Charting the Course: Charter School Exploration in Virginia

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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, while neighboring District of Columbia is home to over one hundred. Organizations that evaluate states’ charter programs consistently rank Virginia near the bottom of their lists.

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

independently operated. The schools are aptly named because a charter agreement, a contract between the state and the school, governs each. Charter agreements typically outline the school’s “mission, program, goals, students served, methods of assessment, and ways to measure success.” Charter agreements vary in duration, though most average between three to five years before being eligible for renewal. 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. 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. For instance, in Virginia, charter applicants must outline performance-based goals and educational objectives that meet or exceed the Standards of Learning (“SOLs”), and failure to meet those standards may result in charter revocation.

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

7. Id.
8. Id.
12. Just the FAQs, supra note 9.
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." 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. A board of directors governs each charter school by overseeing the school's operations and finances. Non-profit boards are the most common model, though private, for-profit education management organizations also operate charter schools.

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. 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. Charters provide parents and students with educational choice, which is especially meaningful to those students who would otherwise not have such choice. 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. The charter school model enables children in these situations to attend a charter school in their district instead. 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. 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. POLY 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.
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
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, \textit{supra} note 5, at 319.


\(^{38}\) \textit{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).


\(^{40}\) \textit{Just the FAQs, supra} note 9.

\(^{41}\) Groshoff, \textit{supra} note 5, at 321.

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

\(^{43}\) \textit{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.
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, and the arts in general).
52. Church, Choice, and Charters, supra note 13, at 1754.
authors while their boards critically evaluate student progress.\textsuperscript{53}

\textbf{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.\textsuperscript{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.\textsuperscript{55} The survey found markedly different rates of success across the twenty-seven states studied.\textsuperscript{56} The Urban Charter School Report also found local variation within its results.\textsuperscript{57}

Critics argue that charters are at odds with integration and demographic inclusion efforts.\textsuperscript{58} They assert that charter schools may provide parents an opportunity to dissent against integration by choosing where their children attend school.\textsuperscript{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.”\textsuperscript{60} Black students enrolled in charter schools often attend charters that are even more segregated than traditional public schools.\textsuperscript{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.\textsuperscript{62}

\begin{itemize}
\item \textsuperscript{53} Id.
\item \textsuperscript{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”).
\item \textsuperscript{55} NATIONAL CHARTER SCHOOL STUDY EXECUTIVE SUMMARY, supra note 37, at 23.
\item \textsuperscript{56} Id.
\item \textsuperscript{57} CREDO STUDY FINDS URBAN CHARTER SCHOOLS OUTPERFORM TRADITIONAL SCHOOL PEERS, supra note 47.
\item \textsuperscript{58} Derek W. Black, Charter Schools, Vouchers, and the Public Good, 48 WAKE FOREST L. REV. 445, 463 (2013).
\item \textsuperscript{59} See id. at 464.
\item \textsuperscript{60} Ware & Robinson, supra note 6, at 2.
\item \textsuperscript{61} Id. at 5.
\item \textsuperscript{62} Id. at 21.
\end{itemize}
Another common criticism of charter schools is that they divert funds from traditional public schools. It is therefore not surprising that local school boards tend to oppose charters. In addition to their reluctance to sacrifice funds, school boards are often “unwilling to surrender their ‘vested’ public-school monopolies.” Sometimes local school boards and politicians simply dismiss charter schools as unnecessary because existing schools are performing sufficiently. Finally, teachers unions oppose charter schools because charter teachers are not automatically unionized, even though they often work grueling and extensive hours. A few charter schools also embrace merit pay, which unions strongly oppose.

II. LEGAL CHALLENGES TO CHARTER SCHOOLS

Charter opponents often turn to the legal system to prevent charter schools from opening. 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.


66. Ward, supra note 64.


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-sectarian or religiously sympathetic charter schools.80

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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.
76. See Saiger, supra note 4, at 1166.
77. Id.
78. See id. at 1189–90.
79. Durham & Smith, supra note 42.
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.\(^1\) Despite the participation of religiously affiliated schools in the voucher program, the Court held that it did not violate the Establishment Clause.\(^2\) The program was constitutional because it was “neutral in all respects toward religion.”\(^3\) State funds reached religious schools only because of the genuine and “independent decisions of private individuals.”\(^4\)

Though the *Zelman* decision did not address charter schools specifically, it was a seminal victory for educational choice programs.\(^5\) It indicates the Court’s apparent receptiveness to school choice programs with religious components.\(^6\) *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.\(^7\) 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.\(^8\) 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.\(^9\)

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82. *Id.* at 644.
83. *Id.* at 653.
84. *Id.* at 655.
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. 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. The Court importantly intimated, however, that in some cases single-sex schools could withstand such challenges.

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. 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. The sex-segregated admissions policy of the school was substantially related to those government objectives, rather than discrimination against females. 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. 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...
charter school enabling act, which prohibited charter enrollment from differing by more than 10% from the racial composition of the school district.77 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.78 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.79 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.”80

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.81 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.82 An earlier Washington case defined common schools as “subject to, and under the control of, the qualified voters of the school district.”83 Charter schools, the

78. 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.
80. Id. at 488.
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. 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.

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. 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. Though Georgia’s constitution allows the General Assembly to provide for the creation of “special schools,” 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. 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.

Legal challenges have not been a significant hindrance to the charter school movement. 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.


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).


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

III. CHARTER SCHOOLS IN VIRGINIA

Virginia's charter law is the key reason why the Common-
wealth 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 char-
ter 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 back-
ground, 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 suc-
cessful 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-

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
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-
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-

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126. Virginia’s Public Charter Schools, supra note 1.
127. See supra notes 97–100 and accompanying text.
129. See VA. CONST. art. VIII.
131. Id. § 22.1-212.8(B) (Cum. Supp. 2015).
133. Id. § 22.1-212.10 (Cum. Supp. 2015).
ly accepted” standards of fiscal management, or violate the law.\textsuperscript{134} Language such as “reasonable” and “generally accepted” in Virginia’s law gives local school boards a great deal of discretion.\textsuperscript{135} Moreover, local school boards may outline conditions for funding in their agreements with charter schools.\textsuperscript{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.\textsuperscript{137} School boards have full authority to deny applications for renewal.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{143} The amendments require school boards to provide charter school applicants with reasons for application denials and to post such reasons on their websites.\textsuperscript{144} They also allow applicants to petition

\textsuperscript{134} Id. § 22.1-212.12(B) (Cum. Supp. 2015).
\textsuperscript{135} Id.
\textsuperscript{136} Id. § 22.1-212.14(B) (Cum. Supp. 2015).
\textsuperscript{137} Id. § 22.1-212.12(A) (Cum. Supp. 2015).
\textsuperscript{138} Id. § 22.1-212.12(C) (Cum. Supp. 2015).
\textsuperscript{139} Id. § 22.1-212.6(A) (Cum. Supp. 2015).
\textsuperscript{140} Id. § 22.1-212.6(B) (Cum. Supp. 2015).
\textsuperscript{141} Id.
\textsuperscript{143} Charter Schools, supra note 112.
the local school board for reconsideration of a denial and to seek technical assistance from the Virginia Department of Education prior to doing so.\textsuperscript{145} School boards must establish processes for reconsideration, including public comment, but the school board's reconsideration decision is final and not appealable.\textsuperscript{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.\textsuperscript{147} However in 2013, the legislature altered that provision so that the Board of Education need not review applications initiated by local school boards.\textsuperscript{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.\textsuperscript{149} The amendment also eliminated a prior requirement that at least half of charter schools be for at-risk students.\textsuperscript{150}

In 2015, Senator Mark Obenshain proposed a state constitutional amendment that would give the Board of Education authority to establish charter schools.\textsuperscript{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.\textsuperscript{152} This would be a significant change for Virginia because under current law, only local school boards may approve charter applications.\textsuperscript{153}

\begin{itemize}
\item \textsuperscript{145} \textit{Id.}
\item \textsuperscript{146} \textit{Id.}
\item \textsuperscript{147} \textit{Id. at 1174–75.}
\item \textsuperscript{150} \textit{Id.}
\item \textsuperscript{153} See Editorial Board, \textit{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
\end{itemize}
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.\textsuperscript{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.\textsuperscript{155} The National Alliance for Public Charter Schools ranked Virginia’s charter law forty-third out of forty-three state laws surveyed in 2014, and gave it only 76 points out of a possible 228.\textsuperscript{156} The survey assigned states weighted points based on key components of a model charter law, including multiple authorizers, accountability, and autonomy.\textsuperscript{157} Similarly, the Center for Education Reform gave Virginia a grade of “F” on its 2013, 2014, and 2015 charter laws scorecards.\textsuperscript{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.”\textsuperscript{159} Despite continual “animosity of these boards to charters,” the state legislature has not yet changed the charter law to address this issue.\textsuperscript{160} Moreover, the U.S. Department of Education denied Virginia’s renewal of a charter school grant in

\textsuperscript{154} See id.


\textsuperscript{157} Measuring Up: Virginia, supra note 3.


\textsuperscript{159} CHARTER SCHOOL LAWS ACROSS THE STATES: 2015 RANKINGS AND SCORECARD, supra note at 3.

\textsuperscript{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-

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161. HARRIS, supra note 112, at 10–11.
164. CHARTER SCHOOL LAWS ACROSS THE STATES: 2015 RANKINGS AND SCORECARD, supra note 3, at 84.
165. See id.
167. Pope, supra note 65; Ward, supra note 64.
169. Id. § 22.1-212.9 (Cum. Supp. 2015); Measuring Up: Virginia, supra note 3.
verting money and resources from existing public schools\textsuperscript{171} and alleged lack of public support for proposed charters.\textsuperscript{172} Moreover, the nature of school boards as authorizers is problematic because they are related state education entities and therefore not independent.\textsuperscript{173}

This restriction to a single authorizing entity results in far fewer charter schools in Virginia than in states that allow multiple chartering authorities.\textsuperscript{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.\textsuperscript{176} 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.\textsuperscript{176}

A key weakness in Virginia's charter law is the lack of accountability for both charter schools and authorizers.\textsuperscript{177} Independent authorizers enhance charter school accountability because they "have full control over how they evaluate charter schools."\textsuperscript{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.\textsuperscript{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.\textsuperscript{180} While the law insists that authorizers base renewal decisions on evidence of the school's performance, it does not command authorizers to provide


\textsuperscript{172} Letter from Laura Hoofnagle, supra note 170.


\textsuperscript{174} Id.


\textsuperscript{176} Pope, supra note 65.

\textsuperscript{177} Measuring Up: Virginia, supra note 3.

\textsuperscript{178} Charter Authorizers: The Truth About State Commissions, supra note 173, at 1.


\textsuperscript{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

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.
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. 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. 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. 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. 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. Ideally, at least some authorizers should be independent from “existing state and local education agencies.”

Large non-profits have been effective au-
thorizers in states such as Minnesota. Other authorizers might include new independent state boards, such as the D.C. Public Charter School Board, or even mayors. States like New York and Michigan have had success empowering colleges and universities as authorizers. 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. 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. A switch to other authorizers may require amendment of Virginia’s constitution. Fortunately, one such change is already in motion.

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. 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. 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. Strong charter laws promote accountability
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.
211. Laws & Legislation, supra note 80.
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.
D. Other Concerns

Virginia could strengthen its charter statute by clearly stating the intent of the law.\textsuperscript{216} The Virginia Department of Education website describes charters as "alternative public schools,"\textsuperscript{217} which enables school boards to argue that charter schools are unnecessary.\textsuperscript{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,\textsuperscript{219} the Center for Education Reform found that most states do not fund equally in practice.\textsuperscript{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.\textsuperscript{221}

Charter schools are subject to liability on a number of grounds.\textsuperscript{222} Authorizers and charter managers currently must anticipate liability issues when creating their charter agreements,\textsuperscript{223} so Virginia should include provisions in its law which allocate liability among potential defendants, including personnel, governing boards, and the schools themselves.\textsuperscript{224} It should establish what defendants would have immunity and under what circumstances.\textsuperscript{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.\textsuperscript{226}

\begin{itemize}
\item \textsuperscript{216} \textit{Id.} at 5.
\item \textsuperscript{217} \textit{Charter Schools}, supra note 112.
\item \textsuperscript{218} \textit{Model Legislation for States}, supra note 193, at 5.
\item \textsuperscript{219} See VA. CODE ANN. § 22.1-212.14(A) (Cum. Supp. 2015); Inman, supra note 155, at 11.
\item \textsuperscript{220} \textit{Model Legislation for States}, supra note 193, at 20.
\item \textsuperscript{221} \textit{The Health of the Public Charter School Movement, supra} note 163, at 167; see also \textit{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.
\item \textsuperscript{222} See supra Part III. Charter schools are also vulnerable to lawsuits under contract, promissory estoppel, and third-party beneficiary claims. Martin, \textit{supra} note 23, at 51.
\item \textsuperscript{223} VA. CODE ANN. § 22.1-212.8(B) (Cum. Supp. 2015).
\item \textsuperscript{224} Martin, \textit{supra} note 23, at 51–52.
\item \textsuperscript{225} \textit{Id.}
\item \textsuperscript{226} \textit{Id.} at 52.
\end{itemize}
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,\(^2^2^7\) compared to nine schools in Virginia.\(^2^2^8\) 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.\(^2^2^9\) Likewise, in a separate review, the Alliance ranked Virginia fortieth out of forty-three states surveyed, and placed D.C. ninth on its list.\(^2^3^0\) The scorecard lauded D.C.’s independent charter board authorizer.\(^2^3^1\) It also praised the degree of autonomy and accountability the law accords charter schools and authorizers, aspects that spur charter growth.\(^2^3^2\)

One unique and successful piece of the D.C. charter law is the establishment of a Public Charter School Board as an independent authorizer.\(^2^3^3\) The mayor appoints Board members who possess knowledge and experience in a number of areas relevant to approving charter schools.\(^2^3^4\) D.C. holds the Board accountable by subjecting it to independent audits.\(^2^3^5\) 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.”\(^2^3^6\) The D.C. law explicitly exempts charter schools from statutes, policies, rules, and regulations established for public schools, further enhancing educational freedom.\(^2^3^7\)

\(^2^2^7\) 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.

\(^2^2^8\) Virginia’s Public Charter Schools, supra note 1.

\(^2^2^9\) The Health of the Public Charter School Movement, supra note 163, at 42–43.


\(^2^3^1\) Id.

\(^2^3^2\) Id.


\(^2^3^6\) Id. § 38-1802.04(c)(3)(A) (2013).

\(^2^3^7\) 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. 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. There is evidence that student performance in D.C. charter schools exceeds that of students in traditional public schools and continues to improve. 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.
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. Though the bill passed the House of Delegates, it failed in the Senate by a 19-21 vote on February 15, 2016. 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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* 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.