Study G-200 July 11, 2012

Memorandum 2012-30

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

In 2009, a resolution was enacted that authorized the Commission 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)).

In the course of that study, the Commission considered the following memoranda (all of which are available at the Commission's website):

- Memorandum 2009-52 — Application of Government Claims Act to Charter Schools (Scope of Study) (12/01/2009)
- Memorandum 2010-6 — Tort Liability and Immunity Under the Government Claims Act (2/11/2010)
- Memorandum 2010-7 — Defense and Indemnification Under the Government Claims Act (2/11/2010)
- Memorandum 2010-16 — Claim Presentation Under the Government Claims Act (3/23/2010)
- Memorandum 2010-17 — Charter Schools and the Government Claims Act: Quasi-Public Entities (3/24/2010)
- Memorandum 2010-26 — Charter Schools and the Government Claims Act: Charter Schools Act (6/01/2010)
- Memorandum 2010-35 — Liability of Charter Schools in Other Jurisdictions (8/05/2010)
- Memorandum 2011-7 — Charter Schools and the Government Claims Act (Discussion of Issues) (1/31/2011)
- First Supplement to Memorandum 2011-7 — Charter Schools and the Government Claims Act (Discussion of Issues) (2/08/2011)
- Memorandum 2011-17 — Charter Schools and the Government Claims Act: Alternative Approaches (3/25/2011)
- First Supplement to Memorandum 2011-17 — Charter Schools and the Government Claims Act: Availability of Insurance (4/08/2011)

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.

- Second Supplement to Memorandum 2011-17 — Charter Schools and the Government Claims Act: Alternative Approaches (4/14/2011)
- Memorandum 2011-22 — Charter Schools and the Government Claims Act: Draft Tentative Report (5/19/2011)

At its June 2011 meeting, the Commission approved the distribution of a tentative report on *Charter Schools and the Government Claims Act* (June 2011). See Minutes (June 2011), p. 3. That report set out the Commission's tentative findings in this study and invited public comment. The deadline for public comment was September 15, 2011.

In response to public comment on the Tentative Report, the staff prepared Memorandum 2011-33 (Oct. 26, 2011) and the First Supplement to Memorandum 2011-33 (Nov. 17, 2011). Those materials discussed the comments that the Commission had received and presented a draft of a final report. However, the meeting at which those materials were scheduled to be considered was canceled for lack of a quorum.

This memorandum reiterates the substance of Memorandum 2011-33 and its First Supplement. **It supersedes those materials, which were never considered by the Commission.**

The Exhibit to this memorandum includes the following comment materials:

Exhibit pp.

- Gregory V. Moser, California Charter Schools Association (6/28/11), (10/3/11), (10/27/11) 1, 13, 18
- Email from Brian Hebert to Gregory V. Moser (9/1/11) 9
- Dr. Wendy Ranck-Buhr, San Diego Cooperative Charter School (9/12/11) 11
- Roger Lowenstein, Los Angeles Leadership Academy (10/27/11) 17
- Nancy Peverini, Consumer Attorneys of California (12/12/11) 19

After reviewing the information in this memorandum, the Commission should decide whether to approve the attached draft as a final report, with or without changes.

The staff recommends that any Commissioner who is new to this material first read the attached draft report, before reading the remainder of this memorandum. The draft report provides a good summary of the subject matter of the study. It also provides necessary context for the comments discussed in this memorandum, which address specific elements of the report.

GENERAL SUMMARY OF COMMENTS

With one exception, the commenters do not raise any fundamental objections to the content or direction of the Commission's report. Instead, most of the comments address possible changes to the report's discussion of specific points.

Fundamental Objection

Dr. Wendy Ranck-Buhr, Principal of the San Diego Cooperative Charter School, "commend[s] the Commission for its well-written report, and its thoughtful and extensive analysis," but suggests that the Commission's report "might have a greater impact on the Legislature if it begins with the premise that a charter school, like other public schools, *should* be deemed a public entity" for the purposes of the Government Claims Act. See Exhibit p. 11 (emphasis in original). "It seems to us that the only question is the proper legislative approach codifying the principle that a charter school, at least a nonprofit public benefit corporation, is a public entity under the Government Claims Act." *Id*.

This would require a significant substantive change in the direction of the report. As drafted, the Commission's report did not endorse any particular reform alternative. Instead, it identified and analyzed the legal and policy implications of a range of possible alternatives. The reason for that drafting approach was discussed at length in a prior memorandum, under the heading "One Alternative or Many?" See Memorandum 2011-17, pp. 24-27. **For the reasons discussed there, the staff recommends against revising the report along the lines suggested by Dr. Ranck-Buhr.**

Possible Changes

The other comments address possible changes to specific aspects of the draft report.

In his letters, Gregory V. Moser writes on behalf of the California Charter Schools Association ("CCSA") to expand on its view that the Commission's final report should place greater emphasis on the following matters:

(1) The role of charter school choice in reducing student risk.
(2) The role of charter school accountability in reducing student risk.
(3) The problem of uninsurable risks in charter schools.

See Exhibit pp. 1-4. In addition, CCSA provides information from other jurisdictions about the application of governmental liability laws to charter schools in those jurisdictions. See Exhibit pp. 5-8.

In response to CCSA's June 28, 2011, letter, the staff contacted Mr. Moser to request further information about charter schools and liability insurance. See Exhibit pp. 9-10. Mr. Moser's October 3, 2011, letter is a response to that request. See Exhibit pp. 13-16.

The letters described above were discussed in Memorandum 2011-33. In response to that discussion, the Commission received another letter from Mr. Moser. See Exhibit p. 18. He writes, in part, "On a quick read I appreciate your suggested additions in a number of areas. I do think this would strengthen and balance the report." *Id*. However, he does have some remaining concerns, which he describes. The Commission also received a letter from Roger Lowenstein, Executive Director of the Los Angeles Leadership Academy. See Exhibit p. 17.

Those two letters were discussed in the First Supplement to Memorandum 2011-33. In response to that supplement, the Commission received a letter from Nancy Peverini, on behalf of the Consumer Attorneys of California. See Exhibit p. 19.

Specific issues raised in the public comments are discussed below.

ROLE OF SCHOOL CHOICE IN REDUCING CHARTER SCHOOL RISK

CCSA believes that the report should have discussed how the voluntary character of charter schools can create an incentive to reduce health and safety risks in charter schools. See Exhibit pp. 1-2.

Role of School Choice in Reducing Charter School Risk

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 the school would not be viable. This gives charter schools a strong incentive to satisfy parent concerns, especially on a matter as important as student health and safety:

> Charter school advocates believe that choice plays a key role in making charter schools safe and encouraging strong risk management and safety practices. Education Code § 47601(e) says

> that a legislative purpose of charter schools is to "provide parents and pupils with expanded choices … within the public school system." Every student attending a charter school has chosen to do so, and may leave for a district-managed public school at any time. A school district "shall not require any pupil enrolled in the school district to attend a charter school." Ed. Code section 47605(f). "A charter school shall admit all pupils who wish to attend the school." Ed. Code section 47605(d)(2)(A). Similarly, every employee of a charter school has chosen it, as no district may "require any employee of the school district to be employed in a charter school." Ed. Code section 47605(e).
>
> If parents believe a charter school is unsafe, they can choose to send their child to the district-operated school to which they would otherwise be assigned. Charter schools are intended to provide vigorous competition[] for students with school district-run schools. Ed. Code section 47601(g). This private sector principle is central to the public policy supporting charter schools.
>
> …
>
> [B]ecause neither students nor employees can be assigned to a charter school (Ed. Code section 47605(e)), they choose to be there, as noted above, and may leave if they believe the school is unsafe. Because charter schools are funded based solely on student attendance, and have no other guaranteed source of funding, if many students leave, their revenues may fall below sustainable levels.

See Exhibit pp. 1-2.

Limitation on Effect of School Choice

In order for school choice to have the incentive effect described above, parents must have knowledge of unsafe conditions in a charter school. If health and safety risks are latent and unknown, parents will not have the information necessary to make an informed judgment about acceptable levels of risk.

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

However, CCSA 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. 18.

The staff agrees that some 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).

Nancy Peverini, writing on behalf of the Consumer Attorneys of California agrees with the staff's view of that issue. See Exhibit p. 19. She adds:

> Indeed, I would argue that most parents, while realizing that charter schools are by definition different from other schools, do not realize that charters are allowed to operate outside of the health and safety standards that apply to regular schools.

Id.

Roger Lowenstein addresses the issue from a different perspective. He states that many parents are specifically drawn to enroll their children in charter schools 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. 17. 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 of exemption from health and safety *regulation*. The concern expressed in the draft report is 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 policymaking discretion. To the extent that charter schools are exempt from general school health and safety laws, those laws would not be available as a check on charter school policymaking.

Parental choice in charter schools could serve as a different kind of check on policymaking, 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 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 policymaking.

Conclusion

If, after considering the issues discussed above, the Commission concludes that more should be said about the effect of school choice in reducing charter school health and safety risks, the following language could be added to the draft report as a footnote on the end of line 18 of page 34 of the attached draft:

> It should be noted that charter schools are schools of choice. Parents are never required to enroll their children in charter schools and are free to withdraw them and enroll them in other schools. This creates an additional check on student health and safety risks in charter schools that does not exist in a traditional public school. To the extent that parents become aware of risks to student health and safety in a charter school, they may choose to withdraw their children from the school. This threat to a charter school's main source of funding could create an incentive for a charter school to take reasonable precautions against known health and safety risks. This incentive may not be as strong with respect to latent risks.

Should a change along those lines be made in the final report?

CCSA observes that "charter schools are held directly accountable for their risk management and safety practices on a 'performance basis' in a variety of ways." See Exhibit p. 2. "These performance based accountability measures have no counterpart in other public schools." *Id*.

Role of Performance-Based Accountability in Reducing Student Risk

CCSA believes that "rule-based" health and safety standards and government transparency laws are not the only way to encourage good risk management in traditional schools. The performance-based accountability rules governing charter schools can also produce good risk management practices. *Id*.

CCSA points to the following ways in which charter schools are held accountable for their health and safety practices:

> (1) If the chartering authority finds that a charter school materially breached a provision of its charter, the charter may be revoked. Educ. Code § 47607(c)(1). This would include a material violation of a charter provision setting out health and safety policies. If the violation "constitutes a severe and imminent threat to the health or safety of the pupils," the charter school can be closed immediately without an opportunity to cure the violation. Educ. Code § 47607(d).
>
> (2) A charter school is subject to investigation by the county office of education and the State Board of Education. Educ. Code §§ 47604.3 (duty to respond to inquiries), 47604.4 (investigation by county superintendent of schools). (CCSA also cites to Section 47604.5, but the authority to investigate conferred by that section is limited in scope and does not appear to include investigation of health and safety conditions in a charter school.)

Id.

Limitations on Role of Performance-Based Accountability

It is probable that direct accountability to superior public entities would serve as a check on some unduly risky charter school policies or practices. However, the staff is not sure of the magnitude of that effect.

The staff's uncertainty has three main sources:

> (1) A sanction for a violation of a *charter provision* only serves to enforce standards that the charter school has adopted for itself. There is no guarantee that a charter will include health and safety requirements that are as protective as the statutory requirements

that govern a traditional public school. For example, Education Code Sections 32030-32034 require that protective eyewear be provided and worn in specified high risk circumstances. Unless a charter school voluntarily includes an equivalent requirement in its charter, the failure to provide eye protection would not be grounds for a sanction under Section 47607.

(2) An accountability measure that sanctions a school for creating a "severe and imminent threat to the health or safety of the pupils" sets a very high bar for intervention. Many health and safety risks could be cause for significant concern, without being both severe and imminent.

(3) While Sections 47604.3 and 47604.4 do provide for direct oversight of charter schools, those provisions do not themselves provide any remedy for any health and safety problems that might be discovered. As noted above, unless those problems involve a violation of a provision of the charter, it is not clear what consequence would result from this oversight.

In summary, the accountability provisions described by CCSA could help to guard against student health and safety risks, but only to the extent that such risks involve a violation of the requirements that a charter school has imposed on itself in the chartering process. In a charter school with strong health and safety provisions in its charter, these oversight mechanisms would provide a strong check on risky practices. However, there can be wide variability in the protectiveness of a charter's health and safety provisions, with corresponding variability in the effectiveness of the accountability measures discussed above.

Conclusion

If the Commission believes that the final report should place greater emphasis on the role of charter school oversight mechanisms in reducing health and safety risk, it might be appropriate to add language along the following lines (with appropriate citations) at the end of the general discussion of "School Health and Safety Standards" (after line 20 of page 10 of the attached draft):

> Once a charter school has adopted health and safety standards as part of its charter, it is subject to investigation and sanction for any violation of those standards. In appropriate circumstances, a school's chartering authority can order closure of the school. Although charters need not follow the same health and safety standards as traditional public schools, these accountability measures should help to ensure that a charter school follows its own voluntarily adopted standards.

It might also be appropriate to add language along the following lines to a footnote at the end of line 18 of page 34 of the attached draft:

> While charter schools are not subject to the same statutory health and safety requirements that govern traditional public schools, they are required to develop their own health and safety policies as part of their charters. Failure to abide by those voluntarily adopted policies can lead to revocation of the charter and closure of the school. This does not guarantee the same level of protection that is afforded through statutory regulation. Nor does it provide for a uniform level of protection across the state's charter school population. But it should still serve as a check against some risky health and safety practices.

Should such language be added to the Final Report?

THE PROBLEM OF UNINSURABLE RISK

CCSA discusses the special problem that charters schools may face because of the "unavailability of insurance for governmental liabilities faced by charter schools." See Exhibit p. 1.

> Because they are public schools, charter schools have obligations and face risks which private schools do not, such as enrolling (without discrimination) students requiring special education services. At the same time, it is unclear whether charter schools are entitled to the protections school districts enjoy under the Government Claims Act. Does insurance fill this gap? Unfortunately, not. This is an important public policy matter, as it affects the potential financial vulnerability of charter schools to risks not faced by school districts or private schools.

See Exhibit p. 3.

The draft report acknowledges that charter schools could face a double-bind, to the extent that they are subject to the uniquely public *liabilities* of a public school, without the *immunities* provided to public schools under the Government Claims Act. This problem is discussed in the attached draft, under the heading "Uniquely Public Liabilities," at Exhibit pages 37-38. It is also taken into account in one of the reform alternatives discussed in the attached draft, under the heading "Alternative #4. Limited Application of Government Claims Act" at Exhibit pages 44-46.

It is not entirely clear what concerns CCSA has about the discussion of the issue in the draft report, because they do not identify specific shortcomings in

their letter. Instead, they set out their own draft of a discussion of the issue. See Exhibit pp. 3-4.

In comparing the Commission's discussion with the draft submitted by CCSA, the main difference appears to be that the CCSA draft includes a number of specific examples of public liabilities that would be difficult to insure against.

The Commission should consider whether to add those examples to its draft report. Before analyzing each of the examples, it would be helpful to discuss some general information about the availability of liability insurance.

Insurance Exclusions Generally

CCSA maintains that liability insurance does not adequately address the double-bind that charter schools find themselves in (facing uniquely public liability without the benefit of public immunities), because "standard" commercial liability insurance policies exclude the following types of liability:

- Liability for damages which are "expected or intended" by the insured.
- Liability for punitive damages.
- Liability for "wrongful acts," such as a breach of a statutory duty.
- Liability for "law enforcement" activities.

Id.

CCSA maintains that a challenge to a decision by a charter school board relating to enforcement or adoption of school policies "will often fall within these common commercial insurance exclusions." *Id*. at 4.

The Commission's discussion of the uninsurable public liability problem already mentions punitive damages and intentional damages as types of risk that cannot be insured against. See Attachment p. 37. Therefore, the main difference between the Commission's draft and the CCSA draft is in the discussion of the availability of insurance for "wrongful acts" and "law enforcement" activity. Those issues are discussed more fully below.

In order to have a better understanding of the types of liability insurance that are actually available to charter schools in California, the staff requested that CCSA provide a copy of the liability policy that it makes available to its own members, through a Joint Powers Authority (hereafter "CCSA Insurance Policy"). In order to conserve resources, the lengthy CCSA Insurance Policy is not reproduced as an attachment to this memorandum.

Exclusion of "Wrongful Acts"

CCSA writes:

> Commercial insurance routinely excludes a variety of "wrongful acts," such as liabilities for breaches of mandatory duties imposed by statute. The [Government Claims Act] protects school districts against liability solely because of errors in recordkeeping […]; not adopting a policy […]; or failing to follow detailed state regulations in some respects […].

See Exhibit p. 3 (citations omitted).

Note, however, that the CCSA Insurance Policy includes "errors and omissions" coverage that insures against "wrongful acts," which it defines as follows:

> WRONGFUL ACT means any actual or alleged error or misstatement, omission, act or neglect or breach of duty due to misfeasance, malfeasance, and nonfeasance, including any EMPLOYMENT PRACTICE VIOLATION, Discrimination, and Violation of Civil Rights by the ASSURED, including mental anguish which arises out of any EMPLOYMENT PRACTICE VIOLATION, Discrimination, and Violation of Civil Rights by the ASSURED.

CCSA Insurance Policy, p. 20 (emphasis in original). The staff did not see any language in the policy that would generally exclude a breach of a mandatory *statutory* duty from the scope of the errors and omissions coverage. The most significant limitation on that coverage is that the policy excludes bodily injuries and "personal injuries." *Id*. at 41. The term "personal injury" means an injury that results from any of the following list of specified causes:

> Wrongful Entry; Wrongful Eviction; Malicious Prosecution; Humiliation; Piracy; Infringement or Misappropriation of any Intellectual Property Rights […]; Invasion of Rights of Privacy; Libel; Slander; Defamation of Character; Disparagement of Property; Erroneous Service of Civil Papers; False Arrest; False Imprisonment; and Detention.

Id. at 18.

One can imagine some wrongful acts that could produce injuries that are excluded from the errors and omissions coverage offered by the CCSA Insurance Policy. For example:

- A wrongful act relating to student records might lead to a student's humiliation or an invasion of privacy.

- A wrongful act involving campus security might lead to false imprisonment or wrongful detention.
- A wrongful act involving student health or safety could lead to bodily injury.

Consequently, there is some scope for wrongful act liability for which insurance is may not be readily available.

However, it would be an overstatement to maintain that insurance for a breach of a mandatory duty is generally unavailable. It would be more accurate to state that insurance for wrongful acts excludes coverage for some types of injuries.

Exclusion of "Law Enforcement Activity"

CCSA also suggests that liability arising from "law enforcement activities" is excluded from coverage under standard commercial liability policies. See Exhibit p. 3.

While it is true that law enforcement activity is excluded from the "standard" provisions of the CCSA Insurance Policy, that policy does offer supplemental coverage for "law enforcement activity," (CCSA Insurance Policy, p. 57), which it defines as follows:

> LAW ENFORCEMENT ACTIVITIES means the activities of any ASSURED while acting as a law enforcement official, auxiliary officer, employee, or volunteer of a law enforcement agency or department of the NAMED ASSURED. LAW ENFORCEMENT ACTIVITIES do not include EMPLOYMENT PRACTICES VIOLATIONS.

Id. at 18 (emphasis in original).

Unless the staff is misreading the CCSA Insurance Policy, it appears that insurance for liability arising from law enforcement activities is available to charter schools.

Basis for Analysis of Examples

The letter from CCSA sets out a number of specific examples of the problem discussed here, for possible inclusion in the Commission's report. The examples are analyzed below, in order to assess whether they should be added to the discussion in the attached staff draft.

In order to be a useful example of the problem under discussion (uninsurable public liability, against which public entities are immunized) the example must satisfy all three of the following criteria:

(1) **The liability must result from a charter school's public obligations.** If a private school faces the same liability, then it is not a uniquely public liability.

(2) **A traditional public school must be immunized against the liability.** If a traditional school is not immunized against the liability, then the application or nonapplication of the Government Claims Act is irrelevant.

(3) **Liability insurance must not be readily available to cover the liability.** If insurance is readily available, then charter schools already have a way to protect themselves, without any change in the law.

Employee Misrepresentation

CCSA points out that a traditional public school is immunized against liability for employee misrepresentations in school records (citing *Grenell v. City of Hermosa Beach*, 103 Cal. App. 3d 864; 163 Cal. Rptr. 315 (1980)). See Exhibit p. 3. In *Grenell*, a claim was made against a city for a paperwork error that overstated the number of dwelling units permitted on a parcel of land. The court held that the claim was barred by the Government Claims Act, which provides immunity for a public employee's negligent or intentional misrepresentations. See Gov't Code §§ 818.8, 822.2.

CCSA also cites *Brown v. Compton Unif. School Dist.*, 68 Cal. App. 4th 114, 80 Cal. Rptr. 2d 171 (1998), in which a high school counselor gave a student erroneous advice about NCAA eligibility requirements. The student's claim was barred by the school's immunity from liability for employee misrepresentations.

Finally, CCSA cites *Chevlin v. Los Angeles Community College Dist.*, 212 Cal. App. 3d 382, 260 Cal. Rptr. 628 (1989). In that case, a community college student alleged that an instructor had fraudulently concealed information about course requirements. The court dismissed the claim out of hand, noting the misrepresentation immunity conferred by the Government Claims Act.

Those examples do demonstrate that a charter school could be held liable for an employee misrepresentation, in a way that a traditional public school would not. Thus, one of the three criteria is satisfied.

But does this liability arise from a charter school's uniquely public obligations? Not necessarily. A private school could also face liability for the types of employee misrepresentations discussed above.

Nonetheless, it is possible that a particular *type* of misrepresentation could only arise in connection with a charter school's obligations as a public school, in which case a private school would not face the liability for *exactly the same type of misrepresentation*.

By way of example, CCSA points out that public schools have different record keeping obligations than private schools. Under Education Code Sections 49070 and 49071 (and a related federal statute, 20 U.S.C. 1232g), parents in public schools have a right to review student records and request the correction of any errors in those records. See Exhibit p. 16. However, the staff does not see how those provisions could ever give rise to monetary liability. They establish an *administrative* review and correction procedure; they do not appear to create any judicial cause of action for damages. Consequently, it is not clear that a charter school's obligations under those provisions would give rise to any uniquely public liability.

Moreover, the errors and omissions coverage in the CCSA Insurance Policy expressly covers misrepresentations. Unless a misrepresentation leads to bodily injury or a "personal injury" (e.g., humiliation or invasion of privacy), it appears that a charter school could insure against liability for an employee misrepresentation.

In summary: A charter school's liability for employee misrepresentations does not seem to arise from its public functions. Also, error and omissions insurance is generally available to protect against such liability. **For those reasons, liability for a misrepresentation does not appear to be a good example of the problem under discussion and should not be noted in the attached draft.**

Failure to Enforce the Law

CCSA notes that a public entity is not liable for "not adopting a policy." See Exhibit p. 3. It points to a case in which a county was immunized, under Government Code Section 818.2, from liability for failure to enforce a state statute mandating a 5 MPH speed limit for boats traveling near a dock. See *Wood v. County of San Joaquin*, 111 Cal. App. 4th 960, 4 Cal. Rptr. 3d 340 (2003).

Section 818.2 provides as follows:

> A public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law.

In considering this provision, it is helpful to consider the meaning of "failing to enforce any law." That clause does not refer to any breach of a mandatory legal duty. Rather, it refers to an enforcement decision made by a law enforcement officer. The Commission's Comment to Section 818.2 makes this clear:

> This section would be unnecessary except for a possible implication that might arise from Section 815.6, which imposes liability upon public entities for failure to exercise reasonable diligence to comply with a mandatory duty imposed by an enactment. This section recognizes that the wisdom of legislative or quasi-legislative action, and the discretion of law enforcement officers in carrying out their duties, should not be subject to review in tort suits for damages if political responsibility for these decisions is to be retained.

Sovereign Immunity: Number 1 — Tort Liability of Public Entities and Public Employees, 4 Cal. L. Revision Comm'n Reports 801 (1963).

To the extent that a charter school official is obliged to act as a law enforcement officer, the "law enforcement activity" insurance provided by CCSA would seem to be available to protect the official.

For that reason, the staff does not believe that liability for failure to enforce the law is a good example of uninsurable public liability. It should probably not be used for that purpose in the attached draft.

Child Abuse Reporting

CCSA suggests that a public school official would be immunized from liability for "reporting and investigatory" duties involving suspected child abuse, but a charter school official would not have the same protection. See Exhibit p. 3, n.1.

The case cited by CCSA involved the liability of sheriff's deputies (and other county officials) who investigated a report of abuse. In conducting their investigation, they used methods that were alleged to be tortious (e.g., strip-searching the children who were suspected to have been abused). See *Newton v. County of Napa*, 217 Cal. App. 3d 1551, 266 Cal. Rptr. 682 (1990). The court held that the investigating officials were partially immunized from liability by Government Code Section 824, which provides:

> A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment.

Charter school officials would not enjoy that same immunity. However, school officials are not abuse *investigators*. They are mandatory abuse *reporters*. As such, there would seem to be much less scope for potentially tortious behavior (e.g., strip-searching children). Furthermore, a mandatory reporter is expressly immunized from civil liability for filing a report. Penal Code § 11172.

To the extent that there might be some area of potential liability relating to the abuse reporting duty (perhaps for a *failure* to make a mandatory report), that same liability would also exist for private school officials. Under the abuse reporting statute, private school officials are also mandatory abuse reporters. See Penal Code § 11165.7(a)(1)-(3), (8). Consequently, it does not appear that a charter school would face any uniquely public liability in connection with its duties under the abuse reporting law.

Furthermore, depending on the nature of the allegedly tortious conduct and the injury that the conduct allegedly caused, there might well be coverage under the comprehensive general liability provisions of the CCSA Liability Insurance Policy, or the errors and omissions or law enforcement activity provisions of that policy.

In summary, it seems likely that any liability that might arise from the child abuse reporting obligations of charter school officials would not be uniquely public. Furthermore, depending on the nature of the wrong, liability insurance against the resulting liability may be readily available. **For those reasons, the staff recommends against using this type of liability as an example in the attached staff draft.**

Civil Rights Violations

As discussed in the First Supplement to Memorandum 2011-17, the law provides remedies for an alleged violation of civil rights by a charter school. For example, Education Code Section 48907 protects specified expressive conduct in public schools, including charter schools. (However, it is not clear whether Section 48907 provides an affirmative cause of action for money damages.) See First Supplement to Memorandum 2011-17, pp. 2-4.

The Bane Act (Civil Code Section 52.1) provides a broad cause of action for interference with the enjoyment of a legal or constitutional right. The Bane Act does expressly provide for an award of money damages. First Supplement to Memorandum 2011-17, p. 8.

Therefore, it is possible that a charter school could face liability for a violation of civil rights. As part of the public school system, that liability could arise from a charter school's uniquely public obligations (e.g., the prohibition on religious discrimination).

Would a traditional public school be immunized against such liability? Yes, if the injury was caused by a discretionary act, a failure to enforce a law, the good faith execution of law, or some other basis for public entity immunity.

The only question that remains is whether a charter school could obtain insurance against liability for a civil rights violation. It appears that such insurance is available in some circumstances. The errors and omissions coverage in the CCSA Insurance Policy expressly covers liability for discrimination and civil rights violations. (See the definition of "wrongful act" on page 12 above.)

However, recall that the errors and omissions coverage provided by the CCSA Insurance Policy excludes bodily injuries and "personal injuries" (such as humiliation or invasion of privacy). It is possible that an action for a civil rights violation could involve those types of injuries.

Furthermore, if a civil rights claim is based on *willful* misconduct, it is likely that insurance would be unavailable as a matter of law. As CCSA has pointed out (at Exhibit p. 14), Insurance Code Section 553 provides:

> 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.

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.

A similar point was made by Nancy Peverini, on behalf of the Consumer Attorneys of California:

> The applicability of Section 533 to civil rights violations under Bane and Unruh will depend on whether the discriminatory act was "willful." While Unruh claims will always require intentional conduct, except for ADA claims, the standard for intentional is lower than the standard for "willful." Further, in claims under the Bane Act, plaintiffs need not allege that defendants acted with discriminatory animus or intent, so long as those acts were accompanied by the requisite threats, intimidation, or coercion. Thus, the issue will be proving "willful" conduct for purposes of section 533.

See Exhibit pp. 19-20.

In light of the above analysis, the staff recommends adding a footnote along the following lines at the end of line 6 on page 38:

> 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. See, e.g., Civ. Code § 2773 (barring indemnity for future unlawful act); Ins. Code § 533 (barring coverage of wilful act).

Should such language be added to the Final Report?

Employment Practice Liability

CCSA points out that a school board member does not have personal liability for making a decision on whether to hire or terminate a superintendent. See Exhibit p. 3 (citing *Caldwell v. Montoya*, 10 Cal. 4th 972, 42 Cal. Rptr. 2d 842 (1995)). In *Caldwell*, the court held that the elected members of a school board were performing discretionary acts when deciding whether to renew the employment of the district's superintendent. Consequently, they were immunized against personal liability for that decision.

Notwithstanding the personal immunity recognized in *Caldwell*, there may still be *entity* liability for a violation of the Fair Employment and Housing Act. See *DeJung v. Superior Ct.*, 169 Cal. App. 4th 533, 86 Cal. Rptr. 3d 99 (2008). Furthermore, not all employment decisions are entitled to discretionary act immunity. See *Taylor v. City of Los Angeles Dep't of Water & Power*, 144 Cal. App. 4th 1216, 1238-39, 51 Cal. Rptr. 3d 206 (2006) (no discretionary act immunity in retaliation complaint under FEHA).

As indicated, the application of discretionary act immunity to employment practices is limited. Even a traditional public school may face entity liability under FEHA, and school employees may face personal liability for nondiscretionary employment decisions.

Moreover, private schools are not immune from liability under FEHA. Therefore, employment practice liability does not appear to be uniquely public in character.

Finally, the CCSA Liability Insurance Policy provides coverage for employment practice liability.

For all of those reasons, the staff does not believe that employment practice liability should be used as an example in the attached draft.

Student Suspension or Expulsion Generally

CCSA states that a public school principal is "protected from suit for suspending or expelling a student." See Exhibit p. 4. In support of that statement, CCSA cites *Skinner v. Vacaville Unified School District*, 37 Cal. App. 4th 31, 43 Cal. Rptr. 2d 384 (1995). In *Skinner*, a student with a history of violence assaulted and injured another student. The injured student sued the school district, on a number of theories. One claim was based on the school district's prior decision *not* to expel the violent student after a previous incident. The court held that the school district's decision was an exercise of policy discretion and the district was therefore immune from liability under the Government Claims Act.

The implication is that a charter school official could face liability for a suspension or expulsion decision that an official in a traditional public school would not face.

In considering the scope of this problem, it is important to first note that a school principal does not have statutory authority to expel a student. That decision must be made by the governing board of the school district. See Educ.

Code § 48915. Thus, the principal of a traditional public school will never make an expulsion decision and so cannot face liability for such a decision.

However, there are circumstances in which a principal is required by law to immediately *suspend* a student. See Educ. Code § 48915(c). Furthermore, in those circumstances a principal must also *recommend* the expulsion of the student. *Id*. In theory, a principal who breaches those obligations could face liability if the breach proximately causes an injury.

It is not clear that a principal in a traditional public school would be immunized from liability for such a breach. While the Government Claims Act does immunize discretionary policy decisions, that immunity doesn't extend to a breach of a nondiscretionary statutory duty. 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.").

It is also important to note that charter schools are generally exempted from the Education Code provisions governing suspension and expulsion. See Educ. Code § 47610. Instead, a charter school must adopt its own suspension and expulsion policies, as part of its charter. See Educ. Code § 47605(b)(5)(J). (Note that legislation was introduced in 2011 to apply the Education Code's suspension and expulsion laws to charter schools. That bill was not enacted. See SB 433 (Liu).)

There does not appear to be any statutory requirement that a charter include any mandatory duties relating to suspension or expulsion. To test that premise, the staff examined the charter and other governing documents of a Sacramento area charter high school. That charter school's rules on suspension and expulsion appear to be entirely discretionary. That is, there do not appear to be any mandatory grounds for suspension or expulsion of a student. See <http://www.sachigh.org/pdfs/2011-12%20SCHS%20handbook.pdf>.

This is in sharp contrast to the mandatory duties in a traditional public school, where the law mandates that a student be immediately suspended and then expelled for any of the following offenses:

> (1) Possessing, selling, or otherwise furnishing a firearm. This subdivision does not apply to an act of possessing a firearm if the pupil had obtained prior written permission to possess the firearm from a certificated school employee, which is concurred in by the principal or the designee of the principal. This subdivision applies

> to an act of possessing a firearm only if the possession is verified by an employee of a school district.
>
> (2) Brandishing a knife at another person.
>
> (3) Unlawfully selling a controlled substance listed in Chapter 2 (commencing with Section 11053) of Division 10 of the Health and Safety Code.
>
> (4) Committing or attempting to commit a sexual assault as defined in subdivision (n) of Section 48900 or committing a sexual battery as defined in subdivision (n) of Section 48900.
>
> (5) Possession of an explosive.

Educ. Code § 48915(c)-(d). Under the rules of the charter school cited above, charter school officials retain discretion on whether to suspend or expel a student who commits such an offense.

Consequently, a principal in a traditional public school could face *greater* liability than a principal in a charter school, at least with respect to a breach of mandatory rules governing suspension or expulsion.

However, the fact that a charter school may have no mandatory statutory duties relating to suspension or expulsion does not mean that it will never face liability for a suspension or expulsion decision. It is possible that a charter school could face liability for a suspension or expulsion decision that is negligent or discriminatory, or that violates a student's due process rights. Each of those possibilities is discussed separately below.

Before presenting those discussions, however, the staff has a question for the Commission. In researching the matters discussed above, it occurred to us that the exemption of charter schools from the mandatory expulsion rules should perhaps be mentioned in connection with the discussion of health and safety standards. The fact that charter schools are not required to expel students who possess firearms on campus, brandish knives, sell drugs, or perpetrate sexual assaults has obvious relevance to student safety. If the Commission agrees, the following language could be added to the attached draft report, at the end of line 12 on page 34:

> Charter schools are also exempt from the law mandating the expulsion of students for specified dangerous offenses, including weapons possession, drug sales, and sexual assault. [fn. See Educ. Code § 48915(c)-(d).]

Should such language be added?

Negligent Student Suspension or Expulsion

With respect to a *negligent* suspension or expulsion decision, liability would not seem to be either uninsurable or uniquely public in character. It appears that the comprehensive liability provisions of the CCSA Insurance Policy would cover liability for a negligent suspension or expulsion decision that leads to an injury. Moreover, a private school could also face liability for a negligent suspension or expulsion decision.

For those reasons, the staff does not believe that liability for a negligent suspension or expulsion decision should be cited as an example in the discussion of uninsurable public liability.

Discriminatory Student Suspension or Expulsion

The question of liability for a *discriminatory* suspension or expulsion decision involves different considerations. In its letter, CCSA cites *Doe v. California Lutheran High School Association*, 170 Cal. App. 4th 828, 88 Cal. Rptr. 3d 475 (2009). See Exhibit p. 16. That case involved a private religious school that expelled two students for allegedly being homosexual. Public schools are prohibited from discriminating on the basis of sexual orientation. See Educ. Code § 220. Therefore, a public school could face liability for a discriminatory suspension or expulsion decision that some private schools would not face.

That is correct, but the scope of the problem is limited. *California Lutheran High School Association* was decided narrowly, on the grounds that the private religious school was not a "business establishment" for the purposes of the Unruh Civil Rights Act. Rather, it was an "expressive social organization whose primary function was the inculcation of values in its youth members." *Id*. at 838. Therefore, it was not susceptible to suit under the Unruh Act.

The case did not establish a general rule that private schools are immune from suit under the Unruh Act. To the contrary, the opinion acknowledges that one of the original purposes of the Unruh Act was to remedy discrimination in private school admissions. *Id*. at 835. Notwithstanding *California Lutheran High School Association*, many private schools can be sued for discrimination under the Unruh Act. Consequently, liability for discriminatory suspension or expulsion is not unique to public schools.

Nor is it clear that a traditional public school would always be immunized against liability for a discriminatory suspension or expulsion decision. Courts have held that a public school is a "business establishment" subject to suit under

the Unruh Act. See *Nicole M. v. Martinez Unified Sch. Dist.*, 964 F. Supp. 1369, 1388 (N.D. Cal. 1997).

If a public school's suspension or expulsion decision plainly violates a mandatory duty (such as the general prohibition on discrimination in Education Code Section 220), the discretionary act immunity would probably not be available. As discussed earlier, public officials do not have discretion to breach mandatory duties.

Furthermore, the errors and omissions coverage available under the CCSA Liability Insurance Policy expressly covers liability for discrimination.

To summarize: (1) liability for discriminatory suspension or expulsion would not be uniquely public in character, (2) traditional public schools would not necessarily be immunized for all such liability, and (3) it appears that charter schools can obtain insurance to protect against this type of liability.

For the reasons discussed above, the staff does not recommend using a discriminatory suspension or expulsion decision as an example in the attached draft. Note, however, that the footnote proposed on page 19 of this memorandum would refer to liability for illegal discrimination generally.

Due Process Violation in Student Discipline

CCSA suggests that despite the exemption of charter schools from statutory procedures governing suspension and expulsion, charter schools must still satisfy due process. "So the risks are far greater in the charter environment." See Exhibit p. 18.

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 student's procedural rights. 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. **Accordingly,**

the staff does not recommend using a due process violation in the suspension or expulsion context as an example in the attached draft.

Schoolyard Supervision

CCSA notes that a traditional public school will be immunized from liability for a discretionary act regarding the supervision of student safety in the schoolyard. See Exhibit p. 4. In support, CCSA cites the case of *Biggers v. Sacramento City Unif. School Dist.*, 25 Cal. App. 3d 269, 101 Cal. Rptr. 706 (1972).

The court in that case declined to overturn a trial court decision that the school was immunized from liability as a result of its discretionary decision regarding the appropriate degree of schoolyard security. However, the court noted that such immunity would not necessarily exist if the school had simply refused to address the issue of schoolyard safety (thereby exercising no discretion on the issue) or had negligently implemented a plan that it had earlier adopted through a discretionary decision. *Id*. at 710.

While a charter school would not be immunized from liability for the discretionary act of adopting a schoolyard security plan, it doesn't appear that a charter school's liability for negligent supervision of a child would arise from a uniquely public obligation. Private entities can also be held liable for negligently failing to protect children from third parties. See, e.g., *Juarez v. Boy Scouts of America, Inc.*, 81 Cal. App. 4th 377, 97 Cal. Rptr. 2d 12 (2000) (private Boy Scout troop could be liable for failure to protect child from criminal assault).

Furthermore, it would seem that the comprehensive liability coverage afforded by the CCSA Insurance Policy would cover a claim grounded in negligence.

For those reasons, the staff recommends against using negligent supervision of a schoolyard as an example in the attached draft.

Conclusion

The attached draft already includes significant discussion of the problem of the uninsurable public liabilities of a charter school. In the staff's view, that discussion does a good job of raising the issue and framing a possible remedy. As noted above, the Commission may want to add the footnote proposed on page 19 of this memorandum, to acknowledge that illegal discrimination and civil rights violations can give rise to some types of uninsurable public liabilities (against which a traditional public school might be immunized). In addition, the Commission may want to add the sentence suggested on page 22, which explains

that charter schools are exempt from the law mandating expulsion of students for specified dangerous offenses.

Aside from these possible modifications, the staff believes the discussion of uninsurable public liabilities is satisfactory in its current form. Does the Commission agree with that assessment?

CHARTER SCHOOLS IN OTHER JURISDICTIONS

In Memorandum 2011-22, the staff explained that the draft Tentative Report did not include information about the treatment of charter schools in other jurisdictions. That information was omitted in order to provide time to conduct further research on the issue. The concern was that some states might have been identified as treating charter schools as public *entities* for all purposes, based solely on statutory declarations that charter schools are public *schools*.

As current California law demonstrates, the fact that charter schools are legally classified as public schools does not necessarily mean that they are also public entities for all purposes. Compare *Wilson v. State Board of Educ.*, 75 Cal. App. 4th 1125, 1139, 89 Cal. Rptr. 2d 745 (1999) (charter schools are "public schools") with *Wells v. One2One Learning Foundation*, 39 Cal. 4th 1164, 141 P.3d 225, 48 Cal. Rptr. 3d 108 (2006) (charter schools not public entities for purposes of False Claims Act and Unfair Competition Law).

The staff has now taken a closer look at the laws in other charter school states. It was aided in that effort by the information provided by the California Charter Schools Association. See Exhibit pp. 5-8. We are grateful for that assistance.

The staff's new findings are presented below and have been incorporated into the attached draft final report. See Attachment, pp. 27-29.

As is detailed in the attached staff draft, 25 of the 39 known charter school jurisdictions appear to extend some or all of their governmental liability law to charter schools. All but one of them do so by means of an express statutory provision. The exception is Colorado, where a federal court decision construed the Colorado Governmental Immunity Act as applying to a charter school.

Another three jurisdictions appear to treat charter schools as public entities for all purposes, presumably including the application of their governmental liability laws.

In the remaining 11 jurisdictions, the status of charter schools is unclear.

To summarize, it appears that a significant majority (28 of 39) charter school jurisdictions treat charter schools as public entities for the purposes of governmental liability law. The attached draft reflects those findings.

OTHER CHANGES TO FINAL REPORT

Acknowledgments

The staff has added an acknowledgments section to the attached draft. See Attachment, p. 1. The purpose of this section is to recognize those who have made positive contributions to the Commission's work on this study.

In particular, the staff would like to thank Cindy Dole, who served as a volunteer Fellow in 2010. Her work on this study was invaluable.

Should the acknowledgments section be added as proposed?

Requests for Comment

The Tentative Report included some specific requests for public comment. Those requests have been deleted from the attached staff draft.

Minor Adjustment to Discussion of *Wells* Precedent

In the Tentative Report, the Commission noted that legislation declaring a charter school to be a public entity for the purposes of the Government Claims Act could cast doubt on the continuing viability of the holdings in *Wells*. See *Wells v. One2One Learning Found.*, 39 Cal. 4th 1164, 141 P.3d 225, 48 Cal. Rptr. 3d 108 (2006) (charter school not public entity for purposes of California False Claims Act and Unfair Competition Law).

In the attached staff draft, on lines 10-16 of page 32, that discussion has been supplemented with language noting that the Legislature could perhaps avoid this problem with a statutory expression of legislative intent:

> That problem could perhaps be avoided through the enactment of an express statement of legislative intent, making clear that a statute governing the application of the Government Claims Act to charter schools is not intended to affect the application of any other statute to charter schools. However, parties could still argue that the policies embodied in a legislative reform relating to the Government Claims Act should be considered in evaluating the application of other statutes (including the statutes addressed in *Wells*).

Is that new language acceptable?

Legislative Development

On page 27 of the attached draft, on line 28, a reference to a then-pending bill (AB 360 (Brownley) (2011)) has been deleted. That bill was not enacted.

CONCLUSION

After considering whether to make any changes to the text of the report, **the Commission needs to decide whether to approve a final version of the recommendation.** The report would then be distributed to the Legislature and the Governor and published through the Commission's usual process.

Respectfully submitted,

Brian Hebert
Executive Director

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June 28, 2011

Law Revision Commission
RECEIVED
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File:

VIA EMAIL and US Mail

Brian Herbert, Executive Secretary
Cindy Dole, Visiting Fellow
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739

Re: Recommended Additions to California Law Revision Commission Study G-200 Report on Charter Schools and Sovereign Immunity

Dear Mr. Herbert:

As promised at the June 9, 2011 meeting of the California Law Revision Commission, on behalf of the California Charter Schools Association ("CCSA"), we offer, for inclusion in the text of Memorandum 2011-22 "Charter Schools and the Government Claims Act" sections to address: (1) how other states treat charter schools; (2) the public policy implications of choice and accountability on risk management practices of charter schools; and (3) the public policy implications of the unavailability of insurance for governmental liabilities faced by charter schools.

1. Sovereign Immunity for Charter Schools in Other States:

We polled charter school and school district attorneys practicing in other states after you expressed concern that the prior work done for the Commission—showing that most states afford charter schools sovereign immunity—might lack rigor. We received responses from practicing attorneys in 16 of the 39 other states with charter school laws. Those responses validate your previous findings that the vast majority of states with charter school laws provide them sovereign immunity. Attorneys from 15 of 16 responding states report that charter schools are accorded the same sovereign immunities provided to school districts. Significantly, these states include those with the largest number of charter schools, including Minnesota, Illinois, Florida and Michigan.

Attached you will find a list of citations to the statutes, and where available, judicial decisions applying sovereign immunity to charter schools.

2. Public Policy Implications of Choice and Accountability.

Choice. Charter school advocates believe that choice plays a key role in making charter schools safe and encouraging strong risk management and safety practices. Education Code §47601(e) says that a legislative purpose of charter schools is to "provide parents and pupils with

expanded choices . . . within the public school system." Every student attending a charter school has chosen to do so, and may leave for a district-managed public school at any time. A school district "shall not require any pupil enrolled in the school district to attend a charter school." Ed. Code section 47605(f). "A charter school shall admit all pupils who wish to attend the school. Ed. Code section 47605(d)(2(A). Similarly, every employee of a charter school has chosen it, as no district may "require any employee of the school district to be employed in a charter school." Ed. Code section 47605(e).

If parents believe a charter school is unsafe, they can choose to send their child to the district-operated school to which they would otherwise be assigned. Charter schools are intended to provide vigorous competition" for students with school district-run schools. Ed. Code section 47601(g). This private sector principle is central to the public policy supporting charter schools.

Accountability. The Charter Schools Act is intended to provide schools "with a method to change from rule-based to performance-based accountability systems." Ed. Code section 47601(f). Accountability is fundamental to the legislative policy underlying the authorization of charter schools. Rather than prescribing health and safety rules, as it does for school districts, the Legislature requires charter schools to include in their charter petitions "procedures that the school will follow to ensure the health and safety of pupils and staff." Ed. Code section 47605(b)(5)(F).

Charter schools are held directly accountable for their risk management and safety practices on a "performance basis" in a variety of ways. First, because neither students nor employees can be assigned to a charter school (Ed. Code section 47605(e)), they choose to be there, as noted above, and may leave if they believe the school is unsafe. Because charter schools are funded based solely on student attendance, and have no other guaranteed source of funding, if many students leave, their revenues may fall below sustainable levels.

Second, a charter school can be closed for violating the health and safety rules it has adopted. Ed. Code section 47607(c)(1). A charter school can be closed without notice if the authorizing agency finds that "the violation constitutes a severe and imminent threat to the health or safety of the pupils." Ed.Code section 47607(d).

Third, charter schools must respond to inquiries and may be investigated by, not only their authorizers, but by the local county office of education (Ed. Code section 47604.4(a)) and by the State Board of Education (Ed. Code section 47604.5) which can close the school for "substantial and sustained departure from measurably successful practices."

These performance-based accountability measures have no counterpart in other public schools. For example, no school district faces the closure of its schools for failing to comply with legislatively or locally prescribed health and safety rules or practices. Consequently, while prescriptive health and safety and government transparency laws may encourage elected school

district leaders to practice good risk management, these "rule-based" measures provide the parents opportunities for input which is, at best, indirect.

3. Policy Implications of Uninsurability of Risks.

Because they are public schools, charter schools have obligations and face risks which private schools do not, such as enrolling (without discrimination) students requiring special education services. At the same time, it is unclear whether charter schools are entitled to the protections school districts enjoy under the Government Claims Act. Does insurance fill this gap? Unfortunately, not. This is an important public policy matter, as it affects the potential financial vulnerability of charter schools to risks not faced by school districts or private schools.

Commercial insurers universally exclude coverage for damages which "are expected or intended" by the insured. Standard insurance policy forms specifically exclude coverage for "law enforcement" activities. Yet, in the course of enforcing laws designed to protect children against abuse and ensuring campus safety, charter schools do engage in limited law enforcement activities.

Commercial insurance routinely excludes a variety of "wrongful acts," such as liabilities for breaches of mandatory duties imposed by statute. The Act protects school districts against liability solely because of errors in recordkeeping (*Grenell v. City of Hermosa Beach* (1980) 103 Cal.App.3d 864 (city not liable because homebuyer relied on erroneous city records showing dwelling unit was properly permitted); not adopting a policy (*Wood v. County of San Joaquin* (2003) 111 Cal.App.4th 960 (county not liable for motor boat injury because it failed to adopt boating rules for lake); or failing to follow detailed state regulations in some respects (*Clausing v. San Francisco Unified School District* (1990) 221 Cal.App.3d 1224 ((failure to adopt specific rules on corporal punishment).[1]

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[1] There are many other examples. A school official may carry out his or her reporting and investigatory duties when there is suspected child abuse involving a student—without fear of suit. (*Newton v. County of Napa* (1990) 217 Cal.App.3d 1551.) A school and school counselor is not be liable for refusal of collegiate association to accept coursework from high school (*Brown v. Compton Unified School District* (1998) 68 Cal.App.4th 114). School districts are protected against a student's claim that requirements for passing a course were fraudulently concealed by a teacher (*Chevlin v. Los Angeles Community College District* (1989) 212 Cal.App.3d 382).) School employees may enforce such policies as school dress codes, rules on student assemblies, picketing on campus, searching of lockers, or seizure of student property, without having to be experts on constitutional law. (*E.g., O'Toole v. Superior Court* (2006) 140 Cal.App.4th 488.) School board members do not have personal liability for making the important decision as to whether to hire or terminate a school superintendent's employment. (*Caldwell v. Montoya* (1995) 10 Cal.App.4th 972 .) A principal is protected from suit for

Insurers in California may not insure intentional misconduct under Insurance Code section 533. Certain kinds of misconduct and damages (such as punitive damages) are not insurable because they are deemed to be against public policy.

When decisions by a board of a charter school to enforce a statute or adopt a policy are challenged, they will often fall within these common commercial insurance exclusions. School districts may defend employees against criminal proceedings and pay punitive damages on their behalf under statutorily-prescribed conditions. (E.g., Gov. Code §825(b).)

The unavailability of insurance for significant risks faced by charter schools because they operate public schools and carry out governmental obligations is an important public policy matter to be considered when determining whether to clarify application of the Government Claims Act to charter schools.

We hope you find this letter of assistance in finalizing the report.

Very truly yours,

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

GVM/aer
Enclosure

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suspending, or expelling a student, or rejecting funds associated with religious advertisements. (*Skinner v. Vacaville Unified School District* (1995) 37 Cal.App.4th 31; *Nicole M. v. Martinez Unified School District* (1997) 964 F.Supp. 1369.) If school officials carefully consider how much supervision of the schoolyard is needed, they are protected from liability. (*Biggers v. Sacramento City Unified School District* (1972) 25 Cal.App.3 269.)

JUNE 2011 SURVEY OF SOVEREIGN IMMUNITY FOR CHARTER SCHOOLS

By Greg Moser for

California Charter School Association

STATE	COMMENTS
ARKANSAS	Arkansas, as of the 2011 Legislative Session, has extended tort immunity to charter schools. See, A.C.A. 21-9-301.
COLORADO	In Colorado, the Charter Schools Act does not specifically address governmental immunity, but there is at least one federal court decision holding that charter schools are public entities for purposes of the state's governmental immunity law. CRS 24-10-101 through 120; See *King v. United States*, 53 F.Supp.2d 1056, 1067 (D.Colo.1999), rev'd in part, 301 F.3d 1270 (10th Cir.2002).
FLORIDA	Under Florida law, charter schools are public schools. Section 1002.33(1), Florida Statutes. For the purposes of tort liability, the governing body and employees of a charter school are governed by section 768.28, Florida Statutes (which governs sovereign immunity of the state for itself and for its agencies or subdivisions). Section 1002.33(12)(h) Florida Statutes.
ILLINOIS	In IL they are, like school districts, covered by the Local Governmental and Governmental Employees Tort Immunity Act. See 105 ILCS 5/27A-5(g)(3); 745 ILCS 10/1-101 *et seq*.
MICHIGAN	In Michigan, charter schools are granted governmental immunity as provided in section 7 of 1964 PA 170, MCL 691.1407. See MCL 380.503(7) (for public school academies); MCL 380.523(4) (for urban high school academies); MCL 380.553(7) (for schools of excellence) and MCL 380.1311e(7) (for strict discipline academies).

STATE	COMMENTS
MINNESOTA	In Minnesota, a charter school is a school district for tort liability purposes covered by our municipal tort liability act. The charter school citation is Minn. Stat. sec. 124D.10, subd. 8(k).
MISSOURI	Missouri's general sovereign immunity statute protects charter schools (Mo. Rev. Stat. § 537.600) because (1) public schools are entitled to immunity under that statute, and (2) the Missouri charter school statute (Mo. Rev. Stat. § 160.400.1) provides that a charter is "an independent public school."
NEW HAMPSHIRE	New Hampshire has charter schools. The governing statute, N.H. R.S.A. 194-B, provides that they shall be considered public schools. However, each charter school operates as a separate corporation independent of any school district.
NEW MEXICO	Our charter schools are treated as a public body and given the same status for purposes of immunity as school districts. Tort Claims Act, NMSA 1978 Sections 41-4-1, et seq. They are described as public schools in the Charter Schools Act, NMSA Sections 22-8B-1, et seq. and are not created under a nonprofit identity. The entire Public School Code, NMSA 1978 Section 22-1-1, et seq. recognizes and treats charter schools as public schools.
NEW YORK	Charter schools are not political subdivisions and do not have immunity as a result.
OHIO	In Ohio, charter schools are known as "community schools." They are sponsored by a public school. Ohio Revised Code Section 2744.01(F) expressly states that they are "political subdivisions" entitled to the governmental immunity provisions of Chapter 2744. Also, the Ohio Supreme Court just recently held that a community school not only was a political subdivision entitled to the protections of the statute but it could, like any other political subdivision, immediately appeal a determination that it was not engaged in a governmental function. Electronic Classroom of Tomorrow v. Cuyahoga Cty. 2010-1401 (2-16-11)

STATE	COMMENTS
OREGON	In Oregon, charter schools are subject the Oregon Tort Claims Act, which is the statute that governs municipal liability in general. Essentially they are subject to tort liability to the same extent other municipalities are.
PENNSYLVANIA	24 P.S. Section 17-1714-A(a)(2) of the Pennsylvania Charter School Law indicates that a charter school may only be sued to the same extent as a political subdivision, claiming immunity under the Political Subdivision Tort Claims Act. *Warner v. Lawrence*, 69 Pa. D. & C.4th 511.
TEXAS	Tex. Educ. Code Sec. 12.1056. IMMUNITY FROM LIABILITY. In matters related to operation of an open-enrollment charter school, an open-enrollment charter school is immune from liability to the same extent as a school district, and its employees and volunteers are immune from liability to the same extent as school district employees and volunteers. A member of the governing body of an open-enrollment charter school or of a charter holder is immune from liability to the same extent as a school district trustee. Amended by Acts 1999, 76th Leg., ch. 1335, Sec. 1, eff. June 19, 1999. Renumbered from Sec. 12.105(c) and amended by Acts 2001, 77th Leg., ch. 1504, Sec. 6, eff. Sept. 1, 2001.
UTAH	In Utah, all public charter schools are defined as "public schools" under Utah law (see Utah Code 53A-1a-503.5 available here: http://le.utah.gov/~code/TITLE53A/htm/53A01a050305.htm). Because of this definition, the Utah Division of Risk Management is willing to insure Utah's Charter Schools under Utah's governmental immunity act, which caps liability at roughly $600,000 per individual or $2 million per incident (amounts change every two years).

STATE	COMMENTS
WASHINGTON D.C.	Statute provides immunity from civil liability for schools, trustees, employees, etc. for acts in scope of "official duties." Exceptions for gross negligence, intentional and criminal acts. Code section is 38-1802.04.

EMAIL FROM BRIAN HEBERT TO GREGORY V. MOSER (SEPTEMBER 1, 2011)

Subject: Your Letter of June 28, 2011

Thanks again for your letter.

I found the data you provided on the law of other states very helpful in jumpstarting my own research on that issue. You'll be happy to know that I've confirmed our original findings, that the majority of jurisdictions extend their government liability law to charter schools. The final report will be revised to include that data, as I'd hoped.

I do have a few issues I'd like to discuss before I start drafting my memo (in two weeks).

I'm clear on your arguments about accountability and choice and will lay out possible revisions to strengthen those points in our final report.

I'm less clear on the issue about uninsurability.

In my First Supplement to Memo 2011-17 (http://clrc.ca.gov/pub/2011/MM11-17s1.pdf), I discussed the issue, based on my understanding of your concern.

As I wrote there, I believe that the problem exists when a charter school faces liability that (1) is not faced by traditional public schools because of their GCA immunities, (2) is not faced by private schools because it results from a uniquely public activity or obligation, and (3) cannot be readily insured against.

In the memo, I ran through the examples you'd provided in your prior letter, applying that rubric to see which fit the pattern.

In your latest letter, some of your prior examples have been reused, without any response to the concerns that I'd raised about whether they were actually good examples of the problem as I understood it. (Or if you have given a response, I've missed it somehow. Apologies, if that's the case.)

For example, see the following discussions in my memo, at the indicated pages:

Grenell on pages 6-7.
Newton on pp 7-8.
Brown v. Compton and *Chevlin* on p. 8.
Skinner on p. 8.
Biggars on pp. 8-9.

In light of my initial analysis, and the fact that I'm not yet aware of any contrary facts or arguments that would show that I was wrong, I can't see recommending that those examples be added to the report.

If you want those examples included, you'll need to explain why my initial analysis was wrong.

Also, while I'm no expert on insurance law or practice, I was able to find a specimen of a commercially available insurance product, specifically designed for schools, that does not seem to include any general exclusion for a breach of a statutory duty. There are some specific statutory exclusions, but I don't see a blanket one. I've attached a copy of the specimen policy.

If you think I'm misreading that policy, please let me know why.

Also, I noticed that CCSA provides JPA insurance coverage for charter schools. Would it be possible for you to forward me a specimen copy of the coverage provided under that plan?

I may have other questions as I get more into preparing for my next memo on this topic, but I'd really welcome input on the points discussed above, before September 15 if possible. It would help me to better understand your position and explain to the Commission why your proposed changes should be made.

Thank you,

Brian Hebert
California Law Revision Commission
c/o UC Davis School of Law
400 Mrak Hall Drive, Rm. 1128
Davis, CA 95616
www.clrc.ca.gov

San Diego Cooperative Charter School

September 12, 2011

BY EMAIL (commission@clrc.ca.gov)
AND REGULAR U.S. MAIL

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739

Re: Charter Schools and the Government Claims Act (G-200)
Comments on June 2011 Tentative Report

To the Commission and its Staff:

On behalf of the San Diego Cooperative Charter School ("SDCCS"), I write to comment briefly on the June 2011 Tentative Report addressing whether charter schools should be deemed public entities for purposes of the Government Claims Act.

SDCCS is a nonprofit public benefit corporation. Our school opened its doors ten years ago this month and has grown and flourished in San Diego (see website address above for more background information). SDCCS thus would be directly impacted by any legislation clarifying the current uncertainty on whether a charter school is a public entity for purposes of the Government Claims Act.

We commend the Commission for its well-written report, and its thoughtful and extensive analysis. We have just one overarching suggestion. The Commission's report might have a greater impact on the Legislature if it begins with the premise that a charter school, like other public schools, *should* be deemed a public entity in this context.

The policy considerations dictating this conclusion, eloquently outlined in the Tentative Report, are compelling. Although the Commission is correct that balancing the policy considerations is ultimately for the Legislature, the lawmakers do so based on the Commission's recommendations and assessments after careful study. It seems to us that the only question is the proper legislative approach codifying the principle that a charter school, at least a nonprofit public benefit corporation, is a public entity under the Government Claims Act. On this score, it may be useful in the Final Report to summarize the various legislative approaches up front rather than at the end of the document. A busy legislator reading the Final Report, or legislative staffer, needs to understand quickly not just the need for legislation but the options, in particular, for what to enact into law.

We greatly appreciate the Commission's attention to this important subject. Please feel free to contact me with any questions regarding these comments.

Very truly yours,

Dr. Wendy Ranck-Buhr (principal@sdccs.org)
Principal, San Diego Cooperative Charter School

CC: K. Rochells; L. Berlanga

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October 3, 2011

VIA EMAIL ONLY
bhebert@clrc.ca.gov

Brian Hebert, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739

Re: More on Charter Schools and Insurance Coverage Issues

Dear Mr. Hebert:

On behalf of the California Charter Schools Association ("CCSA") I wanted to thank you for the consideration you have given to our comments, and to respond to your emailed observations regarding the uninsurability of certain risks faced by charter schools. To reiterate our position, it is that charter schools are entitled to the *same* immunities as other public schools because they carry out an essential function of the State of California under the close supervision of its educational authorities.[1] Because private schools operate under fundamentally different legal rules, we believe their liabilities are simply not comparable or relevant to policymaking regarding charter schools.

Nonetheless, you have asked us to help identify charter school liabilities which are both uninsurable and not faced by private schools, which we do in this letter. By identifying such risks the California Law Revision Commission might be better able to suggest legislation to equalize the risks faced by charter schools and private schools. Again, we disagree. Charter schools are free public schools, not private schools. Whether public school students choose charter schools or district-run public schools, the same governmental immunities should protect those operating such enterprises.

"School Leaders Risk Protector" and other policies. We have examined the specimen AIG policy entitled "School Leaders Risk Protector" ("AIG Policy") which you forwarded as an example of coverage available to public schools in California. Before commenting on the coverage it offers we must offer a couple of caveats. First, we have no information regarding whether this policy is *actually* available to California charter schools or school districts. We

[1] On September 27, 2011, the United States Supreme Court granted review of the 9th Circuit's decision in *Filarsky v. Delia* to address this very question. Federal courts have split on the question of when such persons are entitled to immunity. A copy of the petition is attached for your consideration.

have not seen it before. Second, we don't know whether, assuming this coverage is available, it is issued with endorsements that substantially change its scope.

Nonetheless, assuming that it *is* actually available, the AIG Policy provides a lot less coverage than you might think. To start, although there is no specific exclusion for "breach of a statutory duty," the policy effectively excludes liabilities arising from a charter school's failure to comply with statutory duties in many ways.

First, a breach of a statutory duty is typically enforced by bringing a writ against a public officer, with damages flowing from that under CCP §1095. Such costs and damages are excluded from the definition of "Damages." (AIG Policy, p.2, par. 2(e)(2).) Writs may be brought only "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office . ..." (CCP §1085). The Charter Schools Act and its regulations, as well as the terms and conditions of a charter, and the conditions of approval which are part of its authorization, have been held to be "laws" administered by public "officers" which may be enforced through a writ of mandate. (*See*, *California School Boards Association v. State Board* (2010) 191 Cal.App.4th 530 (conditions of charter approval may be enforced by third party via writ).) This is simply not so for private schools whose policies and procedures are not "laws" administered by public "officers." So writs cannot be brought against private schools.

Second, the policy's definition of "damages" also denies payments for "matters that may be deemed uninsurable" in California. (See AIG Policy, p.2, par 2(e)(7)). This would preclude recovery for many violations of statute under Insurance Code §533 and Civil Code §2773 which preclude insurance for acts which are "willful" or "known" to be unlawful. While this is typically excluded from coverage in insurance policies by language stating there is no coverage for damages "expected or intended by the insured," this policy effectively uses different words to get to the same place.

Third, note that costs of complying with special education laws—a public school burden not shared by private schools—are also expressly excluded by this definition. (AIG Policy, par. (e)(5).)

Fourth, there are several exclusions which, taken together, also exclude coverage for breaches of statutory duties. Claims resulting indirectly from "intentional or knowing violation of the law" are excluded. (AIG Policy, p. 7, par 4(a)(2).) "Intentional" merely means the violation was not negligent. So any policy-making by a board would qualify. (*See, e.g., Trevino v. Gates* (1996) 99 F.3d 911 (city policy of indemnifying police officers provides basis for civil rights claim).) Claims resulting indirectly from "invasion of any right of privacy" or by virtue of a "custom or policy" including "any . . . violation of a civil right" are excluded. (AIG Policy, p.7, par 4(b)(6).) Civil rights violations are also excluded from "Claims" under exclusions (c) and (d). As you previously noted, under the Bane Act (Civil Code §52.1) charter schools are exposed to claims based on violations of constitutional and statutory rights—even when a school

district would be protected under the Government Claims Act immunities. (*O'Toole v. Super. Ct*, 140 Cal App.4th 488.) This language would also exclude civil rights claims under Federal law (e.g., 42 U.S.C. §1983).[2] So to the extent charter schools allegedly violate constitutional rights—which private schools can't—this policy would provide scant protection against damages.

Exclusions for "restraint of trade" "unfair competition" and "similar laws" (AIG Policy, p. 9, par. q) mean charter schools under this policy form would not be covered for the False Claims Act and other theories of liability, such as those asserted in *Wells v. One2One Learning Foundation,* which were predicated on receipt of governmental funding (based on statutory definitions of average daily attendance) for students—something school districts have in common with charter schools, but private schools do not. (Of course some unfair competition claims for damages could be brought against private schools and charter schools, but not district-run schools.)

In sum, the AIG Policy leaves large areas of exposure for charter schools which private schools don't face. Charter schools' policy-making and other decisions are subject to Constitutional limits, their operations are closely intertwined with the State, and they are subject to more statutory restrictions and obligations than private schools.

As you requested, I'm sending you a copy of the form of coverage contract used by the California Charter Schools Association Joint Powers Authority. Our prior letter used examples from that specimen.

Statutory obligations. As to your discussions of other obligations imposed on charter schools, let me start by just observing that the relief available against a public agency for violation of a statute under the Bane Act (as noted above) is pretty automatic, whereas many statutory obligations that might apply to a private school may not give rise to a private right of action. More specifically, upon close inspection, there are marked differences between the statutory obligations of public and private schools which give rise to charter school liabilities in circumstances in which school district officials would have immunity, and private schools would face little or no liability.

Student Records. In the first example you cite, you correctly note that like public schools, private schools must keep *attendance* records. But it is the records reflecting student achievement and discipline which are most likely to result in claims against charter schools and not private schools. As to grades and other records of student conduct, private schools are free to do as they like (though they must give parents access), while public schools are required to

[2] The 9th Circuit is currently reviewing whether a California charter school is entitled to 11th Amendment immunity as the trial court found. *Doe v. Willits Unified School District* (Case No. 10-17880).

provide parents with substantial due process rights to view, challenge and demand correction of student records. (See, e.g., Ed. Code section 49070, 49071).[3]

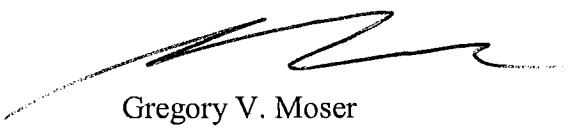
Must charter schools provide comparable "due process" to challenge the records? If a teacher maliciously changed grades, would the family have a claim? As we indicated previously, *Grenell v. City of Hermosa Beach* (1980) 103 Cal.App.3d 864 suggests a school district would be immune from suit in either event (though a writ might be sought to correct the records per the statute). In addition, the statutory immunities for misrepresentation would protect both the district and its officials. A charter school would have no such protection.

Suspension and expulsion. We pointed out that school districts generally are immune from liability for decisions regarding student suspension and expulsion, citing *Skinner v. Vacaville Unif. School Dist.,* 37 Cal. App. 4th 31 (1995) (decision to not expel the student fell "squarely within the discretionary immunity provision of Gov. Code section 820.2"). For different reasons, private schools generally face no liability for suspension or expulsion decisions. (See, *Doe v. California Lutheran High School Association* (2009) 170 Cal. App. 4th 828 (private religious high school had no obligation to educate students in a homosexual relationship).)

Even though the precise processes prescribed by Education Code section 48900 *et seq.* are inapplicable to charter schools and private schools, there can be little doubt that a charter school which suspended or expelled a student without providing any due process, or under the circumstances described in *Skinner* and *Doe,* would face civil liability. Under the Charter Schools Act, charter schools must adopt procedures for suspension and expulsion (Ed. Code §47605(b)(5)(J)); must admit all who wish to attend, must be nonsectarian; and may not discriminate against any pupil on the basis of ethnicity, national origin, gender or disability. (Ed. Code §47605(d).) In like circumstances, private schools have no similar obligation to provide due process or avoid discrimination, while school districts have discretionary immunity insulating their officials from personal liability for flawed decision-making.

Again, we appreciate the chance to engage on these important issues.

Very truly yours,



Gregory V. Moser

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[3] Notably, private schools are not subject to the Family Education Rights and Privacy Act (FERPA; 20 U.S.C. §1232g) which regulates maintenance of all student records by public schools. Like other public schools that provide special education services under federal law, charter schools comply with FERPA.

Brian Hebert
California Law Revision Commission
c/o UC Davis School of Law
400 Mrak Hall Drive, Rm. 1128
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October 27, 2011

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Founder & Executive Director

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Middle School Principal

Etta Kralovec, Ph.D.
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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

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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.

CONSUMER ATTORNEYS OF CALIFORNIA

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Niall P. McCarthy

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Legislative Director
Nancy Peverini

Political Director
Lea-Ann Tratten

December 12, 2011

Mr. Brian Hebert
California Law Revision Commission
c/o UC Davis School of Law
400 Mrak Hall Drive, Rm. 1128
Davis, CA 95616

RE: CHARTER SCHOOLS AND THE GOVERNMENT TORT CLAIMS ACT

Dear Mr. Hebert:

I write to offer a few additional comments as the Commission continues its study on the differences between charter and other schools for purposes of the Government Tort Claims Act. Specifically, we wanted to comment on the First Supplement to Memorandum 2011-33, issued November 17, 2011.

First, CAOC agrees with the staff comments that although physical conditions in a non-traditional facility may be different from conditions in a traditional school, this does "not necessarily mean that parents expect that the charter schools will be subject to different health and safety standards." Indeed, I would argue that most parents, while realizing charter schools are by definition different than other schools, do not realize that the charters are allowed to operate outside of the health and safety standards that apply to regular schools.

Second, CAOC disagrees with the comments submitted by the Charter School Association as it relates to the limitation on the availability of insurance for liability arising from a civil rights violation. The Association comments that, "Your discussion of civil rights misses the crucial point that civil right liability requires intentional acts," and, therefore, "That element of a civil rights claim is what takes it out of coverage…" We believe this statement is both overly broad and an inaccurate statement of the law. As you can see in the attached memo by CAOC's Associate Legislative Advocate:

> The applicability of Section 533 to civil rights violations under Bane and Unruh will depend on whether the discriminatory act was "willful." While Unruh claims will always require intentional conduct, except for ADA claims, the standard for intentional is lower than the standard for "willful." Further, in claims under the Bane Act, plaintiffs need not allege that defendants acted with discriminatory animus or intent, so long as those acts were accompanied by the requisite threats,

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intimidation, or coercion. Thus, the issue will be proving “willful” conduct for purposes of section 533.

Thank you for considering our views on this important topic.

Sincerely,

Nancy Peverini
Legislative Director

Memorandum

December 1, 2011

TO: Nancy Peverini

FR: Jacqueline Serna

RE: California Insurance Code section 533 coverage and the Unruh and Bane Acts

---

Question Presented: Insurance code section 533 bars insurance coverage for willful acts. California Civil code section 51, the Unruh Civil Rights Act and section 52.1, the Bane Act, cover illegal discrimination of civil rights. Does Section 533 preclude coverage for violations of the Unruh and Bane Acts?

Short Answer: The applicability of Section 533 to civil rights violations under Bane and Unruh will depend on whether the discriminatory act was "willful." While Unruh claims will always require intentional conduct, except for ADA claims, the standard for intentional is lower than the standard for "willful." Further, in claims under the Bane Act, plaintiffs need not allege that defendants acted with discriminatory animus or intent, so long as those acts were accompanied by the requisite threats, intimidation, or coercion. Thus, the issue will be proving "willful" conduct for purposes of section 533.

Detailed Answer:

a. <u>Insurance Code Section 533 bars coverage for "willful" acts but not acts that are reckless or negligent.</u>

California Insurance Code section 533 excludes coverage for "willful acts." This section establishes an implied exclusionary clause which must be read into every insurance contract. (*J.C. Penney Casualty Ins. Co. v. M.K.* (1991) 52 Cal.3d 1009).

i. <u>"Willful" requires something more than the mere intentional doing of an act, constituting ordinary negligence.</u>

Determining whether an act is "willful" requires an inquiry into *whether the insured intended to engage in conduct that is wrongful*. (*Save Mart Supermarkets v. Underwriters* (N.D. Cal. 1994) 843 F. Supp. 597), italics added). "Willful" requires something more than the mere intentional doing of an act, constituting ordinary negligence. Likewise, gross negligence or recklessness do not constitute willful acts for purposes of section 533. (See *United Western Grocers, Inc. v. Twin City Fire Ins.* (9th Cir. 2006) 457 F.3d 1106) (Public Policy does not exclude coverage for gross negligence or recklessness).

Further, the court has determined that certain inherently harmful acts are deemed intentional as a matter of law and thus would be barred from liability coverage. (*J.C. Penney, supra,* 52 Cal.3d at 1021).

In conclusion, whether the act satisfies the threshold for "willful," a higher threshold than "intentional," will be the deciding factor in whether the insurer will owe a duty to indemnify the insured for harm caused by the act.

b. The Unruh Act

California Civil code section 51, the Unruh Civil Rights Act, provides protection from discrimination by all "business establishments" in California, including housing and public accommodations.

i. Unruh Requires Proof of Intentional Discrimination except in ADA claims

The California Supreme Court held in *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1175 [278 Cal.Rptr. 614] that "a plaintiff seeking *to establish a case under the Unruh Act* must plead and prove intentional discrimination...." (*Harris, supra,* 52 Cal.3d at p. 1175, italics added).

In June 2009, however, the California Supreme Court carved out an exception for plaintiffs seeking damages for ADA violations under the Unruh Act. (*Munson v Del Taco Inc.* 6 Cal.4th 66194 [Cal.Rptr.3d 685]). The *Munson* Court held that a plaintiff who seeks damages under the Unruh Act, claiming the denial of full and equal treatment on the basis of disability in violation of the Unruh Civil Rights Act and the ADA, need not prove intentional discrimination.

Thus, for purposes of the Unruh Act, intentional conduct is required except in ADA claims.

c. The Bane Act

California Civil code section 52.1, the Tom Bane Civil Rights Act, allows a plaintiff to file a lawsuit against someone who "interferes" or "attempts to interfere" by "threats, intimidation or coercion" with the plaintiff's exercise or enjoyment of any state or federal constitutional or legal right. The statute applies to private actors as well as government agents. Further, the plaintiff need not be a member of a protected class--for example, a class defined by race or gender.

i. Bane Act does not require a showing of discriminatory animus or intent

To obtain relief under the Bane Act, a plaintiff need not allege the defendant acted with discriminatory animus or intent; a defendant is liable if he or she interfered with the plaintiff's constitutional rights by the requisite threats, intimidation, or coercion. (*Austin B. v. Escondido Union School Dist*. (App. 4 Dist. 2007) 149 Cal.App.4th 860, [57 Cal.Rptr.3d 454], review denied). (see *Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 843, [11 Cal.Rptr.3d 692, 87 P.3d 1] (finding that in pursuing relief for constitutional violations under section 52.1,

plaintiffs need not allege that defendants acted with discriminatory animus or intent, so long as those acts were accompanied by the requisite threats, intimidation, or coercion.)

d. Applicability of Section 533 to Bane and Unruh Act Claims will depend on whether discriminatory act was "willful"

Civil rights violations cannot be indemnified by a liability insurer, pursuant to Section 533 if they are willful. Violations including racial harassment and sexual discrimination require willful conduct as defined by section 533 and would be barred from coverage. (*Allstate Ins. Co. v. Tankovich* (N.D.Cal.1991) 776 F.Supp.1394); (*Markel American Ins. Co. v. G.L. Anderson Ins. Services, Inc.* (E.D.Cal.2010) 715 F.Supp.2d 1068). However, not all civil rights violations require "willful" conduct for liability to attach.

Conclusion: In conclusion, non-willful civil rights violations may not be barred by Section 533 and the insurer could indemnify the insured for these acts.

#G-200

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT

REPORT

Charter Schools and the Government Claims Act

August 2012

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739
650-494-1335
<commission@clrc.ca.gov>

SUMMARY OF 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 report sets out the Commission's 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.

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CHARTER SCHOOLS AND THE GOVERNMENT CLAIMS ACT

INTRODUCTION

Charter schools are publicly funded schools of choice. They are part of the public school system[1] and are subject to a number of the duties and restrictions that govern public schools.

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

Because a charter school can operate as a "quasi-public entity" (i.e., a private entity that is created, pursuant to statutory authority, to perform a public function[4]), questions have arisen about whether a charter school should be treated as a public entity for various statutory purposes.

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

In the same case, the Court declared that charter schools "do not fit comfortably within any of the categories defined, for purposes of the [Government Claims Act[7]] as 'local public entities.'"[8] Although that statement was not a necessary part of the Court's holding, it did signal that the Court was inclined against viewing a charter school as a public entity for the purposes of the Government Claims Act.

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1 See Educ. Code § 47615; Wilson v. State Bd. of Educ., 75 Cal. App. 4th 1125, 1137, 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 Found., 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, 741, 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.

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

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

This report was prepared pursuant to that authority. It presents the Commission's findings on the matter. The remainder of the report is 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)).

CHARTER SCHOOLS ACT

The Charter Schools Act of 1992[12] authorizes the creation and operation of charter schools in California.

Charter schools are publicly funded schools of choice.[13] In other words, 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]

In 2009, California had more than 850 charter schools that serve about 2.5% of public school students between kindergarten and twelfth grade.[16]

The stated purpose of charter schools is to:

- Improve student learning.
- Increase learning opportunities for students, particularly those identified as academically low achieving.
- Encourage innovation in teaching methods.
- Create new professional opportunities for teachers.
- Provide families with 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]

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:

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

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12 Educ. Code § 47600 *et seq*.

13 R. Zimmer & R. Buddin, *Making Sense of Charter Schools: Evidence from California* (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*.

- Must provide for special education students in the same manner as traditional public schools.[22]
- Must comply with statewide testing programs.[23]
- Must have credentialed teachers for "core" courses.[24]

Creation and Revocation of Charter

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

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

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

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

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

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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* note 16, at 100.

27 Educ. Code § 47602(b).

28 Educ. Code §§ 47605, 47606.

29 Educ. Code §§ 47605, 47605.5.

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).

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

Oversight and Accountability

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

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

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

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

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

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

Governance Structure

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

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34 Educ. Code § 47607(c).

35 Educ. Code § 47607(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(c), 47613.

40 Educ. Code § 47604.33.

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

42 See Educ. Code § 47604.

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

Although a charter school can be formed as a private nonprofit corporation, all charter schools are considered part of the public school system for purposes of Article IX of the California Constitution.[44]

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

Operational Issues

Personnel

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

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

Financing

For purposes of the state constitution and school financing, a charter school is considered to be under the exclusive control of the officers of the public schools.[49] Charter school funding is similar to traditional public school funding. The funding follows the student, whether the student attends a traditional public school or a charter school.[50]

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43 Educ. Code § 47604(c).

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).

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

Facilities

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

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

Health and Safety Issues

The Field Act

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

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

In contrast, a private school is subject to the Private Schools Building Safety Act.[57] That legislation is analogous to the Field Act. It was intended to ensure that children attending a private school will have similar earthquake safety protections in their buildings as public school children.[58]

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

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

52 Educ. Code § 47614(a).

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

54 Educ. Code § 17280.

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

56 *Id.*

57 Educ. Code §§ 17320-17336.

58 Educ. Code § 17322.

General Building Standards

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

School Health and Safety Standards

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

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

GOVERNMENT CLAIMS ACT

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

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

(2) It deters behavior likely to cause injury.

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

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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 first aid kit), 32060-32066 (art supplies with certain toxic substances are prohibited).

63 Educ. Code § 47605(b)(5)(F).

The unique role of government in society makes the application of those principles problematic.[64]

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

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

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

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

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

The Government Claims Act[69] balances the competing policies of governmental liability and immunity. The Act was the result of a Commission study and

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64 Van Alstyne, *A Study Relating to Sovereign Immunity*, 5 Cal. L. Revision Comm'n Reports 1, 271-72 (1963) (discussing fault theory, which requires party who breached duty of care and caused injury to compensate injured party, and risk or strict liability theory, which spreads cost of 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* note 65, at 810.

67 See, e.g., Alden v. Maine, 527 U.S. 706, 750-51 (1999) (discussing how protecting 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 possibility of government making policy decision about acceptable levels of risk and having court rule on reasonableness of that policy decision if sovereign immunity is not available).

69 Gov't Code §§ 810-998.3.

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

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

Relevant features of the Government Claims Act are summarized below.

Scope of Application

The Government Claims Act applies to "public entities"[73] and "public employees."[74] Public entities are further subdivided into the "state," a "local public entity," or a "judicial branch entity."[75]

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

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

Claim Presentation

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

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70 1963 Cal. Stat. ch. 1681.

71 *Number 1 — Tort Liability of Public Entities and Public Employees*, *supra* note 65, 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 Gov't Code § 811.2 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, 900.6.

76 Gov't Code §§ 900.4, 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 City of Stockton v. Super. Ct., 42 Cal. 4th 730, 739, 171 P.3d 20, 68 Cal. Rptr. 3d 295 (2007).

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

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

Time Limits

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

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

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

Identification of Public Entity

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

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80 Van Alstyne, *A Study Relating to Sovereign Immunity*, *supra* note 64, at 311.

81 See *Stockton*, 42 Cal. 4th at 738; Baines Pickwick Ltd. v. City of Los Angeles, 72 Cal. App. 4th 298, 303, 85 Cal. Rptr. 2d 74 (1999); Van Alstyne, *supra* note 64, at 317.

82 *Id*.

83 Gov't Code § 911.2(a)-(b) (specifying that six-month claims include cause of action for death, or for injury to 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. Dep't. 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 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 timely claim bars lawsuit).

86 Gov't Code §§ 911.4, 911.6; *Recommendation Relating to Sovereign Immunity, Number 2— Claims, Actions and Judgments Against Public Entities and Public Employees,* 4 Cal. L. Revision Comm'n Reports 1003, 1009 (1963).

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

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

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

Content of Claims

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

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

Public Entity Liability

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

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87 Gov't Code § 53051 (requiring public entity to file statement with Secretary of State that includes entity's name and address, as well as name and address of members of its governing body, and requiring Secretary of State and each county clerk to maintain 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 § 910 (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, 99 P.3d 500, 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).

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

- A public entity is vicariously liable for an injury caused by an act or omission of an employee within the scope of employment (unless the employee is immune from liability).[97]
- A public entity is liable for an injury caused by an act or omission of an independent contractor, to the same extent that a private person would be.[98]
- A public entity may be liable for an injury that results from the breach of a mandatory duty imposed by an enactment that is designed to protect against the type of injury that occurred.[99]
- A public entity may be liable for an injury caused by a "dangerous condition" of its property.[100]

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

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

Relevant Immunities

Discretionary Act

A public employee is generally "not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."[103] This immunity also shields the public employer against vicarious liability for the employee's act or omission.[104]

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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 California 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).

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

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

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

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

Misrepresentation

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

Punitive or Exemplary Damages

A public entity is not liable for punitive or exemplary damages.[111] Nor is a public entity authorized to indemnify an employee for any "part of a claim or judgment that is for punitive or exemplary damages."[112]

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105 *Number 1 — Tort Liability of Public Entities and Public Employees, supra* note 65, at 812 (noting that, without discretionary immunity, actions of public entity or employee could be scrutinized by court—effectively allowing court to determine policy).

106 California Government Tort Liability Practice, *supra* note 101, at §§ 10.8-10.12, at 616-22.

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 California Government Tort Liability Practice, *supra* note 101, §§ 10.8-10.29, at 616-52.

109 Gov't Code § 818.8.

110 *Id*.

111 Gov't Code § 818.

112 Gov't Code § 825(a).

Punitive damages are intended to punish a defendant for oppression, fraud, or malice. "They are inappropriate where a public entity is involved, since they would fall upon the innocent taxpayers."[113]

Furthermore, the imposition of a large exemplary damage award against a public school "would place severe and disproportionate financial constraints on [the school's] ability to provide the free education mandated by the Constitution…."[114]

Execution of Law

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

These immunities preserve government's discretion on how to best serve the public:

> Public officials must be free to determine these questions without fear of liability either for themselves or for the public entities that employ them if they are to be politically responsible for these decisions.
>
> The remedy for officials who make bad law, who do not adequately enforce existing law, or who do not provide the people with services they desire, is to replace them with other officials. But their discretionary decisions in these areas cannot be subject to review in tort suits for damages if government is to govern effectively.[117]

Act Under Apparent Authority of Invalid Law

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

Defense and Indemnification

The potential for personal liability might inhibit public employees' willingness to fully perform their jobs. To alleviate those concerns, the defense and indemnification provisions of the Government Claims Act were adopted.[119] These

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

114 Wells v. One2One Learning Found., 39 Cal. 4th 1164, 1198-99, 141 P.3d 225, 48 Cal. Rptr. 3d 108 (2006).

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.

provisions encourage public employees to execute their employment duties with zeal and without fear that they would be personally required to pay for the costs of a judgment or defense.[120] These statutory rights to defense and indemnification are in addition to any rights that may exist under another enactment or contract.[121]

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

STATUS OF CHARTER SCHOOL UNDER EXISTING LAW

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

By statute, charter schools are deemed to be part of the public school system for constitutional purposes, operating under the jurisdiction of the public schools and under the exclusive control of public officials.[123] A court of appeal has affirmed that status.[124]

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

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

- They are funded with public money.
- They are nonsectarian.
- They cannot charge tuition.
- They are bound by the same nondiscrimination rules as traditional public schools.
- They must offer a minimum duration of days and minutes of instruction.

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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 Bd. of Educ., 75 Cal. App. 4th 1125-37, 89 Cal. Rptr. 2d 745 (1999).

125 Gov't Code §§ 6528, 20610.

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

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

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

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

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

All of these issues are discussed more fully below.

Wilson v. State Board of Education

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

The court of appeal upheld the trial court's decision, holding that (1) charter schools are public schools for the purposes of the state constitution, (2) charter schools are under the jurisdiction of the public school system, and (3) charter

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).

school officials are officers of public schools as long as they administer charter schools according to the law and their charters.[129]

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

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

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

The decision to create charter schools as part of the public school system was a "valid exercise of legislative discretion aimed at furthering the purposes of education."[132] The court explained:

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

The charter school opponents argued that charter schools violate Section 8 of Article IX of the California Constitution, which provides in part that, "No public money shall ever be appropriated for the support of … any school not under the exclusive control of the officers of the public schools…." The court rejected that argument, noting the express statutory language declaring that charter schools are part of the public school system.[134] Beyond that, the court found that charter schools are in fact under the exclusive control and jurisdiction of the public school system:

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

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.

> [We] wonder what level of control could be more complete than where, as here, the very destiny of charter schools lies solely in the hands of public agencies and offices, from the local to the state level: school districts, county boards of education, the Superintendent and the Board. The chartering authority controls the application approval process, with sole power to issue charters. … Approval is not automatic, but can be denied on several grounds, including presentation of an unsound educational program. … Chartering authorities have continuing oversight and monitoring powers, with (1) the ability to demand response to inquiries concerning financial and other matters … (2) unlimited access to "inspect or observe any part of the charter school at any time" …; and (3) the right to charge for actual costs of supervisorial oversight …. As well, chartering authorities can revoke a charter for, among other reasons, a material violation of the charter or violation of any law. … Short of revocation, they can demand that steps be taken to cure problems as they occur. … The Board, upon recommendation from the Superintendent, can also revoke any charter or take other action in the face of certain grave breaches of financial, fiduciary or educational responsibilities. … Additionally, the Board exercises continuous control over charter schools through its authority to promulgate implementing regulations. … Finally, public funding of charter schools rests in the hands of the Superintendent.[135]

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

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

Furthermore, "charter school officials are officers of public schools to the same extent as members of other boards of education of public school districts. So long as they administer charter schools according to the law and their charters, as they are presumed to do, they stand on the same constitutional footing as noncharter school board members."[137]

The court of appeal completes its opinion by noting that more detailed standards and guidelines for charter schools would defeat the purpose of encouraging innovation and experimentation.[138]

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

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

137 *Id*. at 1141.

138 *Id*. at 1147.

Wells v. One2One Learning Foundation

In *Wells*, a group of students and their parents sued a group of charter schools. All but one of the charter school defendants were organized as nonprofit public benefit corporations. All of the charter school defendants, including the unincorporated school, were operated by a California nonprofit public benefit corporation.[139]

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

The trial court held that the charter school defendants were public entities subject to the claim presentation requirements of the Government Claims Act and dismissed the claims for failure to comply with those requirements.[140] The plaintiffs appealed. The court of appeal concurred that charter schools are public entities. The court of appeal also held that public entities can be sued under the False Claims Act.

The California Supreme Court reversed on several grounds.

Application of False Claims Act

The Court held that public entities may not be sued under the False Claims Act. However, the Court also held that the charter school defendants were not public entities under the False Claims Act. Thus, the school district could not be sued under the False Claims Act, but the charter school defendants could be sued under the False Claims Act.[141]

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

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

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139 Wells v. One2One Learning Found., 39 Cal. 4th 1164, 1200-01, 141 P.3d 225, 48 Cal. Rptr. 3d 108 (2006).

140 *Id*. at 1183.

141 *Id*. at 1196-97, 1201.

142 *Id*. at 1192.

In evaluating whether application of the False Claims Act to a school district would infringe upon sovereign governmental powers, the Court focused on the fiscal effect of the statute and the sharply limited fiscal resources of school districts.[143] The False Claims Act imposes treble damages and penalties on a person who is found to have submitted a false claim. The Court held that the Legislature did not intend for such "draconian" fiscal penalties to apply to cash-strapped school districts. To do so "would place severe and disproportionate financial constraints on their ability to provide the free education mandated by the Constitution — a result the Legislature cannot have intended."[144]

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

The Court reasoned that the depletion of the fiscal resources of a charter school would not necessarily interfere with the State's operation of the public school system. Even if a charter school were to close because of False Claims Act penalties, the charter school's students and remaining resources would simply return to the school district. Consequently, applying the California False Claims Act remedies to charter schools would not fundamentally threaten the provision of "adequate free public educational services."[147]

Government Claims Act

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

In its analysis, the Court acknowledged that charter schools are part of the public school system and are deemed to be school districts for specific purposes. However, the Court found that those purposes do not explicitly include the Government Claims Act, and that "for reasons previously discussed in connection with the [False Claims Act]," charter schools "do not fit comfortably within any of

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143 *Id*. at 1193-97.

144 *Id*. at 1198-99.

145 *Id*. at 1201.

146 *Id*.

147 *Id*. at 1202.

the categories defined, for purposes of the [Government Claims Act], as 'local public entities.'"[148]

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

However, the Court's statements on this point may have been *dicta* (i.e., statements unnecessary to its decision and thus of limited precedential value), because the Court had another reason for concluding that the claims were not subject to the Government Claims Act. The Court decided that False Claims Act claims are not subject to the Government Claims Act. The Court also noted that the False Claims Act imposes special sealed filing requirements that would be defeated by presentation of a claim against a defendant.[149]

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

Unfair Competition Law

The Court also held that charter schools are "persons" subject to suit under the Unfair Competition Law. It reached that conclusion even though public entities have been held to be exempt from suit under the Unfair Competition Law.

In its analysis, the Court reiterated that charter schools are not considered public entities for the purposes of the False Claims Act. In addition, the Court observed that charter schools compete with traditional public schools and should therefore be subject to the Unfair Competition Law, which provides remedies for unfair competitive practices. Lastly, the Court concluded that application of the Unfair Competition Law to charter schools would not infringe the state's sovereign obligations to operate public schools:

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

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148 *Id*. at 1214.

149 *Id*. at 1215.

150 *Id*. at 1204.

Knapp v. Palisades Charter High School

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

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

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

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

"Good Government" Laws

Traditional public school districts are subject to certain "good government" laws that require open public board meetings (the Brown Act[156]), public access to district records (the California Public Records Act[157]), and restrictions on conflicts of interest in decision making (the Political Reform Act of 1974[158]).

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

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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*.

Political Reform Act of 1974

The Fair Political Practices Commission ("FPPC") is authorized to issue written opinions and advice interpreting the Political Reform Act of 1974.[159]

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

> (1) Whether the impetus for formation of the corporation originated with a government agency;
>
> (2) Whether it is substantially funded by, or its primary source of funds is, a government agency;
>
> (3) Whether one of the principal purposes for which it is formed is to provide services or undertake obligations which public agencies are legally authorized to perform and which, in fact, they traditionally have performed; and
>
> (4) Whether the [c]orporation is treated as a public entity by other statutory provisions.[161]

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

The Ralph M. Brown Open Meeting Act

The Brown Act requires that the meetings of a "legislative body" of a "local public entity" be open to the public. A school district is a "local public entity" under the Brown Act.[163]

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

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

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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).

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

California Public Records Act

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

The application of the Public Records Act to local quasi-public entities is coextensive with the application of the Brown Act (it expressly incorporates the Brown Act's definition of "legislative body.")[167]

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

No Consensus on Application of Good Government Laws to Charter Schools

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

In 2010, legislation was introduced to make clear that charter schools are subject to these good government laws.[168] The bill was approved by the Legislature but was vetoed by the Governor. In his veto message Governor Schwarzenegger characterized the bill as imposing "new" requirements on charter schools, suggesting he did not believe the good government laws already applied to charter schools.[169]

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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) (2010).

169 *Id*. (veto message).

TREATMENT OF CHARTER SCHOOLS IN OTHER JURISDICTIONS

As part of the background for this report, the Commission examined the laws of 39 other U.S. jurisdictions that authorize charter schools.

Twenty-three of those jurisdictions have express statutory provisions that apply their governmental liability laws to charter schools, either in whole or in part.[170] In addition, a federal court has held that Colorado's governmental liability law applies to its charter schools.[171] Finally, in four other jurisdictions, the statutes appear to treat charter schools as public entities for all purposes, presumably including the application of governmental liability law.[172] Consequently, 28 of the 39 charter school jurisdictions appear to apply state governmental immunity laws to their charter schools.[173]

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170 Arkansas (Ark. Code Ann. § 21-9-301); Delaware (Del. Code Ann. tit. 14, § 504(d)); District of Columbia (D.C. Code § 38-1802.04(17)); Florida (Fla. Stat. § 1002.33(12)(h) (tort liability of governing body and employees limited pursuant to Fla. Stat. Ann. §768.28)); Idaho (Idaho Code Ann. § 33-5204(2)); Illinois (105 Ill. Comp. Stat. 5/27A-5(g)(3)); Massachusetts (Mass. Gen. Laws ch. 71, § 89(y)); Michigan (Mich. Comp. Laws §§ 380.503(7), 380.523(4), 380.553(7), 380.1311e(7)); Minnesota (Minn. Stat. § 124.D.10 subd. 8(k)); Missouri (Mo. Rev. Stat § 160.405(11)); New Hampshire (N.H. Rev. Stat. Ann. § 194-B:3); New York (N.Y. Educ. Code § 2853(g)); North Carolina (N.C. Gen. Stat. § 115C-238.29F(c)(1)); Ohio (Ohio Rev. Code Ann. § 2744.01(F)); Oklahoma (Okla. Stat. tit. 70, § 3-136: 13); Oregon (Or. Rev. Stat. § 338.115(i)); Pennsylvania (24 Pa. Cons. Stat. § 17-1714-A); Rhode Island (R.I. Gen. Laws § 16-77-4.1); South Carolina (S.C. Code Ann. § 59-40-50(B)(4)); Tennessee (Tenn. Code Ann. § 49-13-125); Texas (Tex. Educ. Code Ann. § 12.1056); Utah (Utah Code Ann. § 53A-1a-514); Virginia (Va. Code Ann. § 22.1-212.16).

171 King. v. United States, 53 F. Supp. 2d 1056, 1067 (D. Colo. 1999), *rev'd in part*, 301 F.3d 1270 (10th Cir. 2002).

172 Hawaii (Haw. Rev. Stat. § 302B-9(d) ("Notwithstanding any law to the contrary, as public schools and entities of the State, neither a charter school nor the office may bring suit against any other entity or agency of the State."); see also Hawaii Office of Information Practices, Op. Ltr. 05-09 (charter schools are "agencies" subject to sunshine laws)); Nevada (Nev. Rev. Stat. Ann. § 386.549 ("The governing body of a charter school is a public body.")); New Jersey (N.J. Stat. Ann. § 18A:36A-11(a) ("A charter school shall operate in accordance with its charter and the provisions of law and regulation which govern other public schools…")); Wyoming (Wyo. Stat. Ann. § 21-3-304(e) ("A charter school, as a public school, is a governmental entity.")).

173 In the remaining 11 jurisdictions, the status of charter schools under governmental liability laws has not been clearly addressed. Alaska (Alaska Stat. § 14.03.255(a)); Arizona (Ariz. Rev. Stat. § 15-181; 2000 Ariz. AG LEXIS 5); Connecticut (Conn. Gen. Stat. § 10-66ff); Georgia (Ga. Code Ann. §§ 20-2-2062(3), 20-2-2065); Iowa (Iowa Code §§ 256F.1-256F.10); Indiana (Ind. Code § 20-24-8-4 (not subject to statutes that govern school boards and school districts)); Kansas (Kan. Stat. Ann. § 72-1903); Louisiana (La. Rev. Stat. Ann. § 17:3996; 2010 U.S. Dist. LEXIS 6019 ("The fact that the charter school performs a governmental function does not make it a political subdivision of the state. The Supreme Court has stated that "a private entity perform[ing] a function which serves the public does not make its acts state action."); 2004 La. AG LEXIS 424, 7-8 (La. AG 2004) ("A type 2 charter school is an independent public school that is operated pursuant to a charter between a nonprofit corporation and the Board of Elementary and Secondary Education. La. R.S. 17:3973. A charter school is not a political subdivision of the state and is therefore not subject to the mandates set forth in Title 43, Chapter 4 of the Louisiana Revised Statutes."));

However, it should be noted that only one of those 28 jurisdictions appears to broadly exempt charter schools from the health and safety laws that govern public schools.[174] Twenty-three of the 28 jurisdictions expressly provide by statute that charter schools are subject to school health and safety laws, in whole or in part.[175] The four remaining jurisdictions that apply governmental immunity law to charter schools permit regulatory requirements to be waived on the approval of specified public authorities.[176] The Commission does not know whether, as a practical matter, such waivers are granted for health and safety requirements.

In sum, most jurisdictions that extend governmental immunities to charter schools also require compliance with school health and safety laws. That fact is significant. The Commission believes that a combination of governmental immunity and exemption from school health and safety laws could, in some situations, lead to heightened health and safety risks.[177]

LEGAL AND POLICY ANALYSIS

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

Legal Implications

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

Maryland (Md. Code Ann., Educ. § 9-102); New Mexico (N.M. Stat. Ann. § 22-8B-4(P)); Wisconsin (Wis. Stat. § 118.40(7)(am) (district to determine whether charter school is "instrumentality" of the school district)).

174 Idaho Code Ann. § 33-5210(4).

175 Arkansas (Ark. Code Ann. § 6-23-103); Delaware (Del. Code Ann. tit. 14, § 512(12)); District of Columbia (D.C. Code § 38-1802.04(c)(4)(B)); Florida (Fla. Stat. § 1002.33(16)(a)(5)); Hawaii (Haw. Rev. Stat. § 302B-9(a)(3)); Illinois (105 Ill. Comp. Stat. 5/27A-5(d)); Louisiana (La. Rev. Stat. Ann. § 17:3996(A)); Massachusetts (Mass. Gen. Laws ch. 71, § 89(bb)); Michigan (Mich. Comp. Laws § 380.503(6)); Minnesota (Minn. Stat. § 124.D.10 subd. 8(a)); Missouri (Mo. Rev. Stat § 160.405(5)(2)); Nevada (Nev. Rev. Stat. Ann. § 386.527(8) (facilities)); New Hampshire (N.H. Rev. Stat. Ann § 194-B:8(II)); New Jersey (N.J. Stat. § 18A:36A-11(a)); New York (N.Y. Educ. Code § 2854(1)(b)); Ohio (Ohio Rev. Code Ann. § 3314.072(B) (school building safety standards)); Oklahoma (Okla. Stat. tit. 70, § 3-136(a)(1)); Oregon (Or. Rev. Stat. § 338.115(j)); Pennsylvania (Pa. Cons. Stat. § 17-1722-A (regulation of facilities); see also Pa. Cons. Stat. § 17-1732-A (specified health and safety laws applicable)); South Carolina (S.C. Code Ann. § 59-40-50(B)(1)); Tennessee (Tenn. Code Ann. §§ 49-13-105(b)(2), 49-13-11(c)(1)); Texas (Tex. Educ. Code § 12.104(b)(2)(K)); Utah (Utah Code Ann. § 53A-1a-507(3)).

176 Colorado (Colo. Rev. Stat. § 22-30.5-104(b)); Rhode Island (R.I. Gen. Laws § 16-77.3-6); Virginia (Va. Code Ann. § 22.1-212.6(B)); Wyoming (Wyo. Stat. Ann. § 21-3-304(g)).

177 See discussion below.

- In most cases, a person wishing to sue a charter school for money or damages would be required to present a claim, prior to filing the lawsuit.[178]
- A charter school would be immune from punitive damages.[179]
- A charter school would be immune from liability for common law torts.[180]
- A charter school would be immune from liability for an employee's discretionary act.[181]
- A charter school would be immune from liability for an employee's misrepresentation.[182]
- A charter school would be immune for an employee's act or omission, exercised with due care, in the execution or enforcement of law.[183]
- A charter school would be immune for an employee's initiation of, or failure to initiate, a judicial or administrative proceeding within the scope of employment.[184]
- A charter school would be immune for an employee's good faith act under the apparent authority of an enactment that is unconstitutional, invalid or inapplicable.[185]
- A charter school would be subject to special rules on liability for a dangerous condition of property.[186]

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

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

Those indirect effects are discussed more fully below.

Uncertainty as to Application of Government Claims Act

As discussed above, in *Wells* the California Supreme Court did not squarely decide whether a charter school is a public entity for purposes of the Government

178 Gov't Code §§ 900-950.8.

179 Gov't Code §§ 818, 825.

180 Gov't Code § 815.

181 Gov't Code § 820.2.

182 Gov't Code § 818.8.

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

184 Gov't Code § 821.6.

185 Gov't Code § 820.6.

186 Gov't Code § 835.

Claims Act. It was not necessary for the Court to decide that issue, because it held that the Government Claims Act does not apply to the type of claim at issue in the case (a False Claims Act *qui tam* action). Consequently, there is no controlling Supreme Court precedent on the status of a charter school under the Government Claims Act.

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

Furthermore, while the *Knapp* precedent is binding on all inferior California courts, the Supreme Court and other courts of appeal are not bound and could reach a contrary result.[187]

In addition, a recent unpublished federal trial court decision contradicted *Knapp*, holding that a charter school is a public entity for the purposes of California's Government Claims Act.[188] It is unclear why the federal court did not defer to California appellate authority in construing a California statute.[189] Nonetheless, the federal decision arguably creates a division of authority on the issue, whatever its precedential or persuasive weight.

Consequently, it is not certain that *Knapp* is the last word on the status of incorporated charters under the Government Claims Act. Moreover, there is no precedential guidance on the status of a charter school that is formed as a dependent component of a school district, rather than as a separately incorporated entity.

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

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

New Uncertainty Regarding Validity of* Wells *Holdings

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

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

188 See Dubose v. Excelsior Educ. Ctr., No. EDCV 10-0214 GAF (C.D. Cal. Sept. 22, 2010). See also Commission Staff Memorandum 2011-7 (Jan. 31, 2011).

189 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").

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

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

That problem could perhaps be avoided through the enactment of an express statement of legislative intent, making clear that a statute governing the application of the Government Claims Act to charter schools is not intended to affect the application of any other statute to charter schools. However, parties could still argue that the policies embodied in a legislative reform relating to the Government Claims Act should be considered in evaluating the application of other statutes (including the statutes addressed in *Wells*).

Policy Implications

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

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

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

(2) It deters behavior likely to cause injury.

(3) It encourages the use of precautions to prevent injury.[190]

Applying the fault theory of tort liability to government entities can be problematic. Government engages in many activities that serve the public at large. These activities are mandated by law and reflect policy decisions made by the people through their legislators. A public entity may not have the luxury of halting a service simply because it is deemed too costly or risky.[191]

Although sovereign immunity was originally grounded in the idea that government entities are sovereign and cannot be sued without permission, more modern rationales have developed to justify the application of sovereign

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

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

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

Protecting the public fisc is important for several reasons. The costs of defending actions for injuries caused by government activity could be very expensive. To cover such costs, resources may be diverted from important government activities or tax rates may increase. Further, when a public entity is involved, shifting losses away from an innocent injured party places the burden on another arguably innocent party — the taxpayer.[192]

The potential of having to allocate a large portion of the public fisc to money damages may significantly impair the government's ability to govern. Resources are limited and the government should be allowed to decide how to best allocate those resources. A public entity cannot effectively carry out its duties if too many of its resources are devoted to defending lawsuits and paying claims, or if the entity constrains important activities in order to avoid potential claims.[193]

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

Compensation

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

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

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

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

Health and Safety Risk

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

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

193 *Id*. at 750.

risk to student health and safety than the policies they would adopt in the absence of immunity.

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

Charter schools are exempt from a number of health and safety laws that were enacted to protect school children. For example, charter schools are not subject to the Field Act earthquake safety standards.[194] Nor are charter schools required to prepare the comprehensive school safety plans and disaster procedures that are required of all other public schools.[195]

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

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

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

Public Accountability

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

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

As discussed earlier, there is disagreement about whether charter schools are subject to the Brown Act and the California Public Records Act. If not, then these

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

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

"good government" laws would not be available as a check on charter school policy-making discretion. In that case, immunity from liability for injuries that result from discretionary policy-making decisions could lead charter school policy makers to tolerate higher levels of risk than they would if their decision making process were open to public scrutiny and involvement.

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

> **#3 The coupling of discretionary immunity with the possible exemption from good government laws could lead to the adoption of riskier health and safety policies in charter schools than in traditional public schools.**

Pedagogical Innovation

The principal purpose of charter schools is to foster pedagogical innovation and improvement in the public school system.[196] By exempting charter schools from most of the requirements of the Education Code and granting them a significant degree of operational independence from school districts, the Charter Schools Act frees charter schools to experiment.

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

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

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

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

Protecting the Public Fisc

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

> As we will explain, in light of the stringent revenue, appropriations, and budget restraints under which all California governmental entities operate, exposing them

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196 See Educ. Code § 47601.

> to the draconian liabilities of the [False Claims Act] would significantly impede their fiscal ability to carry out their core public missions. In the particular case of public school districts, such exposure would interfere with the state's plenary power and duty, exercised at the local level by the individual districts, to provide the free public education mandated by the Constitution.
>
> …
>
> Hence, there can be no doubt that public education is among the state's most basic sovereign powers. Laws that divert limited educational funds from this core function are an obvious interference with the effective exercise of that power. Were the [False Claims Act] applied to public school districts, it would constitute such a law. If found liable under the [False Claims Act], school districts, like other [False Claims Act] defendants, could face judgments — payable from their limited funds – of at least two, and usually three, times the damage caused by each false submission, plus civil penalties of up to $10,000 for each false claim, plus costs of suit. Such exposure, disproportionate to the harm caused to the treasury, could jeopardize a district financially for years to come. It would injure the districts' blameless students far more than it would benefit the public fisc, or even the hard-pressed taxpayers who finance public education.[197]

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

> If a charter school ceases to exist, its pupils are reabsorbed into the district's mainstream public schools, and the ADA revenues previously allotted to the charter school for those pupils revert to the district.
>
> The [Charter Schools Act] was adopted to widen the range of educational choices available within the public school system. That is a salutary policy. Yet application of the [False Claims Act's] monetary remedies, however harsh, to the charter school defendants presents no fundamental threat to maintenance, within the affected districts, of basically adequate free public educational services. Thus, application of the [False Claims Act] to the charter school operators in this case cannot be said to infringe the exercise of the sovereign power over public education.[198]

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

The establishment of a charter school involves a significant investment of time, money, and effort. The operation of the charter school involves further investment and effort. Those investments are made with the expectation that educational

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197 Wells v. One2One Learning Found., 39 Cal. 4th 1164, 1193-95, 141 P.3d 225, 48 Cal. Rptr. 3d 108 (2006).

198 *Id*. at 1201.

benefits will result — improved learning opportunities for students and potentially useful experimentation in pedagogical practices. If a charter school is forced to close, that investment and the anticipated benefits would be lost. Furthermore, there would be transition costs as students and teachers are integrated back into other schools in the district. In addition to those costs, the transfer of students would be disruptive for the affected students and for the schools that receive them.

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

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

For the most part, charter schools can avoid these fiscal threats through liability insurance. However, there are some sources of liability that may be difficult or impossible to insure against. For example, general liability insurance does not cover punitive damages, because they are considered punishment for intentional wrongful acts. Consequently, a charter school could face a large punitive damage award against which it would not be insured.[199] Under the Government Claims Act, public entities are immune from punitive damages.[200]

In addition, charter schools, like traditional public schools, cannot charge tuition.[201] This places a limit on the fiscal resources available to charter schools. Unlike private schools, they cannot simply raise tuition rates in order to self-insure or pay litigation costs. This makes them more vulnerable than private schools to having their finances depleted as a result of tort liability.

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

#5 Application of the Government Claims Act to a charter school would help to preserve a charter school's scarce fiscal resources from depletion, and thereby prevent the negative consequences associated with closing a charter school, which could occur in the event of a judgment that is not covered by readily available liability insurance.

Uniquely Public Obligations

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

- Charter schools must be nonsectarian.

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199 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.

200 Gov't Code § 818.

201 Educ. Code § 47605(d).

- Charter schools cannot charge tuition.
- Charter schools are bound by the same nondiscrimination rules as traditional public schools.
- Charter schools must provide for special education students in the same manner as traditional public schools.

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

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

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

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

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

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

Summary

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

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

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

#3 The coupling of discretionary immunity with the possible exemption from good government laws could lead to the adoption of riskier health and safety policies in charter schools than in traditional public schools.

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

#5 Application of the Government Claims Act to a charter school would help to preserve a charter school's scarce fiscal resources from depletion, and thereby prevent the negative consequences associated with closing a charter school, which could occur in the event of a judgment that is not covered by readily available liability insurance.

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

ALTERNATIVE APPROACHES

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

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

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

The Commission makes no recommendation on which of the alternative approaches should be adopted. Each presents a different balancing of contending policy considerations. Those considerations involve fundamental questions about the value of charter schools within the public education system and the importance of any heightened level of risk to student health and safety that might result from extending sovereign immunity to charter schools. There are likely to be sharp differences in perspective on how best to balance those important concerns. Consequently, there is no clear answer as to which alternative approach would best serve the People of California. An issue of this fundamentally political character would be best decided by the People's elected representatives, not by the Commission.

"Dependent" Charter Schools: A Special Case?

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

- An "independent" charter school formed as a nonprofit corporate entity, separate from its chartering authority.

- A "dependent" charter school that is not legally separate from its chartering authority.

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

Liability of Chartering Entity

A chartering entity is not liable for the debts, obligations, or torts of a charter school that is formed as a nonprofit public benefit corporation.[202] This means that the finances of the chartering school district will not be directly affected by any liability imposed on an incorporated charter school. Consequently, concerns about conserving the public fisc are not strongly implicated with respect to the liability of an incorporated charter school. No matter what liability such a school incurs, none will directly reach the chartering school district.

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

Legal Identity

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

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

Such a distinction could be expressed as follows:

> (a) A dependent charter school is deemed to be a public entity.
>
> (b) For the purposes of this section, "dependent charter school" means a charter school that is formed as an organizational subdivision of the public entity that chartered it, rather than as a separate legal entity. "Dependent charter school" does not include a charter school that is formed as a nonprofit public benefit corporation.

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202 See Educ. Code § 47604.

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

Alternative #1. Public for All Purposes

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

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

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

The Commission is not authorized to evaluate the substantive merits of treating a charter school as a public entity for the purposes of laws other than the Government Claims Act.[203] Because it lacks that authority, the Commission has not undertaken such an analysis. The alternative discussed here is offered only to provide the Legislature with a complete range of options for its consideration.

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

Advantages

With respect to the legal and policy implications discussed above, the advantages of the alternative under discussion would be as follows:

- **Legal Clarity**. There would be no ambiguity as to whether a charter school is governed by the Government Claims Act. Nor would there be any ambiguity regarding the status of charter schools under other laws affecting public entity liability (e.g., the False Claims Act).
- **Good Government Laws as a Check on Policy Discretion**. The application of good government laws to charter schools would act as a check on policy-making discretion. This would reduce the likelihood that immunity for discretionary policy decisions would lead to a higher level of student health and safety risk.
- **No Chilling of Pedagogical Innovation.** Immunity from liability for discretionary decisions would make it easier for charter schools to adopt pedagogical innovations that might otherwise impose too great a risk of liability.

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203 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.

- **Protection of Limited Fiscal Resources.** The immunities conferred by the Government Claims Act would help to avoid the loss of investment, loss of pedagogical benefit, disruption, and transition costs that might result if a charter school were forced to close as a result of a large judgment against the school. This would only be an advantage with respect to types of liability for which liability insurance is not readily available (e.g., punitive damages or liability for intentional wrongs).

Disadvantages

With respect to the legal and policy implications discussed above, the disadvantages of the alternative under discussion would be as follows:

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

Alternative #2. Public for Government Claims Act Purposes Only

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

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

Advantages

With respect to the legal and policy implications discussed above, the advantages of the alternative under discussion would be as follows:

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

Disadvantages

With respect to the legal and policy implications discussed above, the disadvantages of the alternative under discussion would be as follows:

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

Alternative #3. Combined Approach

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

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

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

The Commission is not authorized to evaluate the substantive merits of treating a charter school as a public entity for the purposes of good government or health and safety laws.[204] Because it lacks that authority, the Commission has not undertaken such an analysis. The alternative discussed here is offered only to provide the Legislature with a complete range of options for its consideration.

The discussion of advantages and disadvantages that follows is not intended as commentary on whether a charter school should be subject to any law other than

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204 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.

the Government Claims Act. It is intended only as an evaluation of how the alternative discussed here would affect the legal and policy implications discussed earlier in the report.

Advantages

With respect to the legal and policy implications discussed above, the advantages of the alternative under discussion would be as follows:

- **Legal Clarity**. There would be no ambiguity as to whether a charter school is governed by the Government Claims Act.
- **No Chilling of Pedagogical Innovation.** Immunity from liability for discretionary decisions would make it easier for charter schools to adopt pedagogical innovations that might otherwise impose too great a risk of liability.
- **Protection of Limited Fiscal Resources.** The immunities conferred by the Government Claims Act would help to avoid the loss of investment, loss of pedagogical benefit, disruption, and transition costs that might result if a charter school were forced to close as a result of a large judgment against the school. This would only be an advantage with respect to types of liability for which liability insurance is not readily available (e.g., punitive damages or liability for intentional wrongs).
- **Health and Safety Risks Minimized.** The application of general student health and safety laws would reduce the likelihood that immunity for discretionary policy decisions would lead to a higher level of student health and safety risk. The application of good government laws to charter schools would have a similar effect.

Disadvantages

With respect to the legal and policy implications discussed above, the disadvantages of the alternative under discussion would be as follows:

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

Alternative #4. Limited Application of Government Claims Act

A statute could be enacted to declare that a charter school is a public entity for the purposes of the Government Claims Act, but only with respect to a claim arising from a charter school's uniquely public obligations. That is, the Government Claims Act would only apply to a claim against a charter school if the claim is a type of claim that can only be brought against a public entity.

Thus:

> If a claim against a charter school is a type of claim that can only be brought against a public entity, the claim is subject to Division 3.6 (commencing with Section 810) of Title 1 of the Government Code. For the purposes of this section, a charter school is deemed to be a public entity.

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

For example, under this approach, the Government Claims Act would apply to the following claims (which can only be brought against a charter school or other school 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 48907 (protecting student expression in public schools).
- 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).

Under the approach described above, the Government Claims Act would not apply to claims that could also be brought against a private school. For example:

- A general tort or contract claim.
- A claim brought pursuant to the California False Claims Act.[205]
- A claim alleging that a charter school violated the general whistleblower protections provided in Labor Code Section 1102.5.

Advantages

With respect to the legal and policy implications discussed above, the advantages of the alternative under discussion would be as follows:

- **Uniform Treatment of Public Claims.** Under existing law, charter schools are uniquely disadvantaged. They face liabilities that arise from their obligations as public schools, without the Government Claims Act protections that are available to other public schools. This approach would eliminate that disparity in treatment.
- **Reduced Chilling of Pedagogical Innovation.** Immunity from liability for some discretionary decisions (those relating to uniquely public obligations) would make it easier for charter schools to adopt pedagogical innovations that might otherwise impose too great a risk of liability.
- **Protection of Limited Fiscal Resources.** The immunities conferred by the Government Claims Act would help to avoid the loss of investment, loss of

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205 Gov't Code § 12650 *et seq*.

pedagogical benefit, disruption, and transition costs that might result if a charter school were forced to close as a result of a large judgment against the school. This would only be an advantage with respect to types of liability for which liability insurance is not readily available (e.g., punitive damages or liability for intentional wrongs).

Disadvantages

With respect to the legal and policy implications discussed above, the disadvantages of the alternative under discussion would be as follows:

- **Likely Increase in Litigation.** A rule that provides significantly different treatment for different types of claims is likely to lead to confusion and increased litigation, as parties misunderstand or dispute the proper classification of particular claims. These problems are likely to be pervasive, given that each individual claimant must determine, in a short period of time, whether his or her claim is subject to the claims presentation requirements of the Government Claims Act. Because an error on this point could lead to dismissal of a claim, it seems likely that the issue would be litigated frequently.
- **Compensation Undermined.** Some innocent persons injured by charter schools would not be compensated for their injuries.

Alternative #5. Not Public for Government Claims Act Purposes

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

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

Advantages

With respect to the legal and policy implications discussed above, the advantages of the alternative under discussion would be as follows:

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

Disadvantages

With respect to the legal and policy implications discussed above, the disadvantages of the alternative under discussion would be as follows:

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

CONCLUSION

There are competing legal and policy considerations for each of the approaches presented in this report. None of the approaches is clearly superior to the others. They each present a different balancing of legitimate policy concerns. For that reason, the Commission makes no recommendation on which of the alternatives would strike the best policy balance.

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

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

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