Study G-200 April 14, 2011

Second Supplement to Memorandum 2011-17

Charter Schools and the Government Claims Act: Alternative Approaches

We have received another letter from Gregory V. Moser, writing on behalf of the California Charter Schools Association. It is attached as an Exhibit.

Mr. Moser disputes some of the points made in Memorandum 2011-17 and renews his recommendation that charter schools be treated as public entities for the purposes of the Government Claims Act. His main points are discussed briefly below.

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

Health and Safety Regulation

In discussing the exemption of charter schools from health and safety regulations applicable to traditional public schools, Memorandum 2011-17 uses Section 32030 as an example. Section 32020 requires that traditional public schools have gates wide enough to admit emergency vehicles to school grounds.

Mr. Moser questions whether that section imposes a stricter requirement than a charter school would already face under local building and fire codes. See Exhibit p. 1.

The staff appreciates Mr. Moser raising this possibility, which the staff has not yet had time to research. If it turns out that Mr. Moser is correct, and Section 32020 simply establishes parity between the access rules for traditional public schools and charter schools, then it should not be used as an example in discussing disparate health and safety requirements. Other sections could be used for that purpose. See, e.g., Sections 32280-32289 (comprehensive school safety planning).

School Choice Obviates Risk

Mr. Moser notes that students are never required to attend a charter school. If parents are dissatisfied with health and safety risks in a charter school, they can

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.

withdraw their students and enroll them in a traditional public school. See Exhibit p. 1.

This is true, in principle. However, parents may not have good information about health and safety risk disparities between charter schools and traditional public schools.

Moreover, suppose we assume that individual parents are comfortable with the level of risk in a particular charter school. That does not obviate the possibility that extending tort immunity to charter schools, in the absence of a regulatory floor, could lead to heightened risk in charter schools generally. Considering the demonstrated legislative concern about public school safety, this would seem to be a policy implication worth noting in this study.

Mr. Moser makes a similar argument with respect to the application of the Brown Act and other open government laws. He disputes that application of those statutes to charter schools would make them more accountable. "If the parents do not agree with the policies and practices of the charter school, they can simply withdraw their children." *Id*.

Again, this assumes that parents will have good information about a charter school's policies and practices, with which to make an informed decision about whether to withdraw their children. It seems less likely that parents would have such information if charter schools hold closed board meetings and keep their policy documents secret.

Charter Liability Could Affect Public Fisc

Mr. Moser has "difficulty following the logic behind the conclusion that charter schools do not warrant liability protection because the public fisc is not at risk." See Exhibit p. 2.

The staff did not reach such a conclusion. To the contrary, protection of scarce public fiscal resources was noted as one of the considerations in weighing various alternative approaches. See Memorandum 2011-17, pp. 19-20, 22, 24.

The argument that protection of the public fisc does not warrant extending public entity immunities to charter schools was made by the California Supreme Court, in *Wells v. One2One Learning Foundation*, 39 Cal. 4th 1164, 141 P.3d 225, 244, 48 Cal. Rptr. 3d 108 (2006). See discussion in Memorandum 2011-17, pp. 13-14. The Court seemed to premise its argument on the notion that charter schools are effectively fungible. If a charter school fails, its students (and the financial resources that follow students) would be reabsorbed by the school district,

without any meaningful impairment of its ability to provide free public education.

In evaluating the effect of charter school liability on the public fisc, another consideration is that a chartering entity has no responsibility for the liabilities or obligations of a charter school that is organized as a nonprofit public benefit corporation. See Section 47604. If such a charter school faces liability that is not covered by its insurance, the chartering entity would not be responsible for the uncovered liability.

Despite those arguments, the staff did point out that there would be significant transition costs and lost investment if a charter school were to go out of business, which could affect a chartering school district's ability to perform its sovereign functions. See Memorandum 2011-17, pp. 14-15 (costs and disruptions resulting from charter school liability "could have significantly deleterious effect on public education programs.").

Mr. Moser suggests one more scenario in which the failure of a charter school due to tort liability could have a fiscal effect on the state: If the chartering school district is in state receivership, then the state would be responsible for any of the costs associated with reintegrating the students of the failed charter school back into the district's traditional public schools. See Exhibit p. 2. The staff is not sure that it understands this point. It would seem that under this scenario, the state would already be paying the cost of operating the charter school. If the charter school were to fail, that cost would just be shifted, as the students are reabsorbed into the school district as a whole. The state would then face the same kind of transitional costs that would be faced by a district that is not in receivership.

Unauthorized Recommendations

Finally, Mr. Moser appears to be objecting to the suggestion that the Legislature might adopt a "combined" approach, in which Government Claims Act immunities are applied to charter schools, in combination with the application of all public school health and safety laws:

> To make recommendations on the appropriate scope of the megawaiver (Education Code section 47610) as staff has suggested […] would go beyond the Commission's charge, and require reconsideration of many aspects of the Charter Schools Act not addressed or studied by the Commission to date.

See Exhibit p. 2.

The staff agrees that the Commission should not make a recommendation on this point. In Memorandum 2011-17, the staff pointed out that making a recommendation on whether charter schools should be subject to the same health and safety laws as public schools might exceed the Commission's authority. "We have not been authorized to study that separate question and have no basis for making a recommendation on that point." Memorandum 2011-17, p. 23.

Nonetheless, given the policy implications of combining Government Claims Act immunities with a general exemption from public school health and safety laws, it seems appropriate that the *possibility* of a combined reform be noted for consideration by the Legislature (without any recommendation by the Commission).

Respectfully submitted,

Brian Hebert
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April 8, 2011

VIA U.S. MAIL

APR 12 2011

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Cindy Dole, Visiting Fellow
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Re: Additional Comments on California Law Revision Commission Study G-200 on Charter Schools and Insurance Coverage Issues

Dear Mr. Herbert and Ms. Dole:

On behalf of the California Charter Schools Association ("CCSA"), we submit these additional comments following the issuance of he Commission's Memorandum 2011-17 entitled "Charter Schools and the Government Claims Act: Alternative Approaches". For reference, we have attached a copy of our March 29, 2011 follow-up comment letter.

The suggestion in Memorandum 2011-17 that the additional safety regulations imposed on school districts makes their schools safer than charter schools' does not withstand close scrutiny. One example given is an Education Code provision regulating the width of gates in school fencing which does not apply to charter schools. Because local building codes (including fire codes) apply to charter schools, but do not apply to school districts (under the Supreme Court's decision in *Hall v. Taft* (1956) 47 Cal.2d 177 and Government Code section 53090 *et seq.*), perhaps the regulations of gate widths merely brings parity to regulatory requirements here.

More importantly, it is important to recognize that before charter schools existed, school districts were (and still mostly are) monopolies serving a captive student population which happens to reside within the geographic boundaries of a district. The fact that school districts are subject to additional, special health and safety regulations that are not applicable to other local governmental agencies simply reflects the fact that for most students, attending a particular public school is legally compulsory. (Most citizens cannot afford private school for their children.) In contrast, no student can be required to attend a charter school, and no teacher can be compelled to work in a charter school. If a parent believes a charter school to be unsafe or higher risk, they can choose to send their child to the district-operated school they would otherwise be required to attend.

Similarly, the suggestion that applying the Brown Act and conflict of interest laws will make charter schools more accountable is highly questionable for similar reasons. Again,

families are required to send their children to the local school operated by a local school district in which they reside, absent a charter school option where admission is by choice and may be strictly by lottery. If the parents do not agree with the policies and practices of the charter school, they can simply withdraw their children. Charter schools are built on the premise of greater accountability for results. Indeed, as we have noted, if charter school students do not achieve minimum standards as measured by state tests, the charter of the school cannot be renewed and the school must close. (Education Code section 47607(b).) Real accountability is fundamental to the charter school idea. Because charter schools are strictly schools of choice, we see no obvious linkage between the accountability laws cited by the latest staff report and sovereign immunity protections for charter schools.

Finally, we have difficulty following the logic behind the conclusion that charter schools do not warrant liability protection because the public fisc is not at risk. If a school district is held liable for negligence, it, and not the State of California, would be liable to pay for the resulting loss. A school district, like a charter school, is able to pay for claims only out of the combination of state funding and local property taxes it receives. If its funds were insufficient to pay a claim, it could not raise local property taxes to satisfy the judgment. A charter school which is incorporated is similarly situated. The State of California would not be liable for a judgment against a charter school. If a judgment or other set of financial burdens caused a school district to be unable to provide public education altogether, then the State of California would have a Constitutional obligation to step in and make sure free public education is available. (See, *Butt v. State of California* (1992) 4 Cal. 4th 668). Indeed, it is conceivable that the closure of a charter school might result in a state obligation to provide a source of public education for the displaced students of the closed school, especially if it were located within a school district already in state receivership.

For these reasons, we urge the Commission to consider recommending that charter schools organized as nonprofit corporations be considered public entities only under the Government Claims Act. To make recommendations on the appropriate scope of the megawaiver (Education Code section 47610) as staff has suggested the would go beyond the Commission's charge, and require reconsideration of many aspects of the Charter Schools Act not addressed or studied by the Commission to date.

Very truly yours,

Gregory V. Moser, of
Procopio, Cory, Hargreaves
& Savitch LLP

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Enclosure

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