgment on what the county could and should provide for schools in a particular year.

School interviewees believed they were in a good position to make their case in 1997. In their view, outside audits of the school system had provided strong evidence of the system's efficiency and its continuing need for more resources. The previous year, voters had approved by 79 percent to 21 percent \$400 million in bonds and other spending for capital improvements. School system leaders believed that the majority of Wake County citizens, not just parents, supported more money for the schools. One interviewee noted that although school board members are elected on a nonpartisan basis, the school board was Democratic-leaning while the board of county commissioners had a Republican majority. She believed this difference heightened the general tension between the two boards and reflected different philosophies toward government, especially with regard to whether taxes in general are too high or need to be increased.

Members of the two boards were not strangers to one another; they met together over lunch once a month. These exchanges were cordial but often tense, even outside of "budget season." The two boards often discussed, and differed over, how to deal with growth, priorities for government services, and the appropriate tax rate for those services. Another possible contributing factor to the tensions in 1997 was the County Economic Development Commission's recommendation that a "high technology academy" be established. The county commissioners approved allocating \$1 million for the academy in their 1997-98 budget. One school interviewee saw this effort as impinging on the responsibilities of the board of education and thus as another sign of the lack of understanding of school needs.

Use of the Statute

After the board of county commissioners adopted its budget ordinance, the school board voted to appeal the funding level. However, through their attorney, the county commissioners' initial position was that the board of education's request was not timely: it did not meet the seven-day requirement. The county noted that the seven-day period begins when the board of county commissioners adopts its budget and not when the board of education is notified of its allocation. The school board's request had been made on the eighth day following the adoption of the county budget.

The board of education filed suit to force the commissioners to accept the mediation process. Superior Court Judge Robert L. Farmer heard the arguments and decided that the statute is "directory rather than mandatory." In his statement from the bench, Judge Farmer noted that the seven-day period is not a statute of limitations. He believed that the purpose of the statute's seven-day provision is to help expedite the process of dispute resolution, and therefore the provision should not be considered mandatory. Judge Farmer directed the commissioners to honor the school board's request for mediation. [5]

Selection of the Mediator

The attorneys for the two boards and the superintendent and county manager did most of the work in

selecting the mediator. Judge Farmer provided a list of certified mediators for superior court cases. The attorneys also reviewed the Institute of Government's list of mediators trained in May 1997 for school budget disputes. The attorneys also considered contacting facilitators from a major leadership training organization in North Carolina.

Interviewees reported that the county manager and the school superintendent had a good working relationship and that the attorneys for each board respected one another. Their biggest challenge was finding a person who was not, or did not appear to be, aligned with the interests of one board or another. At the same time, the attorneys were seeking someone whom they knew and respected and who had a good grasp of the political situation in the county. The mediator needed to have a strong presence as well as the ability to appreciate the subtleties involved in mediating between the two elected boards. On top of this, finding someone who was available immediately to mediate, for an undetermined amount of time, was a significant challenge. Three interviewees reported that the cost of mediation services was not a significant factor in the search for potential mediators.

The attorneys created separate short lists to present to their respective boards. An early sign of hope was that both boards had the same first choice: John B. McMillan, a Raleigh attorney with experience as a lobbyist at the General Assembly but with minimal partisan involvement in Wake County politics. McMillan agreed to mediate.

McMillan reported that he prepared for the task by reviewing two years of news stories on the two boards in order to understand the issues. He also reviewed each board's budget. Although McMillan had participated in several mediations, he had always acted as an advocate rather than a mediator. His preparation included reviewing the Institute of Government's training materials specific to school budget disputes (see "[Public Dispute Resolution Program](#)") and a workbook from a colleague who had attended a forty-hour mediation training workshop.

Joint Meeting of the Boards

County and school district staff exchanged a great deal of information prior to the meeting of the two boards. The statute allows county commissioners to request any and all information pertaining to the school board's budget proposal. [6] The county believed it needed detailed information to assess the school budget request and asked for a wide range of materials, including salary schedules, organization structure, and so forth. School system staff found the request onerous but honored it while also asking for information from the county. Some interviewees viewed the information requests as a "tit-for-tat" effort to "tie things up" and said it did not improve the atmosphere, even if some or most of the information requested was relevant to the dispute. For one interviewee, the requests left the impression that the county was "getting ready for court."

McMillan met with the attorneys separately before the joint meeting of the two boards. He heard their concerns. Whereas the county attorney wanted to focus the meeting on the statutory requirements, the school board attorney wanted a more open approach to "state their case." McMillan chose the latter approach, without time limits on either side's presentation or response. The attorneys chose a neutral setting for the meeting: the boardroom of the Greater Raleigh Chamber of Commerce.

Most interviewees agreed that the July 8 joint meeting of the boards provided an environment that was more favorable to the school board and its staff. School interviewees welcomed the opportunity to

present their oral presentations first. Some school interviewees acknowledged that they were making their case as much, or more, to the general public through media coverage of the meeting (which included television, radio, and daily newspapers) because they doubted that the county commissioners would accede to their request for more money during the joint meeting. After McMillan's introduction and brief opening statements by the two attorneys, approximately three hours were devoted to presentations by several school staff on student enrollment figures, student educational needs, state mandates, results of the audits of the school district's operations, and comparisons between Wake County and other large urban school districts.

County government interviewees were not pleased with the meeting. One described it as "a circus" and "a shouting match" prompted by heavy media coverage. It was viewed as a rehash of much of the same information that the board and county staff already had as part of the school system's initial budget request. During the latter part of the meeting, the county attorney questioned particular points in an effort to separate the fundamental issue of keeping schools open from extraneous questions regarding the most effective curriculum. He noted that he hoped to counterbalance the long presentations by school officials, which he expected would receive sympathetic reporting by the media. As expected, the six-hour meeting was adjourned without a resolution. Immediately following the joint meeting, the county commissioners stayed in session in order to vote to request private mediation and to designate their budget officer as their finance officer for the purposes of private mediation.

Private Meetings

The first mediation session was held Saturday July 19 at McMillan's law office. Before the session, the school board asked to add two members to the four-person working group specified by statute in order to have additional budget expertise during the negotiation. After some back-and-forth prior to the first session, it was agreed that each working group would consist of five people. The July 19 meeting was divided into joint sessions wherein everyone met together, followed by separate caucuses wherein McMillan met with one team and then the other. At other points, McMillan had just the two board chairs or just the county manager and school superintendent meet with him.

Almost all interviewees praised McMillan's work. Participants found the mix of caucusing, one-on-one sessions, and full group negotiations helpful in raising new ideas, providing time within one's own team to assess potential areas of agreement, and allowing for enough direct back-and-forth negotiation. According to participants, the mediator kept the discussion focused, always captured the points of agreement, and reminded participants of what they had already accomplished, as they sometimes became stuck on a new issue.

Two days later finance and legal staff of the boards met at the school system's central office for more detailed questions and an exchange of information. McMillan was present during the second half of the all-day meeting; the board chairs did not attend. One school interviewee believed that, although county officials were assertive and skeptical, the staff-only session built credibility for the school system's assumptions and methods of budgeting. He recognized that the other side was not "convinced" but affirmed that good faith was created through the exchange. The next day the full working groups reconvened at McMillan's law office. This session resulted in a tentative agreement. Over the next week the attorneys reviewed the agreement, consulted with their respective boards, and

recommended adoption of the agreement.

Outcome

On July 28 both boards met separately. Each first held a closed session to discuss the potential agreement. Then, in public session, they each voted unanimously to adopt the agreement. Later that day, at a joint press conference, the chairs of the two boards explained the agreement to the news media. [\[7\]](#)

The agreement provides for a five-year program of county allocations to the Wake County school system. For fiscal year 1997–98, \$1.1 million above the county’s original \$117 million budget allocation was approved. In fiscal year 1998–99, the appropriation will be either \$130 million or the amount equivalent to 35 cents of the county property tax rate, whichever is greater. This amount is to be used to support annual operating expenses; expenditures for long-range capital improvements will be considered separately.

The next three fiscal years are to continue with an appropriation equivalent to the revenue generated by 35 cents of the county property tax rate. In any of the 1999–2000, 2000–2001, or 2001–2 fiscal years, should the school board find that the amount of county funding is insufficient to meet the education needs of the public schools, the board can request that the portion of the county’s tax rate dedicated to the school district be increased. The commissioners are to levy the increase requested by the board of education unless two-thirds of the commissioners vote otherwise. The agreement sets a relatively predictable multiyear plan for appropriations to schools and aligns the school board’s interest in meeting its needs with the county’s interest in tying responsibility for tax increases to increased school spending.

The boards recognize that the future-years provisions of the agreement are not legally binding, but they believe that the agreement is a good faith attempt by both sides to settle their budget differences for several years.

Analysis

One immediate point of comparison in the Pamlico and Wake experiences—despite the different issues, media attention, and length of the processes—is that mediation appears to have assisted the boards in reaching agreements and minimizing legal action. To the extent that the mediation law seeks to create a mechanism to end budget disagreements prior to litigation, the outcomes in Pamlico and Wake counties meet the intent of the statute. However, county interviewees consistently raised concerns that the new procedure is too easy for school boards to use and can have negative short- and long-term consequences. Also, one mediator is concerned that the private mediation procedures constitute a tortured way around the open meetings law and that a better approach would be to provide for a direct, limited exception to open-meeting requirements for resolving county–school budget disputes.

Similarities

There were three main similarities in the Wake and Pamlico experiences.

Praise for the work of the mediator. Participants appear to be satisfied with the work of their respective mediators. They believed that Little's and McMillan's efforts at mediation improved communication, raised optimism that an agreement could be reached, and employed effective techniques for seeking an agreement. The mediators let people talk yet kept discussions on track. Interviewees were not uniformly pleased with the design of the joint meeting of the boards. Whereas school district interviewees in both cases thought the joint board meeting was productive for stating their case, their respective county government interviewees did not.

Belief that some period of private exchange can lead to agreement. Several interviewees felt that allowing them time away from public view in order to try new ideas and reduce tensions was a positive element of the new statute. This view was not universally shared. One Wake County interviewee objected to private mediation in this context and in general, viewing it as inappropriately dealing with the public's business in private.

The joint meeting of the boards favors school boards. Participants in Pamlico and Wake agreed that their respective joint meetings provided favorable environments for the school boards. They predictably differed over whether this judgment was positive or negative: whether it helped move the dispute resolution process along or heightened tension and distrust.

Differences

There were three main differences in the Wake and Pamlico experiences.

Issues. The issues central to the budget disputes were strikingly different in the two counties. In Pamlico County the closing of the school in Arapahoe and the proposal to use the Arapahoe school building for a charter school or for county offices were centerpieces of the budget standoff. In Wake County the school board was concerned about a rapidly growing student population and what they saw as a pattern of underfunding the school system's needs.

Situations of the counties. The differences between the two counties reflect the diversity of the state. Whereas Pamlico County is rural with a smaller population, Wake County is primarily urban with a large, rapidly growing population.

Outcomes. Finally, most striking is the contrast between the one-year agreement in Pamlico County, which at least one interviewee saw as a "band-aid," and Wake County's unusual multiyear agreement. The Wake County provision of a benchmark for a specific proportion of the county's property tax revenues designated for the school system, combined with the ability of the school board to indirectly raise taxes, is gaining significant attention across the state. [8]

Although Pamlico and Wake are the only two examples in which the new statutory provisions were used in full, their experiences hold out the promise that the statute can be useful to counties with very different circumstances and that it can be used to achieve either short- or long-term agreements to resolve budget differences.

Issues

Seven issues arise from using an independent mediator to assist in the resolution of school budget

disputes. These issues were raised during interviews with the participants in the Wake and Pamlico county mediations and also arise from the authors' analysis of the cases.

Relative Ease of Initiating the Mediation Process

Several interviewees expressed concern about the initial low risk for school boards initiating mediation. "They have nothing to lose and everything to gain," was the sentiment shared by several Pamlico and Wake county government interviewees. These participants judged that the new process tips the balance too much in favor of school boards wanting to press their claims for resources. Historically the cost, risk, and potential negative public reaction to filing a suit have made school boards think twice before challenging the appropriation set by the county commissioners. The amended dispute resolution process could be too easy to use.

If mediation is unsuccessful, even worse relationships could result between the two boards and their respective staffs, according to one county government interviewee. The new mediation procedure raises the stakes for resolution prior to litigation. Thus a failure of resolution in mediation could lead to a longer, more expensive, and more contentious court battle if a school board were to continue its appeal of the county's budget appropriation for schools.

The authors believe these concerns are reasonable. With our limited experience so far, it does appear that the mediation process did provide a shorter and less expensive alternative to litigation. The larger concern, however, is that the statute will encourage disgruntled school boards to regularly use the mediation option. To the extent that county government staff and commissioners believe that a challenge is more likely under the statute, the "shadow of mediation" could lead to a new level of "gaming the system," as one interviewee put it. The commissioners may reason that it is wise to set the initial appropriation for schools much lower than they would otherwise. With the expectation that mediation would enable them to make concessions, county commissioners could then raise the funding level in order to end up at an amount "where it should be" in their eyes. If this speculative strategic calculation is confirmed in practice, the new mediation procedure would have the unintended consequence of undermining the deliberative process of policy making and create a longer process of setting county and school system budgets.

Difficulties in the Timetable for the First Phase of the Process

Some Wake and Pamlico interviewees said that mediation would be helpful earlier in the budget process, and to them, the statutory procedures created a late, last-chance mechanism to avoid litigation. Mediation as set by statute does not begin until after the county commissioners adopt their budget ordinance, which typically occurs in late June. July vacations could undermine the ability of the boards and their staffs to be available for mediation.

The portion of the amended statute that generated court action was the seven-day period for school boards to notify the commissioners of their appeal. The statute calls for several things to happen within seven days. First, the school board must decide if the appropriation from the commissioners is sufficient. If they think it is insufficient, they must notify the commissioners of their appeal. Then the two boards must choose a mediator (or have one appointed) and meet in a public, joint session. Even if the school board's appeal can be made expeditiously, it is very difficult, and probably unrealistic, to expect that a mediator can be chosen and a joint meeting arranged and held in such a short time. One

mediator believed the seven-day requirement is too restrictive, and the authors agree.

Neither Pamlico nor Wake County met the seven-day standard. In Wake County the judge ruled this segment of the law “directory rather than mandatory.” In Lee County a similar claim for interpretation of the seven-day requirement was not adjudicated. It would be ironic if a significant, time-consuming, antagonistic litigation results over the timing of a mediation process that is intended to avoid litigation!

The statute’s intent is to have the dispute resolution process occur expeditiously, which is fair and wise. Both boards need to have their budgets finalized as soon as possible. School boards face the beginning of the school year in August, so a long mediation would be disruptive to their operations. The seven-day requirement was on the books before the 1997 Act and is based on the need to move quickly. The question is if that particular deadline is realistic and serves the purposes of the statute.

Edmund P. Regan, deputy director of the North Carolina Association of County Commissioners, and a supporter of the 1997 Act, believes that seven days should be sufficient for initiating the process. He noted that the seven-day standard was carried over from the previous law and, he said, with good reason. According to Regan, this time limit was discussed at length during development of the bill with the Dispute Resolution Commission staff, the bill-drafting staff of the General Assembly, and the bill’s sponsor, Senator Leslie Winner. Regan emphasized the importance of early resolution of budget matters, both for school boards to adopt budgets and execute employment contracts before the new school year starts and for county governments to proceed with tax billings in a timely way. Regan thinks the General Assembly was well aware of the two boards’ budget cycles when it maintained the seven-day time limit. He concluded, “We [the commissioners’ association] believe the legislature intended the deadlines in the law to be mandatory and not directory.” [\[9\]](#)

Potential Effect on School Board Policy Making and Elections

One Wake county interviewee noted that the Wake County agreement gives the school board, in effect, more direct control over tax rates. Therefore, school board members’ views or “positions” on taxes may inject a new dimension into the policy-making dynamics of school boards and school board elections. Whereas county commissioners are clearly seen as responsible for setting local tax rates, when tax-setting power is shared with the school board, greater scrutiny and potentially greater politicization and partisanship will result. The authors believe this speculation deserves close attention. The greater influence over tax rates by school boards embodied in the Wake County agreement raises a concern that political considerations on taxes may hinder school boards’ stewardship of traditional concerns such as educational programs and student achievement.

The Purpose of the Joint Meeting of the Boards

The Wake and Pamlico experiences indicate that it does not seem realistic to expect a resolution of a school budget dispute to occur at the public meeting of the two boards. Instead the question is whether this meeting helps or hinders the attempt to reach a settlement through subsequent confidential mediation sessions. As noted above, county participants thought the joint meeting was stacked against them, was repetitive in content (given their previous review of the school funding request), and did not contribute to a positive atmosphere between the two boards. Conversely, the school participants welcomed the opportunity to make a presentation directly and publicly to the board of county

commissioners. They also welcomed having the attention of the media when they presented the school system's needs.

The mediators believed that the joint meeting was a necessary step for venting and for school participants to feel that both the commissioners and the wider public were informed of and understood their views. The mediators did not express firm opinions that the joint meeting must be retained, but one mediator believed it would be harder, and raise more suspicions, to move directly to private mediation without a public meeting of the two boards.

Tension between the Goals and Requirements of Open Meetings and Private Mediation

One clear conundrum posed by the Wake and Pamlico experiences is the clash between private meetings and the public's "right to know." The private mediation sessions appeared to create greater opportunities to explore new ideas in a low-risk atmosphere and to help each side revise positions leading to a settlement. However, since the goal of the dispute resolution process is to reach agreement without litigation, the issues and considerations that are raised in the process tend to involve regular board business, which normally is conducted in open, public meetings.

This tension was well stated by one Wake County interviewee. His belief that the public's business should be conducted publicly is a basic philosophical premise. Yet he doubted that the innovative, multiyear solution reached through private mediation in Wake County could have resulted from a fully public process.

On the one hand, the 1997 Act might be seen as providing boards with the opportunity to discuss pending or potential litigation with their attorneys in executive session. That is, one may see the statute as a last-gasp effort to avoid litigation rightly falling within the long-standing ability of local government boards to meet in closed session in order to discuss actual and potential litigation and to preserve the attorney-client privilege. [\[10\]](#) On the other hand, to the extent that the dispute is about money and policy issues normally considered in open meetings, and the content is about how to resolve matters without litigation, the resolution process might be seen as more like the general budget process: fully public information, proposals, deliberation, and decision.

Designation of the "Finance Director" to Participate in Mediation

A modest issue, more important for larger county governments, is whether the finance director or budget officer is the best person to participate in the working group for mediation sessions. Interestingly, the statute allows for the two board chairs, the school superintendent, and the county manager to name designees to take their respective places during the mediation sessions. No such designation is provided in the 1997 Act for the finance officers and attorneys of the two boards. In less populous counties, like Pamlico, the finance director usually has full knowledge and responsibility for budget matters, so there is no problem. In Wake County (and approximately twelve other counties) there are separate budget and finance officers. The Wake County commissioners acted to temporarily appoint their budget officer as their finance officer in order to meet this provision of the law. It may be wise to amend the specifications for who constitutes the working groups to allow all members of the working groups to use designees.

Whether More Specific Regulation Is needed

The 1997 Act states that mediation of school budget disputes “shall be held in accordance with the rules and standards of conduct . . . [of] mediated settlement conferences but modified as appropriate and suitable to the resolution of the particular issues in disagreement.” [11] The statute is silent on what modifications may be appropriate and whether they are to be determined solely by the mediator or by some other body. The N.C. Dispute Resolution Commission is responsible for the procedural rules and standards of mediator conduct of the mediated-settlement conference program active in all superior courts and has created procedures for another “pre-litigation” use of mediation: farm nuisance disputes. [12]

No interviewee raised concerns about the “unregulated” nature of the mediation of school budget disputes. Given the mediator’s neutrality, and the power of the boards and their staff, it was doubtful in the Wake and Pamlico situations that either mediator could have done anything deleterious to the financial policy-making powers of the two boards.

Potential conflicts could result from giving mediators wide discretion in handling school budget disputes and at the same time imposing specific modifications of procedural rules and standards of mediator conduct. For school budget disputes, a mediator may use his or her discretion in gathering information prior to the joint meeting of the boards. It is hard to determine what rules could or should be drawn to guide a mediator through what is a complex dispute involving political, financial, and media dimensions. On the other hand, this area of “pre-litigation” mediation could be susceptible to unusual practices that would not be acceptable in a superior court setting and could be disconcerting to elected and appointed officials involved in school budget disputes. In the Pamlico and Wake county cases participants praised the work of the mediators. It may be wise to reflect on these experiences and through them offer general guidelines for future mediators rather than move quickly to set specific rules by administrative procedure. A useful resource, if regulations are being considered, is a published list and explanation of competencies for mediators involved in complex, multiparty disputes. [13]

Guidelines for Mediation of School Budget Disputes

Building on the Pamlico and Wake experiences, and on mediator Little’s work with three counties in an earlier mediation experiment, the authors offer the following guidelines to assist boards of education, boards of county commissioners, their respective employees, and mediators. These guidelines are preliminary due to the newness of the mediation procedure in the county government–school system budget setting.

Conduct More Regular Communication

The strongest point of agreement among interviewees and mediators in Wake and Pamlico counties is that use of mediation might have been avoided through earlier and better communication and problem solving. In Pamlico County such a process involving the budget committees of the two boards apparently broke down in 1997, and that breakdown was a contributing factor leading to the school board’s use of mediation.

The concept of using regular communication to prevent serious budget disputes is already embodied

in law. The statute merely recommends such exchanges, however. It does not make them a requirement: [\[14\]](#)

In order to promote greater mutual understanding of immediate and long-term budgetary issues and constraints affecting public schools and county governments, local boards of education and boards of county commissioners are strongly encouraged to conduct periodic joint meetings during each fiscal year.

The exchanges can be informal, like the monthly luncheons among members of the two boards in Wake County, but at least some meetings should be more formal. Staff-staff contact can address detailed budget information, while board-board exchanges can explore more general outlines of funding for schools. Regular meetings provide an ongoing exchange at times when tension is low and there is no immediate need to act. These meetings can create familiarity and raise the level of trust, which will be important for interactions during times of higher tensions and immediate decision making on budgets.

How to Select a Mediator

The Pamlico and Wake experiences showed that it can be effective to have staff do most of the work in seeking potential mediators and preparing a list for their respective boards. In both cases the board attorneys, the county manager, and the school superintendent were most involved in finding potential mediators. (See [“Finding a Mediator for School Budget Disputes”](#) below.) The Institute of Government, the North Carolina School Boards Association, and the North Carolina Association of County Commissioners all maintain information on potential mediators. Boards of county commissioners and school boards are not limited to selecting someone from these lists. However, interviewees recommended that the two boards choose the mediator rather than rely on the senior resident superior court judge to appoint the mediator.

While many kinds of people trained as mediators can be effective in helping to resolve budget disputes, it is advisable to seek a combination of strong mediation or facilitation experience and knowledge of elected boards or political-governmental issues. Neither of the mediators for Pamlico or Wake counties had special public finance or budgeting expertise.

Mediator Preparation and Strategy

For mediators working on school budget disputes, specific preparation probably will vary according to the situation of the county and the two boards. However, some broad principles for preparing for and conducting mediation include the following:

Make a concerted effort to inform the boards, staff, and the media about the function of mediation, the limitations of the mediator’s role, and the procedures for the joint public meeting and the private mediation sessions. Gain an understanding of the history of relations between boards, with attention to possible recent changes of board membership or leadership due to elections, resignations, or other actions. Investigate how budget differences relate to other programs and policies of both boards. Prepare for likely arguments and exchanges in the joint meeting of the boards. Although facilitating the meeting does not call for the mediator to make substantive recommendations, it does call

for a mediator to encourage speakers to be clear and brief and to maintain a controlled environment for questions and answers. Share concerns with reporters about the potential effects of media coverage on the mediation process. A mediator should not try to “spin” media coverage, but identifying the purposes of mediation and the tensions caused by news gathering can be helpful. Determine what, if any, guidelines are applicable for instructing mediation participants in how to share information outside of mediation sessions with their boards, their staff, and the news media. Help create new options that are not seen as “win-lose” choices. This last point is a standard mediator function but can be more complex in school budget mediation due to the focus on a “zero-sum” issue: the allocation of funding from county government to the local board of education.

Joint Meeting of the Boards: Keep Expectations Low

There should not be the expectation that the joint meeting will create new proposals and quickly end the dispute. With approval of the board chairs, a mediator may want to call for a recess at some point in the joint meeting—and so inform the boards in advance. During this recess the board chairs, county manager, superintendent, and mediator can meet privately to determine if a new proposal could be put forward at the joint meeting and whether further discussion in public would be fruitful. Otherwise, also during the recess, some initial planning for private mediation could be made in order to specify the steps that will follow the joint meeting.

Consider Which People Are Appropriate Representatives

In addition to the consideration of whether the “budget director” or “finance director” is the appropriate person for mediation sessions, some interviewees noted that the statute allows for the board chairs, the county manager, and the superintendent to designate others to serve in their places. If it is likely that personality differences or political friction between certain people would pose barriers to a potential agreement, it might be wise to use designees. Regardless of how agreeable or disagreeable certain combinations of people may be in the mediation, each board retains the authority to accept, modify, or reject a proposed agreement for ending the budget standoff.

Share Information from Mediation with Board Members

In Pamlico County, mediator Little perceived a problem in the “serial communication” between participants in the private mediation session and other members of the two boards. It is important to clarify what information can and should be shared and to assure some flow of information. New disputes may arise over what information, ideas, proposals, and viewpoints are shared, or suspicions may arise due to a lack of information on the status of the private mediation sessions. If a mediation is designed similar to that used in the Pamlico County dispute—one long session with members of both boards standing by to review a potential agreement—periodic breaks are important in order to let negotiators share new proposals with their counterparts.

Conclusion

Mediation worked, at least in the short run, in the 1997 school funding disputes in Pamlico and Wake counties. Mediation may have played a positive role in developing an innovative “formula” for county

appropriations to the school board in Wake County. The 1997 Act is part of a larger trend making mediation and other alternative dispute resolution mechanisms available to public entities throughout North Carolina and the United States. The experiences of mediation in Pamlico and Wake counties in 1997 (and other counties before 1997) continue to be the exception rather than the rule for addressing the interrelated budget and funding needs of boards of county commissioners and boards of education. The mediation provision for handling school budget disputes should continue to function as a useful “brake” to avoid litigation. However, the experiences to date also reinforce the fact that it is in the interest of both boards to address their different perceptions of school funding needs as early as possible, before the stress and deadlines that accompany June budget decisions.

Notes

- 1.** The statute refers to the selection of a mediator, but the 1997 revision specifies that “the mediator will act as a facilitator” for the purpose of the public joint meeting of the two boards. The distinction between mediation and facilitation is not always clear, but this article will consistently employ the term mediator.
- 2.** N.C. GEN. STAT. 7A-381 (hereinafter G.S.).
- 3.** The authors wish to thank the participants in the mediation process for their willingness to participate in confidential interviews. Matt Michel conducted the Pamlico interviews and was able to speak with every participant except Richard Schwartz, the Raleigh-based attorney for the school board.
- 4.** Again, the authors express their thanks to participants in the mediation. John Stephens conducted the Wake interviews and was able to speak with every participant. The conversation with Wake County School Superintendent Jim Surratt was brief.
- 5.** Order of Judge Robert L. Farmer on June 27, 1997, Wake County Board of Education, petitioner, and Wake County Board of Commissioners, respondent. Additional information comes from research by C. Thomas Powell.
- 6.** G.S. 115C-429c.
- 7.** The press release can be accessed at [http://www.state.nc.us/Wake/depts/Admin/whatsnew/archives/july1997.htm#BUDGET AGREEMENT](http://www.state.nc.us/Wake/depts/Admin/whatsnew/archives/july1997.htm#BUDGET%20AGREEMENT). The text of the formal “Joint Resolution and Settlement Agreement” can be accessed at <http://www.state.nc.us/Wake/depts/Admin/schoolres.htm>.
- 8.** Some interviewees noted that they had been contacted by colleagues in other counties who expressed some interest in duplicating the “formula” arrangement in the Wake County agreement.
- 9.** E-mail from Edmund P. Regan, deputy director of the N.C. Association of County Commissioners (Nov. 26, 1997).
- 10.** See G.S. 143-318.11(a)(3).
- 11.** G.S. 115C-431(b).

[12.](#) G.S. 7A-38.3, “Pre-litigation Mediation of Farm Nuisance Disputes.” Rules implementing the statute were prepared by the N.C. Dispute Resolution Commission and adopted by the N.C. Supreme Court, effective July 15, 1996.

[13.](#) Society of Professionals in Dispute Resolution, *Competencies for Mediators of Complex Public Disputes* (Washington, D.C.:SPIDR, 1992). Can be ordered from SPIDR, 815 15th Street, NW, Suite 530, Washington, D.C., 20005. Phone 202-783-7277. Fax 202-783-7281. E-mail spidr@spidr.org.

[14.](#) G.S. 115C-426.2

[Finding a Mediator for School Budget Disputes](#)

In May 1997 twenty-five people from across North Carolina, all experienced mediators or facilitators, attended a one-day workshop on school budget dispute mediation conducted by the Institute of Government in cooperation with the N.C. School Boards Association (NCSBA) and the N.C. Association of County Commissioners ([NCACC](#)).

As the staffs of NCACC and NCSBA began fielding inquiries about budget dispute mediation from their members in June and July, they determined that additional information about these mediators would be helpful. They collected more information, including each person’s mediation experience, the parts of the state they were willing to serve, and so forth.

Upon request, the Institute of Government will send free of charge the list of names, addresses, and phone numbers of the twenty-five participants, plus the two trainers, who attended the May 1997 workshop. However, the Institute does not maintain additional information about their qualifications or experience. School system and county government officials are advised to contact their respective associations for more detailed information to assist in their selection of a mediator.

It is important to note that G.S. 115C-431 does not require selection of a mediator from the Institute’s list or from any other list. Other people may be competent to provide mediation for school budget disputes. Consulting with the local court or mediation center may be helpful. (Also see [“Public Dispute Resolution Program”](#).)

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