

COMMENT

CHARTING THE COURSE: CHARTER SCHOOL EXPLORATION IN VIRGINIA

INTRODUCTION

Charter schools have become a hot topic in education nationwide. Advocates believe the hybrid public and private structure of charter schools enables them to provide education superior to traditional public schools. Charter schools have more freedom than their traditional public school counterparts because they are not subject to the same laws and restrictions. Charters use that freedom to set high standards for themselves and their students, and then strive to meet those standards using alternative, experimental curricula and teaching methods. However, the schools are not without controversy, and opponents question the educational effectiveness of charters, while entities such as teachers unions and local school boards often staunchly combat their formation. Still others believe charter schools conflict with integration efforts. In addition to ideological challenges, charters face various legal battles regarding issues such as religion and equal protection. Nevertheless, the charter school movement has swept across many states in the nation.

The Commonwealth of Virginia is well behind the curve in charter school development. Virginia has only nine charter schools,¹ while neighboring District of Columbia is home to over one hundred.² Organizations that evaluate states' charter programs consistently rank Virginia near the bottom of their lists.³

1. *Virginia's Public Charter Schools*, VA. DEP'T EDUC., http://www.doe.virginia.gov/instruction/charter_schools/charter_schools.shtml (last visited Feb. 19, 2016).

2. *About Us*, D.C. PUB. CHARTER SCH. BD., <http://www.dcpesb.org/about-us> (last visited Feb. 19, 2016).

3. *See, e.g.*, CTR. FOR EDUC. REFORM, CHARTER SCHOOL LAWS ACROSS THE STATES:

The charter school movement is a salient educational topic, and charters have achieved success in other venues. Thus, it is important to consider why Virginia lags so far behind in this arena. The primary cause is Virginia's inadequate charter school law, which does not allow for multiple, independent authorizers to approve and oversee the schools. The law also fails to endow charter schools with the degree of autonomy and accountability they require to flourish. Virginia's law both inhibits the development of new schools and affects the success of the few charter schools already in existence.

However, the future need not remain bleak, as Virginia can better enable charter schools to succeed by changing its statutory framework. The Commonwealth can learn from successful programs in other venues, such as the District of Columbia, which consistently ranks near the top of charter law evaluations. By crafting a more accommodating law, Virginia can effectively explore the charter school model and facilitate progress if it is successful.

This comment reviews the background and status of the charter school movement in Part I and addresses legal challenges charters face in Part II. Part III provides an overview of Virginia's charter school law, and Part IV analyzes how the legislature can improve that law to foster charter school exploration in the Commonwealth.

I. CHARTER SCHOOL BACKGROUND

This section begins by discussing the basic elements of a charter school and proceeds to explain how the charter movement began and has evolved nationwide. Finally, this section considers benefits and criticisms of the charter school model.

A. *What Is a Charter School?*

Charter schools are essentially hybrids of public and private schools, supported by public funding, but privately and largely

2015 RANKINGS AND SCORECARD 7 (Allison Consoletti Zgainer & Kara Kerwin eds., 2015), <https://www.edreform.com/2015/03/charter-school-laws-across-the-states-2015-rankings-scorecard/>; *Measuring Up: Virginia*, NAT'L ALLIANCE FOR PUB. CHARTER SCHS., <http://www.publiccharters.org/get-the-facts/law-database/states/va/> (last visited Feb. 19, 2016).

independently operated.⁴ The schools are aptly named because a charter agreement, a contract between the state and the school, governs each.⁵ Charter agreements typically outline the school's "mission, program, goals, students served, methods of assessment, and ways to measure success."⁶ Charter agreements vary in duration, though most average between three to five years before being eligible for renewal.⁷ Once approved, charter schools are accountable for academic achievement and compliance with their charter agreements, though they enjoy a great deal of autonomy in meeting their goals.⁸ As a testament to the level of accountability inherent in the charter model, if charter schools do not meet certain academic standards or fail to meet rigorous fiscal and managerial criteria, their authorizers will close the schools.⁹ For instance, in Virginia, charter applicants must outline performance-based goals and educational objectives that meet or exceed the Standards of Learning ("SOLs"),¹⁰ and failure to meet those standards may result in charter revocation.¹¹

Nearly anyone can submit an application to open and operate a charter school when they identify a need within their community.¹² Charter applicants are often educators, parents, community organizations, or for-profit companies.¹³ But museums, civic groups, and business leaders have started charter schools as well.¹⁴ Aspirants submit applications to an authorizer for approval.¹⁵ Authorizers vary depending on a state's charter law construction, but they typically include "local school boards, state boards

4. Aaron Saiger, *Charter Schools, the Establishment Clause, and the Neoliberal Turn in Public Education*, 34 CARDOZO L. REV. 1163, 1178 (2013).

5. David Groshoff, *Unchartered Territory: Market Competition's Constitutional Collision with Entrepreneurial Sex-Segregated Charter Schools*, 2010 BYU EDUC. & L.J. 307, 320.

6. Leland Ware & Cara Robinson, *Charters, Choice, and Resegregation*, 11 DEL. L. REV. 1, 3 (2009).

7. *Id.*

8. *Id.*

9. *Just the FAQs—Charter Schools*, CTR. FOR EDUC. REFORM, <https://www.edreform.com/2012/03/just-the-faqs-charter-schools/> (last visited Feb. 19, 2016) [hereinafter *Just the FAQs*].

10. VA. CODE ANN. § 22.1-212.8(B)(2) (Cum. Supp. 2015).

11. *Id.* § 22.1-212.12(B)(2) (Cum. Supp. 2015).

12. *Just the FAQs*, *supra* note 9.

13. Note, *Church, Choice, and Charters: A New Wrinkle for Public Education?*, 122 HARV. L. REV. 1750, 1753 (2009).

14. *Just the FAQs*, *supra* note 9.

15. *Id.*

of education, state universities, state departments of education, or separate independent entities created by law that have as their sole duty sponsoring and overseeing charter schools in the state.”¹⁶ After approving a charter, the authorizer monitors the school’s success, ensuring its integrity, taking action to fix problems, or even closing the school if it fails to function properly.¹⁷ A board of directors governs each charter school by overseeing the school’s operations and finances.¹⁸ Non-profit boards are the most common model, though private, for-profit education management organizations also operate charter schools.¹⁹

Charter schools blend elements of public and private education. They are like public schools because they receive public funding and are open to all students.²⁰ Charter schools are subject to major state and federal performance requirements, though they are free from some of the procedural “red tape” governing other public schools.²¹ Charters provide parents and students with educational choice, which is especially meaningful to those students who would otherwise not have such choice.²² For instance, even when a child is not succeeding in a traditional public school, his family may be unable to fund a private school education or move to a better school district.²³ The charter school model enables children in these situations to attend a charter school in their district instead.²⁴ Moreover, the charter model provides teachers with educational choice, as they might elect to teach at a charter school so they can use innovative methods to create the learning environment they desire.²⁵ Many teachers combine off-the-shelf with cus-

16. *Id.*

17. *Id.*

18. *Id.*

19. Gary Miron et al., *Review of Separating Fact & Fiction*, NAT’L EDUC. POL’Y CTR. 1, 2 (Feb. 2015), <http://nepc.colorado.edu/thinktank/review-separating-fact-and-fiction>; see also Susan L. DeJarnatt, *Follow the Money: Charter Schools and Financial Accountability*, 44 URB. LAW. 37, 40 (2012) (noting that boards may be closely entwined with the organization that founded the school).

20. Groshoff, *supra* note 5, at 320 (quoting KATHERINE K. MERSETH, *INSIDE URBAN CHARTER SCHOOLS: PROMISING PRACTICES AND STRATEGIES IN FIVE HIGH-PERFORMING SCHOOLS* 3 (2009)).

21. *Id.* (quoting KATHERINE K. MERSETH, *INSIDE URBAN CHARTER SCHOOLS: PROMISING PRACTICES AND STRATEGIES IN FIVE HIGH-PERFORMING SCHOOLS* 3 (2009)); *Just the FAQs*, *supra* note 9.

22. Groshoff, *supra* note 5, at 320.

23. Robert J. Martin, *Charting the Court Challenges to Charter Schools*, 109 PENN. ST. L. REV. 43, 43–44 (2004).

24. *Id.*

25. *Just the FAQs*, *supra* note 9.

tomized curricula, and some offer independent studies as an alternative to traditional classroom instruction.²⁶

B. *Charter School Evolution*

It is difficult to say exactly how the charter school movement began. Some trace its roots to economist Milton Friedman, who argued that educational choice would improve school systems overall²⁷ and founded a non-profit organization devoted to promoting school choice.²⁸ Others point to Ray Budde, a Massachusetts teacher who authored a widely publicized book on the topic in 1988.²⁹ The book detailed a contract arrangement that would give teachers room to innovate within the public school system.³⁰ Regardless of who receives credit for the idea, Minnesota was the first state to enact charter legislation in 1991,³¹ shortly followed by California in 1992.³² By 2003, most states had passed charter legislation.³³ For-profit educational management organizations (“EMOs”) contributed to the growth of charter schools beginning in the 1990s because they injected private entrepreneurship into public schools.³⁴ Both for-profit and non-profit EMOs facilitated charter expansion by using economies of scale to confront complex issues charter schools face, while conducting business for multiple schools from a central location.³⁵ Years of studies about school choice fueled discussions among those disappointed in the public

26. NAT’L ALL. FOR PUB. CHARTER SCHS., INSTRUCTIONAL DELIVERY AND FOCUS OF PUBLIC CHARTER SCHOOLS: RESULTS FROM THE NAPCS NATIONAL CHARTER SCHOOL SURVEY, SCHOOL YEAR 2011–2012, at 1–2 (June 10, 2013), http://www.publiccharters.org/wp-content/uploads/2014/01/NAPCS-School-Survey-Instructional-Strategies-101-Final-06-10-13_20130905T164228.pdf.

27. See Groshoff, *supra* note 5, at 308.

28. *Who We Are*, FRIEDMAN FOUND. FOR EDUC. CHOICE, <http://www.edchoice.org/who-we-are/> (last visited Feb. 19, 2016).

29. Ware & Robinson, *supra* note 6, at 1; see RAY BUDDE, EDUCATION BY CHARTER: RESTRUCTURING SCHOOL DISTRICTS—KEY TO LONG-TERM CONTINUING IMPROVEMENT IN AMERICAN EDUCATION (1988).

30. Susan Saulny, *Ray Budde, 82, First to Propose Charter Schools, Dies*, N.Y. TIMES (June 21, 2005), http://www.nytimes.com/2005/06/21/us/ray-budde-82-first-to-propose-charter-schools-dies.html?_r=0.

31. Groshoff, *supra* note 5, at 318.

32. *Charter Schools: Finding out the Facts*, CTR. FOR PUB. EDUC. (Mar. 24, 2010), <http://www.centerforpubliceducation.org/Main-Menu/Organizing-a-school/Charter-schools-Finding-out-the-facts-At-a-glance/Charter-schools-Finding-out-the-facts.html>.

33. *Id.*

34. *Id.*

35. *Id.*

school monopoly, resulting in a massive movement.³⁶ According to a study by the Center for Research on Educational Outcomes at Stanford University (“CREDO”), charter schools served about 4% of the nation’s public school students by 2013.³⁷ However, even this rapid growth may not be enough.³⁸ The number of charter schools in operation is insufficient to meet demand, as many have long student waitlists.³⁹

C. *Benefits of Charter Schools*

Charter schools provide an alternative form of education, and proponents champion charters as “one of America’s tickets to a higher-quality school system.”⁴⁰ A number of charter school facets contribute to their success, including “longer school days, multi-aged classrooms, strict discipline policies, lower student/teacher ratios, summer programs, and more individualized student attention by teachers, tutors, and assistants.”⁴¹ The charter school model enables parents and students to choose a school in their district, which promotes competition among schools, as traditional public schools are motivated to fill gaps in their own systems to compete for students.⁴² Traditional public schools turn to charter schools for examples of curriculum, staffing, and teacher retention.⁴³ Because of these trends, charter schools have a positive

36. Groshoff, *supra* note 5, at 319.

37. CTR. FOR RESEARCH ON EDUC. OUTCOMES, NATIONAL CHARTER SCHOOL STUDY EXECUTIVE SUMMARY 2013, at 8 (2013), <http://credo.stanford.edu/documents/NCSS%202013%20Executive%20Summary.pdf>. The study found that more than 2.3 million students attended over 6000 charter schools in forty-one states. *Id.*

38. *See States Show Little Progress on Annual Education Scorecard*, CTR. FOR EDUC. REFORM (Mar. 16, 2015), <https://www.edreform.com/2015/03/states-show-little-progress-on-annual-education-scorecard/> (arguing that despite steady growth in charter schools, an even more accelerated pace would better meet student demands).

39. Groshoff, *supra* note 5, at 328. The National Alliance for Public Charter Schools estimated that over one million students were on charter school waitlists nationwide in the 2013–14 school year. Nora Kern & Wentana Gebru, *Waiting Lists to Attend Charter Schools Top 1 Million Names*, NAT’L ALLIANCE FOR PUB. CHARTER SCHS. 1, 2 (May 2014), <http://www.publiccharters.org/wp-content/uploads/2014/05/NAPCS-2014-Wait-List-Report.pdf>.

40. *Just the FAQs*, *supra* note 9.

41. Groshoff, *supra* note 5, at 321.

42. *See id.* at 326; W. COLE DURHAM & ROBERT SMITH, 3 RELIGIOUS ORGANIZATIONS AND THE LAW § 12:69 (last updated Dec. 2013).

43. *Just the FAQs*, *supra* note 9.

“ripple effect” on other schools by putting pressure on them to improve their own methods.⁴⁴

Though the charter school movement is relatively new, some studies reveal that charters are more effective than traditional public schools.⁴⁵ CREDO reported in 2013 that the average charter student gained the equivalent of eight additional days of reading education each year compared to her local traditional public school counterparts.⁴⁶ Stanford’s 2015 Urban Charter Schools Report showed that charter schools in urban areas have been especially successful in both math and reading.⁴⁷ Urban charter school students received the equivalent of forty additional days of learning per year in math and twenty-eight additional days in reading.⁴⁸ Charters have had a particularly significant impact on achievement for “students in poverty, black students, and English language learners.”⁴⁹

Supporters highlight the fact that charter schools offer “curricula and teaching methodologies that are not available in public schools,” and that these innovative approaches lead to high academic achievement.⁵⁰ Charter schools are freer to use different curricula and experiment with schedules, including longer school days, summer programs, and individualized education.⁵¹ The schools can test different techniques partly because they are less restricted by the “red tape” governing traditional public schools.⁵² Though subject to fewer government restrictions, charter schools strive for excellence because they must seek renewal from their

44. *Id.*

45. *See, e.g.*, NATIONAL CHARTER SCHOOL STUDY EXECUTIVE SUMMARY 2013, *supra* note 37, at 23.

46. *Id.* at 16.

47. CTR. FOR RESEARCH ON EDUC. OUTCOMES, CREDO STUDY FINDS URBAN CHARTER SCHOOLS OUTPERFORM TRADITIONAL SCHOOL PEERS (Mar. 18, 2015), <http://urbancharters.stanford.edu/news.php>.

48. CTR. FOR RESEARCH ON EDUC. OUTCOMES, URBAN CHARTER SCHOOL STUDY REPORT ON 41 REGIONS 2015, at 11 (2015), <http://urbancharters.stanford.edu/download/Urban%20Charter%20School%20Study%20Report%20on%2041%20Regions.pdf>.

49. NATIONAL CHARTER SCHOOL STUDY EXECUTIVE SUMMARY 2013, *supra* note 37, at 23.

50. Ware & Robinson, *supra* note 6, at 2; *see* Groshoff, *supra* note 5, at 321.

51. Michael Birnbaum, *Virginia Poses Challenges for Charter School Advocates*, WASH. POST (Nov. 8, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/07/AR2009110702763.html>; Groshoff, *supra* note 5, at 321, 325 (discussing charter school curricular focuses such as performing arts, business and finance, math and science, science and technology, and the arts in general).

52. *Church, Choice, and Charters*, *supra* note 13, at 1754.

authorizers while their boards critically evaluate student progress.⁵³

D. *Criticisms of Charter Schools*

Because charter schools are a relatively new phenomenon and few comprehensive studies have been conducted, some critics doubt the alleged success of charters or believe results are limited to a small segment of the population.⁵⁴ CREDO's 2013 study, for instance, revealed mixed findings. Though 25% of charter schools outperformed their local public school peers in reading and 29% outperformed in math, 31% of charters performed worse than traditional public school alternatives in math, and 19% performed worse in reading.⁵⁵ The survey found markedly different rates of success across the twenty-seven states studied.⁵⁶ The Urban Charter School Report also found local variation within its results.⁵⁷

Critics argue that charters are at odds with integration and demographic inclusion efforts.⁵⁸ They assert that charter schools may provide parents an opportunity to dissent against integration by choosing where their children attend school.⁵⁹ In addition to segregation among races, minority students who enroll in charter schools are typically "the most able students, leaving [the] poorer and less prepared students in public schools."⁶⁰ Black students enrolled in charter schools often attend charters that are even more segregated than traditional public schools.⁶¹ Thus, school choice does not necessarily work to the advantage of all students, as black students in inner cities can choose to attend either an already intensely segregated public school or a charter school where the level of segregation may be even higher.⁶²

53. *Id.*

54. *See, e.g., id.* (noting that some critics "assert that charters are at best an incomplete solution, constrained to serve a small segment of the population").

55. NATIONAL CHARTER SCHOOL STUDY EXECUTIVE SUMMARY, *supra* note 37, at 23.

56. *Id.*

57. CREDO STUDY FINDS URBAN CHARTER SCHOOLS OUTPERFORM TRADITIONAL SCHOOL PEERS, *supra* note 47.

58. Derek W. Black, *Charter Schools, Vouchers, and the Public Good*, 48 WAKE FOREST L. REV. 445, 463 (2013).

59. *See id.* at 464.

60. Ware & Robinson, *supra* note 6, at 2.

61. *Id.* at 5.

62. *Id.* at 21.

Another common criticism of charter schools is that they divert funds from traditional public schools.⁶³ It is therefore not surprising that local school boards tend to oppose charters.⁶⁴ In addition to their reluctance to sacrifice funds,⁶⁵ school boards are often “unwilling to surrender their ‘vested’ public-school monopol[ies].”⁶⁶ Sometimes local school boards and politicians simply dismiss charter schools as unnecessary because existing schools are performing sufficiently.⁶⁷ Finally, teachers unions oppose charter schools because charter teachers are not automatically unionized, even though they often work grueling and extensive hours.⁶⁸ A few charter schools also embrace merit pay, which unions strongly oppose.⁶⁹

II. LEGAL CHALLENGES TO CHARTER SCHOOLS

Charter opponents often turn to the legal system to prevent charter schools from opening.⁷⁰ Careful review, however, reveals that most legal challenges to charter schools are unproductive. Those that have succeeded were limited to narrow state constitutional issues specific to the individual state. Thus, to the extent Virginians fear charter schools could be a legal liability, they need only turn to existing case law to discover that these fears are unfounded. Likewise, opponents who attempt to use lawsuits to resist the charter school movement in Virginia will likely be unsuccessful.

63. See Black, *supra* note 58, at 470. Charter schools may receive even less funding than traditional public schools, and an Arizona appellate court recently held that charter schools receiving less funding per student is constitutional. See *Craven v. Huppenthal*, 338 P.3d 324, 325 (Ariz. Ct. App. 2014). A similar lawsuit demanding equal funding for charter schools is currently pending in Washington, D.C. See *D.C. Assoc. of Chartered Pub. Schs. v. District of Columbia*, No. 1:14-cv-1293 (D.D.C. Sept. 29, 2014).

64. Kenric Ward, *Held Back: VA Charter Schools Lag as Other States Move Ahead*, VA. WATCHDOG.ORG (Aug. 22, 2013), <http://watchdog.org/102352/held-back-vacharter-schools-lag-as-other-states-move-ahead/>.

65. Michael Pope, *Despite Obstacles, Charter School Movement Making Gains in Virginia*, WAMU (July 10, 2015), http://wamu.org/programs/metro_connection/15/07/09/charter_school_movement_making_gains_in_virginia.

66. Ward, *supra* note 64.

67. See Sarah Butrymowicz, *Do We Need Charter Schools in High-Performing Districts?*, HECHINGER REP. (Aug. 24, 2011), <http://hechingerreport.org/do-we-need-charter-schools-in-high-performing-districts/>; Joy Resmovits, *Charter School Authorizer at State Level Deemed Unconstitutional in Georgia*, HUFFINGTON POST (July 16, 2011, 5:12 AM), http://www.huffingtonpost.com/2011/05/16/charter-school-authorizer_n_862776.html.

68. Groshoff, *supra* note 5, at 322, 328.

69. *Id.* at 328.

70. Martin, *supra* note 23, at 44.

This section highlights the three primary legal challenges to charter schools: those pertaining to the Establishment Clause, the Equal Protection Clause, and state constitutional issues.

A. *Establishment Clause*

Many charter schools have religious affiliation in a variety of ways, which may subject them to Establishment Clause challenges.⁷¹ Some charters spin off of existing private religious schools, and though they drop their explicitly religious nature, they retain aspects of their religious culture or language.⁷² Other charter schools have used their inherent flexibility to focus education on the culture and language of specific religious groups, and accommodate without advocating religious practices.⁷³ Private religious institutions may also co-enroll their students in cyber charter schools,⁷⁴ which provide instruction over the Internet.⁷⁵

One might argue that charter schools are not vulnerable to Establishment Clause challenges because they are not government actors and are thus essentially private for the purposes of the Clause.⁷⁶ Though they receive public funding, they are privately created and managed and are essentially a service selected by consumers in a marketplace.⁷⁷ The argument follows that charters may engage in religious activities because they are not state actors.⁷⁸ However, courts have treated charter schools as public schools, which are bound to conform to First Amendment strictures.⁷⁹ Thus, opponents can bring Establishment Clause claims if the government funds non-secular or religiously sympathetic charter schools.⁸⁰

71. The Supreme Court has held that the Establishment Clause of the First Amendment prevents states (through the Fourteenth Amendment) from “enacting laws that have the ‘purpose’ or ‘effect’ of advancing or inhibiting religion.” *Zelman v. Simmons-Harris*, 536 U.S. 639, 648–49 (2002).

72. Saiger, *supra* note 4, at 1167.

73. *Id.*

74. *Id.*

75. *Charter Schools: Finding out the Facts*, *supra* note 32.

76. See Saiger, *supra* note 4, at 1166.

77. *Id.*

78. See *id.* at 1189–90.

79. DURHAM & SMITH, *supra* note 42.

80. *Id.*; *Laws & Legislation*, CTR. FOR EDUC. REFORM, <https://www.edreform.com/issues/choice-charter-schools/laws-legislation/> (last visited Feb. 19, 2016).

A landmark 2002 Supreme Court case, *Zelman v. Simmons-Harris*, addressed an Establishment Clause challenge to the Ohio voucher system, an educational choice program like charter schools that provided tuition aid for students to attend a participating school of their choosing.⁸¹ Despite the participation of religiously affiliated schools in the voucher program, the Court held that it did not violate the Establishment Clause.⁸² The program was constitutional because it was “neutral in all respects toward religion.”⁸³ State funds reached religious schools only because of the genuine and “independent decisions of private individuals.”⁸⁴

Though the *Zelman* decision did not address charter schools specifically, it was a seminal victory for educational choice programs.⁸⁵ It indicates the Court’s apparent receptiveness to school choice programs with religious components.⁸⁶ *Zelman* also represents a flexible interpretation of the Establishment Clause, especially when state funding of religiously affiliated schools is merely the product of private parental choice.⁸⁷ Under these parameters, facial challenges to charter school laws are unlikely to succeed, as it would be difficult to argue that charter legislation has the purpose of advancing a particular religious agenda.⁸⁸ While some might argue that charters are more susceptible to First Amendment attacks than voucher programs due to their characterization as public schools, charters may actually stand on “firmer constitutional ground” because they are available to all students, not just those with financial need.⁸⁹

81. 536 U.S. 639, 644–45 (2002).

82. *Id.* at 644.

83. *Id.* at 653.

84. *Id.* at 655.

85. *Newsire—June 28, 2002—Special Supreme Court Victory Edition*, CTR. FOR EDUC. REFORM (June 28, 2002), https://www.edreform.com/wp-content/uploads/2012/03/Newsire_June_28_2002_Special_Supreme_Court_Victory_Edition.pdf.

86. *Church, Choice, and Charters*, *supra* note 13, at 1757.

87. *Id.*

88. *Id.* at 1765–66. However, the Colorado Supreme Court seemingly defied *Zelman* and held the state voucher system unconstitutional. *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461, 470 (Colo. 2015), *petition for cert. filed* (Sept. 3, 2015) (No. 15A269). The court noted in so holding that the Colorado constitution is far more restrictive regarding state funding of religious education than the federal Establishment Clause at issue in *Zelman*. *Id.* at 473–74.

89. *Church, Choice, and Charters*, *supra* note 13, at 1767. At least one federal district court upheld charter schools to an Establishment Clause challenge, though on the procedural grounds that plaintiffs did not present sufficient evidence of violations to survive summary judgment by arguing that teachers in the school held prayer meetings. Daugh-

B. *Equal Protection*

Charter school opponents have also attempted to raise equal protection challenges related to both sex and race. Some charter schools are sex-segregated, and critics argue they must comply with Title IX, which precludes sex-based exclusion from education due to their public school nature.⁹⁰ The Supreme Court held in *United States v. Virginia* that the Virginia Military Institute violated the Equal Protection Clause because its all-male student body received benefits that the all-female alternate school did not provide, including prestige and powerful connections with alumni.⁹¹ The Court importantly intimated, however, that in some cases single-sex schools could withstand such challenges.⁹²

It is likely that courts will defer to charter schools in the same manner as they do to traditional schools and apply lower, rational relationship scrutiny.⁹³ Using that line of analysis, New York approved a sex-segregated charter application because the state had an important interest in promoting school choice and serving male students with documented difficulties in traditional public schools.⁹⁴ The sex-segregated admissions policy of the school was substantially related to those government objectives, rather than discrimination against females.⁹⁵ Other sex-segregated charter schools can defend their admissions policies in litigation on similar grounds.

Another prominent charter school challenge relates to race and the purported anti-integration effects of charters. Some states have implemented requirements to prevent segregation or disproportionate racial and ethnic representation in charter schools, and those requirements may be subject to equal protection challenges on the grounds of reverse discrimination.⁹⁶ However, South Carolina provides a telling example of courts' reluctance to address this issue. In 1999, the South Carolina Supreme Court remanded a case to determine the constitutionality of the state's

erty v. Vanguard Charter Sch. Acad., 116 F. Supp. 2d 897, 903, 917 (W.D. Mich. 2000).

90. Groshoff, *supra* note 5, at 329–30.

91. 518 U.S. 515, 557 (1996).

92. *See id.* at 535–36. A state may provide “benign” justifications for exclusions and the Court will determine if they describe actual state purposes. *Id.*

93. *See* Martin, *supra* note 23, at 56.

94. Groshoff, *supra* note 5, at 346–47.

95. *Id.*

96. Martin, *supra* note 23, at 87.

charter school enabling act, which prohibited charter enrollment from differing by more than 10% from the racial composition of the school district.⁹⁷ On remand, the circuit court found that the racial composition requirement violated equal protection, but when the school board appealed, the South Carolina Supreme Court again declined to rule on the issue, deeming it moot.⁹⁸ In another cogent example of courts' aversion to this topic, the Tenth Circuit, in upholding Colorado's charter school law to an equal protection challenge, noted that courts begin with a presumption of constitutionality when reviewing acts of the state legislature, deferring even more when questions of educational policy are involved.⁹⁹ The court found that the law did not create a suspect class based on culture by aiming to "increase the educational opportunities of at-risk pupils," including those less likely to succeed in a conventional educational environment due to "physical, emotional, socioeconomic, or cultural factors."¹⁰⁰

C. *State Constitutional Issues*

Because they have seen some success, state constitutional challenges may present the most viable threat to charter schools, though success depends on specific constitutional language. In 2015, the Washington Supreme Court was the first to deem charter schools unconstitutional.¹⁰¹ The court found that the state's charter school act violated the state constitution by treating charter schools as "common schools," which the constitution allows to tap certain state funding sources.¹⁰² An earlier Washington case defined common schools as "subject to, and under the control of, the qualified voters of the school district."¹⁰³ Charter schools, the

97. *Beaufort Cty. Bd. of Educ. v. Lighthouse Charter Sch. Comm.*, 516 S.E.2d 655, 660–61 (S.C. 1999).

98. *Beaufort Cty. Bd. of Educ. v. Lighthouse Charter Sch. Comm.*, 576 S.E.2d 180, 181–82 (S.C. 2003). In the interim, the legislature had changed the racial composition requirement to be more "fact-based," moving the racial composition requirement from 10% to 20%, and excusing the requirement entirely if the charter school does not operate in a discriminatory way. *Id.* at 182.

99. *Villanueva v. Carere*, 85 F.3d 481, 487 (10th Cir. 1996).

100. *Id.* at 488.

101. John Higgins, *State Supreme Court: Charter Schools Are Unconstitutional*, SEATTLE TIMES (Sept. 8, 2015, 11:45 AM), <http://www.seattletimes.com/seattle-news/education/state-supreme-court-charter-schools-are-unconstitutional/>.

102. *League of Women Voters of Wash. v. State*, 355 P.3d 1131, 1133, 1135–36 (Wash. 2015).

103. *School Dist. No. 20, Spokane Cty. v. Bryan*, 99 P. 28, 30 (Wash. 1909).

court determined, “are run by an appointed board or nonprofit organization and thus are not subject to local voter control,” thereby disqualifying them from being common schools under the constitution.¹⁰⁴ This decision hinged upon the specific language of Washington’s constitution and would not translate to other states, such as Virginia, whose constitutions do not include such provisions.¹⁰⁵

Georgia’s highest court struck down a law creating a state commission to approve charter schools based on certain language within the state’s constitution.¹⁰⁶ Georgia’s legislature created a commission in 2008 to fund and approve charter schools because, previously, only school boards and the state board of education had the power to do so.¹⁰⁷ Though Georgia’s constitution allows the General Assembly to provide for the creation of “special schools,”¹⁰⁸ the Georgia Supreme Court found the charter commission unconstitutional because it established charter schools “under the guise of being ‘special schools,’” which were designed to enroll only students with special needs or teach only certain special subjects.¹⁰⁹ In response to the decision, the Georgia legislature passed, and voters approved, a constitutional amendment that ensured the state could approve charter schools and establish a commission to do so.¹¹⁰

Legal challenges have not been a significant hindrance to the charter school movement.¹¹¹ Virginians should not view legal bat-

104. *League of Women Voters of Wash.*, 355 P.2d. at 1137. The decision included a separate opinion arguing that, though charter schools are not common schools, they could be constitutionally funded with unrestricted money from the general fund. *Id.* at 1141 (Fairhurst, J., concurring).

105. See VA. CONST. art. VIII.

106. *Gwinnett Cty. Sch. Dist. v. Cox*, 710 S.E.2d 773, 775 (Ga. 2011). A Florida appellate court also found the state’s authorizing commission unconstitutional in a brief opinion, seemingly holding that only local school boards should have the power to approve charters. See *Duval Cty. Sch. Bd. v. State Bd. of Educ.*, 998 So.2d 641, 643–44 (Fla. Dist. Ct. App. 2008).

107. Resmovits, *supra* note 67.

108. GA. CONST. art. VIII, § 5, para. VII(a).

109. *Gwinnett Cty. Sch. Dist.*, 710 S.E.2d at 775–76, 779. The dissenting opinions, however, emphasized the legislature’s effort to improve the educational system via “special charter schools.” *Id.* at 783–84 (Melton, J., dissenting); *id.* at 784 (Nahmias, J., dissenting).

110. GA. CONST. art. VIII, § 5, para. VII(a); Wayne Washington, *State’s Voters Approve Charter Amendment*, ATLANTA JOURNAL-CONSTITUTION (Nov. 6, 2012, 11:55 PM), <http://www.gpb.org/news/2012/02/29/senate-debating-charter-school-bill>; *Senate Debating Charter School Bill*, ASSOCIATED PRESS (Feb. 29, 2012, 2:32 AM), <http://www.gpb.org/news/2012/02/29/senate-debating-charter-school-bill>.

111. See Martin, *supra* note 23, at 103 (arguing charter schools have “obtained the con-

tles as an obstacle to charter school development. In the same vein, charter school opponents in the Commonwealth should acknowledge that using litigation to combat the movement is unlikely to succeed.

III. CHARTER SCHOOLS IN VIRGINIA

Virginia's charter law is the key reason why the Commonwealth has very few charter schools compared with much of the nation. Though the General Assembly passed the charter school statute in 1998 and has approved several amendments since,¹¹² the law remains restrictive in a number of ways that discourage high-quality charter school managers from developing schools in Virginia. As a result, Virginians have not truly explored what charter schools can offer the Commonwealth's education system, particularly for segments of the student population that are struggling in traditional public schools. Changing Virginia's charter law would likely turn the state around in terms of charter growth, as other states have proven.¹¹³

The following sections address Virginia's charter school background, provide an overview of the Commonwealth's charter law, and identify weaknesses within the law.

A. *Virginia Charter School Background*

The charter school movement did not miss Virginia entirely. Indeed, the Virginia Department of Education recognizes that charter schools provide options for parents and students and use

sistent backing of state and federal court systems," and have been "overwhelmingly successful in overcoming court cases challenging their status as a legitimate component within the public school framework").

112. KATHLEEN G. HARRIS, A HISTORY OF CHARTER SCHOOLS IN VIRGINIA, COMMONWEALTH EDUC. POL'Y INST. 6–9 (2007), <http://www.cepi.vcu.edu/media/university-relations/cepi/pdfs/charterschools.pdf>; *Charter Schools*, VA. DEP'T EDUC., http://www.doe.virginia.gov/instruction/charter_schools/index.shtml (last visited Feb. 19, 2016).

113. For instance, Indiana amended its law in 2011 to allow for multiple authorizers, including the Indiana State Charter School Board. Scott Elliott, *Indiana Has Seen a Burst of New Charter Schools Since 2011 Law*, CHALKBEAT (June 22, 2015, 11:54 PM), http://in.chalkbeat.org/2015/06/22/indiana-has-seen-a-burst-of-new-charter-schools-since-2011-law/#.VkP3nL_Y7Gs. As a result, Indiana's charter school law moved from twenty-ninth in the National Alliance survey in 2010 to fifth in 2015. *In the States*, NAT'L ALLIANCE FOR PUB. CHARTER SCHS., <http://www.publiccharters.org/where-we-stand/state/> (last visited Feb. 19, 2016).

innovative instructional programs.¹¹⁴ Despite these acknowledgements, there are only nine schools chartered in Virginia today: three elementary schools, one middle school, four high schools, and one all-male academy for grades six through twelve.¹¹⁵ Two schools are located in Albemarle County, two in Loudoun County, one in York County, three in Richmond, and one in Virginia Beach.¹¹⁶

Federal support laid the groundwork for the establishment of charter schools in Virginia.¹¹⁷ After several years of failed attempts, Virginia's charter school bill finally passed both houses of the legislature in 1998, seven years after Minnesota enacted the first state charter legislation.¹¹⁸ In 1999, the Virginia Department of Education received a federal grant to support charter school development.¹¹⁹ Eight charter schools opened during that initial grant period, but the Commonwealth's weak charter law immediately caused problems.¹²⁰ When Virginia reapplied for federal charter school funding in 2003, the U.S. Department of Education denied its application, citing the inadequacy and inflexibility of its charter law.¹²¹ By the 2005–06 school year, only three of the eight initial schools still operated.¹²² Local school boards did not receive a single charter school application during that year.¹²³

All of the charter schools currently operating in Virginia are nonsectarian, foreclosing, at least for the moment, the possibility of Establishment Clause lawsuits.¹²⁴ Virginia's charter law requires each charter school to certify in its application that it will be "nonreligious in its programs, admission policies, employment practices, and all other operations,"¹²⁵ further decreasing the likelihood of Establishment Clause challenges. Metropolitan Prepar-

114. *Charter Schools*, *supra* note 112.

115. *Virginia's Public Charter Schools*, *supra* note 1.

116. *Id.*

117. *See* HARRIS, *supra* note 112, at 1 (discussing federal legislation that provided support, especially in the form of funding, prior to Virginia's enactment of charter school legislation).

118. *Id.* at 3, 5–6.

119. *Id.* at 10.

120. *Id.* at 10–11.

121. *Id.* at 11.

122. VA. BD. OF EDUC., PUBLIC CHARTER SCHOOLS IN THE COMMONWEALTH OF VIRGINIA 3 (July 6, 2006), http://www.doe.virginia.gov/instruction/charter_schools/reports/2006.pdf.

123. *Id.*

124. *Charter Schools*, *supra* note 112.

125. VA. CODE ANN. § 22.1-212.8(B)(13) (Cum. Supp. 2015).

atory Academy in Richmond will open in 2016 to only young men, and as the first and only single-sex charter in the Commonwealth, could face equal protection challenges related to sex.¹²⁶ However, it is important to remember the hesitance of courts to confront race-based equal protection challenges,¹²⁷ and the Supreme Court has suggested that sex-segregated schools may be constitutional if they survive what appears to be a level of intermediate scrutiny.¹²⁸ Finally, Virginia's constitution does not include the "common school" and "special school" language of the respective Washington and Georgia constitutions, so the Commonwealth is less vulnerable to similar constitutional attacks.¹²⁹

B. *Overview of Virginia's Charter School Law*

According to Virginia Code section 22.1-212.8(A), "[a]ny person, group, or organization, including any institution of higher education," may apply for a charter.¹³⁰ The law outlines mandatory application criteria, including a statement of need for a charter school in the school division, evidence that the school has sufficient support, and detailed information about financials and curriculum.¹³¹ Though both the Board of Education and local school boards review applications, the Board's review is limited to whether the application meets its approval criteria, while the local school board makes the final decision.¹³² School boards must provide reasons for denial of an application and an opportunity for reconsideration, but a school board's decision upon reconsideration is final and not subject to appeal.¹³³

School boards may revoke charters from schools that violate terms in their applications, fail to make "reasonable progress" toward achievement of specified standards, do not meet "general-

126. *Virginia's Public Charter Schools*, *supra* note 1.

127. *See supra* notes 97–100 and accompanying text.

128. *See* *United States v. Virginia*, 518 U.S. 515, 535–36 (1996). There is also compelling evidence that single-sex schools benefit at least certain segments of the student population, especially poor minority boys. *See* Elizabeth Weil, *Teaching Boys and Girls Separately*, N.Y. TIMES MAG. (Mar. 2, 2008), http://www.nytimes.com/2008/03/02/magazine/02sex3-t.html?pagewanted=all&_r=2&.

129. *See* VA. CONST. art. VIII.

130. VA. CODE ANN. § 22.1-212.8(A) (Cum. Supp. 2015).

131. *Id.* § 22.1-212.8(B) (Cum. Supp. 2015).

132. *Id.* §§ 22.1-212.9–10 (Cum. Supp. 2015).

133. *Id.* § 22.1-212.10 (Cum. Supp. 2015).

ly accepted” standards of fiscal management, or violate the law.¹³⁴ Language such as “reasonable” and “generally accepted” in Virginia’s law gives local school boards a great deal of discretion.¹³⁵ Moreover, local school boards may outline conditions for funding in their agreements with charter schools.¹³⁶ Charter terms are limited to five years or less, at which time the school must apply for renewal by submitting a progress report and financial statement.¹³⁷ School boards have full authority to deny applications for renewal.¹³⁸

Enrollment in Virginia’s charter schools is open to any child residing within the school district, and schools select students through a lottery process.¹³⁹ A committee composed of parents of enrolled students, teachers and administrators working in the school, and representatives of community sponsors administer and manage charter schools.¹⁴⁰ Virginia’s charter schools may operate free from school division policies and state regulations if specified in their charter agreements, but are still subject to state SOLs and Standards of Accreditation.¹⁴¹

Virginia has amended its charter school law several times since passage in 1998. In 2007, the General Assembly created a special public charter school fund within the treasury, with money to be used exclusively for establishing or supporting charter schools.¹⁴² The legislature made numerous changes in 2010 designed to increase state support and guidance, and to ensure that local school boards receive quality proposals for charter schools.¹⁴³ The amendments require school boards to provide charter school applicants with reasons for application denials and to post such reasons on their websites.¹⁴⁴ They also allow applicants to petition

134. *Id.* § 22.1-212.12(B) (Cum. Supp. 2015).

135. *Id.*

136. *Id.* § 22.1-212.14(B) (Cum. Supp. 2015).

137. *Id.* § 22.1-212.12(A) (Cum. Supp. 2015).

138. *Id.* § 22.1-212.12(C) (Cum. Supp. 2015).

139. *Id.* § 22.1-212.6(A) (Cum. Supp. 2015).

140. *Id.* § 22.1-212.6(B) (Cum. Supp. 2015).

141. *Id.*

142. Act of Mar. 8, 2007, ch. 118, 2007 Va. Acts 167, 167 (codified as amended at VA. CODE ANN. § 22.1-212.5:1 (Supp. 2007)); see also *Criteria for Making Distributions from the Public Charter School Fund*, VA. BD. OF EDUC. (Jan. 10, 2008), http://www.doe.virginia.gov/instruction/charter_schools/criteria_distributions_fund.pdf.

143. *Charter Schools*, *supra* note 112.

144. Act of Apr. 11, 2010, ch. 650, 2010 Va. Acts 1174, 1175 (codified as amended at VA. CODE ANN. §§ 22.1-212.9–10 (Cum. Supp. 2010)).

the local school board for reconsideration of a denial and to seek technical assistance from the Virginia Department of Education prior to doing so.¹⁴⁵ School boards must establish processes for reconsideration, including public comment, but the school board's reconsideration decision is final and not appealable.¹⁴⁶

The 2010 amendments also required charter applicants to submit their applications to the Board of Education to determine whether they met the Board's approval criteria before submitting to the school board.¹⁴⁷ However in 2013, the legislature altered that provision so that the Board of Education need not review applications initiated by local school boards.¹⁴⁸ Finally, the 2014 General Assembly addressed conversion of existing public schools into charter schools, mandating that students already attending the particular public schools and their siblings will have the opportunity to enroll before the lottery process.¹⁴⁹ The amendment also eliminated a prior requirement that at least half of charter schools be for at-risk students.¹⁵⁰

In 2015, Senator Mark Obenshain proposed a state constitutional amendment that would give the Board of Education authority to establish charter schools.¹⁵¹ The bill passed both houses of the legislature in 2015, but according to Virginia's constitutional amendment procedure, it must pass both houses again in the next session before a referendum in November 2016.¹⁵² This would be a significant change for Virginia because under current law, only local school boards may approve charter applications.¹⁵³

145. *Id.*

146. *Id.*

147. *Id.* at 1174–75.

148. Act of Mar. 12, 2013, ch. 225, 2013 Va. Acts 383, 383 (codified as amended at VA. CODE ANN. § 22.1-212.9 (Cum. Supp. 2013)). All other applications are still subject to Board review. *Id.* at 383–84.

149. Act of Apr. 6, 2014, ch. 645, 2014 Va. Acts __ (codified as amended at VA. CODE ANN. §§ 22.1-212.6, -212.8, -212.11 (Cum. Supp. 2014)).

150. *Id.*

151. S.J. Res. 256, Va. Gen. Assemb. (Reg. Sess. 2015); Michael Melkonian, *Senate OKs Amendment to Boost Charter Schools*, WILLIAMSBURG YORKTOWN DAILY (Feb. 10, 2015), <http://wydaily.com/2015/02/10/senate-oks-amendment-to-boost-charter-schools/>.

152. VA. CONST. art. XII, § 1; Heather Walton et al., *State Constitutional Amendment Would Support Charter Schools*, CHARLOTTESVILLE TOMORROW (May 28, 2015, 1:09 PM), <http://www.cvilletomorrow.org/news/article/20975-state-constitutional-amendment-chart-er-schools/>.

153. See Editorial Board, *Charting the Right Path on Education in Maryland and Virginia*, WASH. POST (Feb. 6, 2015), <https://www.washingtonpost.com/opinions/charting-the-right-path-on-education-in-maryland-and-virginia/2015/02/06/7cd008fe-ae26-11e4-ad71-7>

As many local school boards are reluctant to approve charter schools in their districts, allowing the Board of Education to establish charters would facilitate approval for many qualified charter applicants.¹⁵⁴ The proposed amendment may help Virginia develop a charter school program, but there are still many limitations in the law that the legislature must address.

C. Weaknesses in Virginia's Charter School Law

Virginia notoriously has one of the weakest charter laws in the country, meaning the law is not conducive to the creation and perpetuation of quality charter schools.¹⁵⁵ The National Alliance for Public Charter Schools ranked Virginia's charter law fortieth out of forty-three state laws surveyed in 2014, and gave it only 76 points out of a possible 228.¹⁵⁶ The survey assigned states weighted points based on key components of a model charter law, including multiple authorizers, accountability, and autonomy.¹⁵⁷ Similarly, the Center for Education Reform gave Virginia a grade of "F" on its 2013, 2014, and 2015 charter laws scorecards.¹⁵⁸ Not surprisingly, the biggest flaw in Virginia's law according to that organization is placing approval power "solely in the hands of school boards."¹⁵⁹ Despite continual "animosity of these boards to charters," the state legislature has not yet changed the charter law to address this issue.¹⁶⁰ Moreover, the U.S. Department of Education denied Virginia's renewal of a charter school grant in

b9eba0f87d6_story.html.

154. *See id.*

155. *See, e.g.,* Dave Inman, *What It Will Take to Advance the Growth of High-Quality Charter Schools in New Jersey, Washington, DC and Virginia*, LEXINGTON INST. 3 (June 2014), <http://lexingtoninstitute.org/wp-content/uploads/2014/06/Growth-of-High-Quality-Charters-in-NJ-DC-and-VA.pdf>.

156. *Measuring Up: Virginia*, *supra* note 3. Only Iowa, Kansas, and Maryland ranked lower, for flaws much like Virginia's. *Measuring Up to the Model: A Ranking of State Charter Laws*, NAT'L ALLIANCE FOR PUB. CHARTER SCHS. 40–43, 48–49 (Jan. 2015), http://www.publiccharters.org/wp-content/uploads/2015/01/model_law_2015.pdf.

157. *Measuring Up: Virginia*, *supra* note 3.

158. CTR. FOR EDUC. REFORM, CHARTER SCHOOL LAWS ACROSS THE STATES: 2013 RANKINGS AND SCORECARD (Jan. 2013), https://www.edreform.com/wp-content/uploads/2013/06/CER-CharterLaws2013_Chart_FINAL.pdf; CTR. FOR EDUC. REFORM, CHARTER SCHOOL LAWS ACROSS THE STATES: 2014 RANKINGS AND SCORECARD (Mar. 2014), <https://www.edreform.com/wp-content/uploads/2014/03/2014CharterSchoolLawScorecardLink.pdf>; CHARTER SCHOOL LAWS ACROSS THE STATES: 2015 RANKINGS AND SCORECARD, *supra* note 3, at 6–7.

159. CHARTER SCHOOL LAWS ACROSS THE STATES: 2015 RANKINGS AND SCORECARD, *supra* note at 3.

160. *Id.*

2003, observing that the Commonwealth's charter school statute is "narrow in scope" and does not "provid[e] much flexibility."¹⁶¹

Strong charter laws are the foundation for successful charter schools,¹⁶² and Virginia's weak law is at the root of the stalled charter movement in the Commonwealth. When the National Alliance examined the effects of Virginia's law, it ultimately declined to assign Virginia a rank in its survey, partially because charter schools did not serve even 1% of the Commonwealth's public school students.¹⁶³ Likewise, the Center for Education Reform noted that despite Virginia's "surprisingly diverse" student population, it has very few opportunities for charter schools due to its restrictive law.¹⁶⁴

There are several reasons why Virginia's charter school law hinders the development of a charter school program. First, Virginia does not allow independent or multiple authorizers to approve charter schools.¹⁶⁵ Instead, Virginia enables only local school boards to serve as authorizers,¹⁶⁶ but the boards often oppose charter school formation because they wish to retain funding and control.¹⁶⁷ Under current law, local school boards have tremendous discretion, which is not subject to administrative review.¹⁶⁸ Though the state Board of Education evaluates applications for compliance with established criteria, only local school boards have authority to render decisions on those applications.¹⁶⁹ Often school boards deny applications even after the Board has approved them.¹⁷⁰ Such decisions have cited concerns about di-

161. HARRIS, *supra* note 112, at 10–11.

162. See *Understanding Charter School Laws and How They Are Ranked*, CTR. FOR EDUC. REFORM, <https://www.edreform.com/2013/02/understanding-charter-school-laws-and-how-they-are-ranked/> (last visited Feb. 19, 2015) (reaching this conclusion after conducting fourteen annual charter law evaluations).

163. *The Health of the Public Charter School Movement: A State-by-State Analysis*, NAT'L ALLIANCE FOR PUB. CHARTER SCHS. 166 (Oct. 2014), <http://www.publiccharters.org/wp-content/uploads/2014/09/health-of-the-movement-2014.pdf>.

164. CHARTER SCHOOL LAWS ACROSS THE STATES: 2015 RANKINGS AND SCORECARD, *supra* note 3, at 84.

165. See *id.*

166. VA. CODE ANN. § 22.1-212.9 (Cum. Supp. 2015); *Measuring Up: Virginia*, *supra* note 3.

167. Pope, *supra* note 65; Ward, *supra* note 64.

168. See, e.g., VA. CODE ANN. §§ 22.1-212.9–10, 22.1-212.12 (Cum. Supp. 2015).

169. *Id.* § 22.1-212.9 (Cum. Supp. 2015); *Measuring Up: Virginia*, *supra* note 3.

170. See, e.g., Letter from Laura Hoofnagle, Chair, Rockbridge Cty. Sch. Bd., to David M. Foster, President, Va. Bd. of Educ. (Sept. 24, 2012), http://www.doe.virginia.gov/instruction/charter_schools/local_school_board_actions/rockbridge_county_buffalo_creek_school.

verting money and resources from existing public schools¹⁷¹ and alleged lack of public support for proposed charters.¹⁷² Moreover, the nature of school boards as authorizers is problematic because they are related state education entities and therefore not independent.¹⁷³

This restriction to a single authorizing entity results in far fewer charter schools in Virginia than in states that allow multiple chartering authorities.¹⁷⁴ One of the reasons top charter school operators will not open schools in the Commonwealth is because it is nearly impossible for them to obtain authorization.¹⁷⁵ Large national charter organizations no longer bother applying for charters in the Commonwealth, and even smaller organizations have stopped trying because school boards repeatedly reject applications.¹⁷⁶

A key weakness in Virginia's charter law is the lack of accountability for both charter schools and authorizers.¹⁷⁷ Independent authorizers enhance charter school accountability because they "have full control over how they evaluate charter schools."¹⁷⁸ Though the law requires authorizers to report to the Board of Education annually, it does not mandate the institution of an authorizer oversight body with authority to sanction or remove authorizers.¹⁷⁹ Virginia's law also does not require authorizers to notify charter schools of problems they perceive or provide them with opportunities to correct those problems.¹⁸⁰ While the law insists that authorizers base renewal decisions on evidence of the school's performance, it does not command authorizers to provide

pdf; Letter from Eric Hornberger, Chairman, Loudoun Cty. Pub. Sch., to Ali Gokce, N. Va. Educ. Found. (Mar. 5, 2013), http://www.doe.virginia.gov/instruction/charter_schools/local_school_board_actions/loudoun_county_lmita.pdf.

171. Letter from Laura Hoofnagle, *supra* note 170.

172. Letter from Eric Hornberger, *supra* note 170.

173. *Charter Authorizers: The Truth About State Commissions*, CTR. FOR EDUC. REFORM 1 (May 2013), <https://www.edreform.com/wp-content/uploads/2013/04/Charter-School-Authorizers-Truth-About-State-Commissions-May2013.pdf>.

174. *Id.*

175. Press Release, Va. Dep't of Educ., Office of the Governor, Governor McDonnell Announces Phase Three of the ALL STUDENTS Agenda (Jan. 9, 2013), http://www.doe.virginia.gov/news/news_releases/2013/jan09_gov-b.shtml.

176. Pope, *supra* note 65.

177. *Measuring Up: Virginia*, *supra* note 3.

178. *Charter Authorizers: The Truth About State Commissions*, *supra* note 173, at 1.

179. VA. CODE ANN. § 22.1-212.15 (Repl. Vol. 2011); *Measuring Up: Virginia*, *supra* note 3.

180. *Measuring Up: Virginia*, *supra* note 3.

renewal guidance or allow charter schools to augment their performance records with plans for improvement.¹⁸¹

The General Assembly has not remedied Virginia's charter law for a number of reasons. Charter schools in most jurisdictions enjoy bipartisan support, but in Virginia, the issue has been politically divisive along party lines.¹⁸² Some politicians oppose reform because they are "[s]till haunted by the days of 'massive resistance'" to the *Brown v. Board of Education* integration mandate and thus are "leery of charters."¹⁸³ Others are not convinced charter schools are more successful than traditional public schools, especially in a "suburban-oriented state,"¹⁸⁴ and note that Virginia's public schools are already strong.¹⁸⁵ Legislators who oppose the charter movement routinely point to the Constitution of Virginia, which currently vests supervision of schools in each district in the school board.¹⁸⁶ Virginia also has a "dearly loved tradition of local control" to overcome.¹⁸⁷ School boards resist the charter movement to maintain their "public-school monopol[ies]."¹⁸⁸ Additionally, teachers unions, especially the Commonwealth's largest, the Virginia Education Association, oppose charter schools because teachers in the schools are not unionized.¹⁸⁹

IV. OPTIMAL APPROACH TO VIRGINIA'S CHARTER SCHOOL LAW

The legislature should change Virginia's charter law in a number of ways to create an environment conducive to charter school formation and sustainability in the Commonwealth. Despite polarization on the issue of charter schools in Virginia, the topic is

181. VA. CODE ANN. § 22.1-212.10 (Cum. Supp. 2015); *Measuring Up: Virginia*, *supra* note 3.

182. Inman, *supra* note 155, at 10. For instance, nearly every Democrat in the General Assembly voted against Senator Obenshain's proposed constitutional amendment in 2015. Jim LeMunyon, *LeMunyon: Charter Schools and the 2016 General Assembly Session*, RICH. TIMES-DISPATCH (Nov. 17, 2015, 10:30 PM), http://www.richmond.com/opinion/their-opinion/guest-columnists/article_74231cf4-fe43-59de-88a2-299943f090d0.html. Much of the political polarization is rooted in Virginia's history, including massive resistance to the *Brown v. Board of Education* integration mandate. *Id.*

183. Inman, *supra* note 155, at 10; see LeMunyon, *supra* note 182; Ward, *supra* note 64.

184. Birnbaum, *supra* note 51 (statement of Richard L. Saslaw (D-Fairfax)).

185. See Inman, *supra* note 155, at 9.

186. Ward, *supra* note 64.

187. Editorial Board, *supra* note 153.

188. Ward, *supra* note 64.

189. Birnbaum, *supra* note 51; Ward, *supra* note 64. There is some indication, however, that other union leaders are ready to "move forward." Ward, *supra* note 64.

often a bipartisan one.¹⁹⁰ Legislators should recognize the value in tailoring Virginia's law so that the Commonwealth can explore an educational movement that has swept much of the nation. Though Virginia has a notably strong public education system, achievement gaps remain among students in poverty, minority students, and English language learners.¹⁹¹ The General Assembly should amend the charter law so Virginia can experiment with a schooling option that could enhance educational experiences and outcomes for at least certain underserved segments of the public school student population.¹⁹² The proposed constitutional amendment may facilitate charter school development, but more work is needed to improve Virginia's law.

This section discusses the key changes the legislature should make so that Virginia's charter law can facilitate charter growth where it would be beneficial. These include independent and multiple authorizers, school and authorizer accountability, school autonomy, and various other methods of strengthening the law. Finally, the section reviews the District of Columbia's charter law for ways Virginia's law might facilitate charter school growth.

A. *Independent and Multiple Authorizers*

Virginia currently grants all authorization power to local school boards, which is problematic because boards often view charter schools as competition for funding and reject applications based on political reasons rather than on merit.¹⁹³ Though the proposed constitutional amendment would allow the Virginia Board of Education to authorize schools, the legislature should amend the law to allow additional authorizers.¹⁹⁴ Ideally, at least some authorizers should be independent from "existing state and local education agencies."¹⁹⁵ Large non-profits have been effective au-

190. See, e.g., Andrew J. Rotherham, *The Charter Moment*, U.S. NEWS & WORLD REP. (June 19, 2015), <http://www.usnews.com/opinion/articles/2015/06/19/whats-working-and-whats-not-with-charter-schools>; Ward, *supra* note 64.

191. Inman, *supra* note 155, at 9.

192. See NATIONAL CHARTER SCHOOL STUDY EXECUTIVE SUMMARY, *supra* note 37, at 23.

193. *Model Legislation for States*, CTR. FOR EDUC. REFORM 9 (2012), <https://www.edreform.com/wp-content/uploads/2012/10/CER-ModelCharterLegislation.pdf>.

194. See S.J. Res. 256, Va. Gen. Assembly (Reg. Sess. 2015); HARRIS, *supra* note 112, at 12; *The Health of the Public Charter School Movement: A State-by-State Analysis*, *supra* note 163, at 5.

195. *Charter Authorizers: The Truth About State Commissions*, *supra* note 173, at 1.

thorizers in states such as Minnesota.¹⁹⁶ Other authorizers might include new independent state boards, such as the D.C. Public Charter School Board, or even mayors.¹⁹⁷ States like New York and Michigan have had success empowering colleges and universities as authorizers.¹⁹⁸ In addition to being generally progressive, these institutions offer established financial, legal, human resources, and educational infrastructure, are subject to much public and legislative scrutiny, and have an investment in improving the “pipeline” for future students.¹⁹⁹ Virginia might also consider curbing local school board power by providing charter school applicants with an appeals process because under current law, local school board decisions following reconsideration are not appealable.²⁰⁰ A switch to other authorizers may require amendment of Virginia’s constitution.²⁰¹ Fortunately, one such change is already in motion.²⁰²

B. *Accountability of Authorizers and Schools*

Once Virginia allows for multiple, independent authorizers in its charter law, the Commonwealth should adopt regulations that hold authorizers accountable.²⁰³ The law should specify that an authorizer could lose its status if a certain percentage of its schools fail to meet requirements such as state proficiency standards.²⁰⁴ At the same time, authorizers must hold schools accountable, and placing clear language in Virginia’s law regarding performance-based accountability is a valuable step toward achieving that goal.²⁰⁵ Strong charter laws promote accountability

196. Ward, *supra* note 64.

197. D.C. CODE § 38-1802.14 (2013); *Charter Authorizers: The Truth About State Commissions*, *supra* note 173, at 1; *Model Legislation for States*, *supra* note 193, at 7. Georgia’s Supreme Court found the state commission unconstitutional, but Virginia’s constitution does not contain the “special schools” language found in Georgia’s constitution. VA. CONST. art. VIII; *Gwinnett Cty. Sch. Dist. v. Cox*, 710 S.E.2d 773, 775, 779 (Ga. 2011).

198. *Charter Authorizers: The Truth About State Commissions*, *supra* note 173, at 2.

199. *Id.* at 1.

200. VA. CODE ANN. § 22.1-212.10 (Cum. Supp. 2015); *Laws & Legislation*, *supra* note 80.

201. Inman, *supra* note 155, at 10.

202. See S.J. Res. 256, Va. Gen. Assembly (Reg. Sess. 2015).

203. *Model Legislation for States*, *supra* note 193, at 11.

204. *Id.* at 10.

205. *The Health of the Public Charter School Movement*, *supra* note 163, at 5; see also *Model Legislation for States*, *supra* note 193, at 24.

through transparency about the application and renewal processes as well as the terms for revocation.²⁰⁶

C. *School Autonomy and Freedom*

For charter schools to operate most effectively, Virginia's law should allow them to conduct financial transactions without seeking approval.²⁰⁷ After surviving the rigorous application process, charter operators should have autonomy to control their schools' finances.²⁰⁸ Operators work intimately with their schools and know how best to spend funds to maximize efficiency.²⁰⁹ Furthermore, charter school managers should have autonomy in choosing and managing personnel.²¹⁰

In addition to financial freedom, strong charter statutes exempt charter schools from many of the school district's laws and regulations, though no charter is immune from the most fundamental laws, especially those concerning civil rights.²¹¹ Virginia's charter law states that public charter schools "*may* operate free from specified school division policies and state regulations."²¹² According to this language, charter schools have to request release from state regulations, and the Board of Education must approve the release.²¹³ Altering this optional process to an automatic exemption would enable existing schools to "innovate in ways that traditional public schools cannot," and prompt new charter operators to open schools, enticed by educational flexibility.²¹⁴ Charter laws may also explicitly grant teachers certain freedoms, including the option to bargain collectively, which could address concerns of teachers unions in Virginia.²¹⁵

206. *Measuring Up: Virginia*, *supra* note 3; *Model Legislation for States*, *supra* note 193, at 22.

207. Inman, *supra* note 155, at 10.

208. HARRIS, *supra* note 112, at 12; *Laws & Legislation*, *supra* note 80.

209. *Laws & Legislation*, *supra* note 80.

210. Inman, *supra* note 155, at 10.

211. *Laws & Legislation*, *supra* note 80.

212. VA. CODE ANN. § 22.1-212.6 (Cum. Supp. 2015) (emphasis added).

213. *Id.* § 22.1-212.7 (Cum. Supp. 2015).

214. *Laws and Legislation*, *supra* note 80; see HARRIS, *supra* note 112, at 12; *The Health of the Public Charter School Movement*, *supra* note 163, at 5.

215. *Model Legislation for States*, *supra* note 193, at 16.

D. *Other Concerns*

Virginia could strengthen its charter statute by clearly stating the intent of the law.²¹⁶ The Virginia Department of Education website describes charters as “alternative public schools,”²¹⁷ which enables school boards to argue that charter schools are unnecessary.²¹⁸ A provision regarding intent would help to eliminate this argument. Although Virginia’s charter law appears to grant equal funding to both charter schools and traditional public schools,²¹⁹ the Center for Education Reform found that most states do not fund equally in practice.²²⁰ The General Assembly could resolve this ambiguity by using language in the charter law that mandates a certain amount or percentage a local district must give to charter schools to ensure equitable funding.²²¹

Charter schools are subject to liability on a number of grounds.²²² Authorizers and charter managers currently must anticipate liability issues when creating their charter agreements,²²³ so Virginia should include provisions in its law which allocate liability among potential defendants, including personnel, governing boards, and the schools themselves.²²⁴ It should establish what defendants would have immunity and under what circumstances.²²⁵ For instance, the legislature may extend governmental immunity to charter schools, or immunize school personnel from liability for good faith acts done within the scope of their authority.²²⁶

216. *Id.* at 5.

217. *Charter Schools*, *supra* note 112.

218. *Model Legislation for States*, *supra* note 193, at 5.

219. *See* VA. CODE ANN. § 22.1-212.14(A) (Cum. Supp. 2015); Inman, *supra* note 155, at 11.

220. *Model Legislation for States*, *supra* note 193, at 20.

221. *The Health of the Public Charter School Movement*, *supra* note 163, at 167; *see also Model Legislation for States*, *supra* note 193, at 21. Though such a provision would further disincentivize school boards from approving charter applications, enabling multiple authorizers would eliminate this problem.

222. *See supra* Part III. Charter schools are also vulnerable to lawsuits under contract, promissory estoppel, and third-party beneficiary claims. Martin, *supra* note 23, at 51.

223. VA. CODE ANN. § 22.1-212.8(B) (Cum. Supp. 2015).

224. Martin, *supra* note 23, at 51–52.

225. *Id.*

226. *Id.* at 52.

E. Looking to Exemplary Charter Laws: District of Columbia

Washington, D.C., has a particularly strong charter law, and, while the District may differ from Virginia in some ways, it remains a valuable source of ideas to enhance the Commonwealth's charter school system. The District has 114 charter schools,²²⁷ compared to nine schools in Virginia.²²⁸ While the National Alliance for Public Charters did not even rank Virginia in its 2014 study, D.C. appeared at the very top of the list.²²⁹ Likewise, in a separate review, the Alliance ranked Virginia fortieth out of forty-three states surveyed, and placed D.C. ninth on its list.²³⁰ The scorecard lauded D.C.'s independent charter board authorizer.²³¹ It also praised the degree of autonomy and accountability the law accords charter schools and authorizers, aspects that spur charter growth.²³²

One unique and successful piece of the D.C. charter law is the establishment of a Public Charter School Board as an independent authorizer.²³³ The mayor appoints Board members who possess knowledge and experience in a number of areas relevant to approving charter schools.²³⁴ D.C. holds the Board accountable by subjecting it to independent audits.²³⁵ In addition to accountability, the D.C. charter law grants autonomy to each school via "exclusive control over its expenditures, administration, personnel, and instructional methods."²³⁶ The D.C. law explicitly exempts charter schools from statutes, policies, rules, and regulations established for public schools, further enhancing educational freedom.²³⁷

227. *About Us*, *supra* note 2. Quantity of schools does not equate to a quality charter school system, but D.C.'s numbers are nonetheless a testament to its facilitative law.

228. *Virginia's Public Charter Schools*, *supra* note 1.

229. *The Health of the Public Charter School Movement*, *supra* note 163, at 42–43.

230. *Measuring Up: District of Columbia*, NAT'L ALLIANCE FOR PUB. CHARTER SCHS., <http://www.publiccharters.org/get-the-facts/law-database/states/DC/> (last visited Feb. 19, 2016); *Measuring Up: Virginia*, *supra* note 3.

231. *Id.*

232. *Id.*

233. D.C. CODE § 38-1802.14(a)(1) (2013); *Charter Facts: DC Charter History*, FRIENDS OF CHOICE IN URB. SCHS., <http://www.focusdc.org/history> (last visited Feb. 19, 2016).

234. D.C. CODE § 38-1802.14(a)(2) (2013); Inman, *supra* note 155, at 7.

235. D.C. CODE § 38-1802.14(f) (2013).

236. *Id.* § 38-1802.04(c)(3)(A) (2013).

237. *Id.* § 38-1802.04(c)(3)(B) (2013).

The strength of the District's charter law has resulted in tremendous charter school growth. In the 2013–14 school year, 49% of D.C.'s public schools were charters, and 44% of D.C.'s students attended charter schools.²³⁸ The schools have demonstrated educational growth as well, with the equivalent of 72 more days per year in reading and 101 more days in math than traditional public schools.²³⁹ There is evidence that student performance in D.C. charter schools exceeds that of students in traditional public schools and continues to improve.²⁴⁰ The most important takeaway from the D.C. charter school model for Virginia is that it allows for the development of schools as interested parties see fit; there are no inherent roadblocks to using charter schools to meet identified educational needs.

CONCLUSION

The charter school movement is powerful, though not without controversy. Charter schools are premised on the desirable notion of providing parents and children with a choice in education that they may not otherwise have. The schools blend public funding with private management and enhance learning experiences, especially for underperforming students, through innovative methods. Many oppose the schools for a variety of reasons, and sometimes that opposition manifests in the form of litigation aimed to prevent charter school development. Most legal challenges have been unsuccessful and Virginia should not consider litigation a valid hindrance to charter growth. Virginia has not even begun to explore what charter schools could offer its public school students because the Commonwealth's charter law is so unwelcoming to the schools. Due to its restrictive law, Virginia is unable to draw top operators with experience and knowledge in the charter school field. By altering its law in certain ways, the General Assembly can create an environment hospitable to charter schools and to high quality managers. In so doing, the legislature would make Virginia's strong public school system even stronger.

238. *The Health of the Public Charter School Movement*, *supra* note 163, at 42.

239. *Id.*

240. See OFFICE OF THE STATE SUPERINTENDENT OF EDUC., 2014 DISTRICT OF COLUMBIA COMPREHENSIVE ASSESSMENT SYSTEM RESULTS 24–26 (July 31, 2014), http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/2014%20DC%20CAS%20Result%20July%2031%202014...FINAL_.pdf.

EPILOGUE

In the 2016 session, as required by Virginia constitutional procedure, the General Assembly again considered Senator Obenshain's proposed constitutional amendment to give the Board of Education power to establish charter schools.²⁴¹ Though the bill passed the House of Delegates,²⁴² it failed in the Senate by a 19-21 vote on February 15, 2016.²⁴³ The amendment addressed the authorizer problem in the Commonwealth's charter law, and its defeat emphasizes that Virginia is a long way from exploring the charter school movement.

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241. See S.J. Res. 6, Va. Gen. Assemb. (Reg. Sess. 2016); *supra* notes 151-52 and accompanying text.

242. Graham Moomaw, *House Votes to Give State the Power on Public Charter Schools*, RICH. TIMES-DISPATCH (Feb. 12, 2016, 3:30 PM), http://www.richmond.com/news/virginia/government-politics/article_2a45981b-8dc9-5152-a12f-0e7e57648f18.html.

243. Laura Vozzella, *Charter School Amendment Dies in Va. Senate*, WASH. POST (Feb. 15, 2016), https://www.washingtonpost.com/local/virginia-politics/charter-school-amendment-dies-in-va-senate/2016/02/15/681ad980-d417-11e5-be55-2cc3c1e4b76b_story.html.

* J.D. Candidate 2017, University of Richmond School of Law. B.A., 2010, University of Virginia. I would like to thank *University of Richmond Law Review* for their work on this comment, for supporting me throughout the writing process, and for making this a wonderful experience. I wish to thank those close to me for encouraging me in absolutely everything that I do. I also note that though charter schools may improve public education in many situations, I appreciate that they can be controversial in certain historical and political contexts. I allude to some of these ideas in the piece, but acknowledge that comprehensive analysis and full resolution is beyond its scope.