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EDUCATION

Elementary and Secondary Education: Propose an Amendment to the Constitution of Georgia so as to Clarify the Authority of the State to Establish State-Wide Education Policy; Restate the Authority of the General Assembly to Establish Special Schools; Provide that Special Schools Include State Charter Schools; Provide for Related Matters; Provide for the Submission of this Amendment for Ratification or Rejection; and for Other Purposes

CODE SECTIONS:	GA. CONST. art. VIII, § 1, para. 1 (amended); art. VIII, § 5, para. 1 (amended); art. VIII, § 5, para. 7 (amended)
BILL NUMBER:	HR 1162
ACT NUMBER:	762
GEORGIA LAWS:	2012 Ga. Laws 1364
SUMMARY:	The resolution proposes amendments to the Georgia Constitution that grant authority to the state to authorize charter schools. The resolution specifically prohibits the spending of local money on state-authorized charter schools. The resolution must be ratified by a statewide vote in November 2012.

Elementary and Secondary Education: Amend Title 20 of the Official Code of Georgia Annotated, Relating to Education, so as to Repeal an Article Relating to the Georgia Charter Schools Commission; Provide for Legislative Findings and Intent; Provide for Definitions; Provide for the Establishment of the State Charter Schools Commission; Provide for Its Membership, Duties, and Powers; Provide for Requirements for State Charter Schools; Provide for Information to Parents; Provide for an Annual Report; Provide for Financial Responsibility; Provide for Funding for State Charter Schools; Provide for Rules and Regulations; Revise Provisions Relating to Funding for State Chartered Special

Schools; Provide for Related Matters; Provide for Contingent Effectiveness; Provide for Automatic Repeal Under Certain Conditions; Repeal Conflicting Laws; and for Other Purposes

CODE SECTIONS:	O.C.G.A. §§ 20-2-2068.1, -2080 to -2092 (amended)
BILL NUMBER:	HB 797
ACT NUMBER:	766
GEORGIA LAWS:	2012 Ga. Laws 1298
SUMMARY:	The Act amends several sections of the Georgia Code relating to the creation and funding of charter schools by the State. The Act provides for the creation of a State Charter School Commission that may authorize charter schools. It further provides and clarifies the funding mechanisms for state-chartered schools, the process of nominating and selecting Commission members, the duties of the Commission, and the rules and regulations pertaining to state-authorized charter schools.
EFFECTIVE DATE:	O.C.G.A. § 20-2-2068.1, July 1, 2012; §§ 20-2-2080 to -2092, January 1, 2013.[1]

Introduction

This Article considers the proposed amendments to the Georgia Constitution regarding charter schools—House Resolution (HR) 1162—and its associated enabling legislation—House Bill (HB) 797. The legislation package is, for the most part, the General Assembly's response to the Supreme Court of Georgia's May 2011 decision in *Gwinnett County Public Schools v. Cox*,[2] which invalidated the 2008 Charter Schools Commission Act and held that local school boards

1. Portions of HB 797 become effective only if Georgia citizens ratify HR 1162 at the ballot box in November 2012.

2. *See infra* note 270.

have "exclusive local control" of public education.[3] Part I of the Article traces the history and background of education in Georgia and includes a brief review of constitutional and statutory developments relevant to charter schools. Additionally, Part I provides a brief introduction to the concept of a charter school and concludes with a summary of both the majority and dissenting opinions in *Cox*.

Part II tracks the journey of HR 1162 through the House and Senate and provides details of the deliberative process, including discussion of key tension points in the debates, amendments, and votes in committee and on the floor of each chamber. Part III provides a similar analysis for HB 797. Part IV and Part V, respectively, describe the substantive content of HR 1162 and HB 797 as passed by both chambers of the General Assembly. Part VI offers an objective analysis that considers the arguments of both supporters and opponents of the charter school legislation package. This Article concludes by referring to the upcoming ballot question asking voters, in effect, to decide whether to abrogate the *Cox* decision and allow the State to authorize charter schools over the objection of a local board of education.

History and Background

From James Oglethorpe to Nathan Deal: The Evolution of Georgia's Educational Resources

In 1732, the Trustees of the new colony in Georgia received a donation of one thousand spelling books from James Leake of London.[4] Later that summer "over two thousand books . . . were given for a public library in the colony."[5] When James Oglethorpe landed at Savannah early the next year with his own charter in hand, a minister and a schoolmaster joined him; together, these three "college-bred men" attended to the "governmental, educational and spiritual needs" of the thirty-five families settling the new colony.[6]

3. Gwinnett Cnty. Sch. Dist. v. Cox, 289 Ga. 265, 265, 710 S.E.2d 773, 775 (2011).

4. HAYGOOD S. BOWDEN, TWO HUNDRED YEARS OF EDUCATION: BICENTENNIAL 1733–1933, SAVANNAH, CHATHAM COUNTY, GEORGIA 45 (1932).

5. *Id.*

6. *Id.* at xiii, 19, 45.

Today, nearly three hundred years later, some 1.7 million students attend roughly 2,300 individual public schools in Georgia.[7] The state "spend[s] more on public education than on anything else"[8] and appropriates roughly $7 billion each year to fund its K-12 public schools.[9] Despite all this, public education in Georgia today is underfunded by $1.1 billion.[10]

The Pendulum of Power: A Brief Constitutional History

The history of public education in Georgia is complicated.[11] Ten different constitutions and a variety of statutory enactments have, in one way or another, impacted the balance of power in the educational context.[12] The original 1777 Constitution provided that "schools shall be erected in each county and supported at the general expense of the State, as the legislature shall hereafter point out and direct."[13] After the Civil War, the 1868 Constitution provided that "the general assembly . . . shall provide a thorough system of general education, to be forever free to all children of the State, the expense of which shall be provided for by taxation or otherwise."[14] Two years later, in 1870, the General Assembly enacted comprehensive education legislation that, among other things, established the State Board of Education, created school districts in each Georgia county to manage the schools located there, and allowed for state creation of separately authorized schools aside from those managed by the new county school

7. *Cox*, 289 Ga. 265, 294, 710 S.E.2d 773, 794 (Nahmias, J., dissenting) (citations omitted).

8. *Id.* at 314, 710 S.E.2d at 807.

9. THE GOVERNOR'S BUDGET REPORT: AMENDED FISCAL YEAR 2011, at 14 (2011), *available at* http://opb.georgia.gov/sites/opb.georgia.gov/files/imported/vgn/images/portal/cit_1210/41/38/167205168State%20of%20Georgia%20Budget%20Amended%20FY2011.pdf.

10. *See* Telephone Interview with J. Alvin Wilbanks, Superintendent of Gwinnett County Public Schools (June 22, 2012) [hereinafter Wilbanks Interview]. For example, Superintendent Wilbanks indicated that Gwinnett County's public school budget had been cut by $631 million as a result of austerity reductions since 2003. *Id.* The State has $113.3 million in reductions slated for Gwinnett County during fiscal year 2012–2013. *Id.*

11. *See generally Cox*, 289 Ga. at 280–94, 710 S.E.2d at 785–94 (detailing history of public education in Georgia); McDaniel v. Thomas, 248 Ga. 632, 649–59, 285 S.E.2d 156, 168–75 (1981) (same); DOROTHY ORR, A HISTORY OF EDUCATION IN GEORGIA (1950) (same).

12. For a detailed discussion of the constitutional and statutory evolution, from which much of this section is adapted, see *Cox*, 289 Ga. at 280–94, 710 S.E.2d at 785–94 (Nahmias, J., dissenting).

13. *Cox*, 289 Ga. at 280, 710 S.E.2d at 785 (quoting GA. CONST. of 1777, art. LIV).

14. *Id.* at 280–81, 710 S.E.2d at 785 (quoting GA. CONST. of 1868) (internal alterations omitted).

districts.[15] An 1872 change to this law clarified the right of cities or counties to create their own independent schools.[16] Following Reconstruction, the 1877 Constitution provided that "[t]here shall be a thorough system of common schools for the education of children in the elementary branches . . . , as nearly uniform as practicable, the expenses of which shall be provided for by taxation, or otherwise."[17] Like the one before it, the 1877 Constitution "did not mention county 'boards of education' or assign them the authority to establish and control local schools."[18]

In 1906, the General Assembly passed a law "requiring every county board of education in Georgia to divide the county into school districts with clear boundary lines" that were authorized to raise their own money and manage their own schools.[19] By 1945—for a variety of reasons both economic and social—there were approximately 2,000 school systems in Georgia.[20] As a result, the 1945 Constitution consolidated control in one county-wide Board of Education that had exclusive authority to manage schools in that county.[21] Moreover, the 1945 Constitution prohibited the creation of new independent school systems.[22] Following a Georgia Supreme Court decision[23] denying a city and a county the legal authority to build and operate a high school together, the citizens of Georgia in 1960 amended the constitution to allow "[a]ny two or more counties, or any two or more municipalities, or any county and municipality, or combination thereof [to] jointly establish *area schools*, including vocational trade schools."[24] Another amendment followed in 1966 that, among other things, repealed the 1960 amendment and permitted "[t]he board of education of any county, area school district or independent school

15. *Id.* at 281, 710 S.E.2d at 785 (citing 1870 Ga. Laws 49, at 49–61). Dissenting in *Cox*, Justice Nahmias notes that "sometimes the word 'chartered' is used" when describing these state-created schools. *Id.* at 281, 710 S.E.2d at 785 (Nahmias, J., dissenting).

16. *Id.* at 281–82, 710 S.E.2d at 786 (citing 1872 Ga. Laws 62, at 64, 75).

17. *Id.* (citing GA. CONST. of 1877, art. VIII, § 1, para. 1).

18. *Cox*, 289 Ga. at 282, 710 S.E.2d at 786.

19. *Id.* at 282, 710 S.E.2d at 786.

20. *Id.* at 281–84, 710 S.E.2d at 786–88.

21. *Id.* at 285, 710 S.E.2d at 788.

22. *Id.*

23. Tipton v. Speer, 211 Ga. 886, 89 S.E.2d 633 (1955).

24. *Cox*, 289 Ga. at 285, 710 S.E.2d at 788 (emphasis added) (quoting 1960 amendment to the Georgia Constitution and providing citations to public laws proposing and recording ratification of amendment).

system, or any combination thereof, [to] establish . . . one or more *area schools*, including *special schools* such as vocational trade schools, schools for exceptional children, and schools for adult education."[25] Notably, the General Assembly could not create such special schools; that power remained with voters in the affected districts.[26] The General Assembly did, however, have the authority to determine by local law the way in which a local board established and operated a special school.[27]

Georgia's current constitution took effect in 1983 and "maintained the basic public education scheme of county, area, and pre-existing independent school *systems*, along with the prohibition on establishing new independent systems."[28] Local boards retained authority to establish, control, and manage their own school systems.[29] But the 1983 Constitution included one significant change: it authorized the General Assembly to create its own separately authorized special schools.[30] In a paragraph entitled "Special schools" that gave rise to the current controversy, the 1983 Constitution provided:

> The General Assembly may provide by law for the creation of special schools in such areas as may require them and may provide for the participation of local boards of education in the establishment of such schools under such terms and conditions as it may provide; but no bonded indebtedness may be incurred nor a school tax levied for the support of special schools without the approval of a majority of the qualified voters voting thereon in each of the systems affected. Any special schools shall be operated in conformity with regulations of the State Board of Education pursuant to provisions of law. The state is authorized to expend funds for the support and maintenance of special

25. *Id.* at 286, 710 S.E.2d at 789 (emphasis added) (quoting 1966 amendment to the Georgia Constitution and providing citations to public laws proposing and recording ratification of amendment).
26. *Id.* at 287, 710 S.E.2d at 789.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Cox*, 289 Ga. at 287, 710 S.E.2d at 789.

> schools in such amount and manner as may be provided by law.[31]

As Justice Nahmias noted in dissent in *Cox*, three important differences emerged from this language.[32] First, "'areas [sic] schools, including special schools' became 'special schools in such areas as may require them.'"[33] Second, the three illustrative examples of special schools were eliminated.[34] Third, the General Assembly acquired unilateral authority to create its own special schools—something it had not been able to do since the 1945 Constitution proscribed the creation of any new independent school systems.[35] Three statutory enactments soon followed that refined the General Assembly's newfound power.

What Are Charter Schools, and Why Does it Matter Who Authorizes Them?

"A charter simply means contract."[36] More specifically, a charter school in Georgia is a public, nonsectarian, nonreligious school that operates pursuant to a contract called a charter as opposed to the rules and regulations that govern other public schools.[37] The charter details "the school's mission, program, goals, students served, methods of assessment, and ways to measure success."[38] Before a charter school can open, however, applicants must seek approval from an authorizer.[39]

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31. GA. CONST. art. VIII, § 5, para. 7.
32. *Cox*, 289 Ga. at 287–88, 710 S.E.2d at 790.
33. *Id.* at 287, 710 S.E.2d at 790.
34. *Id.* The three illustrative examples were "vocational trade schools, schools for exceptional children, and schools for adult education." *See supra* note 25 and accompanying text.
35. *Id.* at 288, 710 S.E.2d at 790.
36. *See* Telephone Interview with Rep. Jan Jones (R-46th) (Apr. 18, 2012) [hereinafter Jones Interview].
37. *Frequently Asked Questions*, GA. CHARTER SCH. ASS'N, http://www.gacharters.org/about-us/faq/ (last visited Aug. 29, 2012) [hereinafter FAQs]; *see also* Denise M. Kazlauskas, *Elementary and Secondary Education*, 15 GA. ST. U. L. REV. 101, 111 (1998) [hereinafter HB 353 Peach Sheet].
38. FAQs, *supra* note 37.
39. Caroline Freeman, *Elementary and Secondary Education*, 25 GA. ST. U. L. REV. 47, 48–49 (2008) [hereinafter HB 881 Peach Sheet].

An authorizer is an "entity or body approved by the legislature to bring into existence charter schools."[40] In early 2009, forty-one states and the District of Columbia had enacted some form of charter school legislation.[41] More than half of the states have multiple authorizers.[42] Some research suggests that having multiple authorizers within a state does not benefit education;[43] continued research is needed, however, to determine the precise effect of multiple authorizers on education.[44] Either way, a substantial majority (80%) of the nation's charter schools exist in states with multiple authorizers.[45] The nation's first charter school opened in Minnesota in 1992.[46] Georgia entered the charter school business the following year.[47]

Twenty Years Later: Charter Schools and the Official Code of Georgia

Since 1993, three acts of the General Assembly have provided for the authorization of charter schools in Georgia. The General Assembly passed the state's first charter school law in 1993 (1993 Act).[48] In 1998, the General Assembly repealed the 1993 law and enacted a more comprehensive system for charter schools under the Charter Schools Act of 1998 (1998 Act).[49] Finally, in 2008, the General Assembly passed HB 881—the Charter Schools Commission

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40. *Id.* at 50 (citations omitted).

41. NAT'L ASS'N OF CHARTER SCH. AUTHORIZERS, POLICY GUIDE: MULTIPLE CHARTER AUTHORIZING OPTIONS 1 (2009), *available at* http://www.qualitycharters.org/images/stories/Multiple_Authorizers.pdf [hereinafter AUTHORIZING OPTIONS].

42. *Id.*

43. *See* CREDO, MULTIPLE CHOICE: CHARTER SCHOOL PERFORMANCE IN 16 STATES 4 (2009), *available at* http://credo.stanford.edu/reports/MULTIPLE_CHOICE_CREDO.pdf [hereinafter CREDO].

44. *Id.* For example, there is some recognized benefit to an appeals process following the denial of a petition. *Id.*

45. AUTHORIZING OPTIONS, *supra* note 41, at 1.

46. Kristina Torres, *Clinton to Visit City Academy/First Charter School in Nation Prepares to Show Off for President*, ST. PAUL PIONEER PRESS, May 2, 2000, at 1B LOCAL.

47. *See infra* note 48 and accompanying text.

48. 1993 Ga. Laws 1440 (formerly found at O.C.G.A. § 20-2-255) (repealed 1998); HB 353 Peach Sheet, *supra* note 37, at 104.

49. 1998 Ga. Laws 1080 (codified at O.C.G.A. §§ 20-2-2060 to 2071 (2011)); *see also* HB 353 Peach Sheet, *supra* note 37, at 105.

Act (2008 Act).[50] The Supreme Court of Georgia ultimately invalidated the 2008 Act as unconstitutional on May 16, 2011.[51]

Under the 1993 Act, existing public schools petitioned local school boards for approval—but only if the application was first approved by two-thirds of parents, faculty, and staff.[52] If the local school board approved, the school could then petition the State Board of Education for final charter status.[53]

Only five years later, the General Assembly repealed and replaced the 1993 Act with the 1998 Act.[54] The 1998 Act provided that applicants could petition to establish start-up charter schools in addition to converting existing schools.[55] Over the next decade, the 1998 Act was amended several times.[56] A 2005 amendment, for instance, *required* the state board to approve the petition if approved first by the local board and if the petition complied "with the rules, regulations, policies, and procedures promulgated" by the State Board of Education.[57] Additionally, the 2005 amendment provided that if the local school board denied the petition, a start-up charter school applicant could petition the State Board of Education directly for charter school status.[58] In 2007, the law was further amended to allow local school boards to petition the state to allow entire school districts to operate under a charter.[59]

Importantly, the 1998 Act authorized the creation of "local charter school[s]" and "state chartered special school[s]."[60] Local charter schools were authorized and operated pursuant to a charter with the local board; state chartered special schools were authorized according

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50. 2008 Ga. Laws 603 (codified at O.C.G.A. §§ 20-2-2080 to 2092 (2011)), *invalidated by* Gwinnett Cnty. Sch. Dist. v. Cox, 289 Ga. 265, 710 S.E.2d 773 (2011); *see also* HB 881 Peach Sheet, *supra* note 39, at 67.

51. Gwinnett Cnty. Sch. Dist. v. Cox, 289 Ga. 265, 275, 710 S.E.2d 773, 781 (2011).

52. *See* 1993 Ga. Laws at 1441–45. The law was amended in 1995 to only require a majority of faculty, staff, and parents to approve. HB 353 Peach Sheet, *supra* note 37, at 105.

53. *See* 1993 Ga. Laws at 1441–45.

54. 1998 Ga. Laws 1080.

55. 1998 Ga. Laws at 1082 (codified at O.C.G.A. § 20-2-2061 (2011)). For a more thorough review of charter school legislation before and up to the 1998 Act, see *Cox*, 289 Ga. at 288–89, 710 S.E.2d at 790–91; HB 353 Peach Sheet, *supra* note 37, at 101–14.

56. HB 881 Peach Sheet, *supra* note 39, at 48.

57. 2005 Ga. Laws 798, § 11, at 808 (codified at O.C.G.A. § 20-2-2064.1 (2011)) ("The state board *shall* approve the charter of a charter petitioner if . . . .") (emphasis added).

58. *Id.*

59. 2007 Ga. Laws 185 (codified at O.C.G.A. § 20-2-2063.2 (2011)).

60. O.C.G.A. § 20-2-2062 (2011).

to the terms of a charter with the state board.[61] The 1998 Act referenced the special schools provision of the 1983 Constitution, defining a special school as "a school whose creation is authorized pursuant to Article VIII, Section V, Paragraph VII of the Constitution."[62] The funding mechanism for these state chartered special schools can be found in Code section 20-2-2068.1.[63]

The 2008 Act resulted, in part, from "concerns that local school boards would not approve charter school petitions and that funding for . . . the state charter schools[] was too limited."[64] The 2008 Act created the Georgia Charter Schools Commission (Commission), which was primarily intended to develop and support state charter schools.[65] Like the 1998 Act, the 2008 Act referenced the 1983 Constitution and its "special schools" provision: "'Commission charter school' means a charter school authorized by the commission pursuant to this article whose creation is authorized as a special school pursuant to Article VIII, Section V, Paragraph VII of the Constitution."[66] The 2008 Act included, among other things, a zero sum funding mechanism that attached state funds to students; when a student enrolled in a Commission charter school, the money apportioned for that child's education traveled with her.[67] As a result, local school systems received "reduced state and federal funding in proportion to the number of students residing in their districts that [chose] to attend [C]ommission charter schools."[68] Needless to say, local schools systems did not welcome this new funding scheme with open arms. In 2009 and 2010, seven school districts filed suit seeking

61. *Id.*

62. Gwinnett Cnty. Sch. Dist. v. Cox, 289 Ga. 265, 289, 710 S.E.2d 773, 790 (2011) (Nahmias, J., dissenting) (citing GA. CONST. of 1983) (internal quotation marks omitted).

63. *Id.*

64. *Id.* at 289–90, 710 S.E.2d at 791 (citing HB 881 Peach Sheet, *supra* note 39, at 51–52).

65. O.C.G.A. § 20-2-2080(b) (2011), *invalidated by* Gwinnett Cnty. Sch. Dist. v. Cox, 289 Ga. 265, 710 S.E.2d 773 (2011).

66. O.C.G.A. § 20-2-2081 (2011), *invalidated by* Gwinnett Cnty. Sch. Dist. v. Cox, 289 Ga. 265, 710 S.E.2d 773 (2011).

67. O.C.G.A. § 20-2-2090(c) (2011), *invalidated by* Gwinnett Cnty. Sch. Dist. v. Cox, 289 Ga. 265, 710 S.E.2d 773 (2011) ("The total allotment of state and federal funds to the local school system in which a student attending a Commission charter school resides shall be calculated as otherwise provided in Article 6 of this chapter with an ensuing reduction equivalent to the amount of state and federal funds appropriated to the Commission charter schools pursuant to subsection (a) of this Code section.").

68. *Cox*, 289 Ga. at 291, 710 S.E.2d at 792 (Nahmias, J., dissenting).

to invalidate the 2008 Act.[69] Their complaints were consolidated and heard by the Fulton County Superior Court and, eventually, the Supreme Court of Georgia.[70]

A Divided Supreme Court Invalidates the 2008 Charter Schools Commission Act

Chief Justice Hunstein's Majority Opinion: Exclusive Local Control

By a margin of 4-3, the Supreme Court of Georgia invalidated the 2008 Act on its face.[71] Considering "the constitutional question of whether a school indistinguishable from the general K-12 public schools established by local boards of education is a 'special school' under Art. VIII, Sec. V, Par. VII(a) merely because it was not created by a local board of education," the court held that the 2008 Act "palpably violates Art. VIII, Sec. 5, Par. VII(a) by authorizing a State [C]ommission to establish competing State-created general K-12 schools under the guise of being 'special schools.'"[72] In the majority opinion written by Chief Justice Hunstein, the court stated that "[t]he constitutional history of Georgia could not be more clear that, as to general K-12 public education, local boards of education have the *exclusive authority* to fulfill one of the 'primary obligation[s] of the State of Georgia,' namely '[t]he provision of an adequate public education for the citizens.'"[73] The majority supported its opinion with several rationales: (1) a 134-year-old constitutional status quo establishing exclusive local control of K-12 public education;[74] (2)

69. *Id.* at 265 n.1, 710 S.E.2d at 775 n.1 (providing list of plaintiff-school systems that includes the Gwinnett County School District; the Bulloch and Candler County School Districts; the DeKalb County School District and the Atlanta Independent School System; and the Griffin-Spalding County and Henry County School Districts).

70. *Id.* at 265, 710 S.E.2d at 775.

71. *See id.* at 265–76, 710 S.E.2d at 775–82.

72. *Id.* at 265, 274, 710 S.E.2d at 775, 781.

73. *Id.* at 266, 710 S.E.2d at 776 (emphasis added). "[O]ur constitution embodies the fundamental principle of exclusive local control of general primary and secondary . . . public education . . . ." *Id.* "[O]ur constitutions . . . have limited governmental authority over the public education of Georgia's children to that level of government closest and most responsive to the taxpayers and parents of the children being educated." *Id.*

74. *Cox*, 289 Ga. at 265–66, 710 S.E.2d at 775 (stating that article VIII, section V, paragraph I of the 1983 Constitution, granting authority to "'county and area boards of education to establish and maintain

conditions present in 1983 that suggested "special schools" included only those that enrolled students with certain "special needs" (i.e., charter schools did not exist in 1983 so the clause should not be construed to include them);[75] (3) the legislative history associated with the ratification of the 1983 Constitution;[76] and (4) the ordinary meaning of the word "special."[77] Concerned that Commission charter schools "necessarily operate in competition with or duplicate the efforts of locally controlled general K-12 schools by enrolling the same types of K-12 students who attend locally controlled schools and by teaching them the same subjects that may be taught at locally controlled schools," the court proceeded to dismiss several arguments offered to support the constitutionality of the 2008 Act.[78]

The court first rejected the argument that the General Assembly could define what constitutes a "special school" under the constitution because "[c]onstruing the Constitution is the function of the judiciary and the General Assembly has no power to make such a construction."[79] Second, the court insisted that the removal of the three examples of special schools from the 1983 Constitution did not broaden the definition of special schools because the revised constitution retained the word "special," which still precludes creation by the state of schools that are "non-special."[80] Third, the court disagreed with the contention that charter schools are special on account of their "unique charters, their individualized, performance-based contracts and their educational philosophy" because "every

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public schools within their limits' . . . continues the line of constitutional authority, unbroken since it was originally memorialized in the 1877 Constitution of Georgia, granting local boards of education the exclusive right to establish and maintain, i.e., the exclusive control over, general K-12 public education") (quoting GA. CONST. art. VIII, sec. V, para. I).

75. *Id.* at 269, 710 S.E.2d at 777 ("[T]he 'conditions existing' at the time of the adoption of the 1983 Constitution reflected that 'special schools' were those that enrolled only students with certain special needs, e.g., adults, deaf or blind children, and those that taught only certain special subjects, e.g., vocational trade schools with jobs-oriented curricula.").

76. *Id.* at 269–71, 710 S.E.2d at 778–79 (quoting statements of several legislators suggesting the term "special schools" was to be narrowly construed).

77. *Id.* at 271–72, 710 S.E.2d at 779 ("[T]he phrase 'special schools' is most readily interpreted by defining what those schools are *not*. . . . [They] are not general K-12 schools. . . . [S]chools that 'exist as a public school within the [S]tate as a component of the delivery of public education within Georgia's K-12 education system' and provide 'public education to all students' do not qualify as 'special schools.'") (citations omitted).

78. *Id.* at 268, 270–76, 710 S.E.2d at 777, 779–82.

79. *Id.* at 272–73, 710 S.E.2d at 779–80.

80. *Cox*, 289 Ga. at 272–73, 710 S.E.2d at 780.

general K-12 public school has an educational philosophy [and] a 'unique operating charter.'"[81] Fourth, the majority rejected as circular the appellees' contention that the manner in which charter schools are created by the Commission makes them unique.[82] Fifth, in response to the suggestion that charter schools are special schools because they are not directly funded by local schools taxes, the court stated there is "no constitutional significance as to the source of funding" that would save the Act.[83] Finally, the court rejected several cases offered in support of appellees' interpretation of "special schools" as off point.[84]

In the end, the majority refused to judicially re-write the statute in order to save it from invalidation because "the Act contains no safeguards whatsoever to prevent the creation of unconstitutional schools [and] the unconstitutional part 'is so connected with the general scope of the statute that, should it be stricken out, effect can not be given to the legislative intent.'"[85] After noting that the appellees' goals were "laudable," the majority stated in a conclusory manner that it "carefully considered the remaining arguments raised in support of the Act by the dissent and [found] them to be without merit."[86]

Dissenting Opinions: A State and Local Partnership in Education

The dissenting opinions of two justices followed.[87] First, in a brief dissent joined by Justices Nahmias and Carley, Justice Melton noted that "even under the majority's faulty constructs and its incorrect

81. *Id.* at 273, 710 S.E.2d at 780.

82. *Id.* at 273–74, 710 S.E.2d at 780–81. The majority suggested the Commission charter schools were problematic because they "do not enroll students *categorically different* from those at locally controlled schools or teach subjects *wholly unlike* those that may be taught in locally controlled schools." *Id.* at 274, 710 S.E.2d at 781 (emphasis added). In his dissent, Justice Nahmias criticizes this standard as too demanding. *Id.* at 311, 710 S.E.2d at 805 (Nahmias, J., dissenting) ("[N]o [C]ommission charter school could ever be created that meets that demanding test . . . . [N]o 'special school' *of any kind* could withstand such scrutiny.").

83. *Id.* at 274, 710 S.E.2d at 781.

84. *Id.*

85. *Id.* at 275–76, 710 S.E.2d at 782.

86. *Cox*, 289 Ga. at 276, 710 S.E.2d at 782.

87. *Id.* at 276–78, 710 S.E.2d at 783 (Melton, J., dissenting); *id.* at 278–318, 710 S.E.2d at 783–810 (Nahmias, J., dissenting).

definition of 'special schools,'" the presumption of constitutionality and the fact that the 2008 Act is not unconstitutional "in all of its applications"[88] should have been enough to support its validity.[89] Second, Justice Nahmias (joined by the other two dissenting justices) outlined his views regarding the constitutionality of the 2008 Act in a twenty–eight page dissent.[90]

After methodically walking through the constitutional and statutory history of education in Georgia, Justice Nahmias provided several reasons to support his charge that the "majority's reasoning and its result [were] terribly wrong."[91] In short, he rejected the majority's "one-or-the-other" approach in favor of a complementary power scheme where the State has "*both* public schools and school systems that were established statewide in each county . . . *and* individual schools and school systems that the General Assembly established directly through special and local laws, separate from the common county systems."[92]

In reaching his conclusion that the 2008 Act should be upheld as constitutional, Justice Nahmias focused on: (1) the ordinary meaning of "special";[93] (2) the necessity of construing "special school" broadly after removal of the examples of special schools from the constitution;[94] (3) the importance of "applying old constitutional words to new circumstances" in a way that considers "the meaning of 'special schools' as citizens in 1983 understood that term"—not whether charter schools existed at the time;[95] (4) the constitutional context of the provisions involved;[96] (5) the constitutional history of

88. Justice Melton identified Ivy Preparatory Academy, a girls only charter school, as a constitutionally acceptable special school. *Id.* at 277–78, 710 S.E.2d at 783 (Melton, J., dissenting).

89. *Id.* at 277–78, 710 S.E.2d at 783.

90. *See id.* at 278–319, 710 S.E.2d at 783–810 (Nahmias, J., dissenting). There is some suggestion Justice Nahmias "believed his would be the majority opinion." Jones Interview, *supra* note 36, at 2.

91. *Cox*, 289 Ga. at 278–79, 710 S.E.2d at 783–84 (Nahmias, J., dissenting) ("The majority may be able to change our law, but it cannot change our history or the words of our Constitution.").

92. *Id.* at 278, 710 S.E.2d at 784 (Nahmias, J., dissenting).

93. *Id.* at 295–96, 710 S.E.2d at 795 (Nahmias, J., dissenting) ("[S]pecial means simply of a kind different from others . . . .") (quoting Webster's New World College Dictionary) (internal quotation marks omitted).

94. *Id.* at 297–98, 710 S.E.2d at 795–96 (Nahmias, J., dissenting) ("In my view, a local school for special students is simply another local school, because a 'special school' is defined not by its student body or the subjects it teaches, but by its creation by the General Assembly outside the common county school system.").

95. *Id.* at 298–99, 710 S.E.2d at 796–97 (Nahmias, J., dissenting).

96. *Id.* at 299–302, 710 S.E.2d at 797–99 (Nahmias, J., dissenting) ("[The constitution] gives local

shared control of education in Georgia;[97] (6) the fact that "special schools" is not used in the 1983 Constitution as a term of art;[98] (7) the existence of Attorney General opinions concluding that "the General Assembly has expansive authority to create 'special schools,' including state charter schools";[99] (8) the presence of conflicting statements in the legislative record, including some that support a broad interpretation of the term "special schools";[100] (9) the analytical problems associated with defining "just how different a special school must be in terms of its student body and curriculum" to be "special" under the majority's definition;[101] (10) the fact that the court "[i]n the normal course of constitutional adjudication . . . would clearly hold what a 'special school' is" and so limit the Commission to creating such schools;[102] and (11) the possibility that the majority's decision "throws much of Georgia's public education law into turmoil" and also ignores its own precedent imposing a duty on the state and General Assembly to provide its citizens "an 'adequate education.'"[103]

In conclusion, Justice Nahmias stated that the "appellants never argued for what the majority has given them and their fellow local school systems, and they may come to regret their 'victory' on the relatively minor issue of state-chartered schools as they deal with the turmoil and new obligations that the majority opinion generates."[104] Perhaps intimating that the lawsuit might have created a mountain out of a molehill, Justice Nahmias noted that "well under 1% of the

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districts the *exclusive* right to establish and maintain general K-12 public schools. But the Constitution does not say that local boards have exclusive authority over schools. . . . But there is something else too. There is . . . the grant of authority to the General Assembly to create not new schools *systems* but new *schools*—special schools in such areas as may require them.") (internal quotation marks omitted).

97. *Cox*, 289 Ga. at 303–05, 710 S.E.2d at 799–801 (Nahmias, J., dissenting) ("The reality . . . is that public education in Georgia . . . has *always* been a responsibility *divided* between the common county school systems created by general laws and the entirely separate independent or special schools and school systems created by special or local laws.") (internal quotation marks omitted).

98. *Id.* at 305, 710 S.E.2d at 801 (2011) (Nahmias, J., dissenting).

99. *Id.* at 307, 710 S.E.2d at 802 (Nahmias, J., dissenting).

100. *Id.* at 307–08, 710 S.E.2d at 802–03 (Nahmias, J., dissenting).

101. *Id.* at 308–12, 710 S.E.2d at 803–06 (Nahmias, J., dissenting). Justice Nahmias identifies a related problem: what is the status of a school "that is 'special' when it is created but later loses its distinctiveness[?] . . . [D]oes a 'once-but-no-longer special' school become unconstitutional?" *Id.* at 309 n.21, 710 S.E.2d at 803 n.21 (Nahmias, J., dissenting).

102. *Id.* at 310, 710 S.E.2d at 804 (Nahmias, J., dissenting).

103. *Cox*, 289 Ga. at 313–16, 710 S.E.2d at 806–07 (Nahmias, J., dissenting).

104. *Id.* at 314, 710 S.E.2d at 807 (Nahmias, J., dissenting).

almost 2,300 public schools in Georgia are Commission charter schools, state chartered special schools established under the 1998 Act, or area schools for the deaf and blind."[105] Continuing, Justice Nahmias stated that "no substantial duplication [of educational efforts] is ever likely to exist without amendment of the Constitution."[106] Finally, Justice Nahmias admonished his fellow justices for overstepping judicial boundaries and "remov[ing] the issue from the political process."[107] That is, of course, "unless the General Assembly and the people of our State bear the delay and enormous burden required to correct the Court's error through a constitutional amendment."[108]

In Limbo: State-Authorized Charter Schools After Cox

In 2011, there were 162 approved charter schools in Georgia, a substantial majority of which were approved by the local boards of education.[109] A March 1, 2012, Department of Education enrollment report identifies only five "Commission Charter Schools,"[110] eight "State Charter Schools,"[111] and three "State Schools"[112] with active

105. *Id.* at 316, 710 S.E.2d at 808 (Nahmias, J., dissenting). Disputing the majority's contention that the Commission is not sufficiently accountable to the people and could abuse the local tax base, Justice Nahmias also reiterated that "the commissioners are as accountable as the many other appointed officials in our State Government who make decisions that affect every Georgian" and, on the financial front, that "[n]ot a single dollar of local school taxes goes, directly or indirectly, to [C]ommission charter schools." *Id.* at 318, 710 S.E.2d at 809 (Nahmias, J., dissenting) (emphasis omitted).

106. *Id.* at 316, 710 S.E.2d at 808 (Nahmias, J., dissenting).

107. *Id.* at 318, 710 S.E.2d at 810 (Nahmias, J., dissenting).

108. *Id.*

109. *See* GA. DEP'T OF EDUC., CHARTERING IN GEORGIA: 2010–2011, 27 (2012), *available at* http://www.doe.k12.ga.us/External-Affairs-and-Policy/Charter-Schools/Pages/Annual-Reports.aspx (click "2010–2011 Georgia Charter Schools Annual Report") [hereinafter CHARTERING IN GEORGIA]; *Approved Charter Schools*, GA. DEP'T OF EDUC., http://www.doe.k12.ga.us/External-Affairs-and-Policy/Charter-Schools/Pages/Approved-Charter-Schools.aspx (last visited Aug. 29, 2012); *School Year 2011-2012—Enrollment by Grade Level (PK-12): Enrollment on March 1, 2012 (FTE 2012-3)*, GA. DEP'T OF EDUC., http://app.doe.k12.ga.us/ (selecting "Student Enrollment," then "Enrollment by Grade," then "March 1, 2012 (FTE 2012–3)" and "By District") (last visited Aug. 29, 2012) [hereinafter Enrollment Report].

110. Enrollment Report, *supra* note 109, at 1 (including Atlanta Heights Charter Commission School, CCAT School, Coweta Charter Academy, Fulton Leadership Academy, and Pataula Charter Academy as "Commission Charter Schools").

111. *Id.* at 2 (including Cherokee Charter Academy, Georgia Connections Academy, Heritage Preparatory Academy School, Ivy Prep Academy at Kirkwood for Girls School, Ivy Preparatory Young Men's Leadership Academy School, Mountain Education Center School, Odyssey School, and Scholars Academy Charter School as "State Charter Schools").

student rolls.[113] Together, these schools enroll fewer than 15,000 of Georgia's 1,673,740 public school students.[114]

During its existence under the 2008 Act, the Commission authorized seventeen charter schools.[115] After the decision in *Cox*, the status of those schools was thrown into question.[116] According to its former Executive Director, the Commission worked closely with the Charter Schools Division of the State Board of Education in the months following *Cox* to determine how these schools would move forward.[117] In the end, two of the seventeen schools successfully sought approval from their local school board.[118] Two others chose not to move forward.[119] The State Board of Education approved the remaining thirteen schools as state chartered special schools.[120]

Bill Tracking of HR 1162

Consideration and Passage by the House

Representatives Jan Jones (R-46th), Brooks Coleman (R-97th), Edward Lindsey (R-54th), Margaret D. Kaiser (D-59th), Alisha Thomas Morgan (D-39th), and Matt Hatchett (R-143rd) sponsored HR 1162.[121] The House read the resolution for the first time on January 25, 2012,[122] and for the second time on January 26, 2012.[123] Speaker of the House David Ralston (R-7th) assigned HR 1162 to the House Committee on Education.[124]

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112. *Id.* at 2 (including the Atlanta Area School for the Deaf, Georgia Academy for the Blind, and Georgia School for the Deaf as "State Schools").
113. *Id.*
114. *See id.* at 1–3.
115. *See* Telephone Interview with Mark Peevy, Former Executive Director, Georgia Charter Schools Commission (Apr. 16, 2012) [hereinafter Peevy Interview].
116. *See id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. HR 1162, as introduced, 2012 Ga. Gen. Assem.
122. State of Georgia Final Composite Status Sheet, HR 1162, May 10, 2012.
123. *Id.*
124. *Id.*; Video Recording of House Proceedings, Jan. 25, 2012 at 19 min., 7 sec., http://www.gpb.org/lawmakers/2012/day-8.

Education Committee

The Education Committee held its first hearings on HR 1162 on January 26, 2012.[125] At this hearing, resolution author Representative Jones presented the resolution.[126] She explained the background of the resolution, discussing HB 881 and the *Cox* decision that overturned it.[127] Representative Jones explained that only state Quality Basic Education (QBE)[128] and federal funds would go to state-authorized charter schools and that no local funds would be used.[129]

The floor was then opened to a number of individuals.[130] Retired schoolteacher Elizabeth Hartley, for instance, worried that HR 1162 and HB 797 were simply "political maneuver[s] to dismantle public schools."[131] Tony Roberts, president of the Georgia Charter Schools Association, expressed his support for the resolution and the bill, saying that local boards were not approving enough charter schools and that startup charter schools "need help."[132] Responding to a question from Representative Morgan, Mr. Roberts noted that thirty-two other states already have multiple authorizers for charter schools.[133] Angela Palm, speaking on behalf of the Georgia School Board Association, noted her concern about the impact state-authorized charter schools would have on state funds.[134]

Debate on HR 1162 in the Education Committee continued on February 2, 2012.[135] Resolution author Representative Jones

125. *See* Video Recording of House Education Committee Meeting, Jan. 26, 2012 at 46 min., 59 sec., http://www.house.ga.gov/Committees/en-US/CommitteeArchives102.aspx [hereinafter Education Committee Video 1].

126. *Id.* at 47 min., 7 sec. (remarks by Rep. Jan Jones (R-46th)).

127. *Id.*

128. "QBE" is short-hand for the funding formula used by the State of Georgia in determining the amount of state funding a public school should receive. *See* discussion *infra* note 459.

129. Education Committee Video 1, *supra* note 125, at 47 min., 7 sec. ("If a school system has 100 students and all 100 students, for whatever reason, chose to attend a state special school, that school system, local school system would be left with 100% of their local property taxes to fund no children. Certainly they could roll back their property taxes if they wanted to and the State, through QBE and federal funds, would 100% fund those students.").

130. *Id.* at 57 min., 4 sec. (remarks by Rep. Brooks Coleman (R-97th)).

131. *Id.* at 58 min., 14 sec.

132. *Id.* at 1 hr., 3 min., 54 sec.

133. *Id.* at 1 hr., 7 min., 23 sec.

134. *Id.* at 1 hr., 14 min., 35 sec.

135. Video Recording of House Education Committee Meeting, Feb. 2, 2012 at 36 min., 59 sec.,

introduced the first House Committee substitute, LC 33 4528S, which included changes to sections three and four of the resolution.[136] The original version of section three stipulated that "special" schools included schools for the deaf and blind, vocational schools, and "any type of charter schools";[137] the section was changed to read, "[s]pecial schools may include charter schools; provided, however, that special schools shall only be public schools."[138] Additionally, the first House Committee substitute removed a clarification on the state's authority to fund charter schools, deleting "which may include, but not be limited to, adjusting the proportion of state funds with respect to the affected local school systems."[139] Section four of the resolution contained the ballot question, which originally read "Shall the Constitution of Georgia be amended for the purpose of raising student achievement by allowing state and local approval of public charter schools upon the request of local communities?"[140] The House Committee substitute removed "for the purpose of raising student achievement," and changed the "state and local" to "state or local."[141]

Representative Rashad Taylor (D-55th) offered two amendments to the resolution during the Committee hearing.[142] The first amendment would have removed the words "or local" from the ballot question in section four, so that it would say "Shall the Constitution of Georgia be amended to allow state approval of public charter schools upon the request of local communities?"[143] Representative Taylor was concerned that the voting public might read the question

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http://www.house.ga.gov/Committees/en-US/CommitteeArchives102.aspx (remarks by Rep. Jan Jones (R-46th)) [hereinafter Education Committee Video 2].

136. *See id.*

137. HR 1162, as introduced, § 3, p. 2, ln. 41–44, 2012 Ga. Gen. Assem.

138. *Compare* HR 1162, as introduced, § 3, p. 2, ln. 41–44, 2012 Ga. Gen. Assem., *with* HR 1162 (LC 33 4528S), § 3, p. 2, ln. 41–42, 2012 Ga. Gen. Assem.

139. *Compare* HR 1162, as introduced, § 3, p. 2, ln. 46–47, 2012 Ga. Gen. Assem., *with* HR 1162 (LC 33 4528S), § 3, p. 2, ln. 42–44, 2012 Ga. Gen. Assem.

140. HR 1162, as introduced, § 4, p. 2, ln. 55–57, 2012 Ga. Gen. Assem.

141. Education Committee Video 2, *supra* note 135, at 38 min., 25 sec. (remarks by Rep. Jan Jones (R-46th)). *Compare* HR 1162, as introduced, § 4, p. 2, ln. 55–57, 2012 Ga. Gen. Assem., *with* HR 1162 (LC 33 4528S), § 4, p. 2, ln. 52–53, 2012 Ga. Gen. Assem. Representative Jones noted that the removal of language about how charter schools would be funded, along with the removal of "for the purpose of raising student achievement," were the most requested changes to the resolution "by a long shot." Education Committee Video 2, *supra* note 135, at 39 min., 39 sec.

142. Education Committee Video 2, *supra* note 135, at 1 hr., 11 min., 45 sec.

143. *Id.* at 1 hr., 12 min., 21 sec. (remarks by Rep. Rashad Taylor (D-55th)).

and assume that local school boards did not have the power to authorize charter schools, even though they already did.[144] Representative Brian Thomas (D-100th) further noted that the language was misleading because the amendment did not in any way grant local school boards the authority to authorize local charter schools.[145] While the Democratic representatives felt the question as structured in the House Committee substitute was misleading, Representative Jones and Representative Lindsey—both Republicans—felt that it was the proposed amended language of Representative Taylor that would be misleading.[146] The proposed amendment was defeated.[147]

Representative Taylor next proposed a two-part amendment to section three.[148] The amendment would clarify that only state funds, not local funds, could be spent on state-chartered schools.[149] It would have also added a proviso clarifying "that in no event shall a deduction be made from a school system state allotment as a result of its students attending a special school."[150] Representative Taylor worried that funds would be taken from local schools and given to charter schools, thus penalizing "schools systems who are currently underfunded."[151] Representative Taylor's second proposed amendment was also defeated.[152]

After the proposed amendments were defeated, the Committee voted on the House Committee substitute presented by Representative Jones.[153] The House Committee substitute passed by a

144. *Id.* ("[The question] implies to people, who may not know, that currently local governments do not have the authority to create charter schools, which the Pro Temp has already acknowledged that they do.").

145. *Id.* at 1 hr., 15 min., 1 sec.

146. *Id.* at 1 hr., 13 min., 49 sec. (remarks by Rep. Edward Lindsey (R-54th)); *id.* at 1 hr., 15 min., 30 sec. (remarks by Rep. Jan Jones (R-46th)).

147. *Id.* at 1 hr., 18 min., 39 sec. (remarks by Rep. Brooks Coleman (R-97th)).

148. Education Committee Video 2, *supra* note 135, at 1 hr., 19 min., 18 sec.

149. *Id.*

150. *Id.*

151. *Id.* at 1 hr., 22 min., 44 sec.

152. *Id.* at 1 hr., 24 min., 37 sec. (remarks by Rep. Brooks Coleman (R-97th)).

153. *Id.*

vote of 15 to 6.[154] Representative Coleman then sent the resolution to the House Rules Committee.[155]

The Rules Committee recommitted HR 1162 to the Education Committee, which favorably reported the resolution on February 7, 2012.[156] It was then recommitted.[157] The Education Committee, sans hearings, adopted a new House Committee substitute, LC 33 4555S. The new House Committee substitute contained some minor changes to the resolution.[158] The most important change was in section three; LC 33 4555S made mandatory the inclusion of charter schools in its definition of special schools, whereas it was permissive in LC 33 4528S.[159] HR 1162 was then sent to the full chamber for consideration.

Full Chamber

On February 8, 2012, HR 1162 (LC 33 4555S) was read for a third time.[160] At this time, the House Democratic Caucus had taken a firm stance against the resolution.[161] Among other things, Democrats labeled HR 1162 "Taxation Without Representation."[162] With knowledge of the firm Democratic resistance, the House debated HR 1162 (LC 33 4555S) for over two hours.[163]

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154. Education Committee Video 2, *supra* note 135, at 1 hr., 24 min., 37 sec. (remarks by Rep. Brooks Coleman (R-97th)).

155. *Id.*

156. State of Georgia Final Composite Status Sheet, HR 1162, May 10, 2012.

157. *Id.*

158. *Compare* HR 1162 (LC 33 4528S), 2012 Ga. Gen. Assem., *with* HR 1162 (LC 33 4555S), 2012 Ga. Gen. Assem.

159. *Compare* HR 1162 (LC 33 4528S), § 3, p. 2, ln. 41–42, 2012 Ga. Gen. Assem., *with* HR 1162 (LC 33 4555S), § 3, p. 2, ln. 41–42, 2012 Ga. Gen. Assem.

160. State of Georgia Final Composite Status Sheet, HR 1162, May 10, 2012.

161. *See GA House Democratic Caucus Stands for Local Control, and Against HR 1162*, GA. DEMOCRATS, http://www.georgiademocrat.org/2012/02/16/ga-house-democratic-caucus-stands-for-local-control-and-against-hr-1162/ (last visited May 16, 2012).

162. *See Georgia House Democratic Caucus Opposes HR 1162*, STACEYABRAMS.COM, http://www.staceyabrams.com/issues/georgia-house-democratic-caucus-opposes-hr-1162 (last visited May 16, 2012). This position was echoed by other opponents of the bill, such as Herbert W. Garrett, executive director of the Georgia School Superintendents Association. *See* Herbert W. Garrett, *Rest of the Story on Charter Amendment*, ATLANTA J.-CONST. (Feb. 27, 2012, 10:01 AM), http://www.ajc.com/opinion/rest-of-the-story-1364584.html ("Setting up schools through a faceless Commission in Atlanta without the approval of the local school board elected by the voters is just plain taxation without representation.").

163. Video Recording of House Proceedings (a.m. 2), Feb. 8, 2012,

Representative Jones presented the resolution and then fielded questions. Representative Stacey Abrams (D-84th) expressed concern that the resolution did not contain a detailed definition of charter schools and "that the State would have unprecedented power [if 1162 passed] to create charter schools under the guise of a very vague definition."[164] Representative Jones responded that the power to authorize charter schools had not been abused by the State in the ten years prior to the *Cox* decision.[165]

After Representative Jones yielded the well, many representatives spoke on the resolution. Representative Alisha Thomas Morgan (D-39th) encouraged her colleagues to "put aside political maneuvering and grandstanding" and "do what's right for kids."[166] Representative Mike Dudgeon (R-24th) urged that HR 1162 was not a "magic bullet" for Georgia's education woes but merely provided checks and balances on the power of local school boards.[167] Representative Margaret D. Kaiser (D-59th), a co-sponsor of the resolution, encouraged her fellow Democrats to vote for HR 1162.[168] She noted that charter schools and a fully funded QBE were not mutually exclusive.[169]

Funding was a major concern for opponents of HR 1162. Representative David Wilkerson (D-33rd), for example, worried funds would be taken away from the local school boards and that local schools would continue to be underfunded.[170] Representative Earnest "Coach" Williams (D-89th) shared this sentiment and compared state-authorized charter schools to private schools.[171] Representative Scott Holcomb (D-82nd) summed up the concerns over funding: "[I]f we have to appropriate funds for charter schools, our [s]tate charter schools, what will then be the impact on the

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http://www.gpb.org/lawmakers/2012/day-17 [hereinafter House Video 1].

164. *Id.* at 35 min., 53 sec.

165. *Id.* at 36 min., 8 sec.

166. *Id.* at 52 min., 25 sec.

167. *Id.* at 1 hr., 1 min., 13 sec. ("We just want to set up an alternate authorizer in the cases where the local board for some reason, either for political reasons or just maybe they made a mistake in judgment to not approve the charter school.").

168. *Id.* at 1 hr., 11 min., 35 sec.

169. House Video 1, *supra* note 163, at 1 hr., 11 min., 35 sec.

170. *Id.* at 1 hr., 6 min., 22 sec.

171. *Id.* at 1 hr., 32 min., 10 sec.

formula for all the other remaining public schools?"[172] Representative Holcomb further noted, however, that he wanted to encourage charter schools and could be persuaded to vote yes if his concerns were addressed.[173]

Democrats voiced additional concerns about the resolution. Representative Al Williams (D-165th) discussed the loss of local control and worried that HR 1162 would "add another piece of government into local affairs."[174] Representative Keith G. Heard (D-114th) echoed those concerns, saying the controversy started when a local board, exercising its rightful authority, denied a charter petition.[175] He noted that there was no evidence that charter schools outperform traditional public schools.[176] He further worried that "public charter schools are run by, in most cases, not all, private companies requiring more dollars to operate, and thus, less money directly goes into the classroom."[177]

HR 1162 co-sponsor Representative Lindsey addressed many of the concerns of the opposition.[178] He stressed that HR 1162 "makes it very clear that we cannot use local funds for special schools which include charter schools."[179] He then addressed concerns that charter schools were ill-defined in the resolution.[180] He noted that the definition would come from the General Assembly and does not need to be in the constitutional amendment.[181] He argued that the ballot question was not misleading.[182]

Representative Lindsey further argued that HR 1335—presented as an alternative to HR 1162 by Representative Holcomb—was not a suitable alternative to HR 1162 because it allowed that "the General Assembly may provide for the participation of local boards of education in the establishment of such State charter schools."[183]

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172. *Id.* at 1 hr., 34 min.
173. *Id.*
174. *Id.* at 1 hr., 20 min., 50 sec.
175. House Video 1, *supra* note 163, at 1 hr., 42 min., 22 sec.
176. *Id.*
177. *Id.*
178. *Id.* at 2 hr., 1 min., 1 sec.
179. *Id.*
180. *Id.*
181. House Video 1, *supra* note 163, at 2 hr., 1 min., 1 sec.
182. *Id.*
183. *Id.*

Representative Lindsey worried about the vagaries of the "provide for the participation" language in HR 1335.[184] He also worried about language in HR 1335 that would require that a charter first be rejected by a local school board before it could be approved by the Commission.[185] Notably, Representative Lindsey argued that some local school boards "will play games" and would "simply let a charter sit" without acting at all.[186]

After more than two hours of debate, and after accepting the House Committee substitute and Committee report, the House voted.[187] HR 1162 was defeated after receiving only 110 affirmative votes, short of the 120 votes necessary to pass a constitutional amendment.[188] Promptly upon defeat, Representative Lindsey served notice that he would move for reconsideration on the following day.[189] On February 9, 2012, the House voted affirmatively by a vote of 114 to 49 to reconsider the resolution.[190]

On February 22, 2012, Representative Jones asked the House to reconsider the House Committee substitute to HR 1162.[191] She then discussed AM 33 1151, a floor amendment to the House Committee substitute[192] designated by the Education Committee and allowed under the modified structured rule.[193] This amendment changed the language of section three by adding a definition of state public charter schools.[194] This new language specifically prohibited "private, sectarian, religious, or for profit schools" from the definition of state public charter schools.[195]

AM 33 1151 also added significant language regarding the funding of state charter schools, reading:

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184. *Id.*
185. *Id.*
186. *Id.*
187. House Video 1, *supra* note 163, at 2 hr., 44 min., 32 sec. (remarks by Speaker of the House David Ralston (R-7th)).
188. Georgia House of Representatives Voting Record, HR 1162 (Feb. 8, 2012).
189. House Video 1, *supra* note 163, at 2 hr., 46 min., 21 sec.
190. Georgia House of Representatives Voting Record, HR 1162 (Feb. 9, 2012).
191. Video Recording of House Proceedings, Feb. 22, 2012 (a.m.) at 1 hr., 44 min., 15 sec., http://www.gpb.org/lawmakers/2012/day-23 [hereinafter House Video 2].
192. *Id.*
193. *Id.*; State of Georgia Final Composite Status Sheet, HR 1162, May 10, 2012.
194. *Compare* HR 1162 (HCSFA), § 3, p. 2, ln. 43–48, 2012 Ga. Gen. Assem., *with* HR 1162 (LC 33 4555S), § 3, p. 2, ln. 41–42, Ga. Gen. Assem.
195. HR 1162 (HCSFA), § 3, p. 2, ln. 45–46, 2012 Ga. Gen. Assem.

> The state is authorized to expend state funds for the support and maintenance of special schools in such amount and manner as may be provided by law; provided, however, no deduction shall be made to any state funding which a local school system is otherwise authorized to receive pursuant to general law as a direct result or consequence of the enrollment in a state charter school of a specific student or students who reside within the geographic boundaries of the local school system.[196]

Both changes addressed concerns raised by Democrats in the February 8th debates.[197]

Representative Jones then fielded questions. She addressed some previously discussed concerns, noting that a petitioner (under the accompanying enabling legislation, HB 797) would first have to "receive a denial from the local school board in which the bricks and mortar are located" before being allowed to go to the Commission for authorization.[198]

The Rules Committee limited debate to ninety minutes.[199] During that time, Representative Holcomb—who noted on February 8, 2012, that he might be willing to vote for the resolution if certain changes were made[200]—expressed his support for HR 1162.[201] Representative Holcomb's support stemmed from the amended language that "clearly defines . . . state charter schools and . . . explicitly spells out the funding mechanism."[202]

The opposition reiterated concerns about the resolution. Representative Wilkerson again noted that the resolution did not require petitioners to first go to local school boards, despite assurances that such a requirement would be in the enabling legislation.[203] Representative Wilkerson again urged that the ballot question was misleading.[204]

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196. *Id.* § 3, p. 2, ln. 48–54.
197. *See supra* text accompanying notes 164 & 170–73
198. House Video 2, *supra* note 191, at 1 hr., 48 min., 11 sec. (remarks by Rep. Jan Jones (R-46th)).
199. *Id.* at 1 hr., 48 min., 54 sec. (remarks by Speaker of the House David Ralston (R-7th)).
200. *See supra* text accompanying notes 172–73.
201. House Video 2, *supra* note 191, at 1 hr., 49 min., 44 sec.
202. *Id.*
203. *Id.* at 1 hr., 56 min., 33 sec.
204. *Id.*

After almost an hour of debate, the House adopted AM 33 1151.[205] The chamber then voted on HR 1162 for a second time. The floor amendment to the House Committee substitute—complete with the changes addressing the prior concerns of the opposition—was adopted with 123 ayes, satisfying the constitutional requirement of 120 votes.[206] The floor amendment to the House Committee substitute was then immediately transferred to the Senate.[207]

Consideration and Passage by the Senate

Senator Chip Rogers (R-21st) sponsored HR 1162 in the Senate.[208] It was first read in the Senate on February 22, 2012, immediately after passage from the House.[209] Lieutenant Governor Casey Cagle (R) assigned it to the Education and Youth Committee.[210] The Education and Youth Committee favorably reported the resolution on February 24, 2012.[211] The resolution was read for a second time on February 27, 2012 and then for a third time on February 29, 2012.[212]

On February 29, 2012, Senator Ronnie Chance (R-16th) presented the resolution and answered questions from opposing Senators regarding the funding mechanism.[213] Senator Nan Orrock (D-36th), for example, intimated that state funds to local school boards would be partially redirected towards state-authorized charter schools, even though the resolution specifically prohibited the use of local funds.[214]

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205. *Id.* at 2 hr., 31 min., 25 sec. (remarks by Speaker of the House David Ralston (R-7th)).

206. *Id.*; Georgia House of Representatives Voting Record, HR 1162 (Feb. 22, 2012). Representatives who switched their votes to yea for the February 22 vote were: Kathy Ashe (D-56th), Tommy Benton (R-31st), Bob Bryant (D-160th) (who did not vote the first time but voted affirmatively the second), Elly Dobbs (D-53rd), Carol Fullerton (D-151st), Scott Holcomb (D-82nd), Tony McBrayer (R-153rd), Tom McCall (R-30th), Billy Mitchell (D-88th), Mary Margaret Oliver (D-83rd), Elena Parent (D-81st), Ed Rynders (R-152nd), and Brian Thomas (D-100). *Compare* Georgia House of Representatives Voting Record, HR 1162 (Feb. 22, 2012), *with* Georgia House of Representatives Voting Record, HR 1162 (Feb. 8, 2012).

207. State of Georgia Final Composite Status Sheet, HR 1162, May 10, 2012.

208. *See id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. Video Recording of Senate Proceedings, Feb. 29, 2012 (p.m. 1) at 3 hr., 19 min., 43 sec., http://www.gpb.org/lawmakers/2012/day-28 [hereinafter Senate Video 1].

214. *Id.* at 3 hr., 48 min., 11 sec. ("I was not aware that we had extra state dollars to spend on education in another whole funding stream that's not going to our local schools.").

Senator Chance responded that the number of state-authorized charter schools would be minimal and further noted that local schools would not lose money from their apportioned amount.[215] Many other senators expressed concern that the State had cut funding for education by 25% in recent years.[216]

Like the House Democrats, the Democrats in the Senate took a caucus position against HR 1162.[217] With only twenty members, the Democrats could still successfully prevent the resolution from gaining a constitutional majority.[218] After several Democratic senators rose to state their opposition to the resolution, Senator Chance moved to have HR 1162 laid on the table; HR 1162 was then tabled without objection.[219]

In the days following the February 29th Senate debate, Senate Republicans worked on securing the votes necessary to pass HR 1162.[220] On March 19, 2012, HR 1162 was pulled off the table[221] and was accompanied by two proposed amendments.[222]

Senator Chance briefly reintroduced the resolution without significant commentary.[223] In a noteworthy gesture, the first senator to speak on the resolution after Senator Chance was Senator George Hooks (D-14th),[224] a long-serving Democrat known as the Dean of the Senate.[225] Senator Hooks cited his district's "dysfunctional" local

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215. *Id.* at 3 hr., 47 min., 20 sec., and 3 hr., 48 min., 30 sec.

216. *Id.* at 3 hr., 55 min., 5 sec. (remarks by Sen. Vincent Fort (D-39th)) ("We have cut somewhere between one and two billion dollars since about 2003, 2004 to public school education . . . . 25% [] cut in funding over the last eight years.").

217. *See* Kristina Torres, *Minority of Lawmakers in a Standoff*, ATLANTA J.-CONST., Mar. 11, 2012, at B1, *available at* http://www.ajc.com/news/georgia-government/minority-of-lawmakers-in-1380363.html ("The Senate Democratic Caucus immediately voted as a bloc to oppose the amendment, regardless.").

218. *Id.*

219. Video Recording of Senate Proceedings, Feb. 29, 2012 (p.m. 2) at 36 min., 25 sec., http://www.gpb.org/lawmakers/2012/day-28 [hereinafter Senate Video 2].

220. *See* Kristina Torres, *Charter Schools Vote Gains Support Among Democrats*, ATLANTA J.-CONST., Mar. 15, 2012, at B1, *available at* http://www.ajc.com/news/news/state-regional-govt-politics/charter-schools-vote-gains-support-among-democrats/nQSD9/.

221. State of Georgia Final Composite Status Sheet, HR 1162, May 10, 2012.

222. Video Recording of Senate Proceedings, Mar. 19, 2012 (p.m.) at 1 hr., 50 min., 30 sec., (remarks by Sen. Ronnie Chance (R-16th)), http://www.gpb.org/lawmakers/2012/day-34 [hereinafter Senate Video 3].

223. *Id.*

224. *Id.* at 1 hr., 52 min., 17 sec.

225. *See Biography of Senator George Hooks*, 2012 GA. GEN. ASSEM., http://www.senate.ga.gov/senators/Documents/PrintBios/BioHooksGeorge24.pdf (last visited Aug. 19, 2012).

school board and the demands of his constituency as the primary factors in his decision to vote for the resolution.[226] He then urged his colleagues to vote their "own personal conscience."[227]

After Senator Hooks spoke, the two amendments were introduced.[228] The first proposed amendment came from Senators Steve Henson (D-41st), Vincent Fort (D-39th), and Jason Carter (D-42nd).[229] Senator Henson again argued that the ballot question as posed was misleading and needed to be changed.[230] His amendment would have changed the ballot question to read, "Shall the Constitution of Georgia be amended so as to allow the state to charter special charter schools?"[231]

The second proposed amendment came from Senators Henson (D-41st) and Gloria S. Butler (D-55th).[232] It would have added "(b) Under no circumstance shall any special school chartered by the state under this Paragraph be owned or managed by a for profit company" between lines fifty-four and fifty-five of the floor amendment to the House Committee substitute.[233] Senator Butler wanted to ensure that "charter school's management companies are not for profit, just like our public schools are not for profit."[234]

Senator Fort (D-39th) then reiterated his opposition to HR 1162.[235] He described HR 1162 as a "wolf in sheep's clothing amendment," and blamed a "blatant corruption of power," manifested through a "Herculean lobby effort," for its ascension through the Senate.[236]

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226. *Id.* ("They do not want the local school board in charge of anything. They want the State to take this over.").

227. *Id.*

228. *Id.* at 1 hr., 58 min., 30 sec. (remarks by Secretary of the Senate Bob Ewing).

229. Failed Senate Floor Amendment to HR 1162, introduced by Sen. Steve Henson (D-41st), March 19, 2012.

230. Senate Video 3, *supra* note 222, at 2 hr., 2 min., 45 sec. ("[The question is] deceiving the public to make them think this Constitutional Amendment has something to do with the authority of local school boards to charter schools. That is not the case. The local systems are chartering schools every day.").

231. Failed Senate Floor Amendment to HR 1162, introduced by Sen. Steve Henson (D-41st), March 19, 2012.

232. Failed Senate Floor Amendment to HR 1162, introduced by Sen. Gloria S. Butler (D-55th), March 19, 2012.

233. *Id.*

234. Senate Video 3, *supra* note 222, at 2 hr., 7 min., 10 sec.

235. *Id.* at 2 hr., 12 min., 15 sec.

236. *Id.* ("[HR 1162] uses the children, our children, of this State as pawns in a larger scheme to pad the pockets of for profit school management companies and real estate deals.").

Senator Steve Thompson (D-33rd) closed the debate on HR 1162.[237] Senator Thompson told the chamber that he would embrace HR 1162 because he thought innovation was necessary for the Georgia education system.[238] After Senator Thompson yielded the well, the chamber voted on the two proposed amendments, both of which failed.[239]

Finally, the Senate voted on the floor amendment to the House Committee substitute with no changes from the chamber.[240] The resolution passed with a constitutional majority of forty affirmative votes.[241] Every Republican Senator voted for the resolution, along with four Democratic senators.[242] Because HR 1162 proposes a constitutional amendment, under state law Governor Nathan Deal will not have an opportunity to sign or veto the legislation.[243] Instead, in November 2012, Georgia voters will decide whether or not to ratify the constitutional amendment and allow the State to authorize charter schools.[244]

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237. *Id.* at 2 hr., 30 min., 46 sec.

238. *Id.* ("I'm going to embrace it because if you get afraid to change, you become the dust sitting in the car somewhere in a town where tumbleweeds are rolling by you. And I'm not going to do that.").

239. *Id.* at 2 hr., 41 min., 2 sec. (remarks by Senate President Casey Cagle (R)).

240. Senate Video 3, *supra* note 222, at 2 hr., 41 min., 2 sec. (remarks by Senate President Casey Cagle (R)).

241. *Id.*; Georgia Senate Voting Record, HR 1162 (Mar. 19, 2012).

242. Georgia Senate Voting Record, HR 1162 (Mar. 19, 2012). The Democratic senators who voted for the resolution were Senator Hooks, Senator Thompson, Senator Hardie Davis (D-22nd), and Senator Curt Thompson (D-5th). *Id.*

243. *See* Electronic Mail Interview with Erin Hames, Deputy Chief of Staff for Policy, Office of the Governor (Apr. 12, 2012) (on file with the Georgia State University Law Review). Despite his limited role in enrolling legislation of this kind, Governor Deal was supportive of HR 1162 and "worked closely with members of the General Assembly to ensure that the amendment and the enabling legislation were in the best possible form and passed." *Id.* Lieutenant Governor Casey Cagle also supported the legislation package and helped usher it through the Senate. E-mail from Irene Munn, General Counsel and Director of Policy, Office of the Lieutenant Governor, to Jefferson A. Holt (Aug. 22, 2012) (on file with the Georgia State University Law Review).

244. Charles E. Richardson, *Voters Will Have the Last Word on Constitutional Amendment*, TELEGRAPH (Macon), http://www.macon.com/2012/04/01/1970684/voters-will-have-the-last-word.html (last updated Apr. 1, 2012).

Bill Tracking of HB 797

Consideration and Passage by the House

Representatives Jan Jones (R-46th), Brooks Coleman (R-97th), and Edward Lindsey (R-54th) sponsored HB 797 in the House.[245] The bill proposed amendments to Code section 20-2-2064.[246] In particular, the bill modified several provisions in subsections (b) and (d) relating to the approval or denial of charter petitions.[247] The House read the bill for the first time on January 25, 2012.[248] The House then read the bill for a second time on January 26, 2012.[249] Despite this early surge forward, subsequent discussion in Committee—and the resulting House Committee substitute—drastically altered the scope and content of the bill.

House Education Committee

If the original version of HB 797 aimed to amend Georgia law with surgical precision, the first House Committee substitute, LC 33 4530S, traded in the scalpel for a sledgehammer.[250] The House Committee on Education discussed this first House Committee substitute on February 2, 2012.[251] Chairman Coleman decided to postpone discussion and a vote to a later date, but Representative Jones briefly explained that the first House Committee substitute simply repealed the 2008 Act, retained some introductory language

245. HB 797, as introduced, 2012 Ga. Gen. Assem.

246. *Id.*; *see also* HB 353 Peach Sheet, *supra* note 37, at 106–08 (discussing charter schools and detailing the legislative history of HB 353, known as the "Charter Schools Act of 1998," as passed the 1998 Georgia General Assembly and codified at Code sections 20-2-260, 2060–2071).

247. HB 797, as introduced, 2012 Ga. Gen. Assem.

248. State of Georgia Final Composite Status Sheet, HB 797, May 10, 2012.

249. *Id.*

250. *Compare* HB 797, as introduced, 2012 Ga. Gen. Assem. (focusing on Code section 20-2-2064), *with* HB 797 (LC 33 4530S), 2012 Ga. Gen. Assem. (proposing to start from the beginning with revisions to Code sections 20-2-2080 to -2091); *see also* House Video 1, *supra* note 163, at 25 min., 18 sec. (remarks by Rep. Jan Jones (R-46th)) ("What I did in the Education Committee was I took a bill that I had introduced, HB 797, and I stripped it clean. I gave a substitute to the Education Committee. I told my team [and] the other four, three Democrats and one other Republican, that this was what I was going to do as they had—frankly, as they had suggested. All that's left in it is a preamble to charter schools. And I said, look, guys, in good faith, let's find another way.").

251. Education Committee Video 2, *supra* note 135, at 33 min., 34 sec.

about charter schools, and established a clean slate for debate.[252] She further suggested the House Committee substitute "would be the starting point for enabling legislation should the constitutional amendment pass."[253]

The House Committee on Education returned to HB 797 on February 21, 2012.[254] Working from LC 33 4638S,[255] Representative Jones introduced the second House Committee substitute as a revised "framework on how to authorize and fund state charter schools."[256] Even the findings retained in the first House Committee substitute were changed to better communicate the new direction of the legislature in the charter schools context.[257] Representative Jones then discussed each section of the second House Committee substitute, explaining definitions, funding, and Commission composition, activities, and reporting.[258] Continuing, she identified specific provisions responsive to concerns about local school board notice and student "cherry picking."[259] In addition to offering minor comments seeking clarification, Representative Kathy Ashe (D-56th) thanked Representative Jones "for a far improved 881 [the 2008 Act]."[260]

Later, Representative Jones entertained questions. Representative Brian Thomas (D-100th) expressed concern about proponents of

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252. *Id.* at 34 min., 45 sec. ("All that the substitute to House Bill 797 does is it repeals the previous law that we passed, HB 881 back in 2008 relating to the [Commission]. Secondarily, it takes a very small amount, maybe ten lines, the first lines from 881: simply some findings on Charter Schools. There's nothing else in the bill.").

253. *Id.* at 35 min., 20 sec.

254. Video Recording of Education Committee, Feb. 21, 2012 at 1 min., 15 sec., http://www.house.ga.gov/Committees/en-US/CommitteeArchives102.aspx [hereinafter Education Committee Video 3].

255. *Compare* HB 797 (LC 33 4530S), 2012 Ga. Gen. Assem. (one page long and including only findings), *with* HB 797 (LC 33 4638S), 2012 Ga. Gen Assem. (eight pages long and including most of the substantive provisions that would eventually be included with the version of HB 797 as passed by both houses).

256. Education Committee Video 3, *supra* note 254, at 2 min., 39 sec.

257. *Id.* at 3 min., 18 sec.

258. *Id.* at 4 min., 2 sec.

259. *Id.* at 6 min., 38 sec. ("That you could go into a school system, or into an area, and set an attendance zone to preferentially attract certain students. I don't think, the evidence that I've seen is we haven't really seen this any more with state-authorized than with local authorized, but I think it's a reasonable concern, and I certainly don't want that."). Representative Jones proposed addressing these concerns by allowing for defined or, in the alternative, statewide attendance zones. *See id.* at 7 min., 13 sec.

260. *Id.* at 17 min., 49 sec.

charter schools lobbying Commissioners.[261] Representative Tommy Benton (R-31st) questioned the need for a State Commission altogether, given the existence of the State Board of Education,[262] but praised Representative Jones for "getting in the amendment that local monies would not be used."[263] Still, Representative Benton questioned the wisdom of "another level of schools out there that would be pulling state dollars."[264] Representative Benton also expressed concerns about for-profit management companies taking advantage of the charter schools system and, after a few years of losing money, moving on to yet another project.[265] Representative Jones invited Representative Benton to "talk about what we might [] do to address that."[266] Representative Tom Dickson (R-6th) worried that allowing petition approval before appropriation of funds put the cart before the horse and might leave an approved school with no operating funds.[267] Representative Jones responded that "everything is subject to appropriation, including . . . traditional schools."[268] Then, Representative Benton asked whether Representative Jones might consider postponing a vote on HR 1162 until after the Committee completed work on HB 797.[269] Representative Jones

261. *Id.* at 18 min., 59 sec. ("Obviously we want these things to be addressed on their merits and not based on some explanation of it over dinner or golf or something like that.").

262. Representative Jones thought the Commission would be better suited to "specialize" and "do the work" for charter schools in the state because of the State Board of Education's broad authority and responsibilities. Education Committee Video 3, *supra* note 254, at 20 min., 30 sec. She also noted, however, that the Commission truly is "an arm of the State Board." *Id.* Representative Jones also stated that the bill increased the State Board of Education's ability to control the authorization process by inserting language to allow the Board to overturn a Commission decision by a simple majority vote (instead of the 2/3 majority required under the 2008 Act). *Id.* In the end, Representative Jones suggested the State Board of Education "could turn down every single one if they wanted to." *Id.*

263. *Id.* at 21 min., 38 sec.

264. *Id.* at 21 min., 59 sec.

265. *Id.* at 24 min., 6 sec., 26 min., 40 sec. ("There seems to be the thought that there's some money to be made out there, because I see people out there lobbying right now that are lobbying for this bill, that have never lobbied for an education issue before in their life. Since I've been here."); *see also id.* at 30 min., 54 sec. (remarks by Rep. Rashad Taylor (D-55th)) ("Would you be willing to look at anything that looks at the management fees that charter schools are paying? I'm looking at the report that the Department of Education put out, and I just pulled out the schools in Atlanta. And the management fees vary. The highest one I saw of any school, Atlanta Heights Charter, has been in existence for one year—$4.7 million [in] management fees. I've seen them go from zero to $4.7 million for 364 students.").

266. *Id.* at 26 min., 50 sec.

267. *Id.* at 28 min., 32 sec.

268. Education Committee Video 3, *supra* note 254, at 29 min., 6 sec.

269. *Id.* at 32 min., 5 sec.

declined.[270] Before the meeting adjourned, Representative Jones responded to a question from Representative Ashe and highlighted how the bill sought to accommodate the continued funding needs of the twelve charter schools approved under the old regime.[271]

Eight days later, on February 29, 2012, HB 797 took another leap forward in the House Committee on Education. Working from LC 33 4698S[272]—now the third House Committee substitute—Representative Jones detailed the many changes resulting from previous deliberations, which included: (1) adding the word "public" to "educational opportunities" in the findings section;[273] (2) defining the governing board;[274] (3) addressing Representative Thomas's previous concerns by adding language regarding lobbying borrowed from existing law;[275] (4) requiring adequate notice for charter school lotteries[276] and public meetings of the Commission;[277] (5) encouraging the hiring and retention of highly qualified local teachers who are United States citizens unless such citizens are unavailable or the teacher is a foreign exchange teacher;[278] (6) granting contract preferences to local businesses;[279] (7) attempting to reduce the chance of conflicts of interest by inserting language borrowed from existing state law pertaining to local school boards of education;[280] (8) augmenting the 2008 Act's requirement that the Commission provide training with a requirement that the governing

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270. *Id.* at 32 min., 32 sec. Representative Jones noted the need for the General Assembly to respond to the Supreme Court of Georgia's decision in *Cox* and provide some certainty to charter schools operating under "tenuous authority." *Id.*

271. *Id.* at 34 min., 35 sec.

272. HB 797 (LC 33 4698S), 2012 Ga. Gen. Assem.

273. *See id.* § 1, p. 1, ln. 21.

274. *Id.* § 1, p. 2, ln. 35–38.

275. *Id.* § 1, p. 3, ln. 81–85.

276. *Id.* § 2, p. 5, ln. 141–45.

277. *Id.* § 2, p. 5, ln. 146–49.

278. HB 797 (LC 33 4698S), § 2, p. 6, ln. 179–84, 2012 Ga. Gen. Assem.; *see also* Video Recording of Education Committee, Feb. 29, 2012 at 4 min., 24 sec., http://www. house.ga.gov/ Committees/en-US/CommitteeArchives102.aspx. (remarks by Rep. Jan Jones (R-46th)) [hereinafter Education Committee Video 4] ("I want to make sure that these are Georgia residents to the degree that we can and certainly we don't want to . . . have jobs taken away from people who live here.").

279. HB 797 (LC 33 4698S) § 2, p. 6, ln. 185–89, 2012 Ga. Gen Assem.; *see also* Education Committee Video 4, *supra* note 278, at 5 min., 2 sec. (remarks by Rep. Jan Jones (R-46th)) ("I want Georgia businesses when they contract with them, particularly for things like, you know, any food service or whatever they might utilize.").

280. HB 797 (LC 33 4698S), § 2, p. 6, ln. 195–214. Similar language appears in state law applicable to members of local boards of education. *See, e.g.*, O.C.G.A. § 20-2-63 (2011).

board for each state charter school actually attend annual training;[281] and (9) addressing the appropriations concerns from the prior meeting by stating that charter schools are subject to appropriations by the General Assembly (e.g., statutory funding formulas and grants) and must be treated consistently with all other public schools in the state.[282]

Next, Representative Jones invited Representative Mike Dudgeon (R-24th) to discuss the details of the funding mechanism.[283] Representative Dudgeon began by stating that "[t]hese are public school students in a public charter school so they're going to get the same QBE grants and formula allocations that any other school would get."[284] He further explained that the bill sought a modest funding system; instead of establishing a "Cadillac funding program," the bill attempted to "approximate [the] level of funding for not the average school but for the lowest 3% of systems in the state."[285] Additionally, Representative Dudgeon identified provisions providing capital funding to charter schools at the "average amount available in the state," along with other provisions that would reduce capital funding available to virtual schools.[286] Representative Dudgeon emphasized that, in the end, the amount of funding under this bill was "still well less than the current level of funding under 881 . . . but it is adequate, and it is modest."[287]

Several questions and actions followed Representative Jones's presentation.[288] First, Representative Dickson (R-6th) inquired about transportation funding and whether a charter school that did not provide transportation would still receive its share of transportation funds.[289] Representative Jones suggested that the general funding mechanism (tied to the lowest 3% based on total funding), when coupled with the clause included at line 263 of the third House

281. *Id.* § 2, p. 7, ln. 215–17.
282. *Id.* § 2, p. 10, ln. 311–14.
283. Education Committee Video 4, *supra* note 278, at 6 min., 30 sec.
284. *Id.* at 8 min., 9 sec.
285. *Id.*
286. *Id.*
287. *Id.* (stating further that "we're reflecting what approximately those lowest 3% of school systems are able to do for the kids. But we still have to fund at the level, because they're public school children, they need to have the appropriate level of funding.").
288. *Id.* at 11 min., 34 sec.
289. Education Committee Video 4, *supra* note 278, at 12 min., 1 sec.

Committee substitute (charter schools are to receive a proportional share of transportation grants), would not reduce funding to charter schools that choose not to provide transportation.[290]

Representative Dickson then proposed an oral amendment to make Board of Education review mandatory—and not merely permissive—after any approval or renewal of a charter school by the Commission.[291] Representative Jones stated that the Board of Education's practice under the old system was to review the Commission's work after every approval, even though the process was governed only by state rules and regulations and not by statute.[292] Still, Representative Jones did not object to the amendment.[293] After a motion and a second, and over two nay votes, the bill passed as amended.[294]

On March 5, 2012, the House Committee on Education favorably reported House Committee substitute LC 33 4702S, which ultimately proposed to repeal and replace Article 31A of Chapter 2 of Title 20 of the Official Code of Georgia Annotated.[295]

Full House

The House read the bill for a third time on crossover day, March 7, 2012.[296] That same day, the House Rules Committee adopted a Modified Structured Rule[297] and also voted to limit debate to no more

290. *Id.* at 14 min., 38 sec.; *see also id.* at 14 min. 53 sec. ("They may not offer transportation but considering how modest their funding is, they have other needs that they have to offer. And I also will say that some of them do offer vans. I mean, they try to be more accessible. Some of them offer tokens for public transportation. So . . . I think they try to do what they can."). *But cf. infra* note 309 and accompanying text (suggesting that transportation dollars are not issued unless a school offers transportation).

291. *Id.* at 15 min., 57 sec. The proposed amendment added "shall review and" before "may overrule the approval [or renewal of a] state charter school[]." *Id.* at 18 min., 17 sec.

292. *Id.* at 16 min., 58 sec.

293. *Id.* at 18 min., 56 sec.

294. *Id.* at 19 min., 13 sec.

295. *See* HB 797 (LC 33 4702S), 2012 Ga. Gen. Assem.; State of Georgia Final Composite Status Sheet, HB 797, May 10, 2012.

296. State of Georgia Final Composite Status Sheet, HB 797, May 10, 2012.

297. *Id.* A modified structured rule permits proposal of germane amendments designated by the Committee on Rules. *See* House Rule 33.2(c), 2012 Ga. Gen. Assem., 15, *available at* http://www.house.ga.gov/Documents/Publications-Downloads/RULES_2012.pdf. Such a rule "may preclude amendments to a particular portion of the bill, although other parts of the bill may be open to amendment." *Id.*

than one hour.[298] Speaker David Ralston (R-7th) allocated thirty minutes to each side.[299] Consideration of the bill followed.[300]

Representative Jones spoke first in support of the bill she authored.[301] She stated that the bill "allows the state to authorize the state charter schools under more narrow conditions" than under the old system.[302] She then continued to describe the general outlines of the bill, including the methods for establishing a new charter school, composition of the Commission, and funding.[303] Before taking questions, Representative Jones described how she worked with the Department of Education to establish the funding provisions.[304] She assured House members that funding was adequate, even though the proposed levels were lower than the amount received by charter schools under existing law.[305]

The first question came from the Chairman of the Transportation Committee, Representative Jay Roberts (R-154th), who sought clarification regarding the timing mechanism for petition approval.[306] In response, Representative Jones confirmed that under the proposed bill the local school boards have sixty days to approve or deny a charter school petition before the State Commission could consider that same petition.[307]

Next, the House Minority Leader, Representative Stacy Abrams (D-84th), asked "is it not true that HB 797 grants transportation and school nutrition funding whether or not the charter school offers it or not?"[308] Representative Jones responded: "It does not."[309]

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298. Video Recording of House Proceedings, Mar. 7, 2012 (p.m. 1) at 5 min., 35 sec., (remarks by Speaker of the House David Ralston (R-7th)), http://www.gpb.org/lawmakers/2012/day-30 [hereinafter House Video 3].

299. *Id.* at 5 min., 51 sec.

300. *Id.*

301. *Id.* at 6 min., 3 sec.

302. *Id.*

303. *Id.*

304. House Video 3, *supra* note 298, at 11 min., 42 sec.

305. *Id.*

306. *Id.* at 12 min., 15 sec.

307. *Id.* at 12 min., 49 sec.; *see also* HB 797 (LC 33 4702S), § 1, p. 6, ln. 169–76 (establishing approval timeline for charter petitions).

308. House Video 3, *supra* note 298, at 13 min., 19 sec.

309. *Id.* at 13 min., 37 sec. Representative Jones continued: "If they offer snacks or if they offer, you know, want to subsidize or help with lunches, that they would then earn it and the same is true for transportation." *Id. But cf. supra* note 290 and accompanying text (suggesting transportation funds flow even to schools that do not offer transportation).

Representative Abrams then inquired whether funds were distributed based on enrollment projections or actual enrollment.[310] Representative Jones stated that a school does not receive funds for students who do not enroll and that "[t]he previous Commission did come up with a way to make sure that they weren't issuing funds that then might be hard for the school to pay back."[311] Then, Representative Abrams acknowledged that many charter schools were run by management companies and asked whether the bill included "language that controls the share of funds between the school operations and the management company."[312] Representative Jones responded: "There's not."[313] She then stated there are more management companies assisting locally chartered schools than state-chartered schools and suggested that at least some traditional public schools spend more on management than the average charter school.[314] Representative Jones added that, to keep potentially conflicting interests separate, "it is clear in the bill . . . that you cannot serve on the management . . . and serve on the governing counsel."[315] Lastly, Representative Abrams expressed concern about the "vetting process."[316] She worried that the bill "was introduced with a very short notice, that there was a very limited hearing," and also stated that "this is a fairly substantive change that's going to create a greatly expanded bureaucracy . . . and yet, there has not been a great deal of detail or at least detailed analysis to my knowledge."[317] Representative Jones responded that she didn't "think it creates an expanded bureaucracy."[318] She then described the deliberative process, which included the two hearings separated by

310. House Video 3, *supra* note 298, at 14 min., 7 sec.
311. *Id.* at 14 min., 53 sec.
312. *Id.* at 15 min., 1 sec.
313. *Id.* at 15 min., 11 sec.
314. *Id.* Representative Jones offered an example to support this proposition. *Id.* She stated that Atlanta Heights, a charter school, did not pay any management fees in one particular year. *Id.* In most years, Representative Jones continued, the average charter school spends between 8% and 14% of its budget on management fees. *Id.* In contrast, Atlanta public schools allocate 22% per student for central office—a number that does not include "principals, student services, [or] anything else that's actually out of the classroom." *Id.*
315. *Id.* at 16 min., 33 sec.
316. House Video 3, *supra* note 298, at 16 min., 48 sec.
317. *Id.*
318. *Id.* at 17 min., 20 sec.

eight days described above.[319] Representative Jones stated that she "had copies of the bill in [her] office . . . and distributed them to the minority leadership in the Senate and to any member of the Senate or the House that wanted one."[320] She then described how, during the eight-day period between hearings, she did not have one member ask for changes.[321]

In addition to some clarifying questions regarding petition procedures, Representative Rashad Taylor (D-55th) asked "why state charters would receive capital outlay funds" under the bill.[322] Representative Jones stated they would receive an incremental appropriation of capital funds because "they won't receive bonding."[323] She further acknowledged that although many charter schools lease and do not build their facilities, such an incremental grant could help a charter school make its lease payments.[324] Also, she assured Representative Taylor that a "fully virtual school" would not receive any capital funds.[325] Referring to LC 33 4702S at line 196, Representative Lynn Smith (R-70th) thanked Representative Jones for addressing the profit sharing and conflict of interest concerns previously expressed by other legislators.[326] Representative Jones responded by stating she had "utilized requirements that are in law now with regards to local school boards and then went a couple steps further."[327] In particular, Representative Jones emphasized that the bill encouraged the hiring of Georgia teachers and personnel and also sought to ensure that charter schools were "purchasing [and] contracting with Georgia businesses whenever possible."[328] Before yielding the well, Representative Jones asked the other members for their vote.[329]

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319. *Id.*
320. *Id.*
321. *Id.*
322. House Video 3, *supra* note 298, at 20 min., 4 sec.
323. *Id.* at 20 min., 12 sec.
324. *Id.*
325. *Id.* at 20 min., 35 sec.
326. *Id.* at 20 min., 44 sec.
327. *Id.* at 21 min., 22 sec.
328. House Video 3, *supra* note 298, at 21 min., 39 sec.
329. *Id.* at 21 min., 54 sec.

Speaker Ralston ordered the previous question; there were no objections.[330] Next, Speaker Ralston recognized Representative Ashe to speak to the House Minority Report to HB 797, filed March 1, 2012.[331] Representative Ashe yielded her time to Representative Taylor, who rose in opposition to the bill.[332] Representative Taylor then noted his concerns with the bill: (1) that, according to his reading of the bill, a charter application wouldn't necessarily have to first go to your local boards of education; (2) that charter schools would receive money for transportation or nutrition services they may not provide; (3) that, given the authority of local school boards to grant charters and the reality that local school boards approved a substantial majority of existing charter schools, "there's no crisis here for the correction of charter schools"; (4) that the "legislation moved very quickly through the committee"; (5) that this legislation does too much for charter schools and the legislature is "turning [its] back on our public schools that have educated our kids up until now"; (6) that "this is [a] bad bill . . . that this will create parallel public school systems in Georgia" without equal funding and equal treatment; and (7) that traditional public education in Georgia was already underfunded.[333] Before taking his seat, Representative Taylor encouraged members to vote against the bill and "go back to the drawing board."[334]

Representative Coleman (R-97th), Chairman of the House Education Committee, then rose for a parliamentary inquiry.[335] Perhaps responding to Representative Abrams's earlier concerns about the "vetting process," Representative Coleman's questions suggested he disagreed with her contention that the bill had not been properly considered: "Isn't it true that this bill was heard three times in the full Committee and . . . treated as any other bill would

330. *Id.* at 22 min., 23 sec.

331. *Id.* at 22 min., 30 sec. Representative Ashe and Representative Wayne Howard (D-121st) submitted the Minority Report to HB 797. *See* MINORITY REPORT TO HB 797 (Mar. 1, 2012) (on file with the Georgia State University Law Review). In the report, the signatories opposed HB 797 "because it was passed out of committee in a manner not consistent with the democratic principles of this body." *Id.* They further objected that "[t]here was no opportunity for the public to view the bill and comment." *Id.*

332. *Id.* at 22 min., 45 sec.

333. *Id.*

334. House Video 3, *supra* note 298, at 26 min., 40 sec.

335. *Id.* at 27 min., 15 sec.

be . . . [and] that everyone was encouraged to . . . meet with any of us if they had any comments?"[336] Speaker Ralston responded: "I feel confident that the gentleman is stating the truth, and I know how hard this Speaker Pro Tem [Representative Jones] has worked on this issue for not only during the session but prior."[337] Hearing no objections to adopting the House Committee substitute or agreeing to the report of the Education Committee favoring the bill, Speaker Ralston called for House Vote Number 637.[338] HB 797 received the required majority and passed the House on March 7, 2012,[339] by a vote of 115 to 49.[340]

Consideration and Passage by the Senate

Senator Ronnie Chance (R-16th) sponsored HB 797 in the Senate.[341] The Senate read the bill for the first time and referred it to the Senate Committee on Education and Youth on March 7, 2012.[342] The Senate read the bill for a second time on March 21, 2012.[343] The Committee on Education and Youth favorably reported HB 797 that same day[344] but also offered its own Senate Committee substitute, LC 33 4758S.[345]

The Senate Committee substitute differed in several significant ways from HB 797, as passed by the House. In the first of sixteen alterations, the Senate Committee substitute clarified the relationship

336. *Id.* This remark is particularly interesting given the influence Representative Coleman had over the deliberative process as Chairman of the House Committee on Education.

337. *Id.* at 27 min., 44 sec.

338. *See* Georgia House of Representatives Voting Record, HB 797 (March 7, 2012).

339. State of Georgia Final Composite Status Sheet, HB 797, May 10, 2012.

340. *See* Georgia House of Representatives Voting Record, HB 797 (March 7, 2012). Twelve members of the House did not vote. *Id.* Four were excused. *Id.* Generally speaking, the votes of remaining members fell predominately along party lines. *See id.* Only five Republicans voted against HB 797 (Representatives Benton of the 31st, Greene of the 149th, Holmes of the 125th, Powell of the 29th, and Spencer of the 180th), while eleven Democrats crossed the aisle to vote in favor of the bill (Representatives Dobbs of the 53rd, Drenner of the 86th, Holcomb of the 82nd, Hudson of the 124th, Jones of the 44th, Kaiser of the 59th, Long of the 61st, Mayo of the 91st, Morgan of the 39th, Parent of the 81st, and Thomas of the 100th). *Id.* Representative Kidd (I-141st), the only Independent who cast a vote, voted in favor of the bill. *Id.*

341. *Overview of HB 797*, 2012 GA. GEN. ASSEM., http://www.legis.ga.gov/legislation/en-US/Display/20112012/HB/797 (last visited Aug. 2, 2012).

342. State of Georgia Final Composite Status Sheet, HB 797, May 10, 2012.

343. *Id.*

344. *Id.*

345. *Id. See generally* HB 797 (LC 33 4758S), 2012 Ga. Gen. Assem.

between the State Charter Schools Commission, the Department of Education, and the State Board of Education.[346] Second, the word "gender" replaced the word "sex" at line 69, where the bill sought to establish a Commission composed of diverse members.[347] Third, the Senate Committee substitute removed a limitation that only the State Board of Education could establish rules pursuant to the state charter school approval process created by HB 797.[348] Fourth, the Senate Committee substitute added a requirement that the Commission "review the citizenship and immigration status of each individual that works at a state charter school and aggregate the information by school on an annual basis."[349] Fifth, the Senate Committee substitute removed a requirement that receipt or expenditure of gifts, grants, or donations by the Commission first be funneled through the State Board of Education.[350]

A sixth change occurred in the provision dealing with the submission of a petition for a charter school with a state-wide attendance zone; the Senate Committee substitute moved the word "concurrently" to another position within the same sentence.[351] The

346. *Compare* HB 797 (LC 33 4758S), § 1, p. 2, ln. 44–46, 2012 Ga. Gen. Assem. (substituting the word "authority" for "supervision" at line 45), *with* HB 797, as passed House, § 1, p. 2, ln. 44–46, 2012 Ga. Gen. Assem. ("The State Charter Schools Commission is established as a state-level authorizing entity working in collaboration with the Department of Education under the supervision of the State Board of Education.").

347. *Compare* HB 797 (LC 33 4758S), § 1, p. 3, ln. 69, 2012 Ga. Gen. Assem., *with* HB 797, as passed House, § 1, p. 3, ln. 69, 2012 Ga. Gen. Assem.

348. *Compare* HB 797 (LC 33 4758S), § 1, p. 3, ln. 87–90, 2012 Ga. Gen. Assem. (removing "State Board of Education"), *with* HB 797, as passed House, § 1, p. 3, ln. 87–90, 2012 Ga. Gen. Assem. ("The commission shall have the power to . . . [a]pprove or deny petitions for state charter schools and renew, nonrenew, or terminate state charter school petitions in accordance with State Board of Education rules and regulations established pursuant to this article."). A similar change occurred at two other places within the Senate Committee substitute. *Compare* HB 797 (LC 33 4758S), § 1, p. 5, ln. 141, 2012 Ga. Gen. Assem., *with* HB 797, as passed House, § 1, p. 5, ln. 140–41, 2012 Ga. Gen. Assem.; *compare* HB 797 (LC 33 4758S), § 1, p. 5, ln. 153, 2012 Ga. Gen. Assem., *with* HB 797, as passed House, § 1, p. 5, ln. 152, 2012 Ga. Gen. Assem.

349. *Compare* HB 797 (LC 33 4758S), § 1, p. 4, ln. 114–16, 2012 Ga. Gen. Assem. (adding the language quoted in the accompanying text), *with* HB 797, as passed House, 2012 Ga. Gen. Assem. (containing no such provision).

350. *Compare* HB 797 (LC 33 4758S), § 1, p. 4, ln. 121–23, 2012 Ga. Gen. Assem. (removing ", through the State Board of Education,"), *with* HB 797, as passed House, § 1, p. 4, ln. 119–22, 2012 Ga. Gen. Assem. ("The commission may, through the State Board of Education, receive and expend gifts, grants, and donations of any kind from any public or private entity to carry out the purposes of this article.").

351. *Compare* HB 797 (LC 33 4758S), § 1, p. 5, ln. 165–67, 2012 Ga. Gen. Assem. ("For petitions for state charter schools with a state-wide attendance zone, the petitioner shall submit such petition to the commission and concurrently to the local board of education in which the school is proposed to be

Senate Committee substitute then added the following text to the end of the same sentence: "[F]or information purposes; provided, however, that this shall not apply to a proposed state charter school which will solely provide virtual instruction."[352] In the same section, the Senate Committee substitute removed the provision stating: "The commission shall not act on such petition until at least 60 days after submittal or a decision by the local board of education is made, whichever comes first."[353] A seventh change found in the Senate Committee substitute involved the addition of more precise language that clarified the timeline and procedure for Commission approval of a petition denied by a local school board.[354] An eighth change in the Senate Committee substitute expanded and clarified provisions regarding preferences for hiring of teachers and personnel who are United States citizens by incorporating several provisions of the United States Code pertaining to "protected individuals."[355]

The ninth change expanded the disqualification provisions within the section of the bill dealing with conflicts of interest for members of state charter school boards.[356] The House version disqualified board members from serving as an "officer of any organization that sells goods or services to that state charter school, excluding nonprofit membership organizations."[357] The Senate Committee substitute expanded the disqualification to non-officer board members for vendors and other organizations serving the charter school and also removed the proviso "excluding nonprofit membership organizations."[358] The tenth alteration corrected an

located . . . ."), *with* HB 797, as passed House, § 1, p. 5, ln. 164–66, 2012 Ga. Gen. Assem. ("For petitions for state charter schools with a state-wide attendance zone, the petitioner shall concurrently submit such petition to the commission and to the local board of education in which the school is proposed to be located.").

352. *Compare* HB 797 (LC 33 4758S), § 1, p. 5–6, ln. 165–69, 2012 Ga. Gen. Assem. (adding the language quoted in the accompanying text), *with* HB 797, as passed House, § 1, p. 5–6, ln. 164–66, 2012 Ga. Gen. Assem. (containing no such text).

353. *Compare* HB 797 (LC 33 4758S), § 1, p. 5–6, ln. 165–69, 2012 Ga. Gen. Assem., *with* HB 797, as passed House, § 1, p. 5–6, ln. 166–68, 2012 Ga. Gen. Assem.

354. *Compare* HB 797 (LC 33 4758S), § 1, p. 6, ln. 173–81, 2012 Ga. Gen. Assem., *with* HB 797, as passed House, § 1, p. 6, ln. 172–76, 2012 Ga. Gen. Assem.

355. *Compare* HB 797 (LC 33 4758S), § 1, p. 6, ln. 185–98, 2012 Ga. Gen. Assem., *with* HB 797, as passed House, § 1, p. 6, ln. 180–85, 2012 Ga. Gen. Assem.

356. *Compare* HB 797 (LC 33 4758S), § 1, p. 7, ln. 209, 225–26, 2012 Ga. Gen. Assem., *with* HB 797, as passed House, § 1, p. 6–7, ln. 196, 212–13, 2012 Ga. Gen. Assem.

357. HB 797, as passed House, § 1, p. 6–7, ln. 196, 212–13, 2012 Ga. Gen. Assem.

358. HB 797 (LC 33 4758S), § 1, p. 7, ln. 209, 225–26, 2012 Ga. Gen. Assem.

apparent error involving an internal reference within the House version of HB 797.[359] An eleventh change added a new provision stating: "An individual that works at a state charter school or an individual that has administrative oversight at a state charter school shall not serve on the board of directors of an organization that sells goods or services to such state charter school."[360] A twelfth modification added language authorizing local boards to "charge or continue to charge a reasonable fee for the use of the facilities" provided under an existing charter that is renewed under the provisions of HB 797.[361] The thirteenth change added the following language regarding charter school debts: "Neither the state, the State Board of Education, or the commission shall be liable for any debts of the school in the event the charter is not renewed or is terminated."[362]

In the area of funding, several changes appeared. The fourteenth difference between the Senate Committee substitute and the House version appears in the first section of the funding provisions. The House bill stated: "Except as otherwise provided in paragraph (2) of this subsection, the department shall pay to each state charter school through appropriation of state funds an amount equal to the sum of . . . ."[363] The Senate Committee substitute expanded that language as follows:

> The earnings for a student in a state charter school shall be equal to the earnings for any other student with similar student characteristics in a state charter school, regardless of the local

359. In requiring that members of governing boards attend annual training, the House version cited to "paragraph (13) of subsection (b) of Code section 20-2-2083." HB 797, as passed House, § 1, p. 7, ln. 217, 2012 Ga. Gen. Assem. As presented in the House version, Code section 20-2-2083(b) did not contain a section (13). *See* HB 797, as passed House, § 1, p. 4–5, ln. 98–141, 2012 Ga. Gen. Assem. The Senate Committee substitute correctly refers to "paragraph (12) of subsection (b) of Code Section 20-2-2083." *See* HB 797 (LC 33 4758S), § 1, p. 7, ln. 230, 2012 Ga. Gen. Assem.; *see also* HB 797 (LC 33 4758S), § 1, p. 4–5, ln. 98–142, 2012 Ga. Gen. Assem.

360. *Compare* HB 797 (LC 33 4758S), § 1, p. 7, ln. 232–34, 2012 Ga. Gen. Assem. (adding the language quoted in the accompanying text), *with* HB 797, as passed House, 2012 Ga. Gen. Assem. (containing no such provision).

361. *Compare* HB 797 (LC 33 4758S), § 1, p. 8, ln. 243–47, 2012 Ga. Gen. Assem., *with* HB 797, as passed House, § 1, p. 7, ln. 227–30, 2012 Ga. Gen. Assem.

362. *Compare* HB 797 (LC 33 4758S), § 1, p. 8, ln. 259–66, 2012 Ga. Gen. Assem., *with* HB 797, as passed House, § 1, p. 8, ln. 242–47, 2012 Ga. Gen. Assem.

363. HB 797, as passed House, § 1, p. 8, ln. 249–51, 2012 Ga. Gen. Assem.

> school system in which the student resides or the school system in which the state charter school is located, and, except as otherwise provided in paragraph (2) of this subsection, the department shall pay to each state charter school through appropriation of state funds an amount equal to the sum of . . . .[364]

A fifteenth alteration involved the funding formula for state charter schools. The House version required appropriation of state funds to state charter schools, in part, based on "[t]he average amount of total revenues less federal revenues less state revenues other than equalization grants per full-time equivalent for the lowest 3% of school systems ranked by assessed valuation per weighted full-time equivalent count, as determined by the department."[365] The Senate Committee substitute removed "three percent of school systems" and inserted "five school systems."[366] The sixteenth and final change involved a nearby provision regarding state charter schools that offer virtual instruction.[367] The Senate Committee substitute increased the amount of funding to state charter schools offering virtual instruction from "one-half" to "two-thirds" of the amount granted under the funding formula found at lines 288 through 291 of the Senate Committee substitute (to be codified at section 20-2-2089(a)(1)(B)).[368]

On March 20, 2012, four senators[369] filed a minority report in opposition to HB 797.[370] The Senators, all of whom were members of the Senate Education and Youth Committee, offered the report on behalf of the Senate Democratic Caucus.[371] Echoing concerns voiced in the House, the report objected to the lack of opportunity for the

364. HB 797 (LC 33 4758S), § 1, p. 8–9, ln. 267–73, 2012 Ga. Gen. Assem.
365. HB 797, § 1, as passed House, p. 8, ln. 266–69, 2012 Ga. Gen. Assem.
366. *See* HB 797 (LC 33 4758S), § 1, p. 9, ln. 288–91, 2012 Ga. Gen. Assem.
367. *Id.* § 1, p. 9, ln. 294–99, 2012 Ga. Gen. Assem.
368. *Compare* HB 797, as passed House, § 1, p. 8–9, ln. 272–77, 2012 Ga. Gen. Assem., *with* HB 797 (LC 33 4758S), § 1, p. 9, ln. 294–99, 2012 Ga. Gen. Assem.
369. Senators Vincent Fort (D-39th), Horacena Tate (D-38th), Freddie Powell Sims (D-12th), and Donzella James (D-35th) signed the minority report. *See* SENATE DEMOCRATIC CAUCUS MINORITY REPORT TO HB 797 (Mar. 20, 2012) [hereinafter SENATE MINORITY REPORT] (on file with the Georgia State University Law Review).
370. *Id.*
371. *See id.*

public to review the bill, the funding mechanism, an approval process that circumvented local control, and a lack of ethics provisions.[372] In particular, the Senators were concerned that "[t]he version of the bill considered by the committee on March 20, 2012, was presented to committee members at the start of that committee meeting," and many of those present "were reviewing this version of the bill for the very first time."[373] The fact that "no public comment was allowed during the meeting" caused additional concern.[374] With regard to the funding mechanism in the bill at the time, the report stated that "under HB 797, Commission charter schools will receive more money per [full-time equivalent] than traditional public schools."[375] The report also lamented that "local school boards will be entirely left out of the decision-making process with respect to individual charters."[376] Finally, the report called for strengthened "provisions related to conflicts of interest" that would do more "to protect against self-dealing and corruption."[377]

Seven proposed amendments later emerged from the Senate floor on March 26, 2012.[378] Only one of these amendments—the last—was adopted by the body.[379] Although all but one of the amendments failed, the substance of each amendment is detailed below. Seeking to limit state charter school funding in several ways, Senators Vincent Fort (D-39th), Doug Stoner (D-6th), Steve Henson (D-41st), Freddie Powell Sims (D-12th), and Miriam Paris (D-26th) offered amendment one, which proposed amending the Senate Committee substitute (LC 33 7458S) by: (1) inserting after "Section 20-2-164" on line 279 the following: "less an amount equal to the average of the 5 mill share for the lowest five school systems ranked by assessed valuation per weighted full-time equivalent count, as determined by the department";[380] (2) substituting "one-half" for "two thirds" on

372. *Id.*
373. *Id.*
374. *Id.*
375. SENATE MINORITY REPORT, *supra* note 369.
376. *Id.*
377. *Id.*
378. *HB 797 – State Chartered Special Schools; Revise Funding*, GA. GENERAL ASSEMBLY (June 17, 2012), http://www.legis.ga.gov/legislation/en-US/Display/20112012/HB/797 (see "Votes" and "Past Versions").
379. *See* HB 797 (AM 33 1234), 2012 Ga. Gen. Assem.
380. HB 797 (AM 33 1230), p. 1, ln. 1–5, 2012 Ga. Gen. Assem.

lines 296 and 297;[381] (3) replacing line 337 with: "and grants, including any reductions due to austerity";[382] (4) striking "funding allocations" from line 343; and (5) replacing lines 344 and 345 with the following:

> Education, state charter schools shall, consistent with department rules and regulations, be treated as contained within a single, state-wide local education agency. This local education agency shall be administered by the Department of Education, which shall ensure that state charter schools receive the support required by this article, including, but not limited to, establishing procedures to ensure that state charter schools receive the funding required by Code Section 20-2-2089. This Code section shall not be construed to authorize a state charter school to receive funding for central administration costs, and the total funding provided to a state charter school pursuant to this article shall be as determined pursuant to Code Section 20-2-2089.[383]

By a hand vote, the Senate defeated amendment one 16 to 27.[384]

Seeking to remove a provision granting the Commission authority to issue preliminary approval of a charter based on estimated enrollment, Senators Fort, Stoner, Henson, Paris, and Donzella James (D-35th) then offered amendment two, which proposed to amend the Senate Committee substitute by striking lines 90–93 and inserting in lieu thereof: "established pursuant to this article. The State Board of Education shall review and may."[385] In Senate Vote Number 701, the Senate defeated amendment two by a vote of 17 to 33.[386]

In an effort to augment other provisions already found in the Committee substitute addressing conflicts of interest,[387] Senators Fort, Stoner, Henson, Paris, Horacena Tate (D-38th), and others

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381. *Id.* p. 1, ln. 6.
382. *Id.* p. 1, ln. 7–8.
383. *Id.* p. 1, ln. 9–19.
384. E-mail from Irene Munn, General Counsel/Director of Policy, Office of the Lieutenant Governor, to Jefferson A. Holt (May 22, 2012) (on file with the Georgia State University Law Review) ("[T]he journals say: 'FA#1 (39th) AM 33 1230 Lost 16-27 (Hand Vote)'").
385. HB 797 (AM 40 0024), 2012 Ga. Gen. Assem.
386. *See* Georgia Senate Voting Record, HB 797 (Mar. 26, 2012). Three Senators did not vote, and three were excused from voting. *Id.*
387. *See, e.g.*, HB 797 (LC 33 4758S), § 1, p. 7, ln. 209–26, 2012 Ga. Gen. Assem.

offered amendment three, which sought to amend the Senate Committee substitute by inserting after line 85 the following:

> (g) With respect to commission members, the applicable provisions of Part 1 of Article 2 of Chapter 10 of Title 45 regarding conflicts of interest for public officers and employees shall also extend to transactions between commission members and a state charter school, a nonprofit organization which is the charter petitioner for a state charter school, or a management company operating a state charter school.[388]

Amendment three also inserted after line 234 the following: "(h) Members of governing boards of state charter schools and their immediate family members, as defined in subsection (e) of this Code section, shall be subject to the same conflict of interest provisions and code of ethics requirements, to the extent possible, as members of local boards of education."[389] In Senate Vote Number 702, the Senate defeated amendment three by a vote of 17 to 34.[390]

Senators Fort, Stoner, Henson, Paris, Gloria S. Butler (D-55th), and others then offered amendment four, which proposed excluding private for profit management companies from the state charter school market by inserting after "article." at line 90 the following:

> The commission shall not approve or renew a charter petition for a state charter school which is proposed to be managed by a private for profit management company. In the event that a charter petition for a state charter school proposes to be managed by a private nonprofit management company, the charter petitioner shall make public the amount to be paid to such private nonprofit management company for the operation of such state charter school prior to approval by the commission.[391]

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388. HB 797 (AM 33 1219), p. 1, ln. 1–7, 2012 Ga. Gen. Assem.
389. *Id.* p. 1, ln. 8–12.
390. *See* Georgia Senate Voting Record, HB 797 (AM 33 1219) (Mar. 26, 2012). Two senators did not vote; three were excused from voting. *Id.*
391. HB 797 (AM 33 1220), p. 1, 2012 Ga. Gen. Assem.

In Senate Vote Number 703, the Senate defeated amendment four by a vote of 15 to 36.[392]

Then, Senators Fort, Stoner, Henson, Paris, James, and others offered amendment five, which proposed striking lines 175 through 178 and inserting in lieu thereof the following:

> [T]he petition; provided, however, that, notwithstanding subsection (b) of Code Section 20-2-2064, such local board shall approve or deny the petition no later than 90 days after its submission, unless the petitioner requested an extension in the same manner as provided in subsection (b) of Code Section 20-2-2064. Failure to approve or deny such petition by such local board shall be[.][393]

In short, this amendment proposed extending from sixty to ninety days the time period allotted to local school boards for consideration of a charter school petition. In Senate Vote Number 704, the Senate defeated amendment five by a vote of 17 to 35.[394]

Regarding several provisions of the Senate Committee substitute, Senator Fran Millar (R-40th), Chairman of the Education and Youth Committee, offered amendment six.[395] First, amendment six proposed inserting after "regulations" on line 7 "to revise a provision relating to additional charter system earnings for each full-time equivalent student; . . . ."[396] Second, seeking to limit the applicability of a funding provision in Code section 20-2-165.1 to existing charter systems and to define contingent effective dates for portions of the legislation, the amendment proposed striking lines 353 through 360 and inserting in lieu thereof:

392. *See* Georgia Senate Voting Record, HB 797 (AM 33 1220) (Mar. 26, 2012). Again, two senators did not vote, and three were excused from voting. *Id.*

393. HB 797 (AM 40 0022), p. 1, 2012 Ga. Gen. Assem.

394. *See* Georgia Senate Voting Record, HB 797 (AM 40 0022) (Mar. 26, 2012). This time, only one Senator did not vote, and three were excused from voting. *Id.*

395. *See* HB 797 (AM 33 1227), p. 1, 2012 Ga. Gen. Assem.

396. *Id.* p. 1, ln. 1–4.

> SECTION 2.
> Said title is further amended by revising Code Section 20-2-165.1, relating to charter system earnings for each full-time equivalent student, as follows:
> 20-2-165.1.
> (a) In addition to the amounts earned by a charter system pursuant to subsection (b) of Code Section 20-2-161, a charter system shall earn 3.785 percent of the base amount established pursuant to subsection (a) of Code Section 20-2-161 for each full-time equivalent student in each school within the charter system.
> (b) This Code section shall only apply to local school systems which were charter systems as of January 1, 2012.
> (c) For local school systems which were charter systems as of January 1, 2012, such charter systems shall only be eligible to receive funds pursuant to this Code section through the end of the current term of their charter.
> SECTION 3.
> (a)(1) Section 1 of this Act shall become effective on January 1, 2013, only if a Constitutional amendment expressly authorizing the General Assembly to create state charter schools as special schools is ratified at the November, 2012, general election.
> (2) If such an amendment to the Constitution is not so ratified, then Section 1 of this Act shall not become effective and shall stand repealed by operation of law on January 1, 2013.
> (b) All other sections of this Act shall become effective on July 1, 2012.
> SECTION 4.
> All laws and parts of laws in conflict with this Act are repealed.[397]

In Senate Vote Number 705, the Senate defeated amendment six by a vote of 1 to 50.[398]

Finally, Senators Chance, Bill Jackson (R-24th), Millar, and Butch Miller (R-49th) offered the only successful amendment to the Senate

397. *Id.* p. 1, ln. 5–27.
398. *See* Georgia Senate Voting Record, HB 797 (AM 33 1227) (Mar. 26, 2012). Only Senator Millar voted in favor of the amendment. *Id.* Two Senators did not vote, and three were excused from voting. *Id.*

Committee substitute.[399] Amendment seven proposed several changes, the most significant of which involved the charter schools funding formula.[400] First, amendment seven sought to insert after "regulations" on line 7 "to revise provisions relating to funding for state chartered special schools."[401] The amendment also proposed changes to Code section 20-2-2068.1 by adding a new section 2A to HB 797.[402] This new section, in short, proposed striking Code section 20-2-2068.1(d)(1) and inserting nearly all of the material funding language from HB 797 into section 20-2-2068.1.[403] A related provision limited the oversight responsibility of local boards, established additional reporting requirements, and stated that "the state board shall treat a state chartered special school no less favorably than other public schools within the state with respect to the provision of funds for transportation and building programs."[404] Finally, amendment seven proposed that section 1 of the Act become effective on January 1, 2013, upon ratification of the constitutional amendment, with all other provisions—namely the new section 2A—taking effect on July 1, 2012.[405] The Senate adopted amendment seven by unanimous consent.[406]

The Senate read HB 797 for the third time on March 26, 2012,[407] and the bill passed the Senate that same day.[408] Three days later, on March 29, 2012, the House agreed to the Senate Committee substitute by a margin of 117 to 55.[409] The General Assembly sent

399. *See* HB 797 (AM 33 1234), 2012 Ga. Gen. Assem.
400. *See id.*
401. *Id.* p. 1, ln. 1–2.
402. *Id.* p. 1–3, ln. 5–77.
403. *Compare* HB 797 (LC 33 4758S), § 1, p. 9–10, ln. 274–337, 2012 Ga. Gen. Assem., *with* HB 797 (AM 33 1234), p. 1–3, ln. 21–70, 2012 Ga. Gen. Assem.
404. HB 797 (AM 33 1234), p. 3, ln. 71–77, 2012 Ga. Gen. Assem.
405. *Id.* p. 3, ln. 80–85.
406. E-mail from Irene Munn, *supra* note 384 ("[T]he journals say: . . . FA#7 (16th) AM 33 1234 Adopted (Unanimous Consent)").
407. State of Georgia Final Composite Status Sheet, HB 797, May 10, 2012.
408. *See* Georgia Senate Voting Record, HB 797 (Mar. 26, 2012). One Senator did not vote, and three were excused from voting. *Id.* The ultimate result in the Senate appeared even more partisan than in the House. *See id.* In fact, all of the Republicans in the Senate voted in favor of the bill, and only three Democrats crossed the aisle to vote in favor of it. *Id.*
409. *See* State of Georgia Final Composite Status Sheet, HB 797, May 10, 2012; *see also* Georgia House of Representatives Voting Record, HB 797 (Mar. 29, 2012).

HB 797 to Governor Nathan Deal on April 5, 2012, and he signed the bill into law May 3, 2012.[410]

The Resolution: HR 1162

The resolution amends Article VIII of the Georgia Constitution to clarify the General Assembly's authority to establish statewide education policy, establish a state charter school Commission, and expand the definition of special schools to include charter schools.[411] However, the resolution only amends the constitution and portions of Title 20 if it is ratified by popular vote in November 2012.[412]

Section 1 of the resolution revises article VIII, section 1, paragraph 1 of the Georgia Constitution—which provides that adequate public education prior to college or postsecondary level is a primary obligation of the state, will be free to Georgia citizens, and will be funded through taxation—and specifies that "the General Assembly may by general law provide for the establishment of education policies for such public education."[413]

Section 2 of the resolution revises article VIII, section V, paragraph 1 of the Georgia Constitution—which establishes the authority of county and area boards of education to establish and maintain public schools within their districts—and clarifies that "the authority provided for in this paragraph shall not diminish any authority of the General Assembly otherwise granted under this article, including the authority to establish special schools as provided for in Article VIII, Section V, Paragraph VII."[414]

Section 3 of the resolution revises the definition of special schools at article VIII, section 5, paragraph 7 of the Georgia Constitution:

> Special schools may include state charter schools; provided, however, that special schools shall only be public schools. A

410. State of Georgia Final Composite Status Sheet, HB 797, May 10, 2012; *see also* Press Release, *Deal Signs State Charter Schools Bill*, GEORGIAGOV (May 3, 2012), http://gov.georgia.gov/00/press/detail/0,2668,165937316_184600248_184678049,00.html.

411. 2012 Ga. Laws 1364, at 1364.

412. *Id.* § 4, at 1365–66; *see also* GA. CONST. art. X, § 1, para. 2. (detailing ratification procedures for constitutional amendments proposed by the General Assembly).

413. 2012 Ga. Laws 1364, § 1, at 1364.

414. *Id.* § 2, at 1364–65.

> state charter school under this section shall mean a public school that operates under the terms of a charter between the State Board of Education and a charter petitioner; provided, however, that such state charter schools shall not include private, sectarian, religious, or for profit schools or private educational institutions; provided, further, that this Paragraph shall not be construed to prohibit a local board of education from establishing a local charter school pursuant to Article VIII, Section V, Paragraph I.[415]

Further, the resolution clarifies that local boards of education must approve any bonds or school taxes to fund special schools.[416] Finally, section 3 of the resolution provides:

> [N]o deduction shall be made to any state funding which a local school system is otherwise authorized to receive pursuant to general law as a direct result or consequence of the enrollment in a state charter school of a specific student or students who reside within the geographic boundaries of the local school system.[417]

Section 4 of the resolution provides that the constitutional amendments will be put to a popular vote by way of the question: "Shall the Constitution of Georgia be amended to allow state or local approval of public charter schools upon the request of local communities?"[418]

The Act: HB 797

The Act amends Title 20 of the Official Code of Georgia Annotated and establishes the State Charter Schools Commission.[419] Section 1 outlines the membership, duties, and powers of the Commission, and provides rules and regulations for the creation and maintenance of charter schools in Georgia.[420] Section 2A of the Act

415. *Id.* § 3, at 1365.
416. *Id.*
417. *Id.*
418. *Id.* § 4, at 1365–66.
419. 2012 Ga. Laws 1298, at 1298.
420. *Id.* § 1, at 1298–1307.

refines the funding formula for existing state charter schools.[421] Section 3 provides effective dates for the various sections of the Act.[422] Finally, Section 4 repeals conflicting laws.[423]

Section 1 of the Act amends Title 20 of the Official Code of Georgia Annotated by repealing Article 31A of Chapter 2.[424] As defined by section 3, section 1 "shall become effective on January 1, 2013, only if a Constitutional amendment [HR 1162] . . . is ratified at the November, 2012, general election."[425] This first section enacts a new Article 31A governing charter school creation and maintenance in the state.[426] In Code section 20-2-2080, the Act sets forth findings supporting its decision to allow for state authorization of charter schools, primarily that state charter schools "do not supplant" but can "serve as a complement to" existing "educational opportunities provided by local boards of education."[427] The Act further states the intentions of the General Assembly: the creation of a state-level Commission under the authority of the State Board of Education primarily focused on the "development and support" of state charter schools of the "highest academic quality" that serve the "growing and diverse needs" of students in an "efficient manner."[428]

Code section 20-2-2081 sets forth definitions of various terms used throughout the Act[429] and states, among other things, that a state charter school is a "school authorized by the commission pursuant . . . to Article VIII, Section V, Paragraph VII of the Constitution" that shall be a "public school."[430] Code section 20-2-2082 establishes the Commission and defines the process by

421. *Id.* § 2A, at 1307–09.
422. *Id.* § 3, at 1309.
423. *Id.* § 4, at 1309.
424. *Id.* § 1, at 1298.
425. 2012 Ga. Laws 1298, § 3, at 1309. Should ratification of the amendment fail, Section 1 of the Act will not become effective and will stand repealed by operation of law on January 1, 2013. *Id.*
426. *See id.* § 1, at 1298–1307.
427. *Id.* § 1, at 1299.
428. *Id.*
429. *Id.*
430. *Id.* In addition to defining a state charter school, this subsection defines the following terms: "attendance zone" (which may include some or all of a local schools system, multiple local schools systems or portions thereof, or all local schools systems in the state); "commission" (State Charter Schools Commission); "department" (State Department of Education); and "governing board" (board of nonprofit organization petitioning for or governing a state charter school). *Id.*

which its seven members are selected to staggered two-year terms.[431] The members of the Commission are required to hold at least a bachelor's degree and should represent a "group of diverse individuals representative of Georgia's school population . . . with respect to race, sex, and geography who have experience in finance, administration, law, and education."[432] The Commission meets bimonthly and determines the manner in which it reviews state charter school petitions.[433] Commission members are unpaid and cannot solicit or accept anything of value that is given or offered to influence the member in the discharge of his or her duties.[434]

In Code section 20-2-2083, the Act grants the power to the Commission to approve, deny, renew, nonrenew, or terminate state charter school petitions and conduct curriculum reviews.[435] Notably, the State Board of Education must also "review and may overrule [by majority vote] the approval or renewal of a state charter school by the [C]ommission within 60 days" of the Commission's decision.[436] The Act also requires the Commission to: (1) promote state education goals; (2) develop best practices; (3) create accountability standards; (4) monitor and annually review academic and financial performance;[437] (5) direct petitioners to private funding; (6) seek federal and private grants; (7) recommend necessary statutory revisions; (8) encourage cooperation when state charter schools seek building space in traditional schools; (9) encourage cooperation with municipalities, counties, and higher education governing bodies; (10) administer high-quality schools; (11) assist state charter schools in negotiating and contracting with local school boards for administrative or transportation services; (12) provide for annual training.[438] Finally, this Code section sets forth notice requirements

431. 2012 Ga. Laws 1298, § 1, at 1299–1300. Three members are recommended by the Governor, two by the President of the Senate, and two by the Speaker of the House of Representatives. *Id.* The State Board of Education ultimately makes the appointments. *Id.* at 1299.

432. *Id.* at 1300.

433. *Id.*

434. *Id.*

435. *Id.* at 1300–01.

436. *Id.* at 1301.

437. The Commission is also charged with reviewing the citizenship status of every person who works at a state charter school. 2012 Ga. Laws 1298, § 1, at 1301. These duties to monitor and review certain operational functions do not create the basis for a private cause of action. *Id.*

438. *Id.* at 1301–02.

for limited-enrollment charter school lotteries and public meetings of the Commission.[439]

Code section 20-2-2084 outlines the particulars of the petition process. A petition has either a state-wide or defined attendance zone.[440] A petition proposing a state-wide attendance zone can be approved by the Commission without consideration of other factors.[441] A petition for a charter school with a defined attendance zone, however, can be approved only if the petition demonstrates some "special characteristics."[442] The petition for a charter school with a state-wide attendance zone must be submitted to the local school board where the school will be located "for information purposes" unless the school provides only virtual instruction.[443] On the other hand, the local school board has a larger role when a defined attendance zone is involved. First, the petition must be submitted to the local school boards where the charter school is to be located or from which students are drawn.[444] Second, the Commission cannot act on a petition until the local school board denies it.[445] Third, the local school board must approve or deny the petition within sixty days of its submission or else the petition is deemed denied.[446] Other provisions permit a local school board to present the Commission with reasons for its denial of a petition and grant the Commission discretion to consider the support or opposition of local school boards when reviewing charter school petitions.[447]

Code section 20-2-2084 also defines the duties of state charter schools, which include seeking highly qualified teachers and personnel—giving preference to United States citizens when feasible—and preferring Georgia businesses in service and materials

439. *Id.* at 1302.
440. *Id.*
441. *Id.*
442. *Id.* Such special characteristics could include population, curriculum, or other features that "enhance educational opportunities." *Id.* For example, the need to register students from multiple communities constitutes a special characteristic. *Id.*
443. 2012 Ga. Laws 1298, § 1, at 1302.
444. *Id.*
445. *Id.* at 1302–03.
446. *Id.* at 1303.
447. *Id.*

contracts.[448] The Act also assigns the requisite qualifications for members of a charter school governing board, which operate to exclude non-citizens, non-Georgia residents, and employees of the state charter school.[449] Members of the governing board must also attend annual training provided by the Commission.[450] Language proscribing conflicted transactions and improper compensation, similar to that found in the section governing Commission composition, concludes the Code section.[451]

Code section 20-2-2085 governs submission of a petition by an existing charter school and permits rescission and resubmission of a valid charter under the Act.[452] Code section 20-2-2086 requires the Commission to "provide maximum access to information regarding state charter schools to all parents in this state," and prescribes the maintenance of a "user-friendly Internet website" to help parents make "informed decisions."[453] In Code section 20-2-2087 the Act requires the Chairperson of the Commission to appear before the State Board of Education and submit a report detailing the "academic performance and fiscal responsibility" of all state-approved charter schools.[454] Code section 20-2-2088 assigns responsibility for debts of a nonrenewed or terminated state charter school to the school itself.[455] This Code section also releases the State Board of Education and the Commission from liability for such debts and prohibits a local school board from assuming debt from any service contract between a state charter school and a third party unless "the local school system has agreed upon in writing to assume responsibility."[456]

Code section 20-2-2089 addresses the funding of state charter schools.[457] First, the Code section establishes a horizontal equality principle for state charter schools—that students in different state charter schools with "similar student characteristics" shall be entitled

448. *Id.*
449. 2012 Ga. Laws 1298, § 1, at 1303.
450. *Id.* at 1304.
451. *Id.* at 1303–04.
452. *Id.* at 1304.
453. *Id.* at 1304.
454. *Id.* at 1305.
455. 2012 Ga. Laws 1298, § 1, at 1305.
456. *Id.*
457. *See id.* at 1305–07.

to equal earnings under the funding formula.[458] Second, the Code section directs the Department of Education to appropriate state funds to state charter schools based on four sources: (1) "QBE formula earnings[459] and QBE grants earned by the state charter school based on the school's enrollment, school profile, and student characteristics"; (2) a proportional share of earned state grants for transportation, nutrition grants, and other state grants, as determined by the Department of Education; (3) the average amount of revenue (less federal and state revenues other than equalization grants) per full-time equivalent count for the lowest five schools systems based on assessed valuation[460] per weighted full-time equivalency count[461]; and (4) the state-wide average for total capital revenue per full-time equivalent count.[462] If the state charter school "offers virtual instruction," then its revenue per full-time equivalent funds are reduced by one-third unless, in its own discretion, the Commission permits an increase.[463] Similarly, capital funds earmarked for a school offering virtual instruction may be reduced "in proportion to the amount of virtual instruction provided and based on factors that affect the cost of providing instruction."[464]

The funding mechanism in the Act permits the Commission to withhold up to 3% of the funds appropriated for state charter schools to use in administering its duties; such funds, however, must be spent solely on carrying out the duties of the Act.[465] Next, the Act provides

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458. *Id.* at 1305.

459. "QBE formula earnings" refers to funds earned for the Quality Basic Education Formula under O.C.G.A. § 20-2-161 (2011), including funds calculated in accordance with O.C.G.A. § 20-2-164 (2011). 2012 Ga. Laws 1298, § 1, at 1305. QBE formula earnings include:

> [T]he salary portion of direct instructional costs, the adjustment for training and experience, the nonsalary portion of direct instructional costs, and earnings for psychologists and school social workers, school administration, facility maintenance and operation, media centers, additional days of instruction in accordance with Code Section 20-2-184.1, and staff development, as determined by the department.

Id.

460. "Assessed valuation" is defined by the Act as "40 percent of the equalized adjusted property tax digest reduced by the amount calculated pursuant to subsection (g) of Code Section 20-2-164." 2012 Ga. Laws 1298, § 1, at 1306.

461. "Assessed valuation per weighted full-time equivalent count" is defined by the Act as "the assessed valuation for the most recent year available divided by the weighted full-time equivalent count for the year of the digest." *Id.*

462. *Id.* at 1305.

463. *Id.* at 1306.

464. *Id.*

465. *Id.*

an important guarantee to local school boards: "No deduction shall be made to any state funding which a local school system is otherwise authorized to receive" because a student or students in its geographical area enroll in a state charter school.[466] Then, the Act defines how students are to be counted for funding purposes and limits the frequency of such counts to no more than two per year.[467] Finally, the funding Code section closes by establishing another equality principle; this time, however, the Act focuses on the treatment of state charter schools in relation to traditional public schools by insisting that state charter schools "shall be treated consistently with all other public schools in this state."[468]

Code section 20-2-2090 assigns the Commission to the Department of Education "for administrative purposes only."[469] It further commands the Commission to work in collaboration with the Department of Education and designates each state charter school as a "single local education agency" for administrative purposes (e.g., data reporting, enrollment counting, etc.).[470] Code section 20-2-2091 concludes the first section of the Act by granting the Commission and the State Board of Education authority to "adopt rules and regulations" to carry out the provisions of the Act.[471]

Section 2A of the Act duplicates to a great extent the content of the funding mechanism found in current Code section 20-2-2089.[472] As defined by section 3, section 2A of the Act became effective July 1, 2012, notwithstanding the approval *vel non* of the constitutional amendment.[473] Section 2A revises subsection (d) of Code section 20-2-2068.1, relating to funding for existing charter schools.[474] The differences between Code section 20-2-2089 and revised Code section 20-2-2068.1 are, for the most part, minor in nature.[475]

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466. 2012 Ga. Laws 1298, § 1, at 1306.
467. *Id.*
468. *Id.* at 1307.
469. *Id.*
470. *Id.*
471. *Id.*
472. O.C.G.A. § 20-2-2068.1 (Supp. 2012); *see also supra* notes 457–68 and accompanying text.
473. 2012 Ga. Laws 1298, § 3, at 1309.
474. O.C.G.A. § 20-2-2068.1 (2011).
475. *Compare id.*, *with* 2012 Ga. Laws 1298, § 1, at 1305–07.

Section 3 of the Act outlines the effective dates of the various portions of the Act.[476] Section 1 of the Act becomes effective January 1, 2013, only upon ratification of the constitutional amendment at the November 2012 general election.[477] If the amendment is not ratified, section 1 of the Act will not become effective and will stand repealed on January 1, 2013.[478] Section 2A and section 4 of the Act, which repeals "all laws and parts of laws in conflict with this Act," became effective, notwithstanding the constitutional amendment, on July 1, 2012.[479]

Analysis

As a threshold matter, it is generally accepted that citizens should not hastily set about amending a constitution.[480] And under the traditional American doctrine of judicial review, a high court's interpretation of a constitutional provision is entitled to a certain amount of respect—especially when the arguments are close.[481] Indeed, when asked what advice he would give to a concerned parent considering the constitutional amendment at the polls in November, Gwinnet County Public Schools Superintendent Wilbanks stated, "We have to be very careful when we start amending our constitution."[482] This is especially so, the Superintendent emphasized, when the amendment involves a "State power grab" that would jeopardize the concerned parent's "local control" of education.[483] But one's view of the appropriateness of a

476. 2012 Ga. Laws 1298, § 3, at 1309.
477. *Id.*
478. *Id.*
479. *Id.* §§ 3–4, at 1309.
480. *See, e.g.*, ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 29 (1987) ("[A] constitution represents an attempt by society to limit itself to protect the values it most cherishes."). Analogizing to the story of Ulysses binding himself the ship's mast to avoid the Siren's deadly song, Chemerinsky notes that "[a] constitution is society's attempt to tie its own hands, to limit its ability to fall prey to weaknesses that might harm or undermine cherished values . . . . [It] is a precommitment to a set of commands." *Id.*
481. *See* Perdue v. Baker, 586 S.E.2d 606, 616 (Ga. 2003) ("It is emphatically the province and duty of the judicial department to say what the law is.") (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).
482. Wilbanks Interview, *supra* note 10.
483. *Id.* Here, Superintendent Wilbanks is concerned about the Commission's lack of accountability to the local population. *Id.* He suggested that "[y]ou can vote the local board out of office; you can't vote the seven or eight people in Atlanta out of office." *Id.*

constitutional amendment here ultimately depends on whether you believe the Supreme Court of Georgia got it wrong. Superintendent Wilbanks believes there is no need to "fix" the decision in *Cox*.[484] A parent who is unhappy with the educational options provided by their local board—and who, as a result, seeks to petition a charter school over the objection of a local school board—might disagree. In any event, supporters left nothing to the imagination when establishing that the Legislation was a direct response to the Supreme Court of Georgia's decision in *Cox*.[485]

During the debate, supporters and opponents of HR 1162 and HB 797 (referred to hereinafter collectively as the "Legislation") often framed their arguments in hyperbolic terms. For instance, some opponents labeled the Legislation as "taxation without representation."[486] Others argued that the Legislation was another instance of big government intruding into the lives of citizens and taking control away from local authorities.[487] At least one opponent argued "we can't afford to take more food from the mouths of children to pay for a separate category of public schools."[488] Similarly, the author of the Legislation, Representative Jan Jones (R-46th), professed that opponents were simply concerned about power over education and wanted to maintain control.[489] Other

484. *Id.*

485. *See, e.g.*, House Video 2, *supra* note 191, at 2 hr., 27 min., 8 sec. (remarks by Rep. Larry O'Neal (R-146th)) ("This is bigger than charter schools. This is about an out-of-control activist court making law instead of the General Assembly making law, which is actually what our constitution does provide. Make no mistakes, when courts invent their own words like 'exclusive' and 'sole' they are indeed making law.").

486. *See Georgia House Democratic Caucus Opposes HR 1162*, *supra* note 162, at 1.

487. *See* House Video 2, *supra* note 191, at 2 hr., 12 min., 21 sec. (remarks by Rep. Rashad Taylor (D-55th)) ("HR 1162 circumvents local control, and it could allow an appointed board of bureaucrats to force on each of your local school systems a charter application that your board, and in essence your voters, have denied."); *see also* House Video 1, *supra* note 163, at 1 hr., 23 min., 20 sec. (remarks by Rep. Al Williams (D-165th)) ("For the last ten years that I've been here, [we have heard about] local control. And I want government out of my life. But we've come to add another piece of government into local affairs."). In an odd case of role reversal, the "local control" mantra was repeated by Democrats. *See* sources cited *supra; see also* House Video 1, *supra* note 163, at 1 hr., 42 min., 22 sec. (remarks by Rep. Keith G. Heard (D-114th)) ("How often do I hear about local control in this body? Local control. Local control. Local control. Let the people make a decision. They know. They're best in a position to do it.").

488. Senate Video 1, *supra* note 213, at 4 hr., 3 min., 37 sec. (remarks by Sen. Vincent Fort (D-39th)).

489. *See* Jones Interview, *supra* note 36, at 4.

supporters were heard to say that opponents simply did not like the idea of charter schools.[490]

As is often the case in politics, the actual concerns and issues surrounding the Legislation were masked by the fervent debate. For opponents, the key concerns were that: (1) the Legislation would lead to further reductions in funding for traditional public schools;[491] (2) charter schools have not been shown to be particularly more effective than traditional schools;[492] (3) in execution, the Legislation could lead to discriminatory practices in selecting students or two distinct public school systems;[493] (4) private management companies would take advantage of the system to the detriment of students;[494] and (5)

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490. *See* House Video 1, *supra* note 163, at 36 min., 8 sec. (remarks by Rep. Jan Jones (R-46th)). Opponents were guilty of similar rhetoric. *See* Senate Video 3, *supra* note 222, at 2 hr., 12 min., 15 sec (remarks by Sen. Vincent Fort (D-39th)); *see also supra* note 488 and accompanying text.

491. *See* Maureen Downey, *The Hunger Games for Georgia Schools: Less Money, More Mandates and Micromanagement from Legislature*, AJC.COM (March 27, 2012, 3:33 AM), http://blogs.ajc.com/get-schooled-blog/2012/03/27/the-hunger-games-for-georgia-schools-less-money-more-mandates/?cxntfid= blogs_get_schooled_blog ("If their intent, as they say, is NOT to take money from local systems to support this questionable initiative, why is it so hard for them to put that intent in written form?") (quoting Dr. James Arnold, Pelham City Schools Superintendent); *see also* House Video 1, *supra* note 163, at 1 hr., 6 min., 22 sec. (remarks by Rep. David Wilkerson (D-33rd)).

492. *See* CHARTERING IN GEORGIA, *supra* note 109, at 27. The report shows that traditional schools outperformed charter schools in Annual Yearly Progress (AYP) in the 2010–2011 school year. *Id.* This number must be taken with a grain of salt, however; indeed, charter schools outperformed traditional schools in this metric the year before. *Id.* Furthermore, the report dissects the performance of specific types of charter schools. *Id.* at 28. While start-up and conversion charter schools did not outperform traditional schools in the 2010–2011 school year, charter systems schools—schools within a local school district that itself is the charter petitioner approved by the State Board of Education—did outperform traditional schools during 2010–2011. *Id.* at 27–28. Moreover, charter schools outperformed traditional schools at both the middle school and high school levels, though not at the elementary school level. *Id.* at 31. Finally, the report did not include detailed research showing that the students who actually attended the charter schools performed better or worse than they had (or would have) at their former traditional schools; only the performance of the schools as a whole was measured. *See generally id.* at 27–342.

493. *See* Tracey McManus, *Georgia House Passes HR 1162, Charter School Constitutional Amendment,* AUGUSTA CHRON., Feb. 22, 2012, http://chronicle.augusta.com/news/education /2012-02-22/georgia-house-passes-hr-1162-charter-school-constitutional-amendment; *see also* Telephone Interview with Angela Palm, Director of Policy and Legislative Services, Georgia School Boards Association (Apr. 16, 2012) [hereinafter Palm Interview] ("Looking at the demographics of the schools, I have had some concern because as I look at it, there are very few special education students in any of the state charters at the moment."); House Video 3, *supra* note 298, at 22 min., 59 sec. (remarks by Rep. Rashad Taylor (D-55th)) ("I think that this will create parallel public school systems in Georgia.").

494. *See* Wilbanks Interview, *supra* note 10 (stating that private entities were lobbying legislatures, with the help of model legislation from the American Legislative Exchange Council, to "privatize and defund public education" and create a market potentially worth billions of dollars); *see also* Senate Video 3, *supra* note 222, at 2 hr., 13 min., 30 sec. (remarks by Sen. Vincent Fort (D-39th)) ("[The Legislation] uses the children, our children, of this State as pawns in a larger scheme to pad the pockets

the ballot question framed the issue in a way that would confuse voters as to the effects of the Legislation.[495]

In response to opponents' concerns about funding, the drafters of HB 797 provided a guarantee that no State QBE funds would be diverted from the local school to the charter school when a student switches—a stark change from the 2008 Act.[496] Additionally, HR 1162 seeks to amend the constitution to preclude expenditure of local funds on special schools.[497] These compromises on funding likely contributed to Democratic support for the Legislation in the General Assembly.[498] Yet, these changes raise new problems of their own. With funds thus limited under the Legislation, how will the State ensure that state-commissioned charter schools receive adequate funding? How can charter schools improve public education, which is already underfunded, if the State does not properly support charter school students? On the other hand, traditional public schools have certain fixed costs that do not simply shrink because a few students leave.[499] Would it be wise to further reduce funding to traditional

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of for profit school management companies . . . ."); *Education*, AM. LEGIS. EXCHANGE COUNCIL, http://www.alec.org/task-forces/education/ (last visited June 24, 2012) (identifying Georgia Representative David Casas (R-103rd) as the Public Chair of the organization's Education Task Force).

495. *See* Education Committee Video 2, *supra* note 135, at 1 hr., 11 min., 45 sec. (remarks by Rep. Rashad Taylor (D-55th)). Representative Taylor argued that the question would lead voters to believe that local authorities would gain the power to authorize charter schools, when in fact local authorities already had that power. *Id.*

496. *Compare* 2012 Ga. Laws 1298, § 1, at 1306 ("No deduction shall be made to any state funding which a local school system is otherwise authorized to receive pursuant to this chapter as a direct result or consequence of the enrollment in a state charter school of a specific student or students who reside in the geographical area of the local school system."), *with* O.C.G.A. § 20-2-2090(c) (2011) ("The total allotment of state and federal funds to the local school system in which a student attending a commission charter school resides shall be calculated as otherwise provided in Article 6 of this chapter with an ensuing reduction equivalent to the amount of state and federal funds appropriated to the commission charter schools pursuant to subsection (a) of this Code section"), *invalidated by* Gwinnett Cnty. Sch. Dist. v. Cox, 289 Ga. 265, 710 S.E.2d 773 (2011).

497. 2012 Ga. Laws 1364, § 3, at 1365 ("The state is authorized to expend *state* funds for the support and maintenance of special schools in such amount and manner as may be provided by law . . . .") (emphasis added).

498. *See, e.g.*, House Video 2, *supra* note 191, at 1 hr., 49 min., 42 sec. (remarks by Rep. Scott Holcomb (D-82nd)). On February 8, 2012, Representative Holcomb noted he might be persuaded to change his vote if his concerns about funding were addressed. *See supra* text accompanying notes 172–73. Indeed, he voted against HR 1162 initially, but switched his vote after the funding changes were made. *Compare* Georgia House of Representatives Voting Record, HR 1162 (Feb. 8, 2012), *with* Georgia House of Representatives Voting Record, HR 1162 (Feb. 22, 2012), *and* Georgia House of Representatives Voting Record, HB 797 (Mar. 7, 2012).

499. *See* Education Committee Video 2, *supra* note 135, at 1 hr., 22 min., 48 sec. (remarks by Rep. Rashad Taylor (D-55th)) ("There are fixed costs that these schools systems have to deal with. If you

schools in hopes that state-commissioned charter schools perform better? Moreover, opponents of the Legislation could argue that while HB 797 might not divert QBE funds away from traditional public schools, the General Assembly could still divert money by appropriating less money to the QBE in the first instance and then appropriating more funding to state-commissioned charter schools.[500] The funding issue gets even more convoluted; some contend President Obama's Race to the Top program encourages multiple authorizers of state charter schools.[501] Would Georgia, which was awarded over $400 million in Race to the Top funds in 2010, have received as much if it did not have multiple authorizers in place at the time?[502]

Opponents of the Legislation—a group that included many, if not all, of the major school superintendents[503]—also argued that charter schools have not proven more effective than traditional public schools.[504] Supporters countered that charter schools can foster

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remove four kids out of a school system, the lights still have to operate, the teachers still have to teach in that classroom, the bathrooms still have to work, the janitors still have to clean . . . . So there are fixed costs that are not recognized when you just automatically take a one-for-one dollar deduction from schools systems.").

500. *See* Wilbanks Interview, *supra* note 10. Superintendent Wilbanks expressed his belief that the Legislation would reduce the number of dollars available to traditional school boards because charter school funding would necessarily have to come from an already limited "pie" of QBE education funds available to Georgia schools. *Id.*

501. *See* Gwinnett Cnty. Sch. Dist. v. Cox, 289 Ga. 265, 293–94, 710 S.E.2d at 793–94 (Nahmias, J., dissenting).

502. *See id.* Justice Nahmias wrote that upon considering Georgia's second application for Race to the Top funds, a reviewer "specifically noted Georgia's 'strong state Charter School Commission,'" and as a result, "Georgia was ultimately selected to receive $400 million in Race to the Top funding." *Id. But see* Palm Interview, *supra* note 493, at 10 ("[T]here's been a lot of misinformation about the role that the Commission played in Georgia receiving Race to the Top money. If you go back to the Race to the Top application and actually read the section that deals with that, the Commission was only mentioned a few times . . . .").

503. For example, in a joint meeting of the House and Senate Education Committees where Chairman Sen. Fran Millar (R-40th) stated that he did not want to debate the charter school amendment, three school system superintendents voiced their opposition to the constitutional amendment. Video Recording of Joint House/Senate Meeting, Education Committee, February 12, 2012 at 6 min., 13 sec., http://media.legis.ga.gov/hav/11_12/2012/committees/edu/jointEdu 020212EDITED.wmv. First, Cobb County Schools Superintendent Dr. Michael Hinojosa stated, "I know you asked us not to debate it, but I would be remiss if I did not state my concerns with House Resolution 1162." *Id.* at 13 min., 28 sec. Second, Gwinnett County Schools Superintendent Wilbanks stated, "Let me close and be very clear. I strongly suggest that you oppose House Resolution 1162 and House Bill 797." *Id.* at 28 min., 41 sec. Third, Atlanta Public Schools Deputy Superintendent Steve Smith remarked, "We are very much in favor of local boards maintaining the constitutional authority and control." *Id.* at 36 min., 36 sec.

504. *See* Palm Interview, *supra* note 493, at 1; *see also* CHARTERING IN GEORGIA: 2010–2011, *supra*

innovation and, while charter schools have not always been more effective than traditional schools, that the Legislation was designed to glean and adopt the best practices from successful charter schools.[505] Yet here again, funding is an issue. Georgia slashed public school funding by 25% in the past decade.[506] How much innovation is required to replace such a large reduction in funding? Moreover, how much is needed to improve upon current conditions if funds continue to be cut? Yet public education in Georgia was inadequate before the cuts to funding,[507] and innovation might maximize what limited funding exists.[508] In any event, a definitive determination whether charter schools are any "better" than traditional public schools is not likely to emerge any time soon.[509]

Supporters also disclaimed concerns that charter schools might lead to discriminatory practices in how students are selected.[510] For instance, Mark Peevy, the Former Executive Director of the Georgia Charter Schools Commission, pointed to mechanisms in HB 797 regarding student selection designed to prevent discriminatory selection of students.[511] Namely, all applicants to charter schools will be enrolled, subject to the requirements of the school and the intended size of the student body.[512] Should there be a surplus of

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note 109, at 27.

505. *See* Peevy Interview, *supra* note 115 ("[Charter schools] bring new ideas, innovative approaches to the table . . . . There are a number of high performing charter school networks across the nation that don't operate in Georgia right now. And we would look to encourage some of those networks to consider Georgia as a place that they might want to bring some of their models and do some of the work."). Even some opponents like Angela Palm noted that innovation is necessary in improving public education. *See* Palm Interview, *supra* note 493.

506. Senate Video 1, *supra* note 213, at 3 hr., 55 min., 5 sec. (remarks by Sen. Vincent Fort (D-39th)) ("We have cut somewhere between one and two billion dollars since about 2003, 2004 to public school education . . . . 25% cut in funding over the last eight years.").

507. *See* House Video 2, *supra* note 191, at 1 hr., 52 min., 54 sec. (remarks by Rep. Scott Holcomb (D-82nd)) ("The United States is 26th in the world in education, and Georgia ranks near the bottom of our 50 States. That's unacceptable.").

508. *See id.* ("[C]harter schools can be a laboratory for improving educational outcomes for all Georgia students.").

509. *See generally* JACK BUCKLEY & MARK SCHNEIDER, CHARTER SCHOOLS: HOPE OR HYPE? (2007).

510. *See* discussion *infra* notes 511–13.

511. *See* Peevy Interview, *supra* note 115 (noting that if a charter school receives more applicants than it has capacity to accommodate, the school must "have a full scale lottery. And that has to be an open public process that's done in a lot of different ways").

512. *Id.*; *see also* 2012 Ga. Laws 1298, § 1, at 1302.

applicants, the charter school would conduct a lottery to randomly select students.[513]

As to the idea that the Legislation would create two distinct public school systems in Georgia, supporters looked to history.[514] In the years before the *Cox* decision, when there were multiple authorizers in Georgia, the State did not explode with Commission-authorized charter schools.[515] Furthermore, charter schools are not new creations, and many opponents of the Legislation noted their general support for charter schools.[516] The Legislation creates another means for implementing charter schools; it does not create an entirely new educational construct. Some Georgia lawmakers wondered, however, why the State Board of Education could not simply serve as the alternate authorizer.[517] After all, it did have the authority previously to authorize charter school applications that had been rejected by local boards.[518] Representative Jones noted that a Commission would allow a group of people to specialize in the area of charter schools.[519]

For supporters, the Legislation: (1) gives parents more control over their children's education;[520] (2) encourages innovation and experimentation in education;[521] (3) clarifies that the General Assembly can and will establish education policy for Georgia;[522] and (4) corrects what many believe to be an incorrect and poorly

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513. Peevy Interview, *supra* note 115.

514. *See, e.g.*, discussion *infra* note 515.

515. *See* Education Committee Video 3, *supra* note 254, at 35 min., 38 sec. (remarks by Rep. Jan Jones (R-46th)) (noting that of 130 applications received by the Commission, only fifteen were approved); House Video 3, *supra* note 298, at 22 min., 59 sec. (remarks by Rep. Rashad Taylor (D-55th)).

516. *See* House Video 2, *supra* note 191, at 2 hr., 12 min., 29 sec. (remarks by Rep. Rashad Taylor (D-55th)); House Video 1, *supra* note 163, at 1 hr., 42 min., 22 sec. (remarks by Rep. Keith G. Heard (D-114th)); House Video 1, *supra* note 163, at 1 hr., 10 min., 31 sec. (remarks by Rep. David Wilkerson (D-33rd)).

517. *See* Education Committee Video 3, *supra* note 254, at 19 min., 58 sec. (remarks by Rep. Tommy Benton (R-31st)).

518. 2005 Ga. Laws 798, § 11, at 808 (codified at O.C.G.A. § 20-2-2064.1 (2011)).

519. *See* Education Committee Video 3, *supra* note 254, at 20 min., 32 sec.

520. *Id.* at 22 min., 11 sec.; *see also* Thomas Hart, Op-Ed., *Parent with Choice Best Kind of "Local Control,"* CHEROKEE TRIB., Mar. 23, 2012, http://cherokeetribune.com/view/full_story/17974964/article-Parent-with-choice————best-kind-of-%E2%80%98local-control%E2%80%99?instance=special.

521. *See* Peevy Interview, *supra* note 115.

522. *See* Senate Video 3, *supra* note 222, at 2 hr., 40 min., 40 sec. (remarks by Sen. Steve Thompson (D-33rd)).

reasoned decision in *Cox*.[523] Yet some opponents argued that parents already had control over their children's education; after all, it is parents that vote on the local school board members who approve or deny charter school applications.[524] Contrariwise, parents who are displeased with the decisions of the local school board have little recourse other than voting against board members or running themselves for board positions—a difficult and unrealistic solution.[525]

Both sides repeatedly agreed, however, that public education in Georgia needs improvement, and that legislators on both sides of the aisle were "on the same mission."[526] Even more, many opponents of the Legislation actively support the idea of charter schools.[527] Fundamentally, they disagreed on how to improve public school education.

Representative Jones made, repeatedly, one of the most cogent points in the debate: the Legislation would not grant the state new authority per se, nor would it create a new way of authorizing schools.[528] Indeed, both local school boards and the State Board of Education had been authorizing charter schools for years.[529] In those

523. *See* Jones Interview, *supra* note 36 ("I also think that it is very possible that in the near future that if you litigate this again, that we would get a different decision because I don't believe [HB 881] was unconstitutional."). For a thorough examination of Georgia's history of public education generally and its authority to authorize charter schools specifically, and an explanation of why the majority opinion could be characterized as flawed, see Gwinnett Cnty. Sch. Dist. v. Cox, 289 Ga. 265, 278–318, 710 S.E.2d 773, 783–810 (Nahmias, J., dissenting).

524. *See* House Video 2, *supra* note 191, at 2 hr., 12 min., 21 sec. (remarks by Rep. Rashad Taylor (D-55th)) ("HR 1162 circumvents local control, and it could allow an appointed board of bureaucrats to force on each of your local school systems a charter application that your board, and in essence your voters, have denied.").

525. House Video 1, *supra* note 163, at 1 hr., 11 min., 35 sec. (remarks by Rep. Margaret D. Kaiser (D-59th)).

526. *Id.* at 54 min., 10 sec. (remarks by Rep. Roger Bruce (D-64th)).

527. *See* House Video 2, *supra* note 191, at 2 hr., 12 min., 21 sec. (remarks by Rep. Taylor (D-55th)) ("There are some of us in the body who support charter schools, but we're going to vote against this bill because we don't think it's the appropriate vehicle for what is trying to be accomplished."). *See also* House Video 1, *supra* note 163, at 1 hr., 11 min., 35 sec. (remarks by Rep. Margaret D. Kaiser (D-59th)) ("I don't think there's anybody in this chamber that doesn't support charter schools.").

528. Education Committee Video 2, *supra* note 135, at 56 min., 28 sec. (remarks by Rep. Jan Jones (R-46th)) ("This is not a change in the policy of Georgia that we have had until that decision of May of last year. It is simply allowing us to go back to the way we have operated since before [the *Cox*] decision."); Education Video 3, *supra* note 254, at 35 min., 10 sec. (remarks by Rep. Jan Jones (R-46th)) ("[T]his is nothing new; [the] state's been authorizing for ten years.").

529. *See* Education Committee Video 3, *supra* note 254, at 35 min., 10 sec. (remarks by Rep. Jan Jones (R-46th)) (noting that the State, in some form, has been authorizing charter schools for a decade).

years, the State Board of Education was empowered to authorize charter schools even where the local board had denied the charter application initially.[530] Moreover, many states around the country already have multiple-authorizer systems in place.[531] To Representative Jones, the Legislation merely reaffirms the state's long-held power to establish education policy.[532]

Moving forward, Georgia voters will have the opportunity to ratify the constitutional amendment.[533] Should they vote affirmatively, Georgia will join the many states in the country that already empower independent authorizers.[534] Critics of the Legislation will anxiously observe the resulting effects, and their concerns will be tested. Yet, if those fears are realized, it may well be that opponents of state-authorized charter schools created the situation.[535] Justice Nahmias presciently noted in his *Cox* dissent that "[t]he appellants never argued for what the majority has given them and their fellow local school systems, and they may come to regret their 'victory' on the relatively minor issue of state-chartered schools as they deal with the turmoil and new obligations that the majority opinion generates."[536] In the years preceding the *Cox* decision, there were few state-authorized charter schools.[537] Indeed, charter schools generally were the province of motivated and committed parents and communities.[538] Since the *Cox* decision, however, charter schools

530. *See* 2005 Ga. Laws 798, § 11, at 808 (codified as amended at O.C.G.A. § 20-2-2064.1 (2011)).

531. For an examination of the various types of authorizing agencies across the country and which states currently utilize different types of authorizers, see *Authorizer Comparison*, NAT'L ASS'N OF CHARTER SCH. AUTHORIZER, http://www.qualitycharters.org/overview-interactive-map (last visited June 23, 2012). A 2009 report, however, indicated that of the sixteen states surveyed, those with multiple authorizers showed lower academic achievement than those without. CREDO, *supra* note 43, at 4 ("States that empower multiple entities to act as charter school authorizers realize significantly lower growth in academic learning in their students, on the order of -.08 standard deviations. While more research is needed into the causal mechanism, it appears that charter school operators are able to identify and choose the more permissive entity to provide them oversight.").

532. House Video 1, *supra* note 163, at 20 min., 55 sec. (noting the General Assembly's "historically significant role in partnering with local school boards and enacting general state policy" in education).

533. *See* Richardson, *supra* note 244.

534. *See Authorizer Comparison*, *supra* note 531.

535. See discussion infra notes 536–40.

536. Gwinnett Cnty. Sch. Dist. v. Cox, 289 Ga. 265, 314, 710 S.E.2d 773, 807 (2011).

537. *See* CHARTERING IN GEORGIA, *supra* note 109, at 2, 7 (noting that as of the 2010–2011 school year, there were only 162 charter schools in Georgia representing only 5.9% of Georgia public school students).

538. Admittedly, the authors of this Article were likely two of the many people who were unsure about what a charter school actually was prior to this legislative session.

have lived in the limelight and become a rallying point for many people who knew they were unsatisfied with public education in the state but were not sure how to address the problem.[539] If they were not before the *Cox* decision, charter schools are, like an old sweet song, front of mind for many Georgians today.[540]

Armed with a vote on a constitutional amendment and over a year of publicity, charter schools supporters now have an opportunity to do exactly what opponents fear—push charter schools to the forefront of public education policy at the expense of traditional schools. Even if the amendment is ratified, however, it is unclear if the Legislation will make any significant difference in the lives of most Georgians. The Commission might become a haven for applicants who wish to circumvent what they perceive as a more difficult path through local school board approval, or it might continue, as it did before the *Cox* decision, to reject the vast majority of applications it receives.[541] State-commissioned charter schools may become yet another drain on funding for public education or provide a valuable alternative to the traditional public school model. For-profit management companies could create efficiencies that benefit charter schools students; or they could abuse the opportunities the Legislation creates to the detriment of students and taxpayers. Also, there is always the chance that future members of the General Assembly will take their seats and see the role of the Commission much differently. Although an approved constitutional amendment would likely be here to stay for at least a short time, future legislatures could always vote to expand, limit, or even eliminate the Commission's role in Georgia education.

One sentiment shines through from the debates: public education in Georgia needs more—more funding, more innovation, more commitment, and more opportunities—good opportunities—for children to receive a great education. Only time will tell if this

539. *See, e.g.*, Senate Video 3, *supra* note 222, at 1 hr., 52 min., 17 sec. (remarks by Senator George Hooks (D-14th)).

540. For example, a simple internet search reveals a website archiving more than 100 news articles from across the state discussing the charter school controversy between January and May 2012. *Georgia Legislature 2012*, GA. PARTNERSHIP FOR EXCELLENCE IN EDUC. (June 24, 2012, 4:57 PM), http://www.gpee.org/Georgia-Legislature-2012.50.0.html.

541. *See* sources cited *supra* note 515.

wrinkle in education policy will be a step in the right direction, or another step in the wrong direction for the young students of Georgia.

Conclusion

The citizens of Georgia should have little difficulty agreeing on the ends implicated by the current debate regarding charter schools: that the young students of Georgia deserve only the best educational opportunities. How we go about creating those opportunities—and the way in which charter schools fit into the mix—is a matter of understandable disagreement between reasonable people with good intentions. The Supreme Court of Georgia and the General Assembly have each weighed in with opposing views.[542] Now, in a statewide vote set for November 6, 2012,[543] the people of Georgia will have the opportunity to go to the polls and decide for themselves: "Shall the Constitution of Georgia be amended to allow state or local approval of public charter schools upon the request of local communities?"[544]

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542. *Compare* Gwinnett Cnty. Sch. Dist. v. Cox, 289 Ga. 265, 710 S.E.2d 773 (2011) (striking down 2008 Act), *with* 2012 Ga. Laws 1364, 1364–66 (proposing constitutional amendment to "restate the authority of the General Assembly to establish special schools").

543. 2012 Ga. Laws 1298, § 3, at 1309; GA. SECRETARY OF ST., http://www.sos.ga.gov/elections/election_dates.htm (last visited Aug. 20, 2012).

544. HR 1162, as passed, § 4, p. 3, ln. 62–63, 2012 Ga. Gen. Assem. A January 2012 polling memorandum from McLaughlin & Associates suggests that 62% of likely Georgia voters support the amendment. Memorandum from McLaughlin & Associates to All Interested Parties 1 (Jan. 30, 2012) (on file with the Georgia State University Law Review). At the same time, 17% were undecided. *Id.* According to the memorandum, "[s]upport for public charter schools in Georgia enjoys an unusually high level of support from Georgia voters, regardless of political party, race, ideology, gender or age." *Id.* at 2. Only time will tell what the future holds for charter schools in Georgia.