

## First Supplement to Memorandum 2012-30

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

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The Commission has received another letter from Gregory V. Moser, representing the California Charter Schools Association (“CCSA”). See Exhibit. Mr. Moser encourages the Commission to approve the staff draft report that is attached to Memorandum 2012-30, with three general revisions. His suggested revisions are discussed briefly below.

#### **Recommend that Governmental Immunities be Extended to Charter Schools**

The draft final report analyzes the legal and policy implications of various alternative approaches to the question of whether the Government Claims Act should apply to charter schools, but it does not recommend any one of those approaches over the others. The reason for that general approach was discussed at length in a prior memorandum, under the heading “One Alternative or Many?” See Memorandum 2011-17, pp. 24-27.

CCSA urges the Commission to abandon that general approach and instead recommend that California charter schools “be granted the same immunities as those provided to local public agencies and school districts, as the vast majority of states with charter school laws have done.” See Exhibit pp. 1-2.

#### **Revise and Extend Discussion of School Choice and Accountability**

Memorandum 2012-30 presents possible revisions to the staff draft final report, in order to place greater emphasis on the effect of school choice and accountability in promoting good health and safety practices in charter schools. See generally Memorandum 2012-30, pp. 4-9. In particular, the memorandum presented three possible additions to the draft report.

(1) On page 7, the memorandum presents the possibility of adding the following language to the end of line 18 of page 34 of the staff draft report:

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Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website ([www.clrc.ca.gov](http://www.clrc.ca.gov)). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting.

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.

(2) On page 9, the memorandum suggests that it might be appropriate to add language along the following lines (with appropriate citations) after line 20 of page 10 of the staff 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.

(3) Finally, on page 10, the memorandum presents the possibility of adding language along the following lines to a footnote at the end of line 18 of page 34 of the staff 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.

CCSA recommends that its own language (which was quoted in Memorandum 2012-30), be used in two instances. See Exhibit p. 2.

First, CCSA suggests replacing the language set out on page 7 of Memorandum 2012-30, with the following:

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.

...

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.

Second, CCSA recommends the addition of language substantially similar to the following:

- (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).

In support of its recommendations, CCSA asserts that traditional “district-run schools face no penalty for the lack of a written campus safety plan....” Exhibit p. 2. While CCSA is correct that traditional schools do not face *closure* for a failure to adopt or maintain safety plans, it is incorrect to state that there is *no* penalty for a failure to comply with school safety planning requirements. Nor is it accurate to state that “there is no outside enforcement authority responsible for maintenance of school district campus safety standards.” *Id.*

In fact, there are a number of mechanisms to ensure that school safety plans are completed as required by law, with accountability to the public and to state and local authorities. See Educ. Code §§ 32287 (monetary penalty for noncompliance), 32288(a) (school district or county office of education approval required), (b) (public participation procedure involving broad community cross-section), (c) (notice of non-compliance to State Department of Education). See also Educ. Code §§ 32262 (“partnership” between Attorney General and Superintendent of Public Instruction to develop and administer school safety programs), 32265 (regional conferences on successful programs and techniques), 32270 (establishing “statewide school safety cadre for the purpose of facilitating interagency coordination and collaboration among school districts, county offices of education” and other specified groups), 32275 (annual assessment of safety programs).

### **Revise Description of Charter School Facilities Funding**

As part of the general background information on charter schools in California, the staff draft report has a very brief discussion of the law governing charter school facilities funding:

#### **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.<sup>51</sup>

The Charter Schools Act declares that “public school facilities should be shared fairly among all public school pupils, including those in charter schools.”<sup>52</sup> 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.<sup>53</sup>

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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).

See staff draft attached to Memorandum 2012-30, at page 9. CCSA has a number of concerns about that discussion.

First, CCSA believes that the discussion creates a misleading impression, that shortcomings as to charter school facilities funding have been “addressed.” See Exhibit pp. 2-3.

It is possible that a reader might interpret the first paragraph as suggesting that the problem of limited facilities funding has been *fully* addressed. In order to avoid giving that impression, it might be appropriate to make the following changes:

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

This would acknowledge the described reform, without implying that it was a complete solution. **Should a change along those lines be made?**

Second, CCSA asserts that the statutory duty of school districts to share facilities “fairly” with charter schools has not been adequately fulfilled in practice. CCSA seems to be recommending that the Commission address that issue in its final report. *Id.* at 3. **The staff recommends against doing so.** The Commission should not take any position on issues relating to the adequacy of charter school funding.

CCSA also recommends that footnote 53 be revised to delete the example provided in the parenthetical, thus:

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).

**The staff recommends that the proposed change be made.** The example provided in the parenthetical is not strictly necessary. To the extent that it implies that the Commission is taking a position on a disputed legal or policy issue, it could be problematic.

Finally, CCSA recommends that the final report

acknowledge that while charter schools receive operational funding based on the state-wide average received by school districts, there is no comparable commitment to funding facilities for charter schools.

*Id.*

**The staff recommends against doing so.** Again, the Commission should not take any position on issues relating to the adequacy of charter school funding.

Respectfully submitted,

Brian Hebert  
Executive Director



Procopio, Cory, Hargreaves and Savitch LLP

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**VIA EMAIL AND FIRST CLASS MAIL**

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c/o Brian Hebert, Executive Secretary  
4000 Middlefield Road, Room D-2  
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Re: Comments on Tentative Report; Recommendations To Commission

Dear Honorable Commissioners:

On behalf of the California Charter Schools Association (“CCSA”) we write regarding the June 2011 Tentative Report titled “Charter Schools and the Government Claims Act” (Report) to be considered on August 17, 2012. As a preliminary matter, we want to thank staff for its thorough attention to this important matter over many years. We appreciate their willingness to actively engage with advocates on all sides of this issue.

At this time, we encourage you to adopt the Report with the following revisions in three specific areas:

1. Include a recommendation that charter schools be granted the same immunities as those provided to local public agencies and school districts, as the vast majority of states with charter school laws have done. Currently, this is presented only as Alternative 2. CCSA favors this approach.
2. The additional language suggested on student safety and parental choice and accountability proposed by your staff in the recent Memorandum 2012-30 (pages 7, 9, 10) is appreciated, but should be further strengthened, as described below. We agree that the language proposed on civil rights liabilities (Memorandum page 19) should be added.
3. Correct the misleading statements on page 9 of the report regarding the challenges faced by charter schools in finding suitable facilities. This remains a major hurdle for charter schools, limiting both startup and expansion of existing schools.

We set forth more detail on these proposed revisions below.

### **1. Recommend Alternative 2**

As the proposed Report shows, most states with charter school laws across the United States treat charter schools as governmental organizations for purposes of sovereign immunity laws. California should do likewise. California charter schools are subject to the same health and safety rules as cities, counties, special districts, and most other local and state agencies. Mr. Hebert speculates that parents are “focused on the expected academic advantages” of a charter school, rather than student safety. He is incorrect. As the founder of an inner-city charter school serving low-income, predominantly Latino students (Los Angeles Leadership Academy) stated in his letter to you, “our families want their children in our school so they won’t get stabbed, shot or beat up. . . . My school is typical.” In contrast, there is no empirical—or anecdotal—evidence that school district-only health and safety rules make them safer than charter schools. For example, do written plans to curb campus violence and crime mandated by Education Code sections 32280 et seq. actually make the district-run school campuses with those plans any safer? Mr. Hebert not only posits that they do, but the difference is significant from a public policy standpoint. Los Angeles Leadership Academy parents disagree.

### **2. Address Safety, Parental Choice and Accountability**

In this respect, we urge you direct staff to include in a revised Report the language we previously provided and which is quoted on pages 4-5 and 5-6 of the Memorandum in lieu of the brief paragraph suggested by staff on page 7. In addition to this description of the role of parental choice, we ask that you direct staff to include language substantially similar to the language we previously provided and which is quoted language on page 8 of the Memorandum. This language points out that, unlike district-run schools, which face no penalty for the lack of a written campus safety plan, a charter school can face revocation for failure to follow its charter—including immediate closure if the situation is threatening to life and safety. No district-run school faces oversight which is even remotely comparable. The staff’s study cannot point to a single instance of a district-run school being permanently shuttered because of violence on campus.

As to school campus *facility* safety, it is also important to remember that charter school sites are subject to building code enforcement by independently-governed cities and counties under Education Code section 47610. In contrast, there is no outside enforcement authority responsible for maintenance of school district campus safety standards. School districts are permitted to police themselves.

### **3. Correct the description and analysis of public facilities options for charter schools.**

The description of State funding for charter school facilities on page 9 of the Report leaves the impression that charter schools’ facilities needs have been addressed. This is

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inaccurate. State funding for charter school facilities can most charitably be described as extremely limited. As a result, charter schools are typically housed in facilities which meet State building codes for safety, but which are smaller and contain limited or no school amenities typically found in traditional school facilities constructed with local and state tax dollars. Charter schools have little or no practical access to such facilities. Only a handful of charter schools benefit under the school construction program referenced in footnote 51 of the draft report.

And while the Charter Schools Act does declare that public school facilities “should be shared fairly,” the fact is that 12 years after the voters enacted Education Code §47614 via Proposition 39, and despite dozens of lawsuits brought to enforce the promise of equal access, only a small percentage of charter school students statewide go to school in district-constructed facilities. A huge disparity remains between school district and charter school facilities funding and access.

Further, we ask that you direct staff to delete the parenthetical phrase in footnote 53 describing “actual costs” which a district may charge a charter school when using a facility under Proposition 39. Districts and charter schools actively dispute what services are permitted to be included in the “pro rata share,” and the footnoted language does not track the complex law and regulations. Districts often charge an exorbitant “pro rata share” that makes charter school use of district facilities cost-prohibitive. Deletion of the phrase “such as maintenance and cleaning services” will avoid any potential misinterpretation of the law in the public record.

Finally, we ask you to direct staff to acknowledge that while charter schools receive operational funding based on the state-wide average received by school districts, there is no comparable commitment to funding facilities for charter schools.

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

Very truly yours,



Gregory V. Moser

cc: Ricardo Soto