Study G-200 March 25, 2010

Memorandum 2011-17

Charter Schools and the Government Claims Act: Alternative Approaches

The Legislature has authorized the Commission to study the "legal and policy implications of treating a charter school as a public entity for the purposes of Division 3.6 (commencing with Section 810) of Title 1 of the Government Code" (hereafter "Government Claims Act"). 2009 Cal. Stat. res. ch. 98 (ACR 49 (Evans)).

This study was prompted by an appellate decision holding that a charter school organized as a nonprofit corporation, independent of the chartering entity, is not a public entity for the purposes of the Government Claims Act. See *Knapp v. Palisades Charter High School*, 146 Cal. App. 4th 708, 717, 53 Cal. Rptr. 3d 182 (2007). See also *Wells v. One2One Learning Foundation*, 39 Cal. 4th 1164, 141 P.3d 225, 244, 48 Cal. Rptr. 3d 108 (2006) (charter school not public entity for purposes of California False Claims Act or Unfair Competition Law).

Prior staff memoranda presented in this study have discussed the effect and purpose of the Government Claims Act (see Memoranda 2010-6, 2010-7, 2010-16); the effect and purpose of the Charter Schools Act (see Memorandum 2010-26); the treatment of "quasi-public entities" in California (see Memorandum 2010-17); the status of charter schools in other jurisdictions (see Memorandum 2010-35); and public comment from interested groups (see Memorandum 2011-7).

Those previous materials provided the background necessary for the Commission to begin the next phase in the study: determining what approach to recommend to the Legislature.

The purpose of this memorandum is to set out a range of alternative approaches for the Commission's consideration. Once the Commission decides on the best approach, the staff will prepare a tentative recommendation that implements the chosen approach.

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting.

This memorandum also presents a letter from Nancy Peverini, of the Consumer Attorneys of California. It is attached as an Exhibit. Ms. Peverini's letter supplements her testimony at the Commission's February 2011 meeting. The letter is not discussed further in this memorandum.

BACKGROUND

Charter Schools Generally

Charter schools are publicly funded schools of choice. They are part of the public school system, as defined in Article IX of the California Constitution, and they operate under the jurisdiction of the public school system and under the exclusive control of public school officials. See Educ. Code § 47615. See also *Wilson v. Dep't of Educ.*, 75 Cal. App. 4th 1125, 89 Cal. Rptr. 2d 745 (1999).

Charter schools are exempted from most of the statutory law that regulates public schools. See Educ. Code § 47610.

Individual charter schools may be formed as nonprofit public benefit corporations. The chartering entity is not liable for the debts, obligations, or torts of a charter school that is formed as a nonprofit public benefit corporation. See Educ. Code § 47604.

The flexibility and independence granted to charter schools is intended to encourage pedagogical innovation:

> It is the intent of the Legislature, in enacting this part, to provide opportunities for teachers, parents, pupils, and community members to establish and maintain schools that operate independently from the existing school district structure, as a method to accomplish all of the following:
>
> (a) Improve pupil learning.
>
> (b) Increase learning opportunities for all pupils, with special emphasis on expanded learning experiences for pupils who are identified as academically low achieving.
>
> (c) Encourage the use of different and innovative teaching methods.
>
> (d) Create new professional opportunities for teachers, including the opportunity to be responsible for the learning program at the schoolsite.
>
> (e) Provide parents and pupils with expanded choices in the types of educational opportunities that are available within the public school system.
>
> (f) Hold the schools established under this part accountable for meeting measurable pupil outcomes, and provide the schools with

> a method to change from rule-based to performance-based accountability systems.
>
> (g) Provide vigorous competition within the public school system to stimulate continual improvements in all public schools.

See Educ. Code § 47601.

Charter Schools as Non-Public Entities

The fact that a charter school can be formed as an independent legal entity raises a question as to whether such a charter school is a public entity for the purposes of laws that govern public entities, or is instead a private entity performing delegated public functions.

As noted above, the California courts have held that a charter school is not a public entity for the purposes of certain statutes that limit public entity exposure to suit. Those cases are discussed briefly below.

Wells v. One2One Learning Foundation

In *Wells v. One2One Learning Foundation*, 39 Cal. 4th 1164, 141 P.3d 225, 48 Cal. Rptr. 3d 108 (2006), the California Supreme Court held that a charter school is not a public entity for purposes of the California False Claims Act ("CFCA") or the Unfair Competition Law. Consequently, a charter school does not enjoy public entity immunity from suit under those statutes.

In its opinion, the court distinguished between a traditional public school district and a charter school. The court held that the "draconian" treble damages available under the CFCA should not be applied to a school district. To do so "would place severe and disproportionate financial constraints on their ability to provide the free education mandated by the Constitution — a result the Legislature cannot have intended." *Id.* at 1198-99. The court then found that the Charter Schools Act "assigns no similar sovereign significance to charter schools or their operators." *Id*. at 1201. It characterized charter schools as "distinct outside entities," and compared them to "nongovernmental entities that contract with state and local governments to provide services on their behalf." *Id*.

The court saw no problem imposing treble damages on a charter school because depletion of the fiscal resources of a charter school would not necessarily interfere with the State's operation of the public school system. Even if a charter school were to close because of CFCA penalties, the charter school's students and remaining resources would simply return to the school district. Consequently,

applying the CFCA remedies to charter schools would not impair the state's ability to provide "adequate free public educational services." *Id.*

The court also considered whether the claims presentation requirements of the Government Claims Act would apply to a CFCA claim against a charter school. It held that claims presentation is not required, because the CFCA action was brought on behalf of the state and the claims presentation requirements do not apply to a claim brought by (or on behalf of) the state. Because the Government Claims Act does not apply to a CFCA action, it was not necessary to determine whether the Government Claims Act applied to the charter school defendants. Nonetheless, the court observed, in apparent *dicta*, that charter schools "do not fit comfortably within any of the categories defined, for purposes of the [Government Claims Act], as 'local public entities.'" *Id*. at 1214.

Knapp v. Palisades Charter High School

More recently, the Second District of the Court of Appeal held that a charter school organized as a nonprofit corporation is not a public entity for the purposes of the Government Claims Act. See *Knapp v. Palisades Charter High School*, 146 Cal. App. 4th 708, 717, 53 Cal. Rptr. 3d 182 (2007).

The *Knapp* opinion recited the *Well's* court's conclusions that an incorporated charter school is a "distinct outside entity," with an "independent legal identity," that does not "fit comfortably within any of the categories" of local public entity covered by the Government Claims Act. *Id.* at 716-17. The court then declared that it was "following" *Wells* in concluding that an incorporated charter school is not a public entity for purposes of the Government Claims Act. *Id*. at 717.

LEGAL IMPLICATIONS

The Commission has been charged, in part, with analyzing the legal implications of treating a charter school as a public entity for the purposes of the Government Claims Act.

The main legal effects of such a change in the law are obvious. A charter school would then be subject to the special rules regulating governing claims against public entities. Most significantly:

- In most cases, a person wishing to sue a charter school for money or damages would be required to follow a pre-filing claims presentation procedure. See Gov't Code §§ 900-950.8

- A charter school would be immune from liability for common law torts. See Gov't Code § 815.
- A charter school would be immune from punitive damages. See Gov't Code §§ 818, 825.
- A charter school would be immune from liability for an employee's discretionary act. See Gov't Code § 820.2.
- A charter school would be subject to special rules on liability for a dangerous condition of property (including a defense based on "reasonable" precautions). See Gov't Code § 835(b).
- Charter school employees would have slightly stronger rights with regard to defense and indemnification than they have as private sector employees. See, generally, Memorandum 2010-7.

For a fuller discussion of the effect of the Government Claims Act, see Memoranda 2010-6, 2010-7, 2010-16.

Beyond those direct legal effects, a statute declaring a charter school to be a public entity for purposes of the Government Claims Act would also have two indirect effects worth noting:

(1) It would resolve any existing uncertainty as to whether the Government Claims Act applies to charter schools.
(2) It might introduce new uncertainty as to the status of a charter school under other statutes governing public entities.

Those indirect effects are discussed more fully below.

Uncertainty as to Application of Government Claims Act

As discussed above, the *Wells* court did not squarely decide whether a charter school is a public entity for purposes of the Government Claims Act. It was not necessary for it to decide that issue, because it found that the Government Claims Act did not apply to the *type of claim* at issue in the case (a CFCA *qui tam* action). Consequently, there is no controlling Supreme Court precedent on the status of a charter school under the Government Claims Act.

The *Knapp* court did squarely hold that an incorporated charter school is not a public entity for the purposes of the Government Claims Act. However, it did not make a decision on whether the same would be true of a charter school that is organized as a dependent component of a school district, rather than as an independent legal entity.

Furthermore, while the *Knapp* precedent is binding on all inferior California courts, the California Supreme Court and other panels of the Court of Appeal are

not bound and could reach a contrary result. See *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 455, 369 P.2d 937, 20 Cal. Rptr. 321 (Cal. 1962).

In addition, as noted in Memorandum 2011-7, a recent unpublished federal trial court decision held that a charter school *is* a public entity for the purposes of California's Government Claims Act. See *Dubose v. Excelsior Educ. Ctr.*, No. EDCV 10-0214 GAF (C.D. Cal. Sept. 22, 2010).

It is unclear to the staff why the *Dubose* court did not defer to California appellate authority in construing a California statute. See Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1099 (9th Cir. Cal. 2003) (federal court bound to follow California Court of Appeal's interpretation of California law "absent convincing evidence that the California Supreme Court would reject the interpretation"). Nonetheless, *Dubose* creates an apparent division of authority, whatever its precedential or persuasive weight.

Consequently, there is uncertainty as to whether *Knapp* is the last word on the status of incorporated charters under the Government Claims Act. Moreover, there is no precedential guidance on the status of a charter school that is formed as a dependent component of a school district, rather than as a separately incorporated entity.

This uncertainty could be legally problematic. A person with a claim against a charter school needs to know whether to submit a claim under the claims presentation procedures of the Government Claims Act. Failure to submit a necessary claim could bar the person from filing suit.

It would therefore be helpful to eliminate any uncertainty as to whether the Government Claims Act applies to a charter school. (This does not necessarily weigh in favor of a statute declaring that a charter school is a public entity under the Government Claims Act. Clarity could also be provided by a statute declaring that a charter school is not a public entity for that purpose.)

Possible New Uncertainty Regarding Continuing Effect of *Wells* Decision

If a statute were enacted to make the Government Claims Act applicable to incorporated charter schools, it could cast doubt on the continuing effect of the court's holdings in *Wells*.

As discussed above, the *Wells* decision was grounded in the court's conclusion that a charter school is a nongovernmental entity that does not have sovereign significance. The court found no policy reason to immunize a charter

school from liability under the CFCA (including potential treble damages) or the Unfair Competition Law.

If the Legislature were to enact a statute declaring that a charter school is entitled to sovereign immunities conferred by the Government Claims Act, including immunity from punitive damages, that could create uncertainty about whether the court's reasoning and holdings in *Wells* remain valid.

That uncertainty would be legally problematic, as it would probably require litigation to resolve whether the *Wells* holdings had been superseded by the Legislature.

POLICY IMPLICATIONS

Tort liability provides a civil remedy for injuries caused by others. Under the fault theory of tort liability, the party who breaches a duty of care and causes an injury must compensate the injured party. This serves three purposes:

(1) It shifts losses away from an innocent injured party and to the responsible party.
(2) It deters behavior likely to cause injury.
(3) It encourages the use of precautions to prevent injury.

Arvo Van Alstyne, *A Study Relating to Sovereign Immunity*, 5 Cal. L. Revision Comm'n Reports 1, 271-72 (1963) (hereafter, *A Study Relating to Sovereign Immunity*).

Applying the fault theory of tort liability to government entities can be problematic. Government engages in many activities that serve the public at large. These activities are mandated by law and reflect policy decisions made by the people through their legislators. A public entity may not have the luxury of halting a service simply because it is deemed too costly or risky. A public entity also does not benefit from its conduct in the same manner as private entities. It receives its revenue from the taxpayers generally. See *Recommendation Relating to Sovereign Immunity, Number 1 — Tort Liability of Public Entities and Public Employees,* 5 Cal. L. Revision Comm'n Reports 801, 810 (1963) (hereinafter, *Number 1 — Tort Liability of Public Entities and Public Employees*).

Although sovereign immunity was originally grounded in the idea that government entities are sovereign and cannot be sued without permission, more modern rationales have developed to justify the application of sovereign immunity. See *A Study Relating to Sovereign Immunity, supra,* at 17.

Two closely related arguments constitute the primary modern justifications for governmental immunity: protection of the public fisc and the need to allow government to govern.

Protecting the public fisc is important for several reasons. The costs of defending actions for injuries caused by government activity could be very expensive. Resources may be diverted from important government activities or tax rates may increase. Further, when a public entity is involved, shifting losses away from an innocent injured party places the burden on another arguably innocent party — the taxpayer. See, e.g., *Alden v. Maine*, 527 U.S. 706, 750-51 (1999).

The potential of having to allocate a large portion of the public fisc to money damages may significantly impair the government's ability to govern. Resources are limited and the government should be allowed to decide how to best allocate those resources. A public entity cannot effectively carry out its duties if too many of its resources are devoted to defending lawsuits and paying claims, or if the entity constrains important activities in order to avoid potential claims. See *id.* at 750.

Those sorts of policy considerations are discussed in the specific context of charter schools, below.

Compensation

As discussed above, one of the main policy justifications for tort liability is that it provides for compensation of an innocent injured person, by the person whose breach of duty caused the injury. This allocation of the cost of an injury is grounded in basic fairness.

Sovereign immunity can operate to preclude the compensation of an innocent person who has been injured by a public entity. All other considerations aside, that is an unfair result. It allows an entity that breached a duty to escape the consequences of the breach, and leaves the innocent injured person bearing the full cost of the injury.

There may well be countervailing policy considerations that would justify such a result. Nonetheless, the first policy implication of applying the Government Claims Act to a charter school would be:

- **Some innocent persons injured by charter schools would not be compensated for their injuries.**

Health and Safety

As discussed above, the Government Claims Act provides immunity to public entities for discretionary policy decisions. This immunity allows government to make hard choices, in the public interest, without concern that potential tort liability might exhaust scarce agency fiscal resources or deter necessary actions.

One disadvantage of this immunity is that it removes the beneficial deterrent effect of tort liability. This could lead policy makers to tolerate higher levels of risk. If a public entity cannot be sued for injuries that result from discretionary policies, there is less incentive for the entity to adopt costly or burdensome precautions against injury.

However, there are two other potential checks on public entity policy making, that could serve to constrain risk, even in the absence of tort deterrence. The first is health and safety regulation. The second is public accountability. As discussed below, there are reasons to question whether those checks would be adequate in the context of charter schools.

Health and Safety Regulation

Charter schools are exempt from a number of health and safety laws that were enacted to protect children in public schools. For example, charter schools are not subject to the "Field Act" earthquake safety standards. See Educ. Code §§ 17280-17317, 17365-17374, 81050-81149. Nor are charter schools required to prepare comprehensive school safety plans and disaster procedures that are required for all other public schools under Education Code Sections 32280-32289. See generally Memorandum 2010-26, p. 15.

Consequently, health and safety regulation would not be as effective a check on policy decisions in a charter school, as it would be in a traditional public school. As compared to a traditional public school, a charter school would have broader discretion to adopt policies that present risks to student health and safety.

For example, Education Code Section 32020 requires that any school that is enclosed by walls or fencing provide at least one gate that is of sufficient size to permit access by emergency vehicles. That is a nondiscretionary obligation for traditional public schools. By contrast, a charter school is exempt from Section 32020. It is free to decide whether to provide such a gate. If that decision is made as a matter of conscious policy, after weighing the advantages and

disadvantages, it would likely be covered by the discretionary act immunity provided under the Government Claims Act. This demonstrates how the combination of discretionary immunity and deregulation could lead a charter school to adopt policies that lead to higher levels of risk than are found in a traditional public school.

Thus, another policy implication of applying the Government Claims Act to a charter school would be:

- **The combination of discretionary immunity and exemption from public school health and safety laws could lead to riskier health and safety policies in charter schools than in traditional public schools.**

Public Accountability

In addition to potential tort liability, another important check on the exercise of policy discretion by a public entity is the body of laws requiring that public entity policymaking be transparent and open to public participation. If a public school official is considering a policy decision that might lead to unacceptable health and safety risks to students, one could argue that the decision should be made in the open. Parents and other interested persons could then raise objections to the policy and bring political pressure to bear through the chartering entity or their elected representatives.

Laws like the Ralph M. Brown Open Meeting Act, the California Public Records Act, and the Political Reform Act of 1974 ensure that policy discussions by public legislative bodies are held in open meetings at which the public may speak, that public agency records relating to policy matters are subject to inspection by citizens and the press, and that public officials are barred from making decisions that would materially affect their own economic interests. See Gov't Code §§ 6250 *et seq*. (Public Records Act), 54950 *et seq*. (Open Meeting Act), 81000 *et seq*. (Political Reform Act).

If charter schools are not subject to those sorts of "open government" checks on policy making, charter school policy makers might tolerate higher levels of risk than they would if their decision making process was open to public scrutiny.

For example: As discussed above, a charter school is free to make a discretionary policy decision on whether to provide a gate that is large enough to admit emergency vehicles to school grounds. If that decision must be made at a public meeting, with advance public notice, and with the underlying records

subject to public inspection, there would be an opportunity for affected members of the public to help shape the decision. This would reduce the likelihood that discretionary policy immunity would lead to heightened risk to student health and safety.

As discussed in Memorandum 2010-17, there are good reasons to believe that charter schools are *already* subject to those open government statutes. However, there is no consensus on that point. Bills have been introduced to expressly apply those open government laws to charter schools, but they have been opposed by some charter school advocates and have not been enacted. For example, AB 572 (Brownley) was introduced in 2010 to expressly state that charter schools are subject to the Brown Act, Public Records Act, and Political Reform Act (as well as Government Code Sections 1090-1099, which prohibit self-interested contracting by public officials). The bill was approved by the Legislature, but vetoed by the Governor, who wrote in his veto message:

> Charter school educators have proven that poverty is not destiny for students that attend public schools in California. Repeatedly, charter schools with high proportions of disadvantaged students are among the highest performing public schools in California. Any attempt to regulate charter schools with incoherent and inconsistent cross-references to other statutes is simply misguided. Parents do not need renewed faith in charter schools as suggested in this bill. On the contrary, tens of thousands of parents in California have children on waiting lists to attend a public charter school. Legislation expressing findings and intent to provide "greater autonomy to charter schools" may be well intended at first glance. A careful reading of the bill reveals that the proposed changes apply new and contradictory requirements, which would put hundreds of schools immediately out of compliance, making it obvious that it is simply another veiled attempt to discourage competition and stifle efforts to aid the expansion of charter schools.
>
> For these reasons, I am unable to sign this bill.

As can be seen, the Governor believed that application of the specified open government laws to charter schools would impose "new" requirements. In other words, he believed that those statutes do *not* currently apply to charter schools.

Assembly Member Brownley has re-introduced her bill in 2011, without substantive change, as AB 360. Until the fate of that bill is known, we must assume that the question of whether charter schools are subject to the above-mentioned open government laws has not been conclusively answered. For that

reason, the next policy issue implicated by applying the Government Claims Act to a charter school would be:

- **The combination of discretionary immunity and exemption from open government laws could lead to the adoption of riskier health and safety policies in charter schools than in traditional public schools.**

Pedagogical Innovation

Based on the statutory statement of legislative intent, it appears that the primary purpose of charter schools is to foster pedagogical innovation and improvement.

> It is the intent of the Legislature, in enacting this part, to provide opportunities for teachers, parents, pupils, and community members to establish and maintain schools that operate independently from the existing school district structure, as a method to accomplish all of the following:
>
> (a) Improve pupil *learning*.
>
> (b) Increase *learning* opportunities for all pupils, with special emphasis on expanded *learning* experiences for pupils who are identified as academically low achieving.
>
> (c) Encourage the use of different and innovative *teaching methods*.
>
> (d) Create new professional opportunities for teachers, including the opportunity to be responsible for the *learning program* at the schoolsite.
>
> (e) Provide parents and pupils with expanded choices in the types of *educational opportunities* that are available within the public school system.
>
> (f) Hold the schools established under this part accountable for meeting measurable pupil outcomes, and provide the schools with a method to change from rule-based to performance-based accountability systems.
>
> (g) Provide vigorous competition within the public school system to stimulate continual improvements in all public schools.

See Educ. Code § 47601 (emphasis added).

By exempting charter schools from most of the requirements of the Education Code and granting them a significant degree of operational independence from school districts, the Charter Schools Act frees charter schools to experiment pedagogically.

Concerns about potential tort liability could constrain pedagogical innovation in charter schools. If the potential tort liability is determined to be too great, charter school policy makers might be deterred from undertaking some

innovations. If, however, charter schools were granted immunity under the Government Claims Act from liability for discretionary policy decisions, the scope for pedagogical innovation would probably be broadened.

This illustrates one of the modern justifications for sovereign immunity that is discussed above: allowing government to govern. Tort immunity frees a public entity to make a decision that it might avoid if it needed to factor in the cost of potential tort liability.

Thus, the next policy issue implicated by applying the Government Claims Act to a charter school would be:

- **Discretionary immunity could facilitate the core function of charter schools (pedagogical innovation), by removing liability as a deterrent to experimentation.**

Protecting the Public Fisc

As discussed above, another of the modern justifications for sovereign immunity is to protect the public fisc, so that litigation costs and judgments do not overwhelm scarce public resources, undermining government's ability to perform its sovereign functions. With respect to public school districts, the Supreme Court recognized this concern in *Wells*:

> As we will explain, in light of the stringent revenue, appropriations, and budget restraints under which all California governmental entities operate, exposing them to the draconian liabilities of the CFCA would significantly impede their fiscal ability to carry out their core public missions. In the particular case of public school districts, such exposure would interfere with the state's plenary power and duty, exercised at the local level by the individual districts, to provide the free public education mandated by the Constitution.
>
> …
>
> Hence, there can be no doubt that public education is among the state's most basic sovereign powers. Laws that divert limited educational funds from this core function are an obvious interference with the effective exercise of that power. Were the CFCA applied to public school districts, it would constitute such a law. If found liable under the CFCA, school districts, like other CFCA defendants, could face judgments — payable from their limited funds – of at least two, and usually three, times the damage caused by each false submission, plus civil penalties of up to $10,000 for each false claim, plus costs of suit. Such exposure, disproportionate to the harm caused to the treasury, could jeopardize a district financially for years to come. It would injure the districts' blameless students far more than it would benefit the

> public fisc, or even the hard-pressed taxpayers who finance public education.

Wells, 39 Cal.4th at 1193, 1195.

The *Wells* court concluded that the same concerns did not apply to an independently organized charter school:

> If a charter school ceases to exist, its pupils are reabsorbed into the district's mainstream public schools, and the ADA revenues previously allotted to the charter school for those pupils revert to the district.
>
> The [Charter Schools Act] was adopted to widen the range of educational choices available within the public school system. That is a salutary policy. Yet application of the CFCA's monetary remedies, however harsh, to the charter school defendants presents no fundamental threat to maintenance, within the affected districts, of basically adequate free public educational services. Thus, application of the CFCA to the charter school operators in this case cannot be said to infringe the exercise of the sovereign power over public education.

Id. at 1201.

In effect, the Supreme Court seems to be saying that charter schools are fungible. If one fails, its students are reabsorbed by the district and the general program of public education continues without significant interference. This view has some merit, but the court may be assigning too little significance to the disruption of public education that could result if an individual charter school is abruptly closed due to litigation.

The establishment of a charter school involves a significant investment of time, money, and effort. The operation of the charter school involves further investment and effort. Those investments are made with the expectation that educational benefits will result — improved learning opportunities for students and potentially useful experimentation in pedagogical practices. If a charter school is forced to close, that investment and the anticipated benefits would be lost. Furthermore, there would be transition costs as students and teachers are integrated back into other schools in the district. In addition to those costs, the transfer of students would be disruptive for the affected students and for the schools that receive them.

While these costs and disruptions would be temporary and would not fatally impair school district operations, they could have a significantly deleterious effect on public education programs.

Furthermore, if the potential financial instability of charter schools were significant enough, it might deter the creation of new charter schools. That could undermine the legislative policy embodied in the Charter Schools Act. We have no evidence that the *Knapp* decision has resulted in any reduction in the number of new charter schools.

For the most part, charter schools can avoid these fiscal threats through liability insurance. However, there are some sources of liability that may be difficult or impossible to insure against. In addition, charter schools, as part of the public school system, have special limitations on their ability to manage risk. Those sorts of fiscal concerns are discussed below.

Punitive Damages

One significant effect of the Government Claims Act is that it immunizes public entities against the imposition of punitive or exemplary damages:

> Notwithstanding any other provision of law, a public entity is not liable for damages awarded under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant.

Gov't Code § 818. This makes sense, for the reasons discussed in *Wells*. A very large punitive damage award could seriously impair a public entity's ability to perform its sovereign functions.

General liability insurance does not cover punitive damages, because they are considered punishment for intentional acts. Consequently, a charter school could face a large punitive damage award against which it would not be insured.

This would probably be a rare occurrence. Punitive damages are only available for egregious intentional misconduct ("oppression, fraud, or malice") that must be proven by clear and convincing evidence. See Civ. Code § 3294.

However, if punitive damages were imposed, the fiscal effect on a charter school might be more than the school could sustain. Consequently, another policy implication of treating a charter school as a public entity under the Government Claims Act would be:

- **Immunity from punitive damages would help to protect the resources of a charter school, eliminating the small but not insignificant risk that a large punitive damage award would jeopardize the school's viability.**

Liability for Which Insurance is Unavailable

One of the concerns that has been raised by Greg V. Moser, on behalf of the California Charter Schools Association, is that charter schools are in a double bind, because they have some public entity responsibilities without the protections of public entity immunities. He maintains that this exposes charter schools to types of liability that a traditional public school would be immunized against, but that would not be covered by general liability insurance. See Memorandum 2011-7, Exhibit pp. 11-13.

The staff has requested that Mr. Moser provide a fuller explanation of this problem, including specific examples of liabilities that (1) a charter school would face as a consequence of being part of the public school system, (2) would be covered by the immunities provided by the Government Claims Act, and (3) would not be covered by general liability insurance.

When that information is received, it will be provided in a supplement to this memorandum. Until that time, it would be premature to attempt to draw any conclusions on this point.

Limited Resources

Like traditional public schools, charter schools cannot charge tuition. See Educ. Code § 47605(d). This places a limit on the fiscal resources available to charter schools. Unlike private schools, they cannot simply raise tuition rates in order to self-insure or pay litigation costs. This makes them more vulnerable than private schools to having their finances depleted as a result of tort liability.

This concern is only relevant to the extent that charter schools face types of liability that are not covered by general liability insurance. Again, until we receive the additional information requested from Mr. Moser on that point, it would be premature to draw any conclusions.

Summary

To reiterate, the policy implications of treating a charter school as a public entity under the Government Claims Act appear to be as follows:

- Some innocent persons injured by charter schools would not be compensated for their injuries.
- The combination of discretionary immunity and exemption from public school health and safety laws could lead to riskier health and safety conditions and policies in charter schools than in traditional public schools.

- The combination of discretionary immunity and exemption from open government laws could lead to the adoption of riskier health and safety policies in charter schools than in traditional public schools.
- Discretionary immunity could facilitate the core function of charter schools (pedagogical innovation), by removing liability as a deterrent to experimentation.
- Immunity from punitive damages would help to protect the resources of a charter school, eliminating the small but not insignificant risk that a large punitive damage award would jeopardize the school's viability.

In addition, we are waiting for further information on the extent to which insurance is unavailable for certain types of liability that charter schools face as a result of being part of the public school system. Once that information is available, it may be appropriate to supplement the above list of policy implications.

ALTERNATIVE APPROACHES

This section of the memorandum sets out a range of alternative ways in which the Commission might answer the main question underlying this study: Should a charter school be deemed a public entity for purposes of the Government Claims Act? For each approach, the advantages and disadvantages of the approach are discussed, with particular attention to the legal and policy implications identified earlier in the memorandum.

"Dependent" Charter Schools: A Special Case?

Before considering alternative approaches that might be applied to *all* charter schools, regardless of their form of organization, it would be helpful to consider whether a distinction should be drawn between:

- An "independent" charter school formed as a nonprofit corporate entity, separate from its chartering authority.
- A "dependent" charter school that is not legally separate from its chartering authority.

As discussed above, the *Knapp* case expressly limited its holding — that a charter school is not a public entity for the purposes of the Government Claims Act — to an independent charter school that is organized as a nonprofit corporation. There are two good reasons for drawing such a distinction: (1) the

limited liability of a chartering entity for the torts and obligations of an independent charter school, and (2) the separate legal identity and hence quasi-public, as opposed to purely public, character of an independent charter school.

Liability of Chartering Entity

A chartering entity is not liable for the debts, obligations, or torts of a charter school that is formed as a nonprofit public benefit corporation. See Educ. Code § 47604. This means that the finances of the chartering school district will not be directly affected by any liability imposed on an incorporated charter school. Consequently, concerns about conserving the public fisc are not strongly implicated with respect to the liability of an incorporated charter school. No matter what liability such a school incurs, none will reach the chartering school district.

By contrast, if a charter school is not incorporated, the chartering entity could potentially be held liable for the torts and obligations of the charter school. In that case, concern about protecting the public fisc would weigh in favor of granting a dependent charter school the same degree of sovereign immunity as the public school district of which it is part. A suit against either the dependent charter school or the district itself could have the same disruptive effect on the district's finances.

Legal Identity

If a charter school is organized as an independent nonprofit corporation, it has a legal identity that is separate from the chartering entity. That separate identity seems to be the source of the question of whether a charter school is a public entity. If a charter school is instead organized as an inseparable organizational subdivision of a public school district, it would seem uncontroversial to conclude that the school has the same legal identity and status as the district of which it is a part.

Conclusion

For the reasons discussed above, the staff believes that it would be reasonable to draw an analytical distinction between an independent charter school that is legally separate from its chartering entity, and a dependent charter school that is not legally separate from its chartering authority.

A dependent charter school should probably share the same legal status as the larger entity of which it is part. This makes sense conceptually. This

treatment also makes sense in terms of protecting the public fisc, because the larger entity could be liable for the torts of the charter school.

If the Commission agrees with that approach, it would still need to decide how to characterize an independent charter school. Various alternative approaches are discussed below.

Public for All Purposes

A statute could be enacted to declare that a charter school is a public entity for all purposes. This would include the Government Claims Act, but would also include open government laws and any other laws that regulate public entities (e.g., public contracting laws, public employment laws, etc.).

This is the predominant characterization of charter schools in other U.S. charter school jurisdictions. Twenty-four of the 39 charter school jurisdictions deem charter schools to be public for all purposes. See Memorandum 2010-35.

The advantages and disadvantages of this approach are discussed below.

Advantages

The advantages of treating charter schools as public entities for all purposes would be as follows:

- **Legal Clarity**. There would be no ambiguity as to whether a charter school is governed by the Government Claims Act. Nor would there be any ambiguity regarding the status of charter schools under other laws affecting public entity liability (e.g., CFCA).
- **Open Government Laws as a Check on Policy Discretion**. The application of open government laws to charter schools would act as a check on policy making. This would help to deter health and safety policies that might impose too great a risk of harm to students.
- **No Chilling of Pedagogical Innovation.** Immunity from liability for discretionary decisions would make it easier for charter schools to adopt pedagogical innovations that might otherwise impose too great a risk of liability.
- **Protection of Limited Fiscal Resources.** Immunity from punitive damages and from liability for which insurance is unavailable would help to protect the limited fiscal resources of charter schools. This would help to avoid the loss of investment, loss of pedagogical benefit, disruption, and transition costs that might result if a charter school were forced to close as a result of a large judgment against the school.

Disadvantages

The disadvantages of treating charter schools as public entities for all purposes would be as follows:

- **Commission Not Authorized to Study or Recommend this Alternative.** The Commission's authority in this study is limited to an examination of the legal and policy implications of applying the Government Claims Act to charter schools. We are not authorized to study the status of charter schools under the open government laws or other laws that regulate public entities (e.g., CFCA, public contracting laws, public employment laws, etc.). We have not conducted such an analysis and have no basis on which to determine whether it would be good policy to treat charter schools as public entities for the purposes of other statutes.
- **Compensation Undermined.** Some innocent persons injured by charter schools would not be compensated for their injuries.
- **Heightened Student Health and Safety Risks.** Declaring that a charter school is a public entity would not affect the exemption of charter schools from the student health and safety laws that regulate school districts. That exemption, combined with the discretionary policy immunity conferred by the Government Claims Act, could lead to an increased risk of harm to students in charter schools, as compared to students in traditional public schools.

Public for Government Claims Act Purposes Only

A statute could be enacted to declare that a charter school is a public entity for purposes of the Government Claims Act, without any declaration as to the status of a charter school under other laws that regulate public entities.

The advantages and disadvantages of this approach are discussed below.

Advantages

The advantages of treating charter schools as public entities for the purposes of the Government Claims Act only would be as follows:

- **Legal Clarity**. There would be no ambiguity as to whether a charter school is governed by the Government Claims Act.
- **No Chilling of Pedagogical Innovation.** Immunity from liability for discretionary decisions would make it easier for charter schools to adopt pedagogical innovations that might otherwise impose too great a risk of liability.
- **Protection of Limited Fiscal Resources.** Immunity from punitive damages and from liability for which insurance is unavailable would help to protect the limited fiscal resources of charter

schools. This would help to avoid the loss of investment, loss of pedagogical benefit, disruption, and transition costs that might result if a charter school were forced to close as a result of a large judgment against the school.

Disadvantages

The disadvantages of treating charter schools as public entities for the purposes of the Government Claims Act only would be as follows:

- **Compensation Undermined.** Some innocent persons injured by charter schools would not be compensated for their injuries.
- **Heightened Student Health and Safety Risks.** Declaring that a charter school is a public entity would not affect the exemption of charter schools from the student health and safety laws that regulate school districts. That exemption, combined with the discretionary policy immunity conferred by the Government Claims Act, lead to an increased risk of student harm in charter schools, as compared to students in traditional public schools.
- **Application of Open Government Laws Unclear**. The application of open government laws to charter schools would remain unclear. To the extent charter schools avoid the application of such laws, the public would be denied an opportunity to monitor and participate in policy making. In that case, the discretionary immunity conferred by the Government Claims Act might lead to riskier policies being adopted by charter schools, as opposed to traditional public schools.
- **New Legal Uncertainty**. The application of the Government Claims Act to charter schools could lead to uncertainty about the continuing effect of the holdings in *Wells* (i.e., that charter schools lack "sovereign significance" sufficient to justify exempting them from suit under CFCA and Unfair Competition Law).

Combined Approach: Charters Subject to Government Claims Act, Open Government Laws, and Student Health and Safety Laws

Legislation could be enacted to declare that a charter school is a public entity for purposes of the Government Claims Act, in combination with one or both of the following reforms:

- Make some or all student health and safety laws applicable to charter schools.
- Make the open government laws applicable to charter schools (perhaps with minor operational adjustments to account for the special character of charter schools).

The advantages and disadvantages of this combined approach are discussed below.

Advantages

The advantages of treating charter schools as public entities for the purposes of the Government Claims Act, in combination with one or both of the reforms described above, would be as follows:

- **Legal Clarity**. There would be no ambiguity as to whether a charter school is governed by the Government Claims Act.
- **No Chilling of Pedagogical Innovation.** Immunity from liability for discretionary decisions would make it easier for charter schools to adopt pedagogical innovations that might otherwise impose too great a risk of liability.
- **Protection of Limited Fiscal Resources.** Immunity from punitive damages and from liability for which insurance is unavailable would help to protect the limited fiscal resources of charter schools. This would help to avoid the loss of investment, loss of pedagogical benefit, disruption, and transition costs that might result if a charter school were forced to close as a result of a large judgment against the school.
- **Health and Safety Risks Minimized.** The application of general student health and safety laws would limit the scope for risky health and safety policy decisions. Charter schools would then be in the same health and safety policy making environment as traditional public schools.
- **Open Government Laws as a Check on Policy Discretion**. The application of open government laws to charter schools would act as a check on agency policy making. This would help to deter health and safety policies that might impose too great a risk of harm to students.

Disadvantages

The disadvantages of treating charter schools as public entities for the purposes of the Government Claims Act, in combination with one or both of the reforms described above, would be as follows:

- **Commission Not Clearly Authorized to Study or Recommend this Alternative.** The Commission's authority in this study is limited to an examination of the legal and policy implications of applying the Government Claims Act to charter schools. We are not authorized to study whether charter schools should be subject to the student health and safety laws from which they are currently exempted. Likewise, we are not authorized to study

whether charter schools should be subject to general open government laws.

It is appropriate for the Commission to note the policy *implications* of extending Government Claims Act immunities to charter schools, in light of their exemption from student health and safety laws and the uncertain application of open government laws. It is also appropriate to identify the approach discussed here as an option for legislative consideration.

But it would be ill-advised for the Commission to go farther and make a recommendation on whether charter schools *should* be subject to student health and safety laws and general open government laws. We have not been authorized to study that separate question and have no basis for making a recommendation on that point.

- **Compensation Undermined.** Some innocent persons injured by charter schools would not be compensated for their injuries.
- **Added Costs.** Extending the application of student health and safety laws and general open government laws to charter schools would add operational costs to charter schools. Those costs could interfere with charter school innovation and could even make some charter school operations unsustainable (e.g., where the only facilities available for a charter school do not meet the standards of the Field Act).
- **New Legal Uncertainty**. The application of the Government Claims Act to charter schools could lead to uncertainty about the continuing effect of the holdings in *Wells* (i.e., that charter schools lack "sovereign significance" sufficient to justify exempting them from suit under CFCA and Unfair Competition Law).

Not Public for Government Claims Act Purposes

A statute could be enacted to declare that a charter school is not a public entity for the purposes of the Government Claims Act.

The advantages and disadvantages of this approach are discussed below.

Advantages

The advantages of declaring that charter schools are not public entities for the purposes of the Government Claims Act would be as follows:

- **Compensation Preserved.** Sovereign immunity would not be available to preclude the compensation of innocent persons injured by charter schools.
- **Potential Liability Would Deter Risky Behavior.** One of the principal policy justifications for tort liability is that it deters unduly risky behavior and encourages appropriate precautions to be taken against harm. This is particularly important for charter

schools, considering that they are exempt from some student health and safety laws and may not be subject to open government laws.

- **Legal Clarity**. There would be no ambiguity as to whether a charter school is governed by the Government Claims Act. In addition, because this approach would be compatible with the holdings in *Wells*, the continuing validity of those holdings would not be cast into doubt.

Disadvantages

The disadvantages of declaring that charter schools are not public entities for the purposes of the Government Claims Act would be as follows:

- **Chilling of Pedagogical Innovation.** Charter schools could be deterred from adopting pedagogical innovations as a result of liability concerns.
- **Limited Fiscal Resources at Risk.** Unlimited exposure to tort liability (including possible punitive damages) could threaten the viability of charter schools, to the extent that liability insurance is not available for certain types of activities. If a charter school fails as a result of liability, the public school system would suffer a loss of investment, a loss of pedagogical benefit, disruption, and transition costs. This could significantly impair a school district's educational program.

ONE ALTERNATIVE OR MANY?

As the preceding discussion makes clear, all of the alternatives considered involve significant policy trade-offs. As can also be seen, the trade-offs divide in a way that is likely to polarize the interested groups. Groups that are primarily concerned about encouraging charter school innovation and protecting charter school fiscal resources from depletion will favor one set of alternatives, while those who are primarily concerned about the risk that might result from granting charter schools policy making immunity (in combination with some measure of health and safety deregulation and unclear accountability under general open government laws), will favor a different set. *It seems likely that this division of policy opinion would also exist in the Legislature.*

To further complicate matters, the alternatives that would offer a compromise position (treating charter schools as public entities under the Government Claims Act, but only if they are also subject to other laws that would make them more fully analogous to traditional public schools in terms of health and safety

regulation and public accountability) involve policy questions that are outside of the authority granted to the Commission in this study.

In the staff's view, these factors will make it difficult for the Commission to identify any single alternative that would achieve the "best" policy result, and that would engender broad public and legislative support. That is largely because the study presents policy questions that are not typical of the type addressed by the Commission. In a typical Commission study, legal questions predominate and the policy issues that must be decided are usually fairly straightforward and uncontroversial, once they have been carefully analyzed. By contrast, the policy question at the center of this study seems to involve a fundamental policy choice, to which there is no clearly correct answer.

Rather, the preferred answer would seem to depend on the basic policy orientation of the person answering it:

- A person who is strongly supportive of charter schools and who believes that the benefits provided by charter schools outweigh other countervailing policy concerns will probably prefer tort immunity for charter schools.
- A person who disfavors charter schools as a matter of policy will probably be skeptical of laws that privilege charter schools, by treating them as public when it works to their advantage, but as private when public entity status would be a burden.
- Finally, those whose highest policy concern is student health and safety and the compensation of injured persons, would likely prefer unrestricted tort liability for charter schools, even if such liability would create problems for some charter schools.

The staff does not see a way to reconcile such fundamental differences in policy preference.

Consequently, the staff believes that the best course might be to identify a range of available alternatives, with a discussion of the advantages and disadvantages of each, rather than recommending one alternative over the others. This would provide helpful analysis that the Legislature could use in deciding which policy to adopt.

This would be an unusual approach for the Commission. But, as discussed above, this study presents an unusually *political* question — one that cannot easily be answered through legal analysis and policy compromise alone. At its core, the question may require a judgment about the relative importance of charter schools in California. The Commission has not been authorized to answer

that question. Nor is the Commission well-suited to answer that question. A question of such fundamental character, on which there is likely to be sharply divided public opinion, should probably be decided by the People's elected representatives, rather than an appointed body.

This would not be the first time that the Commission has offered a range of choices, rather than a single recommendation. In its recommendation on *Miscellaneous Hearsay Exceptions: Forfeiture by Wrongdoing*, 37 Cal. L. Revision Comm'n Reports 443 (2007), the Commission decided against making a single recommendation on the question posed in the study. Instead, the recommendation laid out the alternatives considered by the Commission and the policy implications of each. Of course, the circumstances surrounding the hearsay study were not entirely analogous to the present circumstances. In the hearsay study, the Commission was under a very short deadline and a pending U.S. Supreme Court decision would have had a significant effect on the legal context of the issues being analyzed. That was the main reason that the Commission decided against making a single recommendation. Nonetheless, the hearsay study does provide precedent for presenting a range of options, rather than a single recommendation, when the circumstances warrant that approach.

Such an approach may also find some support in the legislative language authorizing the charter school study. Typically, when the Legislature authorizes or mandates a Commission study, it directs the Commission to determine "whether" a particular change should be made to the law. For example, in the Commission's most recently enacted resolution of authority, 20 of the 22 grants of authority are framed in that way. See 2009 Cal. Stat. ch. 98. Another of the authority paragraphs calls specifically for "recommendations" on a particular topic.

By contrast, the charter school language is unique in requesting analysis of "implications" of a particular change in the law, without expressly requesting any recommendation on "whether" the change should be made:

> Resolved, That the Legislature approves for study by the California Law Revision Commission the new topic listed below:
>
> Analysis of the legal and policy implications of treating a charter school as a public entity for the purposes of Division 3.6 (commencing with Section 810) of Title 1 of the Government Code;

Id.

If the Commission agrees that a report analyzing alternative approaches, without recommending one approach over the others, would be appropriate in this case, the staff will prepare a draft tentative recommendation for review at the next meeting. If the Commission believes that it would be better to select a single recommendation, the staff will prepare a draft tentative recommendation to implement that decision. In the latter case, the staff believes that it would still be appropriate to include analysis of the other possible approaches, along with an explanation of why the Commission chose to recommend one over the others.

Respectfully submitted,

Brian Hebert
Executive Director

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February 11, 2011

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RE: Charter Schools and Government Tort Claims Act

Dear Mr. Hebert:

Thanks again for allowing CAOC to participate in yesterday's hearing on this subject.

I am writing to clear the record as I made a statement during the oral testimony that I later found out was erroneous. I had indicated that it was my understanding that CAOC and the CA Charter School Association have a good faith agreement that each organization would abide by the Commission's decision on whether or not charter schools are public entities for purposes of the Tort Claims Act, at least for future legislative purposes. It had always been my understanding that this was the case.

However, Rand Martin clarified for me later that that was not the case, and that although they would like to review the recommendation of the CLRC, their association would not be bound by that recommendation and may or may not seek legislative changes. In other words, they would like to keep their options open. I appreciated Rand immediately letting me know this.

Based on this information, I would like to clarify that CAOC will maintain the same position as the Charter School Association, i.e., that although we will evaluate the CLRC's recommendation, CAOC will, similarly, take legislative action consistent with what we think is the best policy choice.

Thanks again for the thorough analysis.

Sincerely,

Nancy Peverini
Senior Legislative Counsel

cc: Rand Martin

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