

Memorandum 2011-22

Charter Schools and the Government Claims Act: Draft Tentative Report

At its April meeting, the Commission directed the staff to prepare a draft tentative report setting out the Commission's preliminary findings on the legal and policy implications of treating a charter school as a public entity for the purposes of the Government Claims Act. See Minutes (April 2011), p. 3. The Commission made the following decisions regarding the content of the draft report:

- The draft will present a range of options, rather than a single recommended option. *Id.*
- The draft will present a new "hybrid" option, under which a charter school would be treated as a public entity for purposes of the Government Claims Act, but only for a specifically defined class of claims. *Id.*
- The draft will solicit comments on the merits of drawing a distinction between an "independent" charter school (i.e., one that is formed as a legal entity separate from its chartering entity) and a "dependent" charter school (i.e., one that is not legally separate from its chartering entity), with the latter treated as a public entity. The draft would also invite comment on how best to express such a distinction, so as to avoid any ambiguity or gaps in the law.

A draft of the tentative report is attached for Commission review. The Commission needs to decide whether to approve the draft, with or without changes, for circulation for comment.

The remainder of this memorandum discusses two issues relating to the content of the draft tentative report: (1) The details of the hybrid approach noted above, and (2) the prior research on the treatment of charter schools in other jurisdictions.

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.

HYBRID APPROACH

Basic Concept

The proposed hybrid approach would treat a charter school as a public entity for Government Claims Act purposes, but only with respect to liability that arises from the charter school's public obligations. For the purposes of this discussion, "public obligation" means a special duty or restriction that is imposed on a charter school as a consequence of it being part of the public school system. A duty or restriction that also applies to private schools would *not* be a public obligation under this analysis.

For example, a charter school must be "nonsectarian in its programs, admission policies, employment practices, and all other operations." Educ. Code § 47605(d). That is a specific expression of the general constitutional rule prohibiting the appropriation of funds for a sectarian or denominational school. Cal. Const. Art. IX, § 8. A private school is not barred from operating as a sectarian or denominational school. Thus, the requirement that a charter school be nonsectarian is a uniquely public obligation. It derives from the fact that a charter school is part of the public school system.

By contrast, Health and Safety Code Section 25249.5 prohibits *any* person from discharging a cancer-causing chemical into water or onto the ground where it is likely to make its way into a drinking water source. A charter school's duty to abide by that prohibition is the same as that of a private school (or any other private person). Thus, the prohibition provided in Section 25249.5 does not derive from the fact that a charter school is part of the public school system and is therefore not a uniquely public obligation.

With respect to its public obligations, a charter school faces the same liability as any other public school. But, under existing law, a charter school does not receive the same limitations on liability that a traditional public school enjoys under the Government Claims Act.

The purpose of the hybrid approach would be to level the playing field with respect to claims that arise from a public obligation. If such a claim is brought against a charter school, the claim would be treated in the same way as a similar claim against a traditional public school (i.e., the Government Claims Act would apply).

Implementation of Hybrid Approach

The proposed hybrid approach was discussed only briefly at the April 2011 meeting. The Commission described the effect of the hybrid approach as follows: any claim against a charter school *that is grounded in a constitutional or statutory provision* would be subject to the Government Claims Act. See Minutes (April 2011), p. 3.

After further reflection, the staff is not sure of the reason for framing the hybrid approach in that way. The decision might have been based on one of the following reasons:

- The scope of constitutional and statutory claims was assumed to be coextensive with the scope of claims that arise from a charter school's uniquely public obligations.
- The requirement that a claim be grounded in a constitutional or statutory provision was intended as an additional limiting factor. In other words, the hybrid approach should only apply to a claim that arises from both (1) a public obligation of a charter school, *and* (2) a constitutional or statutory provision.

Both of those possibilities are discussed below.

Constitutional and Statutory Claims as Proxy for Claims Arising from Public Obligations

The first possibility is that the class of constitutional and statutory claims was assumed to be coextensive with the class of claims that arise from a charter school's uniquely public obligations.

That assumption does not appear to be correct. The class of constitutional and statutory claims is *much* broader than the class of claims arising from a charter school's public obligations. A constitutional or statutory provision can indeed express a public obligation, but it can also express a general obligation that also applies to a private school.

For example, both of the prohibitions discussed earlier in the memorandum are statutory in origin. See Educ. Code § 47605(d) (charter school shall not be sectarian); Health & Safety Code § 25249.5 (person shall not deposit cancer causing chemical into drinking water supply). A rule that applied the Government Claims Act to every statutory claim brought against a charter school would encompass both of the claims discussed above, despite the fact that the drinking water provision is not a uniquely public obligation.

Consequently, the class of constitutional and statutory claims would not be a good proxy for claims that arise from a charter school's uniquely public obligations. **The staff recommends against describing the hybrid approach in those terms.**

Constitutional and Statutory Claims as an Additional Limiting Factor

The second possibility is that the Commission intended to use the class of constitutional and statutory claims as an additional limiting factor. In other words, the idea may have been that the hybrid approach would apply the Government Claims Act to a claim that arises from a uniquely public obligation, *but only if that claim also has a constitutional or statutory basis.*

What would be the effect of such a limitation? It would exclude all of the following types of claims:

- A common law claim.
- A claim based on an administrative regulation.
- A claim based on a local ordinance.

If the purpose of the hybrid approach is to level the playing field between traditional public schools and charter schools with respect to their shared public obligations, then the staff sees no policy justification for excluding obligations that arise from the common law, regulations, or local ordinances. **The staff recommends against doing so.**

Proposed Implementation

The staff recommends that the hybrid approach be framed so as to expressly state the distinction on which it is based. Specifically, the hybrid approach should only encompass a claim if the claim is of a type that can *only* be brought against a school that is part of the public school system. If a claim could also be brought against a private school, it should not be included within the scope of the hybrid approach. Thus:

If a claim against a charter school is a type of claim that can only be brought against a school that is part of the public school system, the claim is subject to Division 3.6 (commencing with Section 810) of Title 1 of the Government Code.

Under that approach, the Government Claims Act would apply to the following claims (because they can only be brought against schools in the public school system):

- A claim alleging that a charter school violated Education Code Section 47605(d) (requiring that charter schools be nonsectarian).
- A claim alleging that a charter school violated Education Code Section 56145 (requiring that a charter school serve students with exceptional needs in the same manner as such students are served in other public schools).
- A claim alleging that a charter school violated Education Code Section 48907 (protecting student expression in public schools).

Under the approach described above, the Government Claims Act would not apply to the following claims (because they could also be brought against private schools):

- A general tort or contract claim.
- A claim brought pursuant to the California False Claims Act. Gov't Code § 12650 *et seq.*
- A claim alleging that a charter school violated the general whistleblower protections provided in Labor Code Section 1102.5.

Potential Classification Issues

The staff's proposed language turns on whether the claim at issue can only be brought against a school that is part of the public school system. The staff sees one situation in which the answer to that question might be unclear.

There may be circumstances in which functionally similar, but technically different, claims could be brought against public and private schools. For example, both charter schools and private schools are legally required to maintain attendance records. But this duty is expressed in different code sections for each type of school, using different language. *Compare* Educ. Code § 47612.5(a)(2) (charter school attendance records) *with* Educ. Code § 48222 (private school attendance records).

If a claim is brought against a charter school alleging that it breached its duty to maintain attendance records, is that a type of claim that can only be brought against a public school? If the claim is framed narrowly (i.e., violation of Section 47612.5(a)(2)), then one could argue that the same claim could not be brought against a private school. However, if the claim is framed broadly (i.e., failure to maintain attendance records), then one could argue that the same type of claim could be brought against a private school.

Here's another example: Suppose that a charter school enters into a contract with a third party to provide services relating to special education. There is an

alleged breach by the charter school and the service provider sues. Should this be classed broadly as a contract claim (which would not be covered by the statute, because private schools can also be sued for breach of contract)? Or could one argue that the subject matter of the contract should determine its status under the proposed law. That is, because the contract was for services related to a charter school's uniquely public obligation, the same type of claim could not have been brought against a private school and therefore the Government Claims Act would apply?

The staff is concerned that there may be other, as yet unidentified, line drawing issues that could surface if the proposed hybrid approach were enacted. Recall that every claim against a charter school would need to be tested against the hybrid approach language, in order to determine whether the claims presentation requirement of the Government Claims Act applies. That would provide ample scope for creative litigation to argue for the application or non-application of the Government Claims Act.

Conclusion

In the attached draft tentative report, the hybrid approach is framed as recommended in this memorandum. See attached draft, pp. 36-37, 44-46.

The approach is described as distinguishing between claims that can only be brought against public schools, as opposed to claims that can also be brought against private schools, with the Government Claims Act applicable to the former. The proposed hybrid approach is *not* described as being conditioned on whether a claim is constitutional or statutory in origin. **Does the Commission agree with the proposed framing? If not, how should the hybrid approach be described?**

STATUS OF CHARTER SCHOOLS IN OTHER JURISDICTIONS

As background research for this study, the staff examined the treatment of charter schools in other U.S. jurisdictions. See generally Memorandum 2010-35.

In that memorandum, the staff found that most charter school jurisdictions "appear to consider charter schools public for all purposes." *Id.* at 2. After further consideration, the staff is not sure that this is the best way to characterize the data.

The difficulty is that many of the jurisdictions have statutes that simply declare charter schools to be "public schools" or to be "part of the public school

system” See, e.g., Fla. Stat. § 1002.33(1) (“Charter schools shall be part of the state’s program of public education. All charter schools in Florida are public schools....”).

On its face, such language does create an inference that a charter school is a public entity. However, experience in California casts doubt on the reliability of such an inference. In California, the Education Code declares charter schools to be part of the public school system. Educ. Code § 47615. Furthermore, the Court of Appeal has held that charter schools are “public schools.” *Wilson v. State Board of Educ.*, 75 Cal. App. 4th 1125, 1139, 89 Cal. Rptr. 2d 745 (1999) (“To begin with, charter schools *are* public schools because, as explained above, charter schools are part of the public school system.”) (emphasis in original).

Nonetheless, California courts have also held that charter schools are not public entities for some purposes (including sovereign immunity). See *Wells v. One2One Learning Foundation*, 39 Cal. 4th 1164, 141 P.3d 225, 48 Cal. Rptr. 3d 108 (2006); *Knapp v. Palisades Charter High School*, 146 Cal. App. 4th 708, 53 Cal. Rptr. 3d 182 (2007). Consequently, it is not clear that a statute in another jurisdiction that declares charter schools to be “public schools” or to be part of the “public school system” necessarily means that the jurisdiction treats charter schools as public entities under other laws.

For that reason, the staff has not included any discussion of the treatment of charter schools in other jurisdictions in the attached draft tentative report. Instead, the staff hopes to do further research on the matter and revisit the issue at a later time.

Respectfully submitted,

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CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT

TENTATIVE REPORT

Charter Schools and the Government Claims Act

June 2011

The purpose of this tentative report is to solicit public comment on the Commission's tentative conclusions. A comment submitted to the Commission will be part of the public record. The Commission will consider the comment at a public meeting when the Commission determines what, if any, recommendation it will make to the Legislature. It is just as important to advise the Commission that you approve the tentative report as it is to advise the Commission that you believe revisions should be made to it.

COMMENTS ON THIS TENTATIVE REPORT SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN _____.

The Commission will often substantially revise a proposal in response to comment it receives. Thus, this tentative report is not necessarily the report the Commission will submit to the Legislature.

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SUMMARY OF TENTATIVE REPORT

Charter schools are publicly funded schools of choice. They are subject to the constitutional requirements of the public school system, but are exempted from many of the statutory requirements that regulate traditional public schools.

Although charter schools are part of the public school system, a charter school may be formed as a nonprofit public benefit corporation, legally separate from its chartering entity. A chartering entity is not liable for the obligations of a charter school that is formed as a nonprofit public benefit corporation.

This quasi-public character of some charter schools has led to questions about whether charter schools are public entities for the purposes of various statutes that govern public entities.

In response, the Commission was authorized to study the legal and policy implications of treating a charter school as a public entity for the purposes of the Government Claims Act (Gov't Code §§ 810-998.3). See 2009 Cal. Stat. res. ch. 98 (ACR 49 (Evans)).

This tentative report sets out the Commission's preliminary findings on the matter. It discusses the advantages and disadvantages of a range of possible reform alternatives, but makes no recommendation on which would strike the best policy balance. Each of the alternatives discussed involves competing policy considerations, which would best be weighed by the elected representatives of the public (with the benefit of the Commission's analysis), rather than by the Commission.

CHARTER SCHOOLS AND THE GOVERNMENT CLAIMS ACT

INTRODUCTION

1
2 Charter schools are publicly funded schools of choice. They are part of the
3 public school system¹ and are subject to a number of the duties and restrictions
4 that govern public schools.

5 However, charter schools also enjoy a high degree of operational flexibility and
6 independence. A charter school is exempted from most of the statutory law that
7 governs public schools,² and can be formed as a nonprofit public benefit
8 corporation, with a separate legal identity from the public entity that chartered it.³

9 Because a charter school can operate as a “quasi-public entity” (i.e., a private
10 entity that is created, pursuant to statutory authority, to perform a public
11 function⁴), questions have arisen about whether a charter school should be treated
12 as a public entity for various statutory purposes.

13 In 2006, the California Supreme Court decided *Wells v. One2One Learning*
14 *Foundation*.⁵ In *Wells*, the Court held that charter schools are not public entities
15 for the purposes of the False Claims Act and the Unfair Competition Law.⁶ Unlike
16 a public entity, a charter school can be sued under those statutes.

17 In the same case, the Court declared that charter schools “do not fit comfortably
18 within any of the categories defined, for purposes of the [Government Claims
19 Act⁷] as ‘local public entities.’”⁸ Although that statement was not a necessary part
20 of the court’s holding, it did signal that the court was inclined against viewing a
21 charter school as a public entity for the purposes of the Government Claims Act.

1 See Educ. Code § 47615; *Wilson v. State Board of Educ.*, 75 Cal. App. 4th 1125, 89 Cal. Rptr. 2d 745 (1999).

2 See Educ. Code § 47610.

3 See Educ. Code § 47604.

4 For a discussion of quasi-public entities in another context, see *Administrative Adjudication by Quasi-Public Entities*, 26 Cal. L. Revision Comm’n Reports 277 (1996).

5 *Wells v. One2One Learning Foundation*, 39 Cal. 4th 1164, 141 P.3d 225, 48 Cal. Rptr. 3d 108 (2006).

6 *Id.*; Bus. & Prof. Code § 17200 *et seq.* (Unfair Competition Law); Gov’t Code § 12650 *et seq.* (False Claims Act).

7 See Gov’t Code § 810 *et seq.* Although these provisions are often referred to as the “Tort Claims Act,” the California Supreme Court now refers to the statute as the “Government Claims Act,” because some of its provisions apply to contract claims and other non-tort claims. See *City of Stockton v. Superior Ct.*, 42 Cal. 4th 730, 171 P.3d 20, 68 Cal. Rptr. 3d 295 (2007). The Commission will follow the Court’s practice.

8 *Wells*, 39 Cal. 4th at 1214.

1 In 2007, the Second District Court of Appeal decided *Knapp v. Palisades*
 2 *Charter High School*.⁹ In that case, the court expressly adopted the reasoning in
 3 *Wells* and held that a charter school that is formed as a nonprofit corporation is not
 4 a public entity for the purposes of the Government Claims Act.

5 In 2008, legislation was introduced to overturn the holding in *Knapp*.¹⁰ That
 6 legislation was not enacted. Instead, a resolution was enacted in 2009, authorizing
 7 the Law Revision Commission to conduct an “[a]nalysis of the legal and policy
 8 implications of treating a charter school as a public entity for the purposes of
 9 Division 3.6 (commencing with Section 810) of Title 1 of the Government
 10 Code.)”¹¹

11 This tentative report was prepared pursuant to that authority. It presents the
 12 Commission’s preliminary findings on the matter. The remainder of the report is
 13 organized as follows:

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⁹ *Knapp v. Palisades Charter High School*, 146 Cal. App. 4th 708, 53 Cal. Rptr. 3d 182 (2007).

¹⁰ AB 1868 (Walters) (as amended Mar. 24, 2008).

¹¹ 2009 Cal. Stat. res. ch. 98 (ACR 49 (Evans)).

1

CHARTER SCHOOLS ACT

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The Charter Schools Act of 1992¹² authorizes the creation and operation of charter schools in California.

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Charter schools are publicly funded schools of choice.¹³ That is, they receive public funding in a manner similar to traditional public schools, but no student is required to attend a charter school.¹⁴ Nor may a student be denied admission to a charter school, if there is sufficient capacity.¹⁵

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California has more than 850 charter schools that serve about 2.5% of public school students between kindergarten and twelfth grade.¹⁶

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The stated purpose of charter schools is to:

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- 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 more choice within the public school system.
- Make charter schools accountable for performance.
- Create new competition with traditional public schools to promote improvements in all public schools.¹⁷

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A charter school is exempt from much of the statutory law governing public schools.¹⁸ However, a charter school must follow some of the same general admissions and program requirements as a traditional public school. For example, a charter school:

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- Cannot charge tuition.¹⁹
- Must have nonsectarian programs, admission policies, and employment practices.²⁰
- Must not discriminate.²¹

12 Educ. Code § 47600 *et seq.*

13 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.

14 Educ. Code § 47605(f).

15 Educ. Code § 47605(d)(2).

16 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>.

17 Educ. Code § 47601.

18 Educ. Code § 47610.

19 Educ. Code § 47605(d)(1).

20 *Id.*

- 1 • Must provide for special education students in the same manner as traditional
2 public schools.²²
- 3 • Must comply with statewide testing programs.²³
- 4 • Must have credentialed teachers for “core” courses.²⁴

5 **Creation and Revocation of Charter**

6 A charter school may be created as a completely new school (“start up”) or be
7 converted from an existing public school (“conversion”).²⁵ More than three-
8 quarters of charter schools are start-ups and the rest are conversions.²⁶ A private
9 school *may not* convert to a charter school under the Charter Schools Act.²⁷

10 Anyone can propose the creation of a charter school by creating a petition and
11 gathering the requisite number of signatures.²⁸ The petition and a copy of the
12 proposed charter must be submitted to the entity that will authorize the charter
13 (“chartering entity”).²⁹ The chartering entity is usually the local school district.
14 The county board of education and the State Board of Education are also
15 authorized to issue charters, but do so rarely.³⁰

16 A charter must provide specific information about the structure and operation of
17 the proposed charter school.³¹ The petitioner must also provide a proposed budget
18 for the first year of operation of the charter school that includes start up costs, and
19 cash flow and financial projections for the first three years.³²

20 A charter is presumed to be approved if it meets the requirements of the Charter
21 Schools Act. A charter may be denied only with a written finding of facts that
22 support the denial.³³

23 A charter may be revoked if there is substantial evidence that the school
24 materially violated the charter, did not meet student outcomes, did not follow

21 *Id.*

22 Educ. Code § 56145.

23 Educ. Code § 47605(c)(1).

24 Educ. Code §§ 47605(l), 47605.6(l).

25 Educ. Code §§ 47605, 47606.

26 Cal. Dep’t of Educ., *supra*, at 101.

27 Educ. Code § 47602(b).

28 Educ. Code §§ 47605, 47606.

29 Educ. Code §§ 47605, 47606.5.

30 Educ. Code § 47605.8.

31 Educ. Code §§ 47605(b)(5)(A)-(P), 47605(g), 47605.6(h).

32 Educ. Code § 47605(g).

33 Educ. Code § 47605(b).

1 generally accepted accounting principles, engaged in fiscal mismanagement, or
2 violated the law.³⁴ The Charter Schools Act provides a procedure for revocation.³⁵

3 **Oversight and Accountability**

4 The chartering entity is responsible for oversight of the charter school. The
5 charter school must respond to reasonable requests for information from the
6 chartering entity, the county board of education, and the State Superintendent of
7 Public Instruction.³⁶

8 However, the required oversight of charter schools is limited to the following:

- 9 • Identify at least one staff member as a contact person for the charter school.
- 10 • Visit the charter school at least annually.
- 11 • Ensure the charter school complies with all required reports.
- 12 • Monitor the fiscal condition of the charter school.
- 13 • Notify the State Department of Education if the charter is revoked, the charter
14 renewal is granted or denied, or the charter school will cease operation.³⁷

15 A school district that grants a charter to an incorporated charter school is entitled
16 to have one representative on the board of directors of the nonprofit public benefit
17 corporation.³⁸

18 To finance these oversight activities, the chartering entity may charge the charter
19 school the actual costs of oversight, up to one percent of the charter school's
20 revenue.³⁹

21 A charter school must submit a preliminary budget and specified financial
22 reports each year to its chartering entity and the county superintendent of
23 schools.⁴⁰ A charter school must obtain an annual independent fiscal audit that
24 follows generally accepted auditing principles.⁴¹

25 **Governance Structure**

26 The Charter Schools Act does not require a particular governance structure, and
27 gives a charter school the option to organize as a nonprofit public benefit
28 corporation, with a legal identity separate from the chartering entity.⁴²

34 Educ. Code § 47607(c).

35 Educ. Code § 47606(d)-(k).

36 Educ. Code § 47604.3.

37 Educ. Code § 47604.32.

38 Educ. Code § 47604(b).

39 Educ. Code §§ 47604.32(f), 47604.33(f), 47613.

40 Educ. Code § 47604.33.

41 Educ. Code §§ 47605(b)(5)(I), 47605.6(b)(5)(I).

42 See Educ. Code § 47604.

1 A chartering entity is not liable for any of the debts or obligations of an
2 incorporated charter school, as long as the chartering entity's oversight role has
3 been fulfilled.⁴³

4 Despite the fact that a charter school can be formed as a private nonprofit
5 corporation, all charter schools are deemed to be part of the public school system
6 for the purposes of Article IX of the California Constitution.⁴⁴

7 All charter schools are considered public entities for purposes of a joint powers
8 agreement and may thus join a risk pool with a traditional school district.⁴⁵

9 **Operational Issues**

10 *Personnel*

11 All charter school employees, including those employed by a nonprofit public
12 benefit corporation, have the right to be represented through a collective
13 bargaining process.⁴⁶ The charter school may declare itself the public school
14 employer for this purpose. Otherwise, the district is considered the public school
15 employer.⁴⁷

16 Charter schools may choose to participate in the State Teachers' Retirement
17 System or the Public Employees' Retirement System, or both.⁴⁸

18 *Financing*

19 For purposes of the state constitution and school financing, a charter school is
20 considered to be under the exclusive control of the officers of the public schools.⁴⁹
21 Charter school funding is similar to traditional public school funding. The funding

43 Educ. Code § 47604(c). It is likely that the liability of the chartering entity is also addressed in the charter or an accompanying Memorandum of Understanding, because the Charter Schools Act requires that a charter school petitioner address the potential civil liability effects on the school and its chartering entity. Educ. Code §§ 47605(g).

44 Educ. Code § 47615.

45 Gov't Code § 6528. Before 1998, many charter schools were members of a joint powers agreement ("JPA"). 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 a charter school to participate in JPAs, notwithstanding its corporate form. See Senate Local Government Committee Analysis of AB 101 (Mar. 30, 2000), p. 2.

46 Educ. Code § 47611.5(a).

47 Educ. Code § 47611.5(b).

48 Educ. Code § 47611.

49 Educ. Code § 47612(a).

1 follows the student, whether the student attends a traditional public school or a
2 charter school.⁵⁰

3 ***Facilities***

4 One challenge charter schools face is finding suitable facilities. Initially, charter
5 schools had extremely limited funding for facilities. To address the problem, the
6 Legislature has expanded the availability of facilities funding for charter schools.⁵¹

7 The Charter Schools Act declares that “public school facilities should be shared
8 fairly among all public school pupils, including those in charter schools.”⁵² In
9 some cases, the local school district must provide facilities to the charter school
10 that are reasonably equivalent to those a traditional public school student would
11 occupy.⁵³

12 **Health and Safety Issues**

13 ***The Field Act***

14 The Field Act requires a public school building to be designed and constructed
15 to fulfill special building standards set by the state.⁵⁴ The Field Act was intended
16 to provide for the safety of the occupants of school buildings in an earthquake.⁵⁵

17 An Attorney General opinion concluded that charter schools are not required to
18 follow the Field Act, unless the school’s charter requires it. The opinion used a
19 plain language interpretation of the Charter Schools Act to come to its conclusion,
20 because Section 47610 exempts charter schools from most of the laws applicable
21 to school districts.⁵⁶

22 Note that a private school is subject to the Private Schools Building Safety Act,
23 which is analogous to the Field Act.⁵⁷ It was intended to ensure that children
24 attending a private school will have similar earthquake safety protections in their
25 buildings as public school children.⁵⁸

50 *Wells v. One2One Learning Foundation*, 39 Cal. 4th 1164, 1202, 141 P.3d 225, 48 Cal. Rptr. 3d 108 (2006).

51 See, e.g., Educ. Code §§ 17078.52, 17078.66 (Charter School Facility Program).

52 Educ. Code § 47614.

53 Educ. Code §§ 47614 (requiring school districts to share facilities with charter schools and allowing the school district to charge a pro rata share of the actual costs, such as maintenance and cleaning services), 47613(b) (allowing the school district to provide rent-free facilities as part of a three percent oversight fee).

54 Educ. Code § 17280.

55 80 Ops. Cal. Atty. Gen. 52 (1997).

56 *Id.*

57 Educ. Code § 17320.

58 Educ. Code § 17322.

1 Thus, a charter school appears to be in a unique position, with more flexibility as
2 to facilities than either a traditional public school or a private school.

3 ***General Building Standards***

4 In 2005, the Charter Schools Act was amended to state generally that a charter
5 school must comply with the California Building Standards Code.⁵⁹ This
6 amendment was a response to arguments on the part of some charter schools that
7 they were not subject to plan review or inspection by the state architects or local
8 building departments.⁶⁰

9 ***School Health and Safety Standards***

10 The Education Code contains a number of health and safety provisions. Most of
11 the provisions apply to public schools, without making any express reference to
12 charter schools.⁶¹ Some health and safety provisions apply to both public and
13 private schools without express reference to charter schools.⁶² Under the general
14 provision exempting charter schools from laws governing private schools, it
15 appears that none of those health and safety requirements apply to a charter
16 school.

17 A charter school is, however, responsible for establishing procedures to protect
18 the health and safety of students and teachers as part of the charter.⁶³ Unlike many
19 of the health and safety requirements that traditional public schools and private
20 schools must follow, the charter school safety plan requirements do not have
21 specific parameters. Thus, a charter school has a great deal of flexibility in
22 determining what constitutes reasonable health and safety procedures.

23 GOVERNMENT CLAIMS ACT

24 The traditional fault theory of tort liability requires the party who breached a
25 duty of care and caused an injury to compensate the injured party. The fault theory
26 serves three purposes:

- 27 (1) It shifts losses away from an innocent injured party and to the responsible
28 party.

59 Educ. Code § 47610(d). But see Educ. Code § 47610.5.

60 Assembly Committee Analysis of SB 1054 (June 27, 2005), pp. 2-3.

61 See, e.g., Educ. Code §§ 32280-32289 (requirement to create comprehensive school safety plans, including disaster procedures).

62 See, e.g., Educ. Code §§ 32001 (duty to provide fire alarms and conduct fire drills), 32020 (gates must be wide enough to allow emergency vehicles to access all portions of the buildings), 32030-32034 (eye protection must be available), 32040-32044 (duty to equip schools with a first aid kit), 32060-32066 (art supplies with certain toxic substances are prohibited).

63 Educ. Code § 47605(b)(5)(F).

1 (2) It deters behavior likely to cause injury.

2 (3) It encourages the use of precautions to prevent injury.

3 The unique role of government in society makes the application of those
4 principles problematic.⁶⁴

5 The government makes and enforces the laws. It also engages in many activities
6 that serve the public at large. These activities are mandatory and reflect policy
7 decisions made by the people through their legislators. A public entity cannot
8 simply halt a service that is deemed too costly or risky.

9 A public entity also does not profit from its operations in the same manner as
10 private entities. It receives its revenue from the taxpayers rather than directly from
11 the users of its services. Therefore it cannot adjust its pricing to offset the cost of
12 potential liabilities.

13 As a result, the traditional purposes of tort liability are not necessarily
14 appropriate in the context of public entity activities.⁶⁵

15 Even when a public entity provides a service that is analogous to a privately
16 offered service, traditional tort theories can be difficult to apply, because the
17 government version of the service often contains constraints not applicable to
18 private entities.⁶⁶

19 Sovereign immunity accommodates the unique nature of government. It protects
20 the public fisc from depletion and allows government to govern.⁶⁷ It also reduces
21 the possibility of judicial interference in the development of public policy.⁶⁸

22 The Government Claims Act⁶⁹ balances the competing policies of governmental
23 liability and immunity. The Act was the result of a Commission study and

64 Arvo Van Alstyne, *A Study Relating to Sovereign Immunity*, 5 Cal. L. Revision Comm'n Reports 1, 271-72 (1963) (discussing fault theory, which requires the party who breached a duty of care and caused an injury to compensate the injured party, and risk or strict liability theory, which spreads the cost of a loss among all who might benefit regardless of fault).

65 See *Recommendation Relating to Sovereign Immunity, Number 1 – Tort Liability of Public Entities and Public Employees*, 4 Cal. L. Revision Comm'n Reports 801, 810 (1963) (hereinafter, *Number 1 – Tort Liability of Public Entities and Public Employees*).

66 *Id.* A comparison between public and private schools provides an example of how two apparently analogous services can be quite different. Public schools must provide an education to all who qualify and must abide by nondiscrimination rules. Private schools may have selective admissions policies. Public schools may not charge tuition but private schools have no such financial constraint. Cal. Const. art. IX, § 5; see also, Educ. Code § 200; *Number 1 – Tort Liability of Public Entities and Public Employees, supra*, at 810.

67 See, e.g., *Alden v. Maine*, 527 U.S. 706, 750-51 (1999) (discussing how protecting the government fisc keeps resources from being shifted away from important governmental activities and allows government to govern by allowing government to allocate limited resources without diverting too many resources toward defending lawsuits and paying claims).

68 *Id.* at 750 (discussing the possibility of government making a policy decision about acceptable levels of risk and having a court ruling on the reasonableness of the policy if sovereign immunity is not available).

69 Gov't Code §§ 810-998.3.

1 recommendation.⁷⁰ It codified a patchwork of local rules, state rules, and case
2 law.⁷¹

3 The purpose of the Government Claims Act is to define and limit public
4 employee and public entity tort liability. It abolished common law tort liability for
5 public entities, making all public entity liability statutory.⁷²

6 Relevant features of the Government Claims Act are summarized below.

7 **Scope of Application**

8 The Government Claims Act applies to “public entities”⁷³ and “public
9 employees.”⁷⁴ Public entities are further subdivided into the “state,” a “local public
10 entity,” or a “judicial branch entity.”⁷⁵

11 A local public entity includes political subdivisions or public corporations in the
12 state, such as a county, city, or district, but does not include the state. Local public
13 entities are independently liable for their torts.⁷⁶

14 A school district is a local public entity.⁷⁷ An individual school is considered an
15 arm of the district and the district is liable for the torts of the school.

16 **Claim Presentation**

17 In general, a claimant may not bring a suit for money or damages directly
18 against a public entity or a public employee acting within the scope of
19 employment. Instead, a claimant must first present a written claim to the public
20 entity.⁷⁸ There is a single standardized claim presentation procedure that applies to
21 the state, local public entities, and public employees.⁷⁹

70 1963 Cal. Stat. ch. 1681.

71 *Number 1 – Tort Liability of Public Entities and Public Employees, supra*, at 807.

72 See Gov’t Code § 815 & Comment; *Hoff v. Vacaville Unified Sch. Dist.*, 19 Cal. 4th 925, 932, 968 P.2d 522, 80 Cal. Rptr. 2d 811 (1998).

73 “‘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.” Gov’t Code § 811.2. The definition is meant to be applied broadly and includes the state and all of its local and regional subdivisions. See *Id.*, Comment.

74 “‘Public employee’ means an employee of a public entity.” Gov’t Code § 811.4. Independent contractors are specifically excluded from the definition of a public employee and receive special treatment under the Government Claims Act. Gov’t Code §§ 810.2, 815.4.

75 Gov’t Code §§ 900.3, 900.4.

76 Gov’t Code §§ 900.4, 905, 940.4.

77 See, e.g., *Wright v. Compton Unif. School Dist.*, 46 Cal. App. 3d 177, 181-82, 120 Cal. Rptr. 115 (1975).

78 See Gov’t Code §§ 905, 910, 950, 950.2, 950.6(a).

79 *Stockton*, 42 Cal. 4th, at 739 n.4.

1 The claims presentation procedure is intended to facilitate the early resolution of
2 claims, allowing meritorious claims to be settled quickly without litigation.⁸⁰

3 Claim presentation requirements serve several policy goals. They protect the
4 public fisc and allow some injured parties to be compensated quickly.⁸¹ The early
5 presentation of claims also provides timely notice of a dangerous activity or
6 condition, allowing a public entity to take corrective steps promptly.⁸²

7 ***Time Limits***

8 One significant consequence of the claim presentation requirement is that it
9 effectively shortens the statute of limitations for the underlying cause of action.
10 The time period available for presenting a claim is six months or one year,
11 depending on the basis for the claim.⁸³ By contrast, statutes of limitation for
12 common causes of action against private entities range from one to four years.⁸⁴

13 A claimant who files an action in court without first presenting a timely claim is
14 likely to have the suit dismissed.⁸⁵

15 In order to ameliorate harsh results, the Government Claims Act allows some
16 claimants who miss a six-month claim deadline to submit an application to present
17 the claim late.⁸⁶

18 ***Identification of Public Entity***

19 In order to present a claim, the proper public entity must be identified. To
20 facilitate identification, a local public entity must file an information statement

80 Van Alstyne, *A Study Relating to Sovereign Immunity*, *supra*, at 311.

81 See *City of Stockton v. Super. Ct.*, 42 Cal. 4th 730, 738, 171 P.3d 20, 68 Cal. Rptr. 3d 295 (2007); *Baines Pickwick Ltd. v. City of Los Angeles*, 72 Cal. App. 4th 298, 303, 85 Cal. Rptr. 2d 74 (1999); Van Alstyne, *supra*, at 317.

82 *Id.*

83 Gov't Code § 911.2(a), (b) (specifying that six-month claims extend to a cause of action for death, or for injury to a person, personal property, or growing crops, while one-year claims include any other causes of action). A single incident may give rise to both six-month and one-year claims. For example, a tort could damage both real property and personal property. In such cases, the claimant must follow the shorter deadline in order to include all claims. See, e.g., *Baillargeon v. Dept. of Water & Power*, 69 Cal. App. 3d 670, 682, 138 Cal. Rptr. 338 (1977). The accrual date of a cause of action for purposes of a claim is determined in the same manner as the accrual date for the cause of action underlying the claim. Gov't Code § 901.

84 See, e.g., Code Civ. Proc. §§ 340(c) (allowing one year to file a cause of action for libel or slander); 335.1, 339 (allowing two years for personal injury and oral contracts); 338(b), (c), (d) (allowing three years for fraud or injury to real or personal property); 337, 337.2, 343 (allowing four years for written contracts, collection of debt on account, collection of rents, and any other cause of action not currently listed).

85 *State v. Super. Ct.*, 32 Cal. 4th 1234, 1239, 90 P.3d 116, 13 Cal. Rptr. 3d 534 (2004) (holding that failure to present a timely claim bars a lawsuit).

86 Gov't Code §§ 911.4, 911.6; *Number 2 – Claims, Actions and Judgments Against Public Entities and Public Employees*, *supra*, at 1009.

1 with the Secretary of State.⁸⁷ In addition, a public entity must identify itself as
2 such on letterhead and identification cards.⁸⁸ A public entity that does not properly
3 identify itself cannot use a claimant's misidentification as a reason to dismiss a
4 claim.⁸⁹

5 While these requirements remove one source of technical dismissal, not all
6 entities are required to file and appear on the Roster of Public Agencies. A public
7 entity may be a subsidiary of another entity. A subsidiary is not independently
8 responsible for its torts and is not required to file an identifying statement with the
9 Secretary of State.⁹⁰ A claim or action must be filed against the parent entity. The
10 failure to identify the correct entity is usually fatal to a claim.⁹¹

11 A school district is an independent entity and individual schools are subsidiaries
12 of the school district.⁹²

13 ***Content of Claims***

14 A proper claim includes basic information about the claimant and the claim.⁹³ It
15 must also include enough detail to support the legal theory on which a subsequent
16 complaint is grounded.⁹⁴

17 The Government Claims Act recognizes that claimants may make mistakes in
18 the filing of claims and offers some provisions to minimize technical dismissals.⁹⁵

19 **Public Entity Liability**

20 The Government Claims Act provides that a public entity is not liable for an
21 injury, except as provided by statute.⁹⁶ In other words, all public entity liability is
22 statutory.

87 Gov't Code § 53051 (requiring a public entity to file a statement with the Secretary of State that includes the entity name and address, as well as the name and address of the members of the governing body, and requiring the Secretary of State and each county clerk to maintain a Roster of Public Agencies).

88 Gov't Code § 7530.

89 Gov't Code § 946.4.

90 *Hovd v. Hayward Unified Sch. Dist.*, 74 Cal. App. 3d 470, 472, 141 Cal. Rptr. 527 (1977).

91 See *id.*

92 See, e.g., *id.*

93 Gov't Code § 915(a)-(e) (requiring information about the claimant, circumstances that gave rise to the claim, nature of the indebtedness, obligation, injury, damage, or loss, and amount of claim).

94 See, e.g., *Stockett v. Ass'n of Cal. Water Agencies Joint Powers Ins. Auth.*, 34 Cal. 4th 441, 447, 20 Cal. Rptr. 3d 176 (2004) (requiring facts in claim to correspond to facts in subsequent complaint with enough detail to support one or more theories of recovery).

95 See Gov't Code §§ 910.6(a) (allowing claimant to amend claim before presentation period expires), 910.6(b) (allowing court to excuse technical defects if claim substantially complied with statutory requirements); see also Gov't Code §§ 910.8 & 911 (requiring entity to inform claimant of defects and substantial deviation from claim presentation procedures).

96 Gov't Code § 815(a).

1 However, the Act itself establishes four significant statutory bases for liability:

- 2 • A public entity is vicariously liable for an injury caused by an act or
3 omission of an employee within the scope of employment (unless the
4 employee is immune from liability).⁹⁷
- 5 • A public entity is liable for an injury caused by an act or omission of an
6 independent contractor, to the same extent that a private person would be.⁹⁸
- 7 • A public entity may be liable for an injury that results from the breach of a
8 mandatory duty imposed by an enactment that is designed to protect against
9 the type of injury that occurred.⁹⁹
- 10 • A public entity may be liable for an injury caused by a “dangerous
11 condition” of its property.¹⁰⁰

12 In addition, a constitutional provision or statute outside of the Government
13 Claims Act can establish public entity liability.¹⁰¹

14 A public entity’s liability is limited by any immunity conferred by statute and is
15 subject to any defense that would be available to a private person.¹⁰² Immunities
16 that are most relevant to the operation of a school are discussed below.

17 **Relevant Immunities**

18 *Discretionary Act*

19 A public employee is generally “not liable for an injury resulting from his act or
20 omission where the act or omission was the result of the exercise of the discretion
21 vested in him, whether or not such discretion be abused.”¹⁰³ This immunity also
22 shields the public employer against vicarious liability for the employee’s act or
23 omission.¹⁰⁴

24 Discretionary act immunity allows public employees to exercise policy
25 judgment without fear of liability. This gives public entities broad authority to
26 determine public policy without undue interference.¹⁰⁵

97 Gov’t Code § 815.2.

98 Gov’t Code § 815.4.

99 Gov’t Code § 815.6. See also Gov’t Code § 810.6 (“enactment” defined).

100 Gov’t Code §§ 830, 835.

101 See Cal. Government Tort Liability Practice §§ 9.60-9.81, at 561-95 (Cal. Cont. Ed. Bar, 4th ed. 2011).

102 Gov’t Code § 815(b). Note, however, that the Government Claims Act immunities do not limit liability that is based on contract and do not limit the right to obtain relief other than money or damages. Gov’t Code § 814.

103 Gov’t Code § 820.2.

104 Gov’t Code § 815.2(b).

105 *Number 1 – Tort Liability of Public Entities and Public Employees*, *supra* note 67, at 812 (noting that, without discretionary immunity, actions of public entity or employee could be scrutinized by court—effectively allowing court to determine policy).

1 Although the Government Claims Act recognizes discretionary immunity, it
2 does not provide any guidelines to distinguish discretionary acts from other acts.
3 As a result, a significant body of case law has developed to address the issue.¹⁰⁶

4 The basic definition of a discretionary decision is one that requires a policy
5 judgment and is made within the scope of employment. A policy judgment is
6 deliberate and considered with a conscious weighing of the risks and benefits.
7 Without these elements, a decision is considered ministerial and not immune.¹⁰⁷

8 The courts have also used a variety of other criteria to determine whether a
9 decision is discretionary. For example, a court may review the statutes governing
10 the entity or employee to see whether they indicate discretion. A court may also
11 determine whether a decision affects the public at large. If so, then the decision is
12 often discretionary. Otherwise, the decision is likely to be considered
13 ministerial.¹⁰⁸

14 ***Misrepresentation***

15 As a general rule, a public employee is not liable for an injury resulting from a
16 misrepresentation made within the scope of employment, regardless of whether
17 the misrepresentation is negligent or intentional.¹⁰⁹ However, this immunity does
18 not apply if the employee “is guilty of actual fraud, corruption or actual malice.”¹¹⁰

19 ***Punitive or Exemplary Damages***

20 A public entity is not liable for punitive or exemplary damages.¹¹¹ Nor is a
21 public entity authorized to indemnify an employee for any “part of a claim or
22 judgment that is for punitive or exemplary damages.”¹¹²

23 Punitive damages are intended to punish a defendant for oppression, fraud, or
24 malice. “They are inappropriate where a public entity is involved, since they
25 would fall upon the innocent taxpayers.”¹¹³

106 Cal. Government Tort Liability Practice, §§ 10.8-10.12, at 616-22 (Cal. Cont. Ed. Bar 2011).

107 *Johnson v. State*, 69 Cal. 2d 782, 788, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

108 *Caldwell v. Montoya*, 10 Cal. 4th 972, 982, 897 P.2d 1320, 42 Cal. Rptr. 2d 842 (1995) (granting immunity to school board for its decision to fire superintendent despite allegations of discrimination, because board was given statutory discretion to hire and fire superintendent); but see *Sullivan v. County of Los Angeles*, 12 Cal. 3d 710, 527 P.2d 865, 117 Cal. Rptr. 241 (1974) (holding that jailer who refused to release prisoner after all charges had been dismissed was not immune); see generally Cal. Government Tort Liability Practice, §§ 10.8-10.29, at 616-52 (Cal. Cont. Ed. Bar 2011).

109 Gov’t Code § 818.8.

110 *Id.*

111 Gov’t Code § 818.

112 Gov’t Code § 825(a).

113 *Number 1 – Tort Liability of Public Entities and Public Employees*, *supra* note 65, at 817.

1 Furthermore, the imposition of a large exemplary damage award against a public
2 school “would place severe and disproportionate financial constraints on [the
3 school’s] ability to provide the free education mandated by the Constitution....”¹¹⁴

4 ***Execution of Law***

5 A public employee is not liable for an act or omission, exercised with due care,
6 in the execution or enforcement of any law.¹¹⁵ Nor is a public employee liable for
7 an injury that results from the initiation of, or failure to initiate, a judicial or
8 administrative proceeding within the scope of employment, even if the employee
9 acts with malice or without probable cause.¹¹⁶

10 These immunities preserve government’s discretion on how to best serve the
11 public:

12 Public officials must be free to determine these questions without fear of
13 liability either for themselves or for the public entities that employ them if they
14 are to be politically responsible for these decisions.

15 The remedy for officials who make bad law, who do not adequately enforce
16 existing law, or who do not provide the people with services they desire, is to
17 replace them with other officials. But their discretionary decisions in these areas
18 cannot be subject to review in torts suits for damages if government is to govern
19 effectively.¹¹⁷

20 ***Act Under Apparent Authority of Invalid Law***

21 A public employee is not liable for a good faith act under the apparent authority
22 of an enactment that is unconstitutional, invalid, or inapplicable (except to the
23 extent that the employee would be liable if the enactment were valid).¹¹⁸

24 ***Defense and Indemnification***

25 The potential for personal liability might inhibit public employees’ willingness
26 to fully perform their jobs. To alleviate those concerns, the defense and
27 indemnification provisions of the Government Claims Act were adopted.¹¹⁹ These
28 provisions encourage public employees to execute their employment duties with
29 zeal and without fear that they would be personally required to pay for the costs of

114 *Wells v. One2One Learning Foundation*, 39 Cal. 4th at 1198-99.

115 Gov’t Code § 820.4. This provision does not exonerate an employee from liability for false arrest or false imprisonment.

116 Gov’t Code § 821.6.

117 *Number 1 – Tort Liability of Public Entities and Public Employees*, *supra* note 65, at 817.

118 Gov’t Code § 820.6.

119 Gov’t Code §§ 825-825.6.

1 a judgment or defense.¹²⁰ These statutory rights to defense and indemnification are
2 in addition to any rights that may exist under another enactment or contract.¹²¹

3 The defense and indemnification provisions of the Government Claims Act are
4 substantively similar to the equivalent provisions governing the private sector. An
5 employer in the private sector also has an obligation to indemnify its employees
6 for conduct within the scope of employment. Indemnification includes reasonable
7 costs for a defense.¹²²

8 STATUS OF CHARTER SCHOOL
9 UNDER EXISTING LAW

10 Under existing law, charter schools are treated as public entities for some
11 purposes, but not for other purposes.

12 By statute, charter schools are deemed to be part of the public school system for
13 constitutional purposes, operating under the jurisdiction of the public schools and
14 under the exclusive control of public officials.¹²³ The Court of Appeal has affirmed
15 that status.¹²⁴

16 In addition, charter schools are treated as public for purposes of participation in
17 the State Teachers' Retirement Fund and participation in a joint powers
18 agreement.¹²⁵

19 Charter schools also share many of the operational characteristics of public
20 schools:

- 21 • They are funded with public money.
- 22 • They are nonsectarian.
- 23 • They cannot charge tuition.
- 24 • They are bound by the same nondiscrimination rules as traditional public
25 schools.
- 26 • They must offer a minimum duration of days and minutes of instruction.
- 27 • They must provide for special education students in the same manner as
28 traditional public schools.

120 See Gov't Code §§ 825.4, 825.6; *Johnson v. State*, 69 Cal. 2d 782, 791-92, 447 P.2d 352, 73 Cal. Rptr. 240 (1968); *Number 1 – Tort Liability of Public Entities and Public Employees*, *supra* note 65, at 814; *Recommendation Relating to Sovereign Immunity, Number 4 – Defense of Public Employees*, 4 Cal. L. Revision Comm'n Reports 1301, 1307 (1963).

121 Gov't Code § 996.6.

122 Lab. Code §§ 2802, 2804; see, e.g., *Jacobus v. Krambo Corp.*, 78 Cal. App. 4th 1096, 1100, 93 Cal. Rptr. 2d 425 (2000).

123 Educ. Code § 47615.

124 *Wilson v. State Board of Educ.*, 75 Cal. App. 4th 1125, 89 Cal. Rptr. 2d 745 (1999).

125 Gov't Code §§ 6528, 20610.

- 1 • They are entitled to a fair allocation of public school facilities.
- 2 • They are required to conduct standardized testing in the same manner as
- 3 traditional public schools.
- 4 • Their teachers must be certificated.
- 5 • Their employees are eligible to participate in state retirement programs.

6 Taken together, these facts could support a view that charter schools are
7 fundamentally similar to traditional public schools and were intended by the
8 Legislature to be public entities on equal footing with every other school in the
9 public school system.

10 However, on the specific issue of sovereign immunity, the California courts
11 have held that charter schools are not public entities:

- 12 • In *Wells v. One2One Learning Foundation*, the Court held that charter
13 schools are not public entities for the purposes of the False Claims Act and
14 the Unfair Competition Law and are therefore subject to suit under those
15 statutes.¹²⁶
- 16 • In *Knapp v. Palisades Charter High School*, the court held that a charter
17 school that is formed as a nonprofit corporation is not a public entity for the
18 purposes of the Government Claims Act.¹²⁷

19 There is some disagreement about whether charter schools are public entities for
20 purposes of the Ralph M. Brown Open Meeting Act, the California Public Records
21 Act, and the Political Reform Act of 1974.

22 All of these issues are discussed more fully, below.

23 ***Wilson v. State Board of Education***

24 *Wilson v. State Board of Educ.* was the first case to address the public entity
25 status of charter schools.¹²⁸ In *Wilson*, a group of taxpayers challenged the
26 constitutionality of charter schools. The Superior Court denied their petition for a
27 writ of mandate requiring the San Francisco Board of Education to refrain from
28 granting charters or expending public funds on charter schools.

29 The Court of Appeal upheld the trial court's decision, holding that (1) charter
30 schools are public schools for the purposes of the state constitution, (2) charter
31 schools are under the jurisdiction of the public school system, and (3) charter
32 school officials are officers of public schools as long as they administer charter
33 schools according to the law and their charters.¹²⁹

126 *Wells v. One2One Learning Foundation*, 39 Cal. 4th 1164, 141 P.3d 225, 48 Cal. Rptr. 3d 108 (2006),

127 *Knapp v. Palisades Charter High School*, 146 Cal. App. 4th 708, 53 Cal. Rptr. 3d 182 (2007).

128 *Wilson v. State Board of Educ.*, 75 Cal. App. 4th 1125, 89 Cal. Rptr. 2d 745 (1999).

129 See *id.* at 1137, 1139, 1141, 1142.

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

4 Charter schools are grounded in private-sector concepts such as competition-
5 driven improvement . . . , employee empowerment and customer focus. But they
6 remain very much a public-sector creature, with in-bred requirements of
7 accountability and broad-based equity. Simple in theory, complex in practice,
8 charter schools promise academic results in return for freedom from
9 bureaucracy.¹³⁰

10 In its analysis, the court noted that the Legislature has plenary power over the
11 public schools.¹³¹ Consequently, the Legislature has broad discretion in the details
12 of implementing the public school system, so long as it meets the requirements of
13 Article IX of the California Constitution.

14 The decision to create charter schools as part of the public school system was a
15 “valid exercise of legislative discretion aimed at furthering the purposes of
16 education.”¹³² The court explained:

17 Indeed, it bears underscoring that charter schools are strictly creatures of
18 statute. From how charter schools come into being, to who attends and who can
19 teach, to how they are governed and structured, to funding, accountability and
20 evaluation — the Legislature has plotted all aspects of their existence. Having
21 created the charter school approach, the Legislature can refine it and expand,
22 reduce or abolish charter schools altogether.¹³³

23 The charter school opponents argued that charter schools violate Section 8 of
24 Article IX of the California Constitution, which provides in part that, “No public
25 money shall ever be appropriated for the support of . . . any school not under the
26 exclusive control of the officers of the public schools...” The court rejected that
27 argument, noting the express statutory language declaring that charter schools are
28 part of the public school system.¹³⁴ Beyond that, the court found that charter
29 schools are in fact under the exclusive control and jurisdiction of the public school
30 system:

31 [We] wonder what level of control could be more complete than where, as here,
32 the very destiny of charter schools lies solely in the hands of public agencies and
33 offices, from the local to the state level: school districts, county boards of
34 education, the Superintendent and the Board. The chartering authority controls the

130 *Wilson*, 75 Cal. App. 4th 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)).

131 *Id.* at 1134.

132 *Id.* at 1135.

133 *Id.*

134 *Id.* at 1139.

1 application approval process, with sole power to issue charters. ... Approval is not
2 automatic, but can be denied on several grounds, including presentation of an
3 unsound educational program. ... Chartering authorities have continuing over-
4 sight and monitoring powers, with (1) the ability to demand response to inquiries
5 concerning financial and other matters ... (2) unlimited access to “inspect or
6 observe any part of the charter school at any time” ...; and (3) the right to charge
7 for actual costs of supervisory oversight As well, chartering authorities can
8 revoke a charter for, among other reasons, a material violation of the charter or
9 violation of any law. ... Short of revocation, they can demand that steps be taken
10 to cure problems as they occur. ... The Board, upon recommendation from the
11 Superintendent, can also revoke any charter or take other action in the face of
12 certain grave breaches of financial, fiduciary or educational responsibilities. ...
13 Additionally, the Board exercises continuous control over charter schools through
14 its authority to promulgate implementing regulations. ... Finally, public funding
15 of charter schools rests in the hands of the Superintendent.¹³⁵

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

19 We note too that situating the locus of control with the public school system
20 rather than the nonprofit is not incompatible with the laws governing nonprofit
21 public benefit corporations. Specifically, one of their enumerated powers is to
22 “[p]articipate with others in any partnership, joint venture or other association,
23 transaction or arrangement of any kind *whether or not such participation involves*
24 *sharing or delegation of control with or to others.*”¹³⁶

25 Furthermore, “charter school officials are officers of public schools to the same
26 extent as members of other boards of education of public school districts. So long
27 as they administer charter schools according to the law and their charters, as they
28 are presumed to do, they stand on the same constitutional footing as noncharter
29 school board members.”¹³⁷

30 The Court completes its opinion by noting that more detailed standards and
31 guidelines for charter schools would defeat the purpose of encouraging innovation
32 and experimentation.¹³⁸

33 ***Wells v. One2One Learning Foundation***

34 In *Wells*, a group of students and their parents sued a group of charter schools.
35 All but one of the charter school defendants were organized as nonprofit public
36 benefit corporations. All of the charter school defendants, including the

135 *Id.* at 1139-40 (citations omitted).

136 *Id.* at 1140 (emphasis in original).

137 *Id.* at 1141.

138 *Id.* at 1147.

1 unincorporated school, were operated by a California nonprofit public benefit
2 corporation.¹³⁹

3 The basis of the complaint was that the schools failed to provide promised
4 instructional services, equipment, and supplies. The schools only collected average
5 daily attendance forms, which were then used to collect public money for services
6 and supplies that were never provided. Among other allegations, the complaint
7 included a False Claims Act cause of action for qui tam relief on behalf of the
8 state.

9 The trial court held that the charter school defendants were public entities
10 subject to the claim presentation requirements of the Government Claims Act and
11 dismissed the claims for failure to comply with those requirements.¹⁴⁰ The
12 plaintiffs appealed. The Court of Appeal concurred that charter schools are public
13 entities. The Court of Appeal also held that public entities can be sued under the
14 False Claims Act.

15 The California Supreme Court reversed on several grounds.

16 ***Application of False Claims Act***

17 The court held that public entities may not be sued under the False Claims Act.
18 However, the court also held that the charter school defendants were not public
19 entities under the False Claims Act. Thus, the school district could not be sued
20 under the False Claims Act, but the charter school defendants could be sued under
21 the False Claims Act.¹⁴¹

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

28 The court also applied a traditional rule of construction to the effect that a
29 general statute applies to a public entity unless such application would infringe
30 upon sovereign governmental powers.¹⁴²

31 In evaluating whether application of the False Claims Act to a school district
32 would infringe upon sovereign governmental powers, the court focused on the
33 fiscal effect of the statute and the sharply limited fiscal resources of school
34 districts.¹⁴³ The False Claims Act imposes treble damages and penalties on a

139 *Wells*, 39 Cal. 4th at 1200.

140 *Id.* at 1183.

141 *Id.* at 1196-97.

142 *Id.* at 1192.

143 *Id.* at 1193-97.

1 person who is found to have submitted a false claim. The court held that the
2 legislature did not intend for such “draconian” fiscal penalties to apply to cash-
3 strapped school districts. To do so “would place severe and disproportionate
4 financial constraints on their ability to provide the free education mandated by the
5 Constitution — a result the Legislature cannot have intended.”¹⁴⁴

6 The court then distinguished the charter school defendants from public school
7 districts, concluding that the application of the False Claims Act to a charter
8 school operated by a nonprofit public benefit corporation would not unduly
9 infringe on sovereign governmental power. The court described the charter
10 schools as “distinct outside entities,” and compared them to “nongovernmental
11 entities that contract with state and local governments to provide services on their
12 behalf.”¹⁴⁵ Discussing the interference in the provision of public education that
13 would result from imposing treble damages on school districts, the court stated
14 that the Charter Schools Act “assigns no similar sovereign significance to charter
15 schools or their operators.”¹⁴⁶

16 The court reasoned that the depletion of the fiscal resources of a charter school
17 would not necessarily interfere with the State’s operation of the public school
18 system. Even if a charter school were to close because of False Claims Act
19 penalties, the charter school’s students and remaining resources would simply
20 return to the school district. Consequently, applying the California False Claims
21 Act remedies to charter schools would not fundamentally threaten the provision of
22 “adequate free public educational services.”¹⁴⁷

23 ***Government Claims Act***

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

27 In its analysis, the court acknowledged that charter schools are part of the public
28 school system and are deemed to be school districts for specific purposes.
29 However, the court found that those purposes do not explicitly include the
30 Government Claims Act, and that “for reasons previously discussed in connection
31 with the False Claims Act,” charter schools “do not fit comfortably within any of
32 the categories defined, for purposes of the [Government Claims Act], as ‘local
33 public entities.’”¹⁴⁸

144 *Id.* at 1198-99.

145 *Id.* at 1201.

146 *Id.*

147 *Id.*

148 *Id.* at 1214.

1 Those statements suggest that the court’s False Claims Act analysis would apply
2 equally to the question of whether the Government Claims Act should apply to
3 charter schools. In other words, it suggests that the court views such charter
4 schools to be distinct outside entities, comparable to private contractors, and not
5 invested with any sovereign significance that would justify application of the
6 Government Claims Act.

7 However, the court’s statements on this point may have been *dicta* (i.e.,
8 statements unnecessary to its decision and thus of limited precedential value),
9 because the court had another reason for concluding that the claims were not
10 subject to the Government Claims Act. The court decided that False Claims Act
11 claims are not subject to the Government Claims Act, because they are filed by
12 public entities (or by private parties acting for the public through a *qui tam* action),
13 and public entity claims are not subject to the claims presentation requirement.
14 The court also noted that the False Claims Act imposes special sealed filing
15 requirements that would be defeated by presentation of a claim against a
16 defendant.¹⁴⁹

17 Because that was a sufficient basis to decide the issue, the court did not need to
18 decide whether the Government Claims Act applies to charter schools.

19 ***Unfair Competition Law***

20 The court also held that charter schools are “persons” subject to suit under the
21 Unfair Competition Law, despite the fact that public entities have been held to be
22 exempt from suit under the Unfair Competition Law.

23 In its analysis, the court reiterated the fact that charter schools are not considered
24 public entities for the purposes of the False Claims Act. In addition, charter
25 schools compete with traditional public schools and should therefore be subject to
26 the Unfair Competition Law, which provides remedies for unfair competitive
27 practices. The court concluded by stating that application of the Unfair
28 Competition Law to charter schools would not infringe the state’s sovereign
29 obligations to operate public schools:

30 Nor is the state’s sovereign educational function thereby undermined. Even if
31 governmental entities, in the exercise of their sovereign functions, are exempt
32 from the [Unfair Competition Law’s] restrictions on their competitive practices,
33 ... no reason appears to apply that principle to the charter school defendants,
34 which are covered by the plain terms of the statute and which compete with the
35 traditional public schools for students and funding.¹⁵⁰

149 *Id.* at 253.

150 *Id.* at 1204.

1 ***Knapp v. Palisades Charter High School***

2 Shortly after *Wells* was decided, a Court of Appeal was directly faced with the
3 question of whether charter schools are subject to the claim presentation
4 procedures of the Government Claims Act.¹⁵¹ The court held that an incorporated
5 charter school, operating independently from the chartering entity, is not a public
6 entity for purposes of the Government Claims Act.¹⁵²

7 The case arose after the plaintiff, Courtney Knapp (“Knapp”), then an eighth
8 grade student, visited defendant Palisades Charter High School (“Palisades”) as a
9 prospective student. According to the undisputed facts, Knapp was the target of
10 sexual banter by a teacher during a classroom visit. Knapp was humiliated and
11 embarrassed, and as a result of her experience, ultimately chose a different high
12 school.¹⁵³

13 Knapp sued Palisades, the Los Angeles Unified School District, and the teacher.
14 The trial court granted the defendants’ motion for summary judgment, because
15 Knapp did not present a claim to those defendants before filing the lawsuit.¹⁵⁴

16 Taking direction from *Wells*, the *Knapp* court held that “assuming [Palisades]
17 can demonstrate that it is a nonprofit corporation independent from the [chartering
18 entity], we follow *Wells* and conclude that Knapp was not required to present
19 written claims to the charter school under the [Government Claims Act] before
20 filing her sexual harassment and tort claims.”¹⁵⁵

21 **“Good Government” Laws**

22 Traditional public school districts are subject to certain “good government” laws
23 that require open public board meetings (the Brown Act¹⁵⁶), public access to
24 district records (the California Public Records Act¹⁵⁷), and restrictions on conflicts
25 of interest in decision making (the Political Reform Act of 1974¹⁵⁸).

26 There are good reasons to believe that these statutes also apply to charter
27 schools, as “quasi-public entities” (i.e., as private entities formed pursuant to
28 statute in order to perform delegated public functions). However, there is no
29 consensus on this point.

151 See *Knapp v. Palisades Charter High School*, 146 Cal. App. 4th 708, 53 Cal. Rptr. 3d 182 (2007).

152 *Id.* at 717.

153 *Id.* at 711-12.

154 *Id.* at 713.

155 *Id.* at 717.

156 Gov’t Code § 54950 *et seq.*

157 Gov’t Code § 6250 *et seq.*

158 Gov’t Code § 81000 *et seq.*

1 ***Political Reform Act of 1974***

2 The Fair Political Practices Commission (“FPPC”) is authorized to issue written
3 opinions and advice interpreting the Political Reform Act of 1974.¹⁵⁹

4 Shortly after the Act took effect, the FPPC issued an opinion on whether the Act
5 applies to a “quasi-public entity.”¹⁶⁰ The FPPC announced four criteria for
6 determining whether a quasi-public entity is governed by the Political Reform Act:

- 7 (1) Whether the impetus for formation of the corporation originated with a
8 government agency;
- 9 (2) Whether it is substantially funded by, or its primary source of funds is, a
10 government agency;
- 11 (3) Whether one of the principal purposes for which it is formed is to provide
12 services or undertake obligations which public agencies are legally
13 authorized to perform and which, in fact, they traditionally have performed;
14 and
- 15 (4) Whether the Corporation is treated as a public entity by other statutory
16 provisions.¹⁶¹

17 Those criteria were later applied in FPPC advice letters discussing the specific
18 issue of whether a charter school created as a nonprofit public benefit corporation
19 is subject to the Political Reform Act. In each case, the FPPC concluded that a
20 charter school formed as a nonprofit public benefit corporation meets all of the
21 stated criteria and is therefore subject to the Political Reform Act.¹⁶²

22 ***The Ralph M. Brown Open Meeting Act***

23 The Brown Act requires that the meetings of a “legislative body” of a “local
24 public entity” be open to the public. A school district is a “local public entity”
25 under the Brown Act.¹⁶³

26 The term “legislative body” generally means the governing body of a local
27 public entity, but it can also encompass the board of a private entity, if that entity:

- 28 Is created by the elected legislative body in order to exercise authority that may
29 lawfully be delegated by the elected governing body to a private corporation,
30 limited liability company, or other entity.¹⁶⁴

159 Gov’t Code § 83114.

160 See *In re Siegel*, 3 FPPC Ops 62 (1977).

161 *Id.*

162 See *Walsh* Advice Letter, No. A-98-234 (1998); *Fadely* Advice Letter, No. A-02-223 (2002).

163 Gov’t Code § 54951.

164 Gov’t Code § 54952(c)(1)(A). See, e.g., *Epstein v. Hollywood Entertainment Dist. II Bus. Improvement Dist.*, 87 Cal. App. 4th 862, 104 Cal. Rptr. 2d 857 (2000) (Brown Act applies to private property owners association to which city delegated certain public functions).

1 The Brown Act’s standard for application of the Act to a quasi-public entity
2 would seem to encompass a charter school that is approved by a local school
3 district. Such a charter school is created by an elected legislative body (the local
4 school board) to exercise lawfully delegated authority of the school board (the
5 operation of a public school). Although there is no published appellate decision on
6 whether the Brown Act applies to a charter school that is formed as a nonprofit
7 public benefit corporation, at least one trial court has held the Act to be applicable
8 to such a charter school.¹⁶⁵

9 ***California Public Records Act***

10 The California Public Records Act requires that the records of a public entity be
11 subject to public inspection and copying. That general requirement is subject to a
12 lengthy list of specific exceptions, many of which are designed to preserve the
13 privacy of personal information in public records.¹⁶⁶

14 The application of the Public Records Act to local quasi-public entities is
15 coextensive with the application of the Brown Act (it expressly incorporates the
16 Brown Act’s definition of “legislative body.”)¹⁶⁷

17 Consequently, if the Brown Act applies to a charter school organized as a
18 nonprofit public benefit corporation, the California Public Records Act also
19 applies.

20 ***No Consensus on Application of Good Government Laws to Charter Schools***

21 There is no consensus about whether these good government laws apply to a
22 charter school.

23 In 2010, legislation was introduced to make clear that charter schools are subject
24 to these good government laws.¹⁶⁸ The bill was approved by the Legislature but
25 was vetoed by the Governor. In his veto message Governor Schwarzenegger
26 characterized the bill as imposing “new” requirements on charter schools,
27 suggesting he did not believe the good government laws already applied to charter
28 schools.¹⁶⁹ A new bill along the same lines is currently pending in the
29 Legislature.¹⁷⁰

165 See Garretson, *Charter Board in Violation of Meeting Act, Judge Sends Directors Back to School*,
Marin Ind. J., July 10, 2001, at 1J.

166 See generally Gov’t Code §§ 6250-6276.48.

167 Gov’t Code § 6252(a).

168 AB 572 (Brownley).

169 *Id.* (veto message).

170 AB 360 (Brownley).

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

- 4 • It would resolve any existing uncertainty as to whether the Government
5 Claims Act applies to charter schools.
- 6 • It would introduce new uncertainty as to the status of a charter school under
7 other statutes governing public entities.

8 Those indirect effects are discussed more fully below.

9 ***Uncertainty as to Application of Government Claims Act***

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

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

21 Furthermore, while the *Knapp* precedent is binding on all inferior California
22 courts, the Supreme Court and other panels of the Court of Appeal are not bound
23 and could reach a contrary result.¹⁸⁰

24 In addition, a recent unpublished federal trial court decision contradicted *Knapp*,
25 holding that a charter school is a public entity for the purposes of California's
26 Government Claims Act.¹⁸¹ It is unclear why the federal court did not defer to
27 California appellate authority in construing a California statute.¹⁸² Nonetheless, the
28 federal decision arguably creates a division of authority on the issue, whatever its
29 precedential or persuasive weight.

30 Consequently, it is not certain that *Knapp* is the last word on the status of
31 incorporated charters under the Government Claims Act. Moreover, there is no
32 precedential guidance on the status of a charter school that is formed as a

180 See *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 455, 369 P.2d 937, 20 Cal. Rptr. 321 (Cal. 1962).

181 See *Dubose v. Excelsior Educ. Ctr.*, No. EDCV 10-0214 GAF (C.D. Cal. Sept. 22, 2010). See also Commission Staff Memorandum 2011-7.

182 See *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1099 (9th Cir. 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").

1 dependent component of a school district, rather than as a separately incorporated
2 entity.

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

7 It would therefore be helpful to eliminate any uncertainty as to whether the
8 Government Claims Act applies to a charter school.

9 ***New Uncertainty Regarding Validity of Wells Holdings***

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

13 As discussed above, the *Wells* decision was grounded in the court's conclusion
14 that a charter school is a nongovernmental entity that does not have sovereign
15 significance. The court found no policy reason to immunize a charter school from
16 liability under the False Claims Act (including potential treble damages) or the
17 Unfair Competition Law.

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

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

25 **Policy Implications**

26 Before analyzing the specific policy implications of treating a charter school as a
27 public entity for the purposes of the Government Claims Act, it would be helpful
28 to revisit the general policy principles underlying tort liability and sovereign
29 immunity.

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

- 33 (1) It shifts losses away from an innocent injured party and to the responsible
34 party.
- 35 (2) It deters behavior likely to cause injury.
- 36 (3) It encourages the use of precautions to prevent injury.¹⁸³

183 Van Alstyne, *supra* note 64, at 271-72.

1 Applying the fault theory of tort liability to government entities can be
2 problematic. Government engages in many activities that serve the public at large.
3 These activities are mandated by law and reflect policy decisions made by the
4 people through their legislators. A public entity may not have the luxury of halting
5 a service simply because it is deemed too costly or risky.¹⁸⁴

6 Although sovereign immunity was originally grounded in the idea that
7 government entities are sovereign and cannot be sued without permission, more
8 modern rationales have developed to justify the application of sovereign
9 immunity. Two closely related arguments constitute the primary modern
10 justifications for governmental immunity: protection of the public fisc and the
11 need to allow government to govern.

12 Protecting the public fisc is important for several reasons. The costs of
13 defending actions for injuries caused by government activity could be very
14 expensive. To cover such costs, resources may be diverted from important
15 government activities or tax rates may increase. Further, when a public entity is
16 involved, shifting losses away from an innocent injured party places the burden on
17 another arguably innocent party — the taxpayer.¹⁸⁵

18 The potential of having to allocate a large portion of the public fisc to money
19 damages may significantly impair the government's ability to govern. Resources
20 are limited and the government should be allowed to decide how to best allocate
21 those resources. A public entity cannot effectively carry out its duties if too many
22 of its resources are devoted to defending lawsuits and paying claims, or if the
23 entity constrains important activities in order to avoid potential claims.¹⁸⁶

24 The policy implications of extending sovereign immunity to charter schools are
25 set out below.

26 ***Compensation***

27 One of the main policy justifications for tort liability is that it provides for
28 compensation of an innocent injured person, by the person whose breach of duty
29 caused the injury. This allocation of the cost of an injury is grounded in basic
30 fairness.

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

184 See *Number 1 – Tort Liability of Public Entities and Public Employees*, *supra* note 65, at 810.

185 See, e.g., *Alden v. Maine*, 527 U.S. 706, 750-51 (1999).

186 *Id.* at 750.

1 Other policy considerations may justify limiting recovery in some
2 circumstances. Nonetheless, the first policy implication of applying the
3 Government Claims Act to a charter school would be:

4 **#1 Some innocent persons injured by charter schools would not be**
5 **compensated for their injuries.**

6 ***Health and Safety Risk***

7 As noted earlier, public officials are immunized against liability for injuries that
8 result from an employee's discretionary policy decisions. This could undermine
9 deterrence, leading school officials to adopt policies that result in higher levels of
10 risk to student health and safety.

11 However, the Legislature has constrained public school discretion on health and
12 safety matters, by enacting a number of non-discretionary health and safety
13 requirements. These regulations provide a check on a public school's ability to
14 adopt risky policies, by ensuring that all public schools provide the specified
15 minimum level of health and safety protection.

16 Charter schools are exempt from a number of health and safety laws that were
17 enacted to protect school children. For example, charter schools are not subject to
18 the Field Act earthquake safety standards.¹⁸⁷ Nor are charter schools required to
19 prepare the comprehensive school safety plans and disaster procedures that are
20 required of all other public schools.¹⁸⁸

21 This exemption removes an important constraint on the discretion of charter
22 schools in making health and safety policy decisions. They are not required to
23 meet all of the same standards that apply to other public schools. In combination
24 with immunity from liability for injuries that result from discretionary policy
25 decisions, this could lead to higher levels of health and safety risk in charter
26 schools than would be allowed in traditional public schools.

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

29 **#2 The combination of discretionary immunity and exemption from public**
30 **school health and safety laws could lead to riskier health and safety**
31 **policies in charter schools than in traditional public schools.**

32 ***Public Accountability***

33 In addition to potential tort liability, another important check on the exercise of
34 policy discretion by a public entity is the body of laws requiring that public entity
35 policy making be transparent and open to public participation.

187 See Educ. Code §§ 17280-17317, 17365-17374, 81050-81149.

188 See Educ. Code §§ 32280-32289. Charter schools are required to describe the procedures they will use to ensure pupil and staff health and safety, in their charters. Educ. Code § 47605(b)(5)(F). However, there are no standards governing this requirement, and procedures can vary widely between charter schools.

1 If the school board of a traditional public school district is considering a policy
2 decision that might lead to higher health and safety risks to students, the decision
3 would be made in an open meeting and the relevant records would be open to
4 public inspection. Parents and other interested persons could then raise objections
5 to the policy and, if warranted, bring political pressure to bear through the
6 chartering entity or their elected representatives.

7 As discussed earlier, there is disagreement about whether charter schools are
8 subject to the Brown Act and the California Public Records Act. If not, then these
9 “good government” laws would not be available as a check on charter school
10 policy making discretion. In that case, immunity from liability for injuries that
11 result from discretionary policy making decisions could lead charter school policy
12 makers to tolerate higher levels of risk than they would if their decision making
13 process were open to public scrutiny and involvement.

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

16 **#3 The combination of discretionary immunity and exemption from good**
17 **government laws could lead to the adoption of riskier health and safety**
18 **policies in charter schools than in traditional public schools.**

19 *Pedagogical Innovation*

20 The principal purpose of charter schools is to foster pedagogical innovation and
21 improvement in the public school system.¹⁸⁹ By exempting charter schools from
22 most of the requirements of the Education Code and granting them a significant
23 degree of operational independence from school districts, the Charter Schools Act
24 frees charter schools to experiment.

25 Concerns about potential tort liability could constrain pedagogical innovation in
26 charter schools. If the potential tort liability is determined to be too great, charter
27 school policy makers might be deterred from undertaking some innovations. If,
28 however, charter schools were granted immunity under the Government Claims
29 Act from liability for discretionary policy decisions, the scope for pedagogical
30 innovation would probably be broadened.

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

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

37 **#4 Discretionary immunity could facilitate pedagogical innovation, by**
38 **removing liability as a deterrent to experimentation.**

189 See Educ. Code § 47601.

1 ***Protecting the Public Fisc***

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

7 As we will explain, in light of the stringent revenue, appropriations, and budget
8 restraints under which all California governmental entities operate, exposing them
9 to the draconian liabilities of the [False Claims Act] would significantly impede
10 their fiscal ability to carry out their core public missions. In the particular case of
11 public school districts, such exposure would interfere with the state's plenary
12 power and duty, exercised at the local level by the individual districts, to provide
13 the free public education mandated by the Constitution.

14 ...

15 Hence, there can be no doubt that public education is among the state's most
16 basic sovereign powers. Laws that divert limited educational funds from this core
17 function are an obvious interference with the effective exercise of that power.
18 Were the [False Claims Act] applied to public school districts, it would constitute
19 such a law. If found liable under the [False Claims Act], school districts, like
20 other [False Claims Act] defendants, could face judgments — payable from their
21 limited funds — of at least two, and usually three, times the damage caused by
22 each false submission, plus civil penalties of up to \$10,000 for each false claim,
23 plus costs of suit. Such exposure, disproportionate to the harm caused to the
24 treasury, could jeopardize a district financially for years to come. It would injure
25 the districts' blameless students far more than it would benefit the public fisc, or
26 even the hard-pressed taxpayers who finance public education.¹⁹⁰

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

29 If a charter school ceases to exist, its pupils are reabsorbed into the district's
30 mainstream public schools, and the ADA revenues previously allotted to the
31 charter school for those pupils revert to the district.

32 The [Charter Schools Act] was adopted to widen the range of educational
33 choices available within the public school system. That is a salutary policy. Yet
34 application of the [False Claims Act's] monetary remedies, however harsh, to the
35 charter school defendants presents no fundamental threat to maintenance, within
36 the affected districts, of basically adequate free public educational services. Thus,
37 application of the [False Claims Act] to the charter school operators in this case
38 cannot be said to infringe the exercise of the sovereign power over public
39 education.¹⁹¹

40 In effect, the Supreme Court seems to be saying that charter schools are
41 fungible. If one fails, its students are reabsorbed by the district and the general

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

191 *Id.* at 1201.

1 program of public education continues without significant interference. This view
2 has some merit, but the court may be assigning too little significance to the
3 disruption of public education that could result if an individual charter school is
4 abruptly closed due to litigation.

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

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

17 Furthermore, if the potential financial instability of charter schools were
18 significant enough, it might deter the creation of new charter schools. That could
19 undermine the legislative policy embodied in the Charter Schools Act.

20 For the most part, charter schools can avoid these fiscal threats through liability
21 insurance. However, there are some sources of liability that may be difficult or
22 impossible to insure against. For example, general liability insurance does not
23 cover punitive damages, because they are considered punishment for intentional
24 wrongful acts. Consequently, a charter school could face a large punitive damage
25 award against which it would not be insured.¹⁹² Under the Government Claims
26 Act, public entities are immune from punitive damages.¹⁹³

27 In addition, charter schools, like traditional public schools, cannot charge
28 tuition.¹⁹⁴ This places a limit on the fiscal resources available to charter schools.
29 Unlike private schools, they cannot simply raise tuition rates in order to self-insure
30 or pay litigation costs. This makes them more vulnerable than private schools to
31 having their finances depleted as a result of tort liability.

32 Thus, another policy implication of treating charter schools as public entities
33 under the Government Claims Act would be:

34 **#5 Application of the Government Claims Act to a charter school would**
35 **help to preserve a charter school's scarce fiscal resources from**
36 **depletion, and thereby prevent the negative consequences associated**

192 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.

193 Gov’t Code § 818.

194 Educ. Code § 47605(d).

1 **with closing a charter school, which could occur in the event of a**
2 **judgment that is not covered by readily available liability insurance.**

3 ***Uniquely Public Obligations***

4 Because a charter school is part of the public school system, it is subject to many
5 of the fundamental rules governing the operation of public schools. For example:

- 6 • Charter schools must be nonsectarian.
- 7 • Charter schools cannot charge tuition.
- 8 • Charter schools are bound by the same nondiscrimination rules as traditional
9 public schools.
- 10 • Charter schools must provide for special education students in the same
11 manner as traditional public schools.

12 These uniquely public obligations could give rise to types of liabilities that could
13 only be faced by a school within the public school system (either a charter school
14 or a traditional public school). For example, Education Code Section 48907
15 protects student free speech rights in all public schools, including charter schools.
16 A charter school faces potential liability under that provision that a purely private
17 school would not face.

18 This puts charter schools in a uniquely disadvantageous position. A charter
19 school has many of the same obligations (and potential liabilities) as a traditional
20 public school, without the protections against liability that are afforded to a
21 traditional public school under the Government Claims Act.

22 If an alleged breach of a public obligation involves intentional misconduct, it
23 may be difficult for a charter school to obtain affordable insurance to protect
24 against liability.

25 This problem would be minimized if a charter school were treated as a public
26 entity for purposes of the Government Claims Act. Any liability that a charter
27 school faces as a consequence of its public obligations would be subject to the
28 same procedures and immunities that govern similar claims against traditional
29 public schools.

30 Consequently, another policy implication of treating a charter school as a public
31 entity under the Government Claims Act would be:

32 **#6 Application of the Government Claims Act to a charter school would**
33 **eliminate an existing disparity, in which a charter school may face**
34 **uniquely public liabilities as a consequence of being part of the public**
35 **school system, without the same protections that are afforded to other**
36 **public schools.**

37 ***Summary***

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

- 1 #1 Some innocent persons injured by charter schools would not be
2 compensated for their injuries.
- 3 #2 The combination of discretionary immunity and exemption from public
4 school health and safety laws could lead to riskier health and safety policies
5 in charter schools than in traditional public schools.
- 6 #3 The combination of discretionary immunity and exemption from good
7 government laws could lead to the adoption of riskier health and safety
8 policies in charter schools than in traditional public schools.
- 9 #4 Discretionary immunity could facilitate pedagogical innovation, by
10 removing liability as a deterrent to experimentation.
- 11 #5 Application of the Government Claims Act to a charter school would help to
12 preserve a charter school's scarce fiscal resources from depletion, and
13 thereby prevent the negative consequences associated with closing a charter
14 school, which could occur in the event of a judgment that is not covered by
15 readily available liability insurance.
- 16 #6 Application of the Government Claims Act to a charter school would
17 eliminate an existing disparity, in which a charter school may face uniquely
18 public liabilities as a consequence of being part of the public school system,
19 without the same protections that are afforded to other public schools.

20 ALTERNATIVE APPROACHES

21 The preceding sections of this report discuss the legal and policy implications of
22 treating a charter school as a public entity for the purposes of the Government
23 Claims Act.

24 While it is helpful to identify those implications in isolation, it would be more
25 helpful to place them in the context of possible legislative reforms on the topic.
26 There are a range of alternative approaches that the Legislature could consider in
27 determining how to address the status of charter schools under the Government
28 Claims Act. Each of those alternatives presents a different configuration of legal
29 and policy advantages and disadvantages.

30 This section of the report identifies various alternative approaches to reform and
31 summarizes the advantages and disadvantages of each.

32 The Commission makes no recommendation on which of the alternative
33 approaches should be adopted. Each presents a different balancing of contending
34 policy considerations. Those considerations involve fundamental questions about
35 the value of charter schools within the public education system and the importance
36 of any heightened level of risk to student health and safety that might result from
37 extending sovereign immunity to charter schools. There are likely to be sharp
38 differences in perspective on how best to balance those important concerns.
39 Consequently, there is no clear answer as to which alternative approach would
40 best serve the People of California. An issue of this fundamentally political

1 character would be best decided by the People’s elected representatives, not by the
2 Commission.

3 **“Dependent” Charter Schools: A Special Case?**

4 Before considering alternative approaches that might be applied to all charter
5 schools, regardless of their form of organization, it is worth considering whether a
6 distinction should be drawn between:

- 7 • An “independent” charter school formed as a nonprofit corporate entity,
8 separate from its chartering authority.
- 9 • A “dependent” charter school that is not legally separate from its chartering
10 authority.

11 As discussed above, the *Knapp* case expressly limited its holding — that a
12 charter school is not a public entity for the purposes of the Government Claims
13 Act — to an independent charter school that is organized as a nonprofit
14 corporation. There are two good reasons for drawing such a distinction: (1) the
15 limited liability of a chartering entity for the torts and obligations of an
16 independent charter school, and (2) the separate legal identity and hence quasi-
17 public, as opposed to purely public, character of an independent charter school.

18 ***Liability of Chartering Entity***

19 A chartering entity is not liable for the debts, obligations, or torts of a charter
20 school that is formed as a nonprofit public benefit corporation.¹⁹⁵ This means that
21 the finances of the chartering school district will not be directly affected by any
22 liability imposed on an incorporated charter school. Consequently, concerns about
23 conserving the public fisc are not strongly implicated with respect to the liability
24 of an incorporated charter school. No matter what liability such a school incurs,
25 none will directly reach the chartering school district.

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

32 ***Legal Identity***

33 If a charter school is formed as an independent nonprofit corporation, it has a
34 legal identity that is separate from the chartering entity. That separate identity
35 seems to be the source of the question of whether a charter school is a public
36 entity.

195 See Educ. Code § 47604.

1 If a charter school is instead formed as an inseparable organizational subdivision
2 of a public school district, it would seem uncontroversial to conclude that the
3 school has the same legal identity and status as the district of which it is a part.

4 ***Public Comment Invited***

5 The Commission invites public comment on whether the law should draw a
6 distinction between a charter school that is legally separate from its chartering
7 entity (an independent charter school), and a charter school that is not legally
8 separate from its chartering authority (a dependent charter school). Specifically,
9 should the law provide that a dependent charter school shares the public entity
10 status of the chartering entity of which it is part?

11 Such a distinction could be expressed as follows:

12 (a) A dependent charter school is deemed to be a public entity.

13 (b) For the purposes of this section, “dependent charter school” means a charter
14 school that is formed as an organizational subdivision of the public entity that
15 chartered it, rather than as a separate legal entity. “Dependent charter school”
16 does not include a charter school that is formed as a nonprofit public benefit
17 corporation.

18 The Commission also invites comment on whether the language set out above
19 would cause any problems or could be improved.

20 If this approach were adopted, the question of whether to apply the Government
21 Claims Act to an independent charter school would remain unanswered.
22 Alternative approaches to answering that question are discussed below.

23 **Alternative #1. Public for All Purposes**

24 The first alternative would be to enact a statute declaring that a charter school is
25 a public entity, without limitation. Thus:

26 A charter school is deemed to be a public entity.

27 This approach would make the Government Claims Act applicable to a charter
28 school, but it would also subject charter schools to all other laws that regulate
29 public entities as public entities (e.g., Brown Act, California Public Records Act,
30 public contracting laws, public employment laws, etc.).

31 The Commission is not authorized to evaluate the substantive merits of treating
32 a charter school as a public entity for the purposes of laws other than the
33 Government Claims Act, and has not done so.¹⁹⁶ The alternative discussed here is
34 offered only to provide the Legislature with a complete range of options for its
35 consideration.

196 The Commission’s charge in this study is to evaluate the implications of applying the Government Claims Act to charter schools. See 2009 Cal. Stat. res. ch. 98.

1 The discussion of advantages and disadvantages that follows is not intended as
2 commentary on whether a charter school should be subject to any law other than
3 the Government Claims Act. It is intended only as an evaluation of how the
4 alternative discussed here would affect the legal and policy implications discussed
5 earlier in the report.

6 *Advantages*

7 With respect to the legal and policy implications discussed above, the
8 advantages of the alternative discussed here, would be as follows:

- 9 • **Legal Clarity.** There would be no ambiguity as to whether a charter school
10 is governed by the Government Claims Act. Nor would there be any
11 ambiguity regarding the status of charter schools under other laws affecting
12 public entity liability (e.g., the False Claims Act).
- 13 • **Good Government Laws as a Check on Policy Discretion.** The
14 application of good government laws to charter schools would act as a check
15 on policy making discretion. This would reduce the likelihood that
16 immunity for discretionary policy decisions would lead to a higher level of
17 student health and safety risk.
- 18 • **No Chilling of Pedagogical Innovation.** Immunity from liability for
19 discretionary decisions would make it easier for charter schools to adopt
20 pedagogical innovations that might otherwise impose too great a risk of
21 liability.
- 22 • **Protection of Limited Fiscal Resources.** The immunities conferred by the
23 Government Claims Act would help to avoid the loss of investment, loss of
24 pedagogical benefit, disruption, and transition costs that might result if a
25 charter school were forced to close as a result of a large judgment against
26 the school. This would only be an advantage with respect to types of
27 liability for which liability insurance is not readily available (e.g., punitive
28 damages or liability for intentional wrongs).

29 *Disadvantages*

30 With respect to the legal and policy implications discussed above, the
31 disadvantages of the alternative discussed here, would be as follows:

- 32 • **Compensation Undermined.** Some innocent persons injured by charter
33 schools would not be compensated for their injuries.
- 34 • **Heightened Student Health and Safety Risks.** Declaring that a charter
35 school is a public entity would not affect the exemption of charter schools
36 from the student health and safety laws that regulate school districts. That
37 exemption, combined with the discretionary policy immunity conferred by
38 the Government Claims Act, could lead to an increased risk of harm to
39 students in charter schools, as compared to students in traditional public
40 schools.

1 **Alternative #2. Public for Government Claims Act Purposes Only**

2 A statute could be enacted to declare that a charter school is a public entity for
3 purposes of the Government Claims Act, without addressing the status of a charter
4 school under other laws that regulate public entities:

5 A charter school is a public entity for the purposes of Division 3.6
6 (commencing with Section 810) of Title 1 of the Government Code.

7 **Advantages**

8 With respect to the legal and policy implications discussed above, the
9 advantages of the alternative discussed here, would be as follows:

- 10 • **Legal Clarity.** There would be no ambiguity as to whether a charter school
11 is governed by the Government Claims Act.
- 12 • **No Chilling of Pedagogical Innovation.** Immunity from liability for
13 discretionary decisions would make it easier for charter schools to adopt
14 pedagogical innovations that might otherwise impose too great a risk of
15 liability.
- 16 • **Protection of Limited Fiscal Resources.** The immunities conferred by the
17 Government Claims Act would help to avoid the loss of investment, loss of
18 pedagogical benefit, disruption, and transition costs that might result if a
19 charter school were forced to close as a result of a large judgment against
20 the school. This would only be an advantage with respect to types of
21 liability for which liability insurance is not readily available (e.g., punitive
22 damages or liability for intentional wrongs).

23 **Disadvantages**

24 With respect to the legal and policy implications discussed above, the
25 disadvantages of the alternative discussed here, would be as follows:

- 26 • **Compensation Undermined.** Some innocent persons injured by charter
27 schools would not be compensated for their injuries.
- 28 • **Heightened Student Health and Safety Risks.** Declaring that a charter
29 school is a public entity would not affect the exemption of charter schools
30 from the student health and safety laws that regulate school districts. That
31 exemption, combined with the discretionary policy immunity conferred by
32 the Government Claims Act, could lead to an increased risk of student harm
33 in charter schools, as compared to students in traditional public schools. The
34 existing uncertainty about whether good government laws apply to charter
35 schools could exacerbate the problem, by shielding health and safety policy
36 making from public scrutiny.
- 37 • **New Legal Uncertainty.** The application of the Government Claims Act to
38 charter schools could lead to uncertainty about the continuing validity of the
39 holdings in *Wells* (i.e., that charter schools lack “sovereign significance”
40 sufficient to justify exempting them from suit under the False Claims Act
41 and Unfair Competition Law).

1 **Alternative #3. Combined Approach**

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

- 5 • Make some or all student health and safety laws applicable to charter
6 schools.
- 7 • Make the good government laws applicable to charter schools (perhaps with
8 minor operational adjustments to account for the special character of charter
9 schools).

10 This would arguably provide a more balanced approach, with charter schools
11 enjoying privileges of public entity status, while being held to the general
12 standards of public accountability that apply to public entities.

13 The Commission is not authorized to evaluate the substantive merits of treating
14 a charter school as a public entity for the purposes of good government or health
15 and safety laws and has not done so.¹⁹⁷ The alternative discussed here is offered
16 only to provide the Legislature with a complete range of options for its
17 consideration.

18 The discussion of advantages and disadvantages that follows is not intended as
19 commentary on whether a charter school should be subject to any law other than
20 the Government Claims Act. It is intended only as an evaluation of how the
21 alternative discussed here would affect the legal and policy implications discussed
22 earlier in the report.

23 **Advantages**

24 With respect to the legal and policy implications discussed above, the
25 advantages of the alternative discussed here, would be as follows:

- 26 • **Legal Clarity.** There would be no ambiguity as to whether a charter school
27 is governed by the Government Claims Act.
- 28 • **No Chilling of Pedagogical Innovation.** Immunity from liability for
29 discretionary decisions would make it easier for charter schools to adopt
30 pedagogical innovations that might otherwise impose too great a risk of
31 liability.
- 32 • **Protection of Limited Fiscal Resources.** The immunities conferred by the
33 Government Claims Act would help to avoid the loss of investment, loss of
34 pedagogical benefit, disruption, and transition costs that might result if a
35 charter school were forced to close as a result of a large judgment against
36 the school. This would only be an advantage with respect to types of
37 liability for which liability insurance is not readily available (e.g., punitive
38 damages or liability for intentional wrongs).

197 The Commission's charge in this study is to evaluate the implications of applying the Government Claims Act to charter schools. See 2009 Cal. Stat. res. ch. 98.

- 1 • **Health and Safety Risks Minimized.** The application of general student
2 health and safety laws would reduce the likelihood that immunity for
3 discretionary policy decisions would lead to a higher level of student health
4 and safety risk. The application of good government laws to charter schools
5 would have a similar effect.

6 ***Disadvantages***

7 With respect to the legal and policy implications discussed above, the
8 disadvantages of the alternative discussed here, would be as follows:

- 9 • **Compensation Undermined.** Some innocent persons injured by charter
10 schools would not be compensated for their injuries.
- 11 • **New Legal Uncertainty.** The application of the Government Claims Act to
12 charter schools could lead to uncertainty about the continuing validity of the
13 holdings in *Wells* (i.e., that charter schools lack “sovereign significance”
14 sufficient to justify exempting them from suit under the False Claims Act
15 and Unfair Competition Law).

16 **Alternative #4. Limited Application of Government Claims Act**

17 A statute could be enacted to declare that a charter school is a public entity for
18 the purposes of the Government Claims Act, but only with respect to a claim
19 arising from a charter school’s uniquely public obligations. That is, the
20 Government Claims Act would only apply to a claim against a charter school if the
21 claim is a type of claim that can only be brought against schools within the public
22 school system.

23 Thus:

24 If a claim against a charter school is a type of claim that can only be brought
25 against a school that is part of the public school system, the claim is subject to
26 Division 3.6 (commencing with Section 810) of Title 1 of the Government Code.

27 This would provide for consistent treatment of such claims. The Government
28 Claims Act would apply to a claim arising from a public obligation, regardless of
29 whether the claim is brought against a charter school or against a traditional public
30 school.

31 For example, under this approach, the Government Claims Act would apply to
32 the following claims (which can only be brought against a charter school or other
33 school in the public school system):

- 34 • A claim alleging that a charter school violated Education Code Section
35 47605(d) (requiring that charter schools be nonsectarian).
- 36 • A claim alleging that a charter school violated Education Code Section
37 56145 (requiring that a charter school serve students with exceptional needs
38 in the same manner as such students are served in other public schools).
- 39 • A claim alleging that a charter school violated Education Code Section
40 48907 (protecting student expression in public schools).

1 Under the approach described above, the Government Claims Act would not
2 apply to the following claims (which could also be brought against a private
3 school):

- 4 • A general tort or contract claim.
- 5 • A claim brought pursuant to the California False Claims Act.¹⁹⁸
- 6 • A claim alleging that a charter school violated the general whistleblower
7 protections provided in Labor Code Section 1102.5.

8 *Advantages*

9 With respect to the legal and policy implications discussed above, the
10 advantages of the alternative discussed here, would be as follows:

- 11 • **Uniform Treatment of Public Claims.** Under existing law, charter schools
12 are uniquely disadvantaged. They face liabilities that arise from their
13 obligations as public schools, without the Government Claims Act
14 protections that are available to other public schools. This approach would
15 eliminate that disparity in treatment.
- 16 • **Reduced Chilling of Pedagogical Innovation.** Immunity from liability for
17 some discretionary decisions (those relating to uniquely public obligations)
18 would make it easier for charter schools to adopt pedagogical innovations
19 that might otherwise impose too great a risk of liability.
- 20 • **Protection of Limited Fiscal Resources.** The immunities conferred by the
21 Government Claims Act would help to avoid the loss of investment, loss of
22 pedagogical benefit, disruption, and transition costs that might result if a
23 charter school were forced to close as a result of a large judgment against
24 the school. This would only be an advantage with respect to types of
25 liability for which liability insurance is not readily available (e.g., punitive
26 damages or liability for intentional wrongs).

27 *Disadvantages*

28 With respect to the legal and policy implications discussed above, the
29 disadvantages of the alternative discussed here, would be as follows:

- 30 • **Likely Increase in Litigation.** A rule that provides significantly different
31 treatment for different types of claims is likely to lead to confusion and
32 increased litigation, as parties misunderstand or dispute the proper
33 classification of particular claims. These problems are likely to be pervasive,
34 given that each individual claimant must determine, in a short period of
35 time, whether his or her claim is subject to the claims presentation
36 requirements of the Government Claims Act. Because an error on this point
37 could lead to dismissal of a claim, it seems likely that the issue would be
38 litigated frequently.

198 Gov't Code § 12650 *et seq.*

- 1 • **Compensation Undermined.** Some innocent persons injured by charter
2 schools would not be compensated for their injuries.

3 **Alternative #5. Not Public for Government Claims Act Purposes**

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

6 A charter school is not a public entity for the purposes of Division 3.6
7 (commencing with Section 810) of Title 1 of the Government Code.

8 **Advantages**

9 With respect to the legal and policy implications discussed above, the
10 advantages of the alternative discussed here, would be as follows:

- 11 • **Compensation Preserved.** Sovereign immunity would not be available to
12 preclude the compensation of innocent persons injured by charter schools.
- 13 • **Potential Liability Would Deter Risky Behavior.** One of the principal
14 policy justifications for tort liability is that it deters unduly risky behavior
15 and encourages appropriate precautions to be taken against harm. This is
16 particularly important for charter schools, considering that they are exempt
17 from some student health and safety laws and may not be subject to good
18 government laws.
- 19 • **Legal Clarity.** There would be no ambiguity as to whether a charter school
20 is governed by the Government Claims Act. In addition, because this
21 approach would be compatible with the holdings in *Wells*, the continuing
22 validity of those holdings would not be cast into doubt.

23 **Disadvantages**

24 With respect to the legal and policy implications discussed above, the
25 disadvantages of the alternative discussed here, would be as follows:

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

35

CONCLUSION

36 There are competing legal and policy considerations for each of the range of
37 alternative approaches presented in this report. None of the alternatives is clearly
38 superior to the others. They each present a different balancing of legitimate policy

1 concerns. For that reason, the Commission makes no recommendation on which of
2 the alternatives would strike the best policy balance.

3 However, the Commission does recommend that the Legislature address the
4 issue in some way. As discussed above, the law on the issue is not entirely settled:

- 5 • There is no clear court decision on the status of dependent charter schools
6 with respect to the Government Claims Act.
- 7 • The decision in *Knapp* is not binding on the California Supreme Court or
8 other court of appeal districts. This leaves the door open for further appellate
9 litigation on the issue.
- 10 • One federal trial court has contravened the holding in *Knapp*.

11 A clear statutory expression of the status of charter schools under the Government
12 Claims Act would eliminate these problematic sources of uncertainty.

13 The Commission invites comment from interested persons on any aspect of this
14 tentative report. It is just as important to indicate areas where you agree with the
15 Commission's analysis and findings, as it is to indicate areas of disagreement.

16
