

Memorandum 2010-26

**Charter Schools and the Government Claims Act:
Charter Schools Act**

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” (“Government Claims Act”). 2009 Cal. Stat. res. ch. 98 (ACR 49 (Evans)).

In many important ways, charter schools look and operate like public entities. A Court of Appeal opinion upholds the constitutionality of charter schools and states that they are part of the public school system. *Wilson v. Dep’t of Educ.*, 75 Cal. App. 4th 1125, 89 Cal. Rptr. 2d 745 (1999).

However, the language of the Charter Schools Act does not expressly state that charter schools are public entities for all purposes. A review of the legislative history did not produce a definitive answer. Educ. Code §§ 47600-47664.

A recent California Supreme Court decision held that a charter school is not necessarily a public entity for all purposes. *Wells v. One2One Learning Foundation*, 39 Cal. 4th 1164, 141 P.3d 225, 244, 48 Cal. Rptr. 3d 108 (2006). Following that decision, a Court of Appeal held that an incorporated charter school operating independently from the school district is not a public entity for purposes of the Government Claims Act. However, the holding did not address the public entity status of an unincorporated charter school. See *Knapp v. Palisades Charter High School*, 146 Cal. App. 4th 708, 717, 53 Cal. Rptr. 3d 182 (2007). Thus, for purposes of the Government Claims Act, the public entity status of many charter schools is unclear.

This memorandum begins by providing an overview of the Charter Schools Act, discussing how charter schools operate and addressing the relevant differences between charter schools, traditional public schools, and private schools.

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.

It then discusses two different theories for determining whether charter schools should be considered public entities for purposes of the Government Claims Act. Under the first theory, charter schools are understood as being wholly public in character. All laws governing public entities (other than those made inapplicable by the Charters School Act) would apply to a charter school, including the Government Claims Act. Under the second theory, a charter school is considered public for some purposes but not for others. The second theory requires close analysis of the policy purposes of the Government Claims Act and the Charter Schools Act in order to determine whether the Government Claims Act should be applied to a charter school.

The memorandum concludes with a request that interested groups provide the Commission with written commentary on the various issues discussed in the memorandum. This memorandum is designed to identify and describe the issues that relate to the public character of charter schools. However, it is important for the groups closest to those issues to provide the Commission with their perspective.

All statutory references in this memorandum are to the Education Code unless otherwise indicated.

OVERVIEW OF CHARTER SCHOOLS

In general, charter schools are publicly funded schools of choice. They operate under a charter granted by a public entity but are freed from much of the bureaucracy regulating traditional public schools. In exchange, charter schools are accountable for measurable results in student achievement. R. Zimmer & R. Buddin, *Making Sense of Charter Schools: Evidence from California*, Rand Education (2006) available at http://www.rand.org/pubs/occasional_papers/2006/RAND_OP157.pdf.

Charter schools have provided an educational alternative to traditional public schools since Minnesota passed the first charter schools statutes in 1991. California followed shortly thereafter with the Charter Schools Act of 1992. 1992 Cal. Stat. ch. 781.

Today, 40 states, the District of Columbia, and Puerto Rico allow charter schools. The federal government is also a proponent of charter schools. 20 U.S.C. § 7221; M. Perez et al., *Charter Schools in California: A Review of Their Autonomy and*

Resource Allocation Practices, American Institutes for Research, at 3 (2006), available at http://www.air.org/files/Final_Report_Charter_Schools.pdf.

Supporters laud charter schools as promoting efficiency and innovation in education and student learning. Opponents argue that charter schools will divert resources from traditional public schools, lure the best students away, and increase segregation. M. Perez, *supra*, at 3.

Over the years many studies have attempted to measure the efficacy of charter schools. These studies have generally focused on the academic performance of charter school students. Few studies focus on the operations of charter schools.

More than half of the states authorizing charter schools automatically exempt charter schools from most of the existing public school laws. The remaining states and jurisdictions require charter schools to submit waiver applications in order to receive specified exemptions. California follows the automatic-exemption model. M. Perez, *supra*, at 20.

CHARTER SCHOOLS ACT

California currently has about 850 charter schools. They serve about 2.5% of public school students between kindergarten and twelfth grade. Cal. Dep't of Educ., *Fact Book 2009: Handbook of Education Information*, at 100 (2009), available at <http://www.cde.ca.gov/re/pn/fb/documents/factbook2009.pdf>; M. Perez, *supra*, at 5-6.

Purpose of the Charter Schools Act

The Charter Schools Act of 1992 offers a performance-based rather than rule-based accountability system for schools. 2003 Cal. Stat. ch. 892. The Legislature explicitly stated that the purpose of charter schools is to:

- Improve student learning.
- Increase learning opportunities for students, particularly those identified as academically low achieving.
- Encourage innovation in teaching methods.
- Create new professional opportunities for teachers.
- Provide families with greater choice of educational opportunity within the public school system.
- Make charter schools accountable under performance-based accountability systems.

- Create new competition with traditional public schools to promote improvements in all public schools.

Section 47601.

They provide communities with a tuition-free alternative to the traditional, neighborhood public school. However, charter schools are schools of choice, and students are not required to attend a charter school instead of a traditional public school. Section 47605(f).

Basic Structure of the Charter Schools Act

In order to allow charter schools to fulfill their purpose, the Legislature created the Charter Schools Act. The Charter Schools Act is designed to be a comprehensive set of requirements governing charter schools.

The authorizing legislation for charter schools makes clear that charter schools are part of the “Public School System”:

47615. (a) The Legislature finds and declares all of the following:
- (1) Charter schools are part of the Public School System, as defined in Article IX of the California Constitution.
 - (2) Charter schools are under the jurisdiction of the Public School System and the exclusive control of the officers of the public schools, as provided in this part.
 - (3) Charter schools shall be entitled to full and fair funding, as provided in this part.
- (b) This part shall be liberally construed to effectuate the findings and declarations set forth in this section.

However, unlike traditional public schools, charter schools receive considerable freedom from regulation in exchange for accountability of results. A charter school is bound by its charter agreement with its authorizing entity (usually the school district). The charter agreement defines the purpose, goals, and operations of a charter school, as well as much of the relationship between the school and the chartering entity.

The regulatory freedom granted to charter schools is expressed through a broad statutory exemption from “the laws governing school districts” (except as expressly provided otherwise):

47610. A charter school shall comply with this part and all of the provisions set forth in its charter, but is otherwise exempt from the laws governing school districts, except all of the following:
- (a) As specified in Section 47611.
 - (b) As specified in Section 41365.

(c) All laws establishing minimum age for public school attendance.

(d) The California Building Standards Code (Part 2 (commencing with Section 101) of Title 24 of the California Code of Regulations), as adopted and enforced by the local building enforcement agency with jurisdiction over the area in which the charter school is located.

(e) Charter school facilities shall comply with subdivision (d) by January 1, 2007.

The meaning of the phrase “the laws governing school districts” is arguably ambiguous. Narrowly interpreted, “the laws governing school districts” means only those laws that apply *specifically* to school districts *as school districts*. Interpreted broadly, “the laws governing school districts” means all laws that apply to school districts, *including laws of general application*.

In the staff’s view, the broad interpretation is untenable. It would not be reasonable to exempt charter schools from all laws of general application (e.g., statutes defining crimes). By contrast, the narrow interpretation seems to be sensibly tailored to the purpose of the Charter Schools Act, to exempt charters from most laws that specifically regulate the operation of public schools.

That said, it is worth noting that the Legislature saw fit to add language making clear that charter schools are subject to the California Building Standards Code, *which is a statute of general application*. If Section 47610 does not exempt charter schools from statutes of general application, there is no legal need for the provision regarding the Building Code.

However, the Legislature sometimes adds clarifying language to a statute, even on a point that seems legally clear when examined closely, simply to resolve an actual controversy over the proper interpretation of the law. That seems to have been what happened in this case. Legislative history suggests that the building code language was added in response to a claim from some charter schools that Section 47610 exempted them from the general building codes. Senate Floor Analysis of SB 1054 (May 11, 2005), pp. 2-3.

In any event, the waiver provided to charter schools in Section 47610 offers charter schools freedom in operations and curriculum that are a stark contrast to the heavy regulation of traditional public schools in California. M. Perez, *supra*, at vii.

The original Charter Schools Act has been revised a number of times since it was first enacted. Much of the new legislation increases the ability of charter

schools to obtain facilities and funding. However, the legislation covers a range of issues, with a trend toward increasing the regulation of charter schools. See M. Perez, *supra*, at 6.

Creation, Revocation, and Renewal of Charter Schools

A charter school may be created as a completely new school (“start up”) or be converted from an existing public school (“conversion”). Sections 47605(a)(1)(A)-(B), 47606. More than three-quarters of charter schools are start-ups and the rest are conversions. A private school *may not* convert to a charter school under the Charter Schools Act. Section 47602(b); Cal. Dep’t of Educ., *supra*, at 101.

Creation of Charter Schools

Anybody may propose a charter school by creating a petition and gathering the requisite number of signatures. Sections 47605, 47606. The petition and a copy of the proposed charter must be submitted to the entity that will authorize the charter (“chartering entity”). Section 47605(a)(2)-(3). The chartering entity is usually the local school district. The county board of education and the State Board of Education are also authorized to issue charters but do so rarely. Sections 47605(a)(6), (b), (i); 47605.6, 47605.8.

One of the initial problems faced by a charter school petitioner was difficulty in receiving approval of the charter. The Charter Schools Act was amended in 1998 to address this problem. 1998 Cal. Stat. ch. 34. Currently, a charter is presumed approved if it meets the requirements of the Charter Schools Act. A charter may be denied only with a written finding of facts that support the denial. Section 47605(b)(1)-(5).

When a school district is the chartering entity, the proposed charter must address the following items:

- Description of the educational program.
- Outcomes the school will measure.
- Methods used to measure student outcomes.
- Governance structure of the school, including the mechanism for parental involvement.
- Qualification requirements for school employees.
- Procedures to ensure the health and safety of students and staff.
- Means used to attain a racial and ethnic balance among students that reflects the general population within the chartering district.

- Requirements for admission, if any.
- How annual and independent financial audits will be conducted, and how audit exceptions and deficiencies will be resolved.
- Procedures for suspending or expelling students.
- How staff will be covered by the State Teachers' Retirement System, Public Employees' Retirement System, or federal Social Security.
- Public school alternatives for potential students.
- Description of the rights an employee has to leave a school district to work for a charter school or to return to the school district.
- Procedure for resolving disputes between the charter school and its chartering entity.
- Declaration of whether the charter school will be considered the exclusive public school employer for purposes of the Educational Employment Relations Act.
- Procedures for closing the school.

Section 47605(b)(5)(A)-(P).

Petitions submitted directly to a county board of education or the State Board of Education have similar requirements. Sections 47605.5, 47605.8.

In addition to the 16 elements required in the petition, a petitioner must be prepared to give the chartering entity information about the proposed operation and potential liability of the school district. Sections 47605(g), 47605.6(h).

A petitioner must also provide a proposed operational budget for the first year that includes start up costs, and cash flow and financial projects for the first three years. Sections 47605(d), (g).

Revocation of a Charter

A charter may be revoked if there is substantial evidence that the school materially violated the charter, did not meet student outcomes, did not follow generally accepted accounting principles, engaged in fiscal mismanagement, or violated the law. The Charter Schools Act provides a procedure for revocation. Sections 47605(b), 47607(c).

Operation of Charter Schools

Admissions and Program Restrictions

A charter school must follow many of the same admissions and program requirements as a traditional public school. A charter school:

- Cannot charge tuition.
- Must have nonsectarian programs, admission policies, and employment practices.
- Must not discriminate.

Sections 220, 47605(c)(1), (d)(1).

By contrast, a private school is not subject to the same restrictions. See Cal. Dep't of Educ., *supra*, at 101-02.

Special Education

A charter school must comply with federal and state special education laws. Sections 47641 and 47646.

A student with special needs who attends a charter school is expected to receive services in the same manner as a special needs student attending a traditional public school. Section 56145. A charter school is also eligible for the same types of special education funding as a traditional public school. Section 56146.

In actuality, charter schools serve many fewer special needs students than traditional public schools.

A school district is obligated to identify all students with special needs, whether or not the student is attending a public school. Sections 56172-56175. A private school may receive public funds for the purpose of providing special education if the local district cannot provide the necessary services. However, a private school has no obligation to accept and provide services to a special needs student.

Governance

The Charter Schools Act does not require a particular governance structure, and gives a charter school the option to organize as a nonprofit public benefit corporation. See Sections 47604, 47605(b)(5)(D), 47605.6(b)(5)(E). As a result, charter schools adopt a variety of governance structures.

Some charter schools are almost indistinguishable from traditional public schools and operate as an arm of the district. Other schools have almost no interaction with their chartering entity, receive their funding directly from the state, have their own facilities, and are responsible for all employment and personnel decisions. Charter schools may also adopt a wide variety of

governance structures that fall between complete dependence on and complete independence from the school district. See Memorandum 2009-52.

Legal Entity Status of a Charter School

Despite the operational freedom given to a charter school, there has been some question about whether a charter school is legally independent from the chartering entity. In 1998, the Attorney General's office issued an opinion stating that a charter school is not a separate legal entity from the chartering entity. 81 Ops. Cal. Atty. Gen. 140 (1998). This opinion is in line with the usual treatment of an individual school as an arm of the school district, rather than an independent legal entity. See Memorandum 2010-16.

Shortly after the Attorney General's opinion was published, the Legislature authorized charter schools to operate as nonprofit public benefit corporations. 1998 Cal. Stat. ch. 34. The legislative history does not indicate why incorporation was allowed.

An incorporated charter school must meet the requirements of both the Corporations Code and the Education Code. Section 47604(a); Corp. Code § 5110 *et seq.* It may allow paid staff to serve on its governing board as long as no more than 49 percent of the board members are interested parties. Corp. Code § 5227. It must also allow the chartering school district at least one seat on its board. Section 47604(b).

Though a charter school in California may incorporate only as a nonprofit public benefit corporation, a school may contract with a for-profit education management company. In some cases, this flexibility may result in abuse of public funds. See Press Release, Cal. Dep't of Educ., Schools Chief Jack O'Connell Releases Audit of California Charter Academy, April 14, 2005, *available at* <http://www.cde.ca.gov/nr/ne/yr05/yr05rel43.asp>.

Staffing of Charter Schools

A teacher at a charter school must hold credentials equivalent to those of a traditional public school teacher for "core" courses. The grade and subject assignment of a teacher at a charter school must also be consistent with the teacher's credential. However, a charter school has some leeway to hire non-credentialed teachers for non-core and non-college preparatory classes. Sections 47605(l), 47605.6(l).

The requirement that charter school teachers hold a credential is an example of the trend toward increasing regulation of charter schools over time. Before 1998, charter schools were not required to hire credentialed teachers. 1998 Cal. Stat. ch. 34.

By contrast, private schools are not required to hire credentialed teachers, though teaching in a private school may count toward credentialing requirements. See Sections 33190, 44259.2.

Employees at Charter Schools

All charter school employees, including those employed by a nonprofit public benefit corporation, have the right to be represented through a collective bargaining process. Section 47611; Gov't Code § 3540. The charter school may declare itself the public school employer for this purpose. Otherwise, the district is considered the public school employer. Section 47611.5.

Charter schools are also considered public schools for purposes of participation in the Public Employees' Retirement System. Gov't Code § 20610. This clarification of charter school status was added to the law in 2004. Assembly Committee Analysis on SB 1054 (June 23, 2004), p. 1.

Though a charter school may choose to do so, it is not required to comply with the statutes and regulations governing tenure, merit, or the civil service system for teachers. A charter school may opt to be solely responsible for hiring, firing, and disciplining its employees. Section 47611.5.

Oversight and Accountability of Charter Schools

Responsibilities of a Chartering Entity

The chartering entity is responsible for oversight of the charter school. The charter school must respond to reasonable requests for information from the chartering entity, the county board of education, and the State Superintendent of Public Instruction. Section 47604.3.

Required oversight of charter schools is limited to the following:

- Identify at least one staff member as a contact person for the charter school.
- Visit the charter school at least annually.
- Ensure the charter school complies with all required reports.
- Monitor the fiscal condition of the charter school.

- Notify the State Department of Education if the charter is revoked, the charter renewal is granted or denied, or the charter school will cease operation.

Section 47604.32.

A school district that grants a charter to an incorporated charter school is entitled to have one representative on the board of directors of the nonprofit public benefit corporation. Section 47604(b).

To finance these oversight activities, the chartering entity may charge the charter school the actual costs of oversight, up to one percent of the charter school's revenue. Sections 47604.32(f), 47613.

Liability of Chartering Entity

The Charter Schools Act expressly states that the chartering entity is not liable for any of the debts or obligations of an incorporated charter school, as long as the chartering entity's oversight role has been fulfilled. Section 47604(c).

In any case, it is likely that the liability of the chartering entity is addressed in the charter or an accompanying Memorandum of Understanding, because the Charter Schools Act requires a charter school petitioner to address the potential civil liability effects on the school and its chartering entity. Sections 47605(g), 47605.6(h).

Liability of a Charter School

A charter school organized as a nonprofit public benefit corporation is individually liable for its debts and obligations. Even when a charter school is not incorporated, the charter may specify that the school is individually liable for its actions and that the school will indemnify the district.

Insurance for a Charter School

An insurer may require a charter school to be insured separately from the district, regardless of the charter school's governance structure.

To assist in obtaining coverage, a charter school is considered a public entity for purposes of a joint powers agreement ("JPA") and may thus join a risk pool with a traditional school district. Gov't Code § 6528.

Before 1998, many charter schools were members of JPAs. After charter schools were authorized to organize as nonprofit public benefit corporations, an attorney for one of the risk-pooling JPAs determined that an incorporated charter school would not be eligible to participate in the JPA. The purpose of

Government Code Section 6528 was to remove confusion and unambiguously allow charter schools to participate in JPAs. Senate Local Government Committee Analysis of AB 101 (Mar. 30, 2000), p. 2.

Audit and Reporting Requirements of a Charter School

A charter school must submit a preliminary budget, two interim financial reports, and a final unaudited report each year to its chartering entity and the county superintendent of schools. Section 47604.33(a). A charter school must obtain an annual independent fiscal audit that follows generally accepted auditing principles. Sections 47605(b)(5)(I), 47605.6(b)(5)(I).

A charter school must also submit an annual unaudited statement of all receipts and expenditures to its chartering entity. Sections 1628, 42100, 47604.33, 47605(b)(5)(I), 47605(m).

These requirements are another example of the trend toward increasing regulation of charter schools. The State Auditor recommended that the Legislature amend the Charter Schools Act to make charter schools more accountable. Assembly Floor Analysis of AB 1137 (Sept. 4, 2003), p. 3.

Testing of Charter School Students

A charter school must comply with the same statewide testing programs as a traditional public school, and must follow state-mandated procedures for test administration. These tests include the Standardized Testing and Reporting (STAR) program, California High School Exit Exam, Physical Fitness Testing, and if warranted, the California English Language Development Test. Sections 47605(c)-(d), 47612.5(a)(3), 60600 *et seq.*

The Charter Schools Act has always included a requirement that charter schools comply with statewide testing standards. 1992 Cal. Stat. ch. 781. When the Public Schools Accountability Act (“PSAA”) was enacted in 1999, charter schools were expressly included in the requirements. Section 52051.5. The PSAA was intended to improve the accountability of all of the state’s public schools. Section 52050.5.

In 2003, meeting minimum performance requirements became a condition of renewal of the charter. Section 47607(b); 2003 Cal. Stat. ch. 892.

By contrast, a private school is not required to administer any standardized testing.

Financing of a Charter School

For purposes of the state constitution and school financing, a charter school is considered to be under the exclusive control of the officers of the public schools. Section 47612(a). Charter school funding is similar to traditional public school funding. The funding follows the student, whether the student moves from a traditional public school to a charter school or from a charter school back to a traditional public school. *Wells v. One2One Learning Foundation*, 39 Cal. 4th 1164, 1202, 141 P.3d 225, 48 Cal. Rptr. 3d 108 (2006).

A charter school can also be considered a school district for purposes of receiving funding. This allows a charter school to receive funding directly from the state, rather than through the local school district. Section 47650.

To receive full funding, a charter school must offer at least 175 days of instruction and meet the traditional public school requirements for total number of annual instructional minutes. It must also track average daily attendance of its students. Sections 46201(a)(3), 47612.5.

By contrast, private schools are not required to meet any minimum requirements for the number of days of instruction or minutes of instruction. They are also not required to track average daily attendance, although they are required to report to the county if a student is absent for ten or more consecutive days. Section 48202.

Facilities for a Charter School

One challenge charter schools face is finding suitable facilities. Initially, charter schools had extremely limited funding for facilities. To address the problem, the Legislature has expanded the availability of facilities funding for charter schools. See, e.g., Sections 17078.52, 17078.66 (Charter School Facility Program).

The Charter Schools Act declares that “public school facilities should be shared fairly among all public school pupils, including those in charter schools.” Section 47614. In some cases, the local school district must provide facilities to the charter school that are reasonably equivalent to those a traditional public school student would occupy. Section 47614.

A chartering entity may provide rent-free facilities as part of a three percent oversight fee. Section 47613(b). A district may also charge a charter school a pro rata share of the actual costs of the facilities, such as maintenance and cleaning services. Section 47614.

Field Act

Early on, there was some question about whether a charter school was subject to the Field Act. The Field Act requires a public school building to be designed and constructed to fulfill special building standards set by the state. Sections 17280, 81130 *et seq.* The Field Act was intended to provide for the safety of the occupants of school buildings in an earthquake. 80 Ops. Cal. Atty. Gen. 52 (1997).

The author of the Charter Schools Act and others maintained that charter schools were not subject to the Field Act. The purpose of the exemption was to give charter schools maximum flexibility and make efficient use of community resources. In any case, a number of traditional public school also house students in buildings that do not comply with the Field Act because of various waivers and exemptions. Com. on Cal. State Gov't Organization and Economy, *The Charter Movement: Education Reform School by School* (Mar. 1996) at 81 (Little Hoover Report), available at <http://www.lhc.ca.gov/studies/138/report138.pdf>.

An Attorney General opinion agrees that a charter school is not required to follow the Field Act, unless the school's charter requires it. The Attorney General's opinion used a plain language interpretation of the Charter Schools Act to come to its conclusion, because Section 47610 exempts charter schools from most of the laws applicable to school districts. 80 Ops. Cal. Atty. Gen. 52 (1997).

Note that a private school is subject to the Private Schools Building Safety Act, which is analogous to the Field Act. Section 17320. It was intended to ensure that children attending a private school will have similar earthquake safety protections in their buildings as public school children. Section 17322.

Thus, a charter school appears to have more flexibility in selecting a facility than either a traditional public school or a private school.

Building Standards

In 2005, the Charter Schools Act was amended to state generally that a charter school must comply with the California Building Standards Code. Section 47610.5. This amendment was a response to arguments on the part of some charter schools that they are not subject to plan review or inspection by the state architects or local building departments. Assembly Committee Analysis of SB 1054 (June 27, 2005), pp. 2-3.

School Health and Safety

The Education Code contains a number of health and safety provisions. Most of the provisions apply to public schools, without making any express reference to charter schools. See, e.g., Sections 32280-32289 (requirement to create comprehensive school safety plans, including disaster procedures), 35294.10-35294.15 (intent to provide all public schools with access to supplies and resources to establish school safety and violence prevention programs), 32225 (requirement that each classroom contain a two-way communication device for the teacher to use if there is a medical emergency or violent crime in the classroom).

Some health and safety provisions apply to both public and private schools without express reference to charter schools. See, e.g., Sections 32000 (duty to provide fire alarms and conduct fire drills), 32020 (eye protection must be available), 32030-32034 (gates must be wide enough to allow emergency vehicles to access all portions of the buildings), 32040-32044 (duty to equip schools with a first aid kit), 32060 (art supplies with certain toxic substances are prohibited), 35292.5 (restrooms must be open, available, and clean during hours of operation).

Other provisions expressly include charter schools. See, e.g., Section 35330(d) (public schools, including charter schools, are immune from claims arising out of field trips), Section 44830.1(j) (charter schools are expressly prohibited from hiring former felons convicted of a serious or violent felony).

A charter school is, however, responsible for establishing procedures to protect the health and safety of students and teachers as part of the charter. Section 47605(b)(5)(F). Unlike many of the health and safety requirements that traditional public schools and private schools must follow, the charter school safety plan requirements do not have specific parameters. See, e.g., Section 32282. Thus, a charter school has a great deal of flexibility in determining what constitutes reasonable health and safety procedures.

Presumably, if these procedures were inadequate, the chartering entity would not approve the charter. However, the broad language that gives a charter school such flexibility also does not offer specific standards for determining the adequacy of procedures. This would seem to leave the matter largely up to local discretion, which could result in widely differing health and safety measures.

CHARTER SCHOOLS AS PUBLIC ENTITIES: TWO THEORIES

The staff finds it helpful to identify two general theories on the extent to which charter schools should be treated as public entities.

Under the first theory, charter schools are “wholly public entities.” They are public entities for every purpose. This theory is premised on the totality of the circumstances surrounding the creation and character of charter schools, which suggest that the Legislature intended for charter schools to be public entities, regardless of whether they are operated as nonprofit corporations. Under this theory, charter schools should be governed by the Government Claims Act — just as they should be governed by all other statutes that regulate public entities generally.

Under the second theory, charter schools are “limited public entities.” They are public entities for some purposes, but not necessarily for all purposes. Under this theory, charter schools would not automatically be governed by the Government Claims Act. Instead, the policy purposes of the Government Claims Act and the Charter School Act must be examined to determine whether the Government Claims Act should be applied to charter schools.

These two theories are discussed in more detail below.

CHARTER SCHOOLS AS WHOLLY PUBLIC ENTITIES

A straightforward approach to the question of whether charter schools are public entities for purposes of the Government Claims Act would be to view charter schools as wholly public entities, for *all* purposes. There is support for this view in the Charter Schools Act and in an appellate case that closely examined the nature of charter schools and upheld their constitutionality. *Wilson v. Dep’t of Educ.*, 75 Cal. App. 4th 1125, 89 Cal. Rptr. 2d 745 (1999).

The Legislature declared expressly that charter schools are part of the public school system, are under the jurisdiction of the public schools, and are under the exclusive control of public officials. Section 47615.

Charter schools also share many of the characteristics of public schools.

- They are funded with public money.
- They are nonsectarian.
- They cannot charge tuition.
- They are bound by the same nondiscrimination rules as traditional public schools.

- They must offer a minimum duration of days and minutes of instruction.
- They must provide for special education students in the same manner as traditional public schools.
- They are entitled to a fair allocation of public school facilities.
- They are required to conduct standardized testing in the same manner as traditional public schools.
- Their teachers must be certificated.
- Their employees are eligible to participate in state retirement programs.

Taken together, these facts could support a view that charter schools are essentially public in character and were intended by the Legislature to be public entities on equal footing with every other school in the public school system. That view finds support in *Wilson v. Department of Education*, as discussed below.

Wilson v. Department of Education

Wilson v. Dep't of Educ., 75 Cal. App. 4th 1125, 89 Cal. Rptr. 2d 745 (1999), was the first case to address the public entity status of charter schools. In *Wilson*, a group of taxpayers challenged the constitutionality of charter schools. The Superior Court denied their petition for a writ of mandate requiring the San Francisco board of education to refrain from granting charters or expending public funds on charter schools.

The Court of Appeal upheld the trial court's decision, holding that (1) charter schools are public schools for the purposes of the state constitution, (2) charter schools are under the jurisdiction of the public school system, and (3) charter school officials are officers of public schools as long as they administer charter schools according to the law and their charters. See *id.* at 1137, 1139, 1141, 1142.

The *Wilson* court began its analysis by quoting a report of the "Little Hoover Commission," which seems to suggest that charter schools are public entities at base, despite having some characteristics of private entities:

"Charter schools are grounded in private-sector concepts such as competition-driven improvement . . . , employee empowerment and customer focus. But they remain very much a public-sector creature, with in-bred requirements of accountability and broad-based equity. Simple in theory, complex in practice, charter schools promise academic results in return for freedom from bureaucracy."

Wilson at 1129 (quoting Com. on Cal. State Gov't Organization and Economy, rep., *The Charter Movement: Education Reform School by School* (Mar. 1996), p. 1 (Little Hoover Report)).

In its analysis, the court noted that the Legislature has plenary power over the public schools. *Id.* at 1134. Consequently, the Legislature has broad discretion in the details of implementing the public school system, so long as it meets the requirements of Article IX of the California Constitution.

The decision to create charter schools as part of the public school system was a “valid exercise of legislative discretion aimed at furthering the purposes of education.” *Id.* at 1135.

Indeed, it bears underscoring that charter schools are strictly creatures of statute. From how charter schools come into being, to who attends and who can teach, to how they are governed and structured, to funding, accountability and evaluation — the Legislature has plotted all aspects of their existence. Having created the charter school approach, the Legislature can refine it and expand, reduce or abolish charter schools altogether.

Id.

The charter school opponents argued that charter schools violate Section 8 of Article IX of the California Constitution, which provides in part that, “No public money shall ever be appropriated for the support of ... any school not under the exclusive control of the officers of the public schools....” The court rejected that argument, noting the express statutory language declaring that charter schools are part of the public school system. *Id.* at 1139. Beyond that, the court found that charter schools are in fact under the exclusive control and jurisdiction of the public school system.

[We] wonder what level of control could be more complete than where, as here, the very destiny of charter schools lies solely in the hands of public agencies and offices, from the local to the state level: school districts, county boards of education, the Superintendent and the Board. The chartering authority controls the application approval process, with sole power to issue charters. ... Approval is not automatic, but can be denied on several grounds, including presentation of an unsound educational program. ... Chartering authorities have continuing over-sight and monitoring powers, with (1) the ability to demand response to inquiries concerning financial and other matters ... (2) unlimited access to “inspect or observe any part of the charter school at any time” ...; and (3) the right to charge for actual costs of supervisory oversight As well, chartering authorities can revoke a charter

for, among other reasons, a material violation of the charter or violation of any law. ... Short of revocation, they can demand that steps be taken to cure problems as they occur. ... The Board, upon recommendation from the Superintendent, can also revoke any charter or take other action in the face of certain grave breaches of financial, fiduciary or educational responsibilities. ... Additionally, the Board exercises continuous control over charter schools through its authority to promulgate implementing regulations. ... Finally, public funding of charter schools rests in the hands of the Superintendent.

Id. at 1139-40 (citations omitted).

This is true even if the charter school is formed as a nonprofit public benefit corporation, because the Corporations Code specifically provides for shared governance of a public benefit corporation:

We note too that situating the locus of control with the public school system rather than the nonprofit is not incompatible with the laws governing nonprofit public benefit corporations. Specifically, one of their enumerated powers is to “[p]articipate with others in any partnership, joint venture or other association, transaction or arrangement of any kind *whether or not such participation involves sharing or delegation of control with or to others.*”

Id. at 1140 (emphasis in original).

Furthermore, “charter school officials are officers of public schools to the same extent as members of other boards of education of public school districts. So long as they administer charter schools according to the law and their charters, as they are presumed to do, they stand on the same constitutional footing as noncharter school board members.” *Id.* at 1141.

The Court completes its opinion by noting that more detailed standards and guidelines for charter schools would defeat the purpose of encouraging innovation and experimentation. *Id.* at 1147.

Conclusion

Charter schools are part of the public school system. They share many of the characteristics of traditional public schools, including satisfying all of the constitutional requirements governing the public school system. Although they can be formed as separate legal entities (i.e., as nonprofit public benefit corporations), they are entirely creatures of statute that remain subject to significant accountability to and control by the chartering public entity.

One could reasonably conclude from the foregoing that charters were intended by the Legislature to be wholly public entities, and that they share enough of the character of public entities to justify treating them as such.

CHARTER SCHOOLS AS LIMITED PUBLIC ENTITIES

Regardless of the merits of an approach that treats charter schools as wholly public entities, it was not followed by the California Supreme Court in *Wells v. One2One*, 39 Cal. 4th 1164, 141 P.3d 225, 48 Cal. Rptr. 3d 108 (2006). In that decision, which is discussed more fully below, the court held that charter schools are not public entities for the purposes of the California False Claims Act (“CFCA”) (Gov’t Code § 12650 *et seq.*) or the Unfair Competition Law (“UCL”) (Bus. & Prof. Code § 17200 *et seq.*). Those holdings are incompatible with the notion that charter schools are wholly public entities.

Instead, the court seems to have adopted the view that charter schools can be considered public entities for some purposes (e.g., Article IX of the California Constitution), but not for other purposes (e.g., the CFCA and UCL).

Under that approach, one cannot simply assume that the Government Claims Act applies to charter schools, as a consequence of their wholly public character. Instead, that approach seems to require a particularized analysis of the policy surrounding each statute that governs public entities generally, to determine whether it should be applied to charter schools.

The *Wells* decision was cited in a subsequent appellate decision holding that an incorporated charter school is not governed by the Government Claims Act. See *Knapp v. Palisades Charter High School*, 146 Cal. App. 4th 708, 53 Cal. Rptr. 3d 182 (2007). That case is also discussed below.

Wells v. One2One Learning Foundation

In *Wells*, a group of students and their parents sued a group of charter schools. All but one of the charter school defendants were organized as nonprofit benefit corporations. All of the charter school defendants, including the unincorporated school, were operated by a California nonprofit public benefit corporation. *Wells*, 39 Cal. 4th at 1200.

The basis of the complaint was that the schools failed to provide promised instructional services, equipment, and supplies. The schools only collected average daily attendance forms, which were then used to collect public money for services and supplies that were never provided. Among other allegations, the

complaint included a CFCA cause of action for qui tam relief on behalf of the state.

Notably, the plaintiffs did not comply with the claim presentation requirements of the Government Claims Act. *Id.* at 1183.

The trial court dismissed the claims, holding that the charter school defendants were public entities subject to the claim presentation requirements of the Government Claims Act. The plaintiffs appealed. The Court of Appeal concurred that charter schools are public entities. The Court of Appeal also held that public entities can be sued under the CFCA.

The California Supreme Court reversed on several grounds.

Application of CFCA

The court held that public entities may *not* be sued under the CFCA. However, the court also held that the charter school defendants *were not public entities under the CFCA*. Thus, the school district could not be sued under the CFCA, but the charter school defendants could be sued under the CFCA. *Id.* at 1196-97.

In its analysis, the court first focused on the text of the CFCA, which has a statutory definition of a “person” who may be sued under the act. That definition makes no mention of public entities. So, on its face, it is unclear that the CFCA should apply to a public entity. The definition expressly includes “corporations,” suggesting that the act was intended to apply to charter schools operated as corporations.

The court also applied a traditional rule of construction to the effect that a general statute applies to a public entity *unless such application would infringe upon sovereign governmental powers*. *Id.* at 1192. In evaluating whether application of the CFCA to a school district would infringe upon sovereign governmental powers, the court focused on the fiscal effect of the statute and the sharply limited fiscal resources of school districts. *Id.* at 1193-97.

The CFCA imposes treble damages and penalties on a person who is found to have submitted a false claim. The court held that the legislature did not intend for such “draconian” fiscal penalties to apply to cash-strapped school districts. 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 distinguished the charter school defendants from public school districts, concluding that the application of the CFCA to a charter school operated by a nonprofit public benefit corporation would not unduly infringe on sovereign governmental power. The court described the 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.* at 1201. Discussing the interference in the provision of public education that would result from imposing treble damages on school districts, the court stated that the Charter Schools Act “assigns no similar sovereign significance to charter schools or their operators.” *Id.*

The court reasoned that the 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 California False Claims Act remedies to charter schools would not fundamentally threaten the provision of “adequate free public educational services.” *Id.*

It is not clear whether the court’s holding was limited to charter schools that are operated by corporations (because of their separate legal entity status).

Application of Government Claims Act Claims Presentation Requirement

The Court also considered whether a CFCA cause of action against the charter school defendants required prior presentation of a claim under the Government Claims Act.

In its analysis, the court acknowledges that charter schools are part of the public school system and are deemed to be school districts for specific purposes. However, the court found that those purposes do not explicitly include the Government Claims Act, and that “for reasons previously discussed in connection with the CFCA,” 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.

Those statements are interesting, because they suggest that the court’s CFCA analysis would apply equally to the question of whether the Government Claims Act should apply to charter schools operated by corporations. In other words, it suggests that the court views such charter schools to be distinct outside entities,

comparable to private contractors, and not invested with any sovereign significance.

However, the court's statements on this point may have been dicta, because the court had another reason for holding that the claims were not subject to the Government Claims Act. The court held that CFCA claims are not subject to the Government Claims Act, because they are filed by public entities (or by private parties acting for the public through a qui tam action), and public entity claims are not subject to the claims presentation requirement. The court also noted that the CFCA imposes special sealed filing requirements that would be defeated by presentation of a claim against a defendant. *Id.* at 253.

Because that was a sufficient basis to decide the issue, the court didn't need to decide whether the Government Claims Act applies to charter schools.

Application of Unfair Competition Law

The court also held that charter schools are "persons" subject to suit under the UCL, despite the fact that public entities have been held exempt from suit under the UCL.

In its analysis, the court reiterated the fact that charter schools are not considered public entities for the purposes of the CFCA. In addition, charter schools compete with traditional public schools and should therefore be subject to the UCL, which provides remedies for unfair competitive practices. The court concluded by stating that application of the UCL to charter schools would not infringe the state's sovereign obligations to operate public schools:

Nor is the state's sovereign educational function thereby undermined. Even if governmental entities, in the exercise of their sovereign functions, are exempt from the UCL's restrictions on their competitive practices, ... no reason appears to apply that principle to the charter school defendants, which are covered by the plain terms of the statute and which compete with the traditional public schools for students and funding.

Id. at 1204.

Knapp v. Palisades Charter High School

Shortly after *Wells* was decided, a Court of Appeal was directly faced with the question of whether charter schools are subject to the claim presentation procedures of the Government Claims Act. See *Knapp v. Palisades Charter High School*, 146 Cal. App. 4th 708, 53 Cal. Rptr. 3d 182 (2007). The court held that an

incorporated charter school, operating independently from the chartering entity, is not a public entity for purposes of the Government Claims Act. *Id.* at 717.

The case arose after the plaintiff, Courtney Knapp (“Knapp”), then an eighth grade student, visited defendant Palisades Charter High School (“Palisades”) as a prospective student. According to the undisputed facts, Knapp was the target of sexual banter by a teacher during a classroom visit. Knapp was humiliated and embarrassed, and as a result of her experience, ultimately chose a different high school. *Id.* at 711-12.

Knapp sued Palisades, the Los Angeles Unified School District, and the teacher. The trial court granted the defendants’ motion for summary judgment, because Knapp did not present a claim to those defendants before filing the lawsuit. *Id.* at 713.

Taking direction from *Wells*, the *Knapp* court held that “assuming [Palisades] can demonstrate that it is a nonprofit corporation independent from the [chartering entity], we follow *Wells* and conclude that Knapp was not required to present written claims to the charter school under the [Government Claims Act] before filing her sexual harassment and tort claims.” *Id.* at 717.

It is unclear whether the Court’s holding would apply to a charter school that was not operated as an independent nonprofit public benefit corporation.

Conclusion

In both *Wells* and *Knapp*, the court impliedly rejected the notion that charter schools are *wholly* public in character. Instead, the courts made a particularized determination of whether specific statutes should be applied to a charter school. In conducting that analysis, the court first looked to the language of the statute at issue, in an effort to determine legislative intent. It also considered whether the charter schools had sufficient “sovereign significance” to justify the extension of public entity immunities. Particular emphasis was placed on protecting scarce public fiscal resources.

The next section of this memorandum conducts a similar analysis, examining how well charter schools “fit” within the policy purposes of the Government Claims Act.

APPLICATION OF THE GOVERNMENT CLAIMS ACT TO CHARTER SCHOOLS

If charter schools are not viewed as wholly public entities, then the Government Claims Act should be reviewed to determine whether the policy purposes of that act require charter schools to be extended the same protections.

Overview of the Government Claims Act

The Government Claims Act is designed to be a complete statutory treatment of liability and immunity for public entities and public employees. It can be categorized into three broad areas: (1) liability and immunity of public entities and employees, (2) public employee rights to indemnification, and (3) claim presentation. Gov't Code §§ 810-998.3. These areas balance the traditional tort theories of compensation and deterrence with the unique needs of government.

The liability provisions provide an avenue of compensation for those injured by governmental activities. The immunity provisions protect the public fisc by limiting the governmental activities for which an injured party may receive compensation, and they allow the government to govern by minimizing interference with governmental activities.

The indemnification provisions encourage public employees to execute their employment duties with zeal by limiting their personal tort liability. They also remove the risk of making a public employee personally liable for risks created by public employment when the public entity is not liable. The defense and indemnification rules for public and private entities are similar enough in their policy rationales and results that they do not provide a helpful basis for evaluating whether a charter school should be governed by the Government Claims Act. Thus, these provisions will not be analyzed in this memorandum. See Memorandum 2010-7 for further discussion.

The claims presentation provisions protect the public fisc and provide just compensation to injured parties by potentially allowing claims to be resolved before litigation ensues.

The Government Claims Act provisions on liability apply only to actions for money or damages. A public entity may still have liability based on contract or a right to relief other than money or damages. Gov't Code § 814. See Memorandum 2010-6.

The claim presentation procedures may also apply to contract claims and other non-tort claims.

Government Claims Act Definition of a Public Entity

The Government Claims Act defines a public entity as follows:

“Public entity” includes the State, the Regents of the University of California, a county, city, *district*, public authority, public agency, and any other political subdivision or public corporation in the State.

Section 811.2 (emphasis added). The comment by the Law Revision Commission states that, “the definition is intended to include every kind of independent political or governmental entity in the State.” This comment suggests that the definition of a public entity should be construed broadly.

Some charter schools may be fully integrated into the operations of the school district, operating as an arm of the district rather than as a separate legal entity. There is a good argument for treating such charter schools as public entities for purposes of the Government Claims Act, especially if there is no clear limit to the liability of the chartering entity for the liabilities of the charter school. It is the sense of the staff that such closely integrated operations are not typical. **The staff invites public comment on the frequency of such arrangements, and on the details of their integration into district operations.**

The staff believes that most charter schools are functionally independent of the chartering school district and are operated by a separate legal entity (a nonprofit public benefit corporation). There is a reasonable argument that such a charter school does not fit within the definition of “local public entity” provided in the Government Claims Act. That was the opinion of the court in *Wells and Knapp*.

To determine whether it would be good policy to allow all charter schools to receive the protections of the Government Claims Act, the policies of the Government Claims Act and the Charter Schools Act should be examined.

Implications of Tort Liability and Immunity

The liability of a public entity and a public employee under the Government Claims Act are not too dissimilar from that of a private entity and private employee. Consequently, the *liability* provisions of the Government Claims Act are unlikely to have a significant effect on charter schools, regardless of whether they are treated as public entities or private entities.

The key differences lie in the statutory protections granted to governmental entities in acknowledgement of their unique role in society. Public entities

receive certain immunities (including immunity from punitive damages) and are generally subject to a lower standard of care than private entities. See Memorandum 2010-6.

The most relevant and significant protections granted to public entities by the Government Claims Act are discussed below.

Discretionary Immunity

Discretionary immunity is the primary immunity available to public entities and employees. Discretionary immunity allows a policy judgment to be made within the scope of employment. It is very broad and allows government to govern without undue interference.

Discretionary immunity is easier to justify when a public entity is subject to regulation to provide minimum safeguards against injury to the public. So, for example, when a public school is governed by the Field Act or any of the other numerous health and safety statutes that regulate public schools, the prospect of immunizing the school district from discretionary policy judgments made about student safety is less problematic. There is a guaranteed statutory floor below which the school district may not fall in exercising its discretion as to what precautions against student injury make sense.

As discussed above, charter schools are not governed by the Field Act and are exempt from other health and safety related statutory requirements. For example, charter schools are exempt from Sections 32280-32289, which require schools to create comprehensive school safety plans, including disaster procedures. Instead, charters must include safety planning in their charters (which could vary from district to district in the quality and specificity of planning). Section 47605(b)(5)(F).

If a charter school was immunized from liability for discretionary policy decisions about health and safety matters, might the lack of a tort deterrent lead to a lower standard of care regarding such matters? If statutory health and safety regulations do not apply, could the standard of care become problematically low?

For example, the *Los Angeles Times* recently reported a story about a six-year-old boy who pricked himself with a syringe he found on the grounds of the charter school he attends. The school took eight days to inform the parents of the incident, and the syringe was not immediately tested for infectious diseases. The article noted that the Los Angeles Unified School District had a procedure in

place that would have resulted in the parents being informed of the incident quickly and the needle could have been tested. Howard Blume, *Needle Poke Turns into Big Problem at L.A. Charter School*, Los Angeles Times, April 19, 2010, available at <http://articles.latimes.com/2010/apr/19/local/la-me-needle-20100420>.

It is not clear whether the charter school in this story neglected to follow adequate procedures or whether their procedures were inadequate. If their procedures were found to be inadequate, an argument could be made that the school made a discretionary decision that it was unnecessary to create detailed procedures that covered this situation. Thus, the school might have discretionary immunity under the Government Claims Act.

These considerations present a significant policy question: is the freedom from regulation granted to charter schools compatible with a grant of immunity for discretionary decisions? Or would the combination of immunity and deregulation remove too much of the incentive to take appropriate precautions against risk? **The staff specifically invites public comment on this issue.**

Punitive Damages

Public entities are exempt from payment of punitive or exemplary damages. The limitation is a mechanism to protect the public fisc. See the discussion above of the *Wells* court's opinion on the way in which harsh financial penalties can infringe on the sovereign obligation to operate public schools.

Charter schools receive their funding in the same manner as traditional public schools. They cannot charge tuition as a mechanism to increase revenue. Charter schools are also part of the public school system and must abide by the same accountability and accessibility rules as traditional public schools. There is a strong argument that charter schools should not be subject to punitive damages, because the threat of damages might interfere with the Legislature's intent to provide educational alternatives within the public school system. A prohibition on payment of punitive damages also suggests that public funds will be more likely to be used for the intended purpose of educating children.

However, the counterargument, articulated in *Wells*, is that the funding follows the child. If a charter school is subject to punitive damages that it cannot pay, the charter school will simply close down and the students will return to the traditional public school. Furthermore, a charter school may be controlled by a for-profit corporation and the corporation may be making an unjustifiable profit at the expense of educating children.

That said, the *Wells* court did not discuss other costs that can result when a charter school goes out of operation. The Legislature authorized charter schools to provide a greater opportunity for innovation in the public school system. Communities propose charters, because they are expected to provide an educational benefit to the children. The process of petitioning for a charter school, creating an appropriate charter, reviewing and approving a charter, finding appropriate facilities, and staffing a charter school requires a considerable investment of resources. All of those opportunities and resources are wasted if a charter goes out of operation. In addition, the disruption to settled plans and expectations that would result if a charter school were to end operations abruptly could be significant. See, e.g., *Three Charter Schools Suddenly Announce Closure*, available at <http://cbs13.com/local/horizon.charter.schools.2.1633713.html> (charter school required to close five weeks before end of school year).

Those types of costs could provide some justification for immunizing charter schools from punitive damages that could result in financial failure of the school.

Duty of Care

Dangerous conditions of public property were determined to be a large area of liability for public entities. Presumably schools also face significant liability for dangerous conditions of public property.

Dangerous conditions liability of a public entity is similar to the liability a private entity would face for negligence with regard to property.

However, a public entity is required to take “reasonable action” to prevent injury. By contrast, a private party is held to a standard of ordinary care. “Reasonable action” may be a lower standard than ordinary care because of financial or political constraints. See Memorandum 2010-6.

The staff invites public comment on whether lowering the standard of care for dangerous property conditions while also exempting charter schools from some health and safety regulations that govern school districts would cause problems.

Claim Presentation

Claim presentation is part of a procedure for administration of a claim against a public entity. Claim presentation requirements serve several competing policy goals. They protect the public fisc, allow some injured parties to be compensated

quickly, and promote deterrence of injury-causing activity. See *City of Stockton v. Super. Ct.*, 42 Cal. 4th 730, 738, 171 P.3d 20, 68 Cal. Rptr. 3d 295 (2007).

Claim presentation requirements protect the public fisc in three ways. They (1) allow a public entity to settle claims quickly and outside of a judicial proceeding, which can be more fiscally prudent than allowing a lawsuit to go forward, (2) provide for early notice, which allows a public entity to engage in fiscal planning for potential liability, and (3) allow early investigation, which may make it easier to determine which claims have merit. See Memorandum 2010-16.

Claim presentation requirements can also fulfill the traditional tort policy goals of compensation and deterrence. In straightforward cases, an injured party can be compensated quickly. Also, if an injury was caused by an ongoing activity or situation, early notice allows a public entity to take steps to avoid such liability in the future.

Claim presentation is an extra procedural step that must be followed in order to be able to sue a public entity or public employee for money or damages. Failure to file a claim in a timely manner usually precludes filing a lawsuit against a public entity.

Claim Presentation Deadlines

The most significant consequence of claim presentation requirements is that they effectively shorten the statute of limitations for the underlying cause of action. The time period available for presenting a claim is six months or one year, depending on the basis for the claim. By contrast, the statute of limitations for most common causes of action against private entities ranges between one and four years.

A claimant who files an action in court without first timely complying with the claim presentation requirements is likely to have the suit dismissed. Thus, a claimant has a burden to act quickly.

At present, anybody injured by an act or omission of a traditional public school must file a claim with the school district within the allotted time. So long as the application of the Government Claims Act to charter schools is made clear, the claim presentation deadline seems unlikely to create a greater burden on a claimant than the burden faced by a party injured by a traditional public school.

It is also possible that the short claim presentation deadline may give a private entity operator of a charter school a greater advantage than warranted when compared to the freedom of operation they enjoy.

Independent or Dependent Status

If charter schools are treated as public entities for purposes of the Government Claims Act, one issue that must be resolved is whether charter schools should be considered independent or dependent entities.

Under the Government Claims Act, independent entities must file a form with the Secretary of State, and provide contact information. Claims against independent entities are filed directly with the entity.

Dependent entities are treated as arms of another entity and do not need to file with the Secretary of State. Claims against dependent entities must be filed with the entity on which they are dependent. Memorandum 2010-16.

Normally, school districts are independent entities and individual schools are dependent entities. One could therefore argue that charter schools should also be treated as dependent entities for claims presentation purposes. However, many charter schools are independent legal entities that are entirely liable for their own torts. A good argument can be made that claims against such entities should be filed directly with the charter school (i.e., charter schools should be considered independent for claim presentation purposes).

Ultimately, either rule would probably be workable, so long as it is clear. The key consideration is that claimants understand their procedural obligations.

Claim Presentation Against Other Public Entities

A public entity is not required to file a claim against another public entity under the Government Claims Act. Therefore, the question of whether a charter school is a public entity for purposes of the Government Claims Act will also affect whether charter schools are required to follow the claim presentation procedures in order to sue a public entity, such as a school district, for money or damages. This is another reason why the law in this area needs to be clarified.

Considerations for Determining Whether Charter Schools Should Be Public Entities Under the Government Claims Act

The Government Claims Act provides immunities to public entities in order to protect the government fisc and allow government to govern. Charter schools receive public funding in the same manner as traditional public schools,

suggesting that they should receive the same protections with regard to the government fisc.

However, charter schools can be distinguished from traditional public schools in some key areas. Charter schools have a limited existence and are schools of choice. Also, charter schools may be organized as or operated by private entities, which have a significant amount of financial discretion. That financial discretion could lead to abuse. Liability as a private entity could provide a significant deterrent to such abuse.

A more significant argument is that the purpose of the Charter Schools Act could be infringed without the protections provided by the Government Claims Act. The Legislature gave charter schools a great deal of freedom so that they can innovate and experiment. The expectation was that such innovation would result in better education for public school students.

If charter school actions could be scrutinized by courts in the same way that private entities are scrutinized, there is the possibility that charter schools will be effectively regulated by the courts. The specter of a lawsuit could affect a charter school's willingness or ability to innovate, hampering the government's ability to govern.

In addition, if charter schools potentially face liability greater than that of a traditional public school, their ability to obtain reasonably priced insurance may be affected. This could thwart the Legislature's purpose in creating charter schools.

CONCLUSION

This memorandum concludes the background phase of this study. The Commission now has information about the operation and policy purposes of both the Government Claims Act and the Charter Schools Act.

In addition to discussing the Charter Schools Act, this memorandum has laid out two approaches to answering the question of whether charter schools should be deemed public entities for the purposes of the Government Claims Act.

Under one theory, charter schools were intended by the Legislature to be public for every purpose. The evidence for that conclusion can be drawn from the totality of the Charter Schools Act and the discussion in *Wilson*. Charter schools are created by statute to serve as an important part of the public school system. They are subject to the exclusive jurisdiction of the public school system,

are administered by public officials, use public funds and facilities, and must meet all of the constitutional mandates governing the state's system of common schools. Thus, they are public entities.

Under the other theory, which seems to have been followed in *Wells*, charter schools are not wholly public entities. They are public entities for some purposes (e.g., Article IX of the California Constitution), but not for others (e.g., the CFCA and UCL). They do not share all of the sovereign significance of public entities and therefore may not warrant all of the same immunities.

If one accepts the second theory, then it becomes necessary to closely examine the policy purposes of the Government Claims Act and the Charter Schools Act to determine whether charter schools should be treated as public entities for the purposes of the Government Claims Act.

At this stage in the study, the Commission needs input from experts and stakeholders. We have the legal background and a preliminary understanding of the policy and practical considerations that need to be addressed. But we need to have a fuller understanding of the real world implications of that information with respect to school administration, risk management, and compensation of harms.

To that end, the staff requests that the various experts and interested groups submit written comments on the merits of the two theories discussed in this memorandum. The Commission would also benefit from receiving concrete information about charter school operational structure, degree of independence from the chartering entity, accountability to the chartering entity, insurance availability before and after *Knapp*, hardships associated with charter failure, hardships that would result from expanded tort liability, the appropriateness or inappropriateness of subjecting charter schools to punitive damages, and any other matter that would be helpful in resolving the policy question before us.

Commissioners should consider what other specific information would be helpful to them as this study enters its next stage, in which the Commission will

need to begin forming a tentative position on the various policy questions that need to be decided.

Respectfully submitted,

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