

First Supplement to Memorandum 2011-33

**Charter Schools and the Government Claims Act  
(Comment on Tentative Report)**

The Commission has received further communications relating to the issues discussed in Memorandum 2011-33. Those communications are attached in an Exhibit, as follows:

- Exhibit p.*
- Roger Lowenstein, Los Angeles Leadership Academy (10/27/11)..... 1
- Gregory V. Moser (10/27/11) .....2

PARENT EXPECTATIONS ABOUT SCHOOL SAFETY

Memorandum 2011-33 discusses the role of parental choice as a check on risky conditions in charter schools:

Because students are never required to attend a charter school, charter schools must be responsive to parent concerns. Otherwise, parents may “vote with their feet,” returning their children to the traditional public schools. If enough students withdraw, the charter school’s funding may be reduced to levels at which it is not practical to operate. This gives charter schools a strong incentive to satisfy parent concerns, especially on a matter as important as student health and safety...

Memorandum 2011-33, pp. 2-3. However, the memorandum cautioned that:

the incentive effect of parent choice would only operate in circumstances where health and safety risks are *known* to parents. To the extent that risks are latent and unknown to most parents, parents will not have the information necessary to make an informed choice on how much risk to tolerate before withdrawing their children from a charter school.

In all probability, most parents who place their children in charter schools are focused on the expected academic advantages. It seems unlikely that parents expect any difference between charter

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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](http://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.

schools and other public schools with respect to student health and safety standards.

*Id.* at 3-4 (emphasis in original).

The two new letters both bear on that issue. They are discussed below.

### **Some Parents Choose Charter Schools for Safety Reasons**

Roger Lowenstein, executive director of the Los Angeles Leadership Academy charter school, states that many parents are specifically drawn to enroll their children in the Academy out of concern about violent crime in the public schools. “The simple fact is that our families want their children in our school so they won’t get stabbed, shot or beat up.” See Exhibit p. 1. He reports that this type of motivation is “an unfortunate fact of life in the inner city.” *Id.*

This makes sense. If a charter school is perceived to have a significantly lower rate of violent crime than the other schools in a district, it is likely that many parents will enroll their students in the charter school for that reason.

However, that does not directly bear on the issue discussed in Memorandum 2011-33. That memorandum discussed the possibility that the tort immunity conferred by the Government Claims Act could reduce the incentive to take some precautions, thereby increasing the risk of injury. That problem is limited in a traditional public school by mandatory health and safety regulations, which act as a check on policy making discretion. However, charter schools are exempt from general school health and safety laws, and so those laws would not be available as a check on charter school policy making.

Parental choice in charter schools could serve as a different kind of check on policy making, but only to the extent that parents are aware of risks and willing to withdraw their children and return them to the traditional public schools to avoid those risks.

The fact that some parents will enroll their children in a charter school because the charter school has a lower rate of violent crime than the other schools in the district does not mean that those parents expect the charter school to be exempted from general school health and safety laws or would have any greater awareness of any risks that might arise from those exemptions. If anything, overriding concerns about crime in a school district might lead a parent to keep a child enrolled in a charter school even if other risks in the charter school are known. For example, a parent might choose to tolerate lower earthquake safety standards in order to protect a child from the more imminent danger of violent

crime. That could reduce the effectiveness of parental choice as a check on risky policy making.

### **Obvious Differences Between Charter Schools and Other Public Schools**

Mr. Moser maintains that the differences between non-traditional charter school facilities and traditional public school facilities are obvious to parents:

I'd disagree that parents don't expect school conditions to differ from traditional public schools. They do. Since 75% of charters are in non-traditional facilities (churches, office buildings, etc.) which are not purpose-built schools, the differences are obvious to anyone who steps onto a charter school "campus." For example, it is common for children to have to walk public thoroughfares or cross private parking lots to reach playgrounds or public parks for outdoor activities, or to get to public libraries. Bathrooms and drinking fountains in these facilities tend to be standard, rather than reduced size/height for children as in typical elementary schools. So parents are very aware that their children are not in a traditional environment.

See Exhibit p. 2.

The staff agrees that physical *conditions* in a non-traditional facility may be markedly and obviously different from conditions in a traditional public school facility. However, that does not necessarily mean that parents expect that the charter schools will be subject to different health and safety *standards*. For example, the fact that a charter school operates in a church basement, does not mean that parents would know or expect that charter schools are exempt from the health and safety planning requirements that govern traditional public schools. See, e.g., Educ. Code §§ 32280-32289 (requirement to create comprehensive school safety plans, including disaster procedures).

### CHARTER SCHOOL SUSPENSION AND EXPULSION

Mr. Moser makes two points regarding student suspension and expulsion in charter schools.

First, he points out that charter schools delegate these sorts of decisions to principals to a much greater extent than is permitted in a traditional public school. See Exhibit p. 2. That appears to be correct. See Memorandum 2011-33, pp. 17-18 (noting that charter schools are exempted from statutory suspension and expulsion procedures and citing sample charter in which suspension and expulsion decisions are made by principal).

Second, he suggests that despite the exemption of charter schools from statutory procedural requirements, charter schools must still satisfy due process requirements. “So the risks are far greater in the charter environment.” See Exhibit p. 2.

However, a traditional public school must also satisfy due process, and it is not clear that the Government Claims Act would immunize a public school from suit for a breach of due process.

While the courts have recognized that discretionary act immunity applies to the fundamental policy decision that a school board makes in deciding whether to expel a student, that immunity would not necessarily extend to a breach of a procedural requirement. See Cal. Government Tort Liability Practice § 10.14, at 624-25 (Cal. Cont. Ed. Bar, 4th ed. 2011) (“The cited cases reflect the premise that public officers and employees have no discretionary authority to refuse to perform a mandatory duty or to violate statutory law governing the scope and character of their duties.”).

For that reason, it is not clear that charter schools face greater liability for a breach of due process than a traditional public school would face.

#### CIVIL RIGHTS LIABILITY

At pages 14-15, Memorandum 2011-33 discusses charter school liability for civil rights violations. In that discussion, the staff noted that the insurance that the California Charter Schools Association makes available to its members would provide some coverage for discrimination and other civil rights violations (with exclusions for bodily injury and “personal injury”).

In light of that discussion, the staff recommended adding a footnote to the staff draft of the final report, along these lines:

A charter school could also face liability under the Unruh Act or the Bane Act for illegal discrimination or a violation of civil rights, arising from the charter school’s obligations as part of the public school system. See Civ. Code §§ 51, 52.1. Standard commercial liability insurance may not cover all injuries arising from such wrongs.

*Id.* at p. 15.

Mr. Moser writes to emphasize another limitation on the availability of insurance for liability resulting from a civil rights violation:

Your discussion of civil rights coverage misses the crucial point that civil right liability requires intentional acts. That element of a civil rights claim is what takes it out of coverage (because it is expected or intended), so the most coverage available is for defense only, not indemnity.

See Exhibit p. 2.

Mr. Moser appears to be referring to the fact that Insurance Code Section 533 bars insurance coverage for intentional wrongs:

533. An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others.

The staff agrees that Section 533 would preclude coverage for many civil rights violations. However, it is not clear that a civil rights violation *requires* the sort of wilful act that is excluded from coverage under Section 533.

A "wilful act" within the meaning of Section 533 is not merely an intentional act. It is an act that is done with a "preconceived design to inflict injury." *Clemmer v. Hartford Ins. Co.*, 22 Cal. 3d 865, 887, 587 P.2d 1098, 151 Cal. Rptr. 285 (1978).

While many civil rights violations would fall within the scope of Section 533, some would not. For example, in *Save Mart Supermarkets v. Underwriters*, 843 F. Supp. 597 (N.D. Cal. 1994), the court held that Section 533 does not preclude coverage of a claim for unintentional ("disparate impact") employment discrimination, because "a plaintiff need not establish that the insured intended to commit a wrongful act in order to recover under such a theory." *Id.* at 606.

It is not difficult to imagine other situations where a school might violate a student's civil rights without any intent to commit a wrongful act. For example, a school might adopt a rule regulating student speech that it believes, in good faith but erroneously, to be constitutionally permissible. Adoption of the rule would be an "intentional" act, but it would not necessarily be a "wilful" act within the meaning of Section 533.

In summary, Mr. Moser is correct that some civil rights violations could not be indemnified by a liability insurer, pursuant to Section 533. However, a civil rights violation that is not wilful would not be subject to Section 533 and the insurer could indemnify the school. Consequently, the staff believes that the footnote text proposed in Memorandum 2011-33 (and set out above) is mostly correct, but could be improved, thus:

A charter school could also face liability under the Unruh Act or the Bane Act for illegal discrimination or a violation of civil rights, arising from the charter school's obligations as part of the public school system. See Civ. Code §§ 51, 52.1. Standard commercial liability insurance ~~may~~ will not cover all injuries arising from such wrongs. See Ins. Code § 533 (barring coverage of wilful acts).

**Should a change along those lines be made?**

Respectfully submitted,

Brian Hebert  
Executive Director



Brian Hebert  
California Law Revision Commission  
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October 27, 2011

Dear Mr Hebert:

I am writing to you as a result of a conversation I had this morning with a committee of lawyers who represent charter schools, one of which is Greg Moser. I made some observations about student safety that he suggested I share with you.

I am the founder and Executive Director of an inner city charter school in Los Angeles. Our school is predominantly Latino and extremely poor – an average family income in the \$15,000 to \$20,000 range. The theme of our school is social justice. It is a critical part of our mission to encourage our students to perceive themselves as agents of social change, to help empower the marginalized portion of our population. It is also a critical part of our mission to prepare our students to succeed in college. During our first few years I began to collect anecdotal explanations from families as to why they came to our school. Eventually I replaced that with an actual survey. The results of these efforts were sobering and, from my perspective, disappointing. It's not that our families couldn't care less about social justice, or even our college readiness program. It's simply that the predominant reason they sent their child to us – safety -- so far outweighed any other reason that we could be offering courses in underwater basket weaving and it wouldn't make a difference.

The simple fact is that our families want their children in our school so they won't get stabbed, shot or beat up. That is a terribly low bar, and it puts lots of pressure on us to not only educate our students about social justice and college, but their parents as well. My school is typical. I have discussed this issue with so many other charter school operators. It's an unfortunate fact of life in the inner city. By the way, we are not always successful. It is part of my duties to attend and sometimes preside at funerals for our students. Fortunately none of my murdered students were killed on the premises of the school, but that is little consolation. I hope these observations help to inform your work.

Sincerely,

**Roger Lowenstein**  
Founder & Executive Director

**Kristen Kaplanis McGregor, Ed.D.**  
Middle School Principal

**Etta Kralovec, Ph.D.**  
High School Principal

**Gloria Boccato**  
Food Services Director

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**EMAIL FROM GREGORY V. MOSER**  
**(10/27/11)**

Subject: RE: Charter school memo

Thanks. I will review. On a quick read I appreciate your suggested additions in a number of areas. I do think this would strengthen and balance the report.

I'd disagree that parents don't expect school conditions to differ from traditional public schools. They do. Since 75% of charters are in non-traditional facilities (churches, office buildings, etc.) which are not purpose-built schools, the differences are obvious to anyone who steps on to a charter school "campus." For example, it is common for children to have to walk public thoroughfares or cross private parking lots to reach playgrounds or public parks for outdoor activities, or to get to public libraries. Bathrooms and drinking fountains in these facilities tend to be standard, rather than reduced size/height for children as in typical elementary schools. So parents are very aware that their children are not in a traditional environment.

I also disagree with the discuss of expulsion/suspensions. Charters routinely delegate these decisions to the principal/CEO, with some kind of appeal, to a far greater extent than the statutes allow in district schools. While the statutes aren't prescriptive for charter schools, our view is that due process is still required. So the risks are far greater in the charter environment.

Your discussion of civil rights coverage misses the crucial point that civil right liability requires intentional acts. That element of a civil rights claim is what takes it out of coverage (because it is expected or intended), so the most coverage available is for defense only, not indemnity.

If time permits, we will provide a more formal response.