

# CALIFORNIA LAW REVISION COMMISSION

## TENTATIVE REPORT

### Charter Schools and the Government Claims Act

June 2011

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

**COMMENTS ON THIS TENTATIVE REPORT SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **SEPTEMBER 15, 2011**.**

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

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## SUMMARY OF TENTATIVE REPORT

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

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

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

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

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

## CHARTER SCHOOLS AND THE GOVERNMENT CLAIMS ACT

1

### INTRODUCTION

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

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

9 Because a charter school can operate as a “quasi-public entity” (i.e., a private  
10 entity that is created, pursuant to statutory authority, to perform a public  
11 function<sup>4</sup>), questions have arisen about whether a charter school should be treated  
12 as a public entity for various statutory purposes.

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

17 In the same case, the Court declared that charter schools “do not fit comfortably  
18 within any of the categories defined, for purposes of the [Government Claims  
19 Act]<sup>7</sup> as ‘local public entities.’”<sup>8</sup> Although that statement was not a necessary part  
20 of the court’s holding, it did signal that the court was inclined against viewing a  
21 charter school as a public entity for the purposes of the Government Claims Act.

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<sup>1</sup> See Educ. Code § 47615; *Wilson v. State Bd. of Educ.*, 75 Cal. App. 4th 1125, 1137, 89 Cal. Rptr. 2d 745 (1999).

<sup>2</sup> See Educ. Code § 47610.

<sup>3</sup> See Educ. Code § 47604.

<sup>4</sup> 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).

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

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

<sup>7</sup> 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.

<sup>8</sup> *Wells*, 39 Cal. 4th at 1214.

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

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

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

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

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

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

## 1 CHARTER SCHOOLS ACT

2 The Charter Schools Act of 1992<sup>12</sup> authorizes the creation and operation of  
3 charter schools in California.

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

8 California has more than 850 charter schools that serve about 2.5% of public  
9 school students between kindergarten and twelfth grade.<sup>16</sup>

10 The stated purpose of charter schools is to:

- 11 • Improve student learning.
- 12 • Increase learning opportunities for students, particularly those identified as  
13 academically low achieving.
- 14 • Encourage innovation in teaching methods.
- 15 • Create new professional opportunities for teachers.
- 16 • Provide families with more choice within the public school system.
- 17 • Make charter schools accountable for performance.
- 18 • Create new competition with traditional public schools to promote  
19 improvements in all public schools.<sup>17</sup>

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

- 24 • Cannot charge tuition.<sup>19</sup>
- 25 • Must have nonsectarian programs, admission policies, and employment  
26 practices.<sup>20</sup>
- 27 • Must not discriminate.<sup>21</sup>

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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](http://www.rand.org/pubs/occasional_papers/2006/RAND_OP157.pdf).

14 Educ. Code § 47605(f).

15 Educ. Code § 47605(d)(2).

16 Cal. Dep’t of Educ., Fact Book 2009: Handbook of Education Information, at 100 (2009), available at <http://www.cde.ca.gov/re/pn/fb/documents/factbook2009.pdf>.

17 Educ. Code § 47601.

18 Educ. Code § 47610.

19 Educ. Code § 47605(d)(1).

20 *Id.*

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

5     **Creation and Revocation of Charter**

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

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

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

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

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

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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).

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

3 **Oversight and Accountability**

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

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

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

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

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

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

25 **Governance Structure**

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

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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.

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

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

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

9       **Operational Issues**

10      **Personnel**

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

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

18      **Financing**

19     For purposes of the state constitution and school financing, a charter school is  
20 considered to be under the exclusive control of the officers of the public schools.<sup>49</sup>  
21 Charter school funding is similar to traditional public school funding. The funding  
22 follows the student, whether the student attends a traditional public school or a  
23 charter school.<sup>50</sup>

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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).

1      **Facilities**

2      One challenge charter schools face is finding suitable facilities. Initially, charter  
3      schools had extremely limited funding for facilities. To address the problem, the  
4      Legislature has expanded the availability of facilities funding for charter schools.<sup>51</sup>

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

10     **Health and Safety Issues**

11     ***The Field Act***

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

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

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

24     Thus, a charter school appears to be in a unique position, with more flexibility as  
25     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.<sup>59</sup> 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.<sup>60</sup>

## **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.<sup>61</sup> Some health and safety provisions apply to both public and private schools without express reference to charter schools.<sup>62</sup> 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.<sup>63</sup> 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.

<sup>59</sup> Educ. Code § 47610(d). But see Educ. Code § 47610.5.

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

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

<sup>62</sup> 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).

<sup>63</sup> Educ. Code § 47605(b)(5)(F).

1       The unique role of government in society makes the application of those  
2 principles problematic.<sup>64</sup>

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

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

11      As a result, the traditional purposes of tort liability are not necessarily  
12 appropriate in the context of public entity activities.<sup>65</sup>

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

17      Sovereign immunity accommodates the unique nature of government. It protects  
18 the public fisc from depletion and allows government to govern.<sup>67</sup> It also reduces  
19 the possibility of judicial interference in the development of public policy.<sup>68</sup>

20      The Government Claims Act<sup>69</sup> balances the competing policies of governmental  
21 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.

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

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

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

7 **Scope of Application**

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

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

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

16 **Claim Presentation**

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

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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, 68 Cal. Rptr. 3d 295 (2007).

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

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

7       **Time Limits**

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

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

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

18       **Identification of Public Entity**

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

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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).

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

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

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

13 ***Content of Claims***

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

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

19 **Public Entity Liability**

20 The Government Claims Act provides that a public entity is not liable for an  
21 injury, except as provided by statute.<sup>96</sup> In other words, all public entity liability is  
22 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, 20 Cal. Rptr. 3d 176 (2004) (requiring facts in claim to correspond to facts in subsequent complaint with enough detail to support one or more theories of recovery).

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

96 Gov't Code § 815(a).

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

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

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

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

## 17        **Relevant Immunities**

### 18        *Discretionary Act*

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

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

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

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

103 Gov’t Code § 820.2.

104 Gov’t Code § 815.2(b).

105 *Number 1 — Tort Liability of Public Entities and Public Employees*, *supra* note 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).

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

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

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

14      ***Misrepresentation***

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

19      ***Punitive or Exemplary Damages***

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

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

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106 Cal. Government Tort Liability Practice, §§ 10.8-10.12, at 616-22 (Cal. Cont. Ed. Bar, 4th ed. 2011).

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

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

109 Gov’t Code § 818.8.

110 *Id.*

111 Gov’t Code § 818.

112 Gov’t Code § 825(a).

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

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

4 ***Execution of Law***

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

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

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

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

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

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

24 ***Defense and Indemnification***

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

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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.

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

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.<sup>122</sup>

# 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.<sup>123</sup> The Court of Appeal has affirmed that status.<sup>124</sup>

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.<sup>125</sup>

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.
  - They must provide for special education students in the same manner as traditional public schools.

<sup>120</sup> 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.

<sup>122</sup> 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.

<sup>124</sup> Wilson v. State Bd. of Educ., 75 Cal. App. 4th 1125-37, 89 Cal. Rptr. 2d 745 (1999).

125 Gov't Code §§ 6528, 20610.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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130 *Wilson*, 75 Cal. App. 4th at 1129 (quoting Com. on Cal. State Gov’t Organization and Economy, rep., *The Charter Movement: Education Reform School by School* (Mar. 1996), p. 1 (Little Hoover Report)).

131 *Id.* at 1134.

132 *Id.* at 1135.

133 *Id.*

134 *Id.* at 1139.

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

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

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

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

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

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

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

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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.

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

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

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

15 The California Supreme Court reversed on several grounds.

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

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

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

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

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

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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.

143 *Id.* at 1193-97.

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

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

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

23 **Government Claims Act**

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

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

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144 *Id.* at 1198-99.

145 *Id.* at 1201.

146 *Id.*

147 *Id.* at 1202.

148 *Id.* at 1214.

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

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

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

19 ***Unfair Competition Law***

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

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

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

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149 *Id.* at 1215.

150 *Id.* at 1204.

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

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

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

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

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

21      **“Good Government” Laws**

22      Traditional public school districts are subject to certain “good government” laws  
23      that require open public board meetings (the Brown Act<sup>156</sup>), public access to  
24      district records (the California Public Records Act<sup>157</sup>), and restrictions on conflicts  
25      of interest in decision making (the Political Reform Act of 1974<sup>158</sup>).

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

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

<sup>152</sup> *Id.* at 717.

<sup>153</sup> *Id.* at 711-12.

<sup>154</sup> *Id.* at 713.

<sup>155</sup> *Id.* at 717.

<sup>156</sup> Gov’t Code § 54950 *et seq.*

<sup>157</sup> Gov’t Code § 6250 *et seq.*

<sup>158</sup> Gov’t Code § 81000 *et seq.*

1      **Political Reform Act of 1974**

2      The Fair Political Practices Commission (“FPPC”) is authorized to issue written  
3      opinions and advice interpreting the Political Reform Act of 1974.<sup>159</sup>

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

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

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

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

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

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

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

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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).

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

9      ***California Public Records Act***

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

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

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

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

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

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

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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).

170 AB 360 (Brownley) (2011).

1                   **LEGAL AND POLICY ANALYSIS**

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

5       **Legal Implications**

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

- 9           • In most cases, a person wishing to sue a charter school for money or  
10          damages would be required to present a claim, prior to filing the lawsuit.<sup>171</sup>
- 11          • A charter school would be immune from punitive damages.<sup>172</sup>
- 12          • A charter school would be immune from liability for common law torts.<sup>173</sup>
- 13          • A charter school would be immune from liability for an employee's  
14          discretionary act.<sup>174</sup>
- 15          • A charter school would be immune from liability for an employee's  
16          misrepresentation.<sup>175</sup>
- 17          • A charter school would be immune for an employee's act or omission,  
18          exercised with due care, in the execution or enforcement of law.<sup>176</sup>
- 19          • A charter school would be immune for an employee's initiation of, or failure  
20          to initiate, a judicial or administrative proceeding within the scope of  
21          employment.<sup>177</sup>
- 22          • A charter school would be immune for an employee's good faith act under  
23          the apparent authority of an enactment that is unconstitutional, invalid or  
24          inapplicable.<sup>178</sup>
- 25          • A charter school would be subject to special rules on liability for a  
26          dangerous condition of property.<sup>179</sup>

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171 Gov't Code §§ 900-950.8.

172 Gov't Code §§ 818, 825.

173 Gov't Code § 815.

174 Gov't Code § 820.2.

175 Gov't Code § 818.8.

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

177 Gov't Code § 821.6.

178 Gov't Code § 820.6.

179 Gov't Code § 835.

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

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

8      Those indirect effects are discussed more fully below.

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

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

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

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

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

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

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

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

182 See *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1099 (9th Cir. 2003) (federal court bound to follow California Court of Appeal's interpretation of California law "absent convincing evidence that the California Supreme Court would reject the interpretation").

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

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

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

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

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

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

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

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

25 **Policy Implications**

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

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

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

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

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

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

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

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

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

26 **Compensation**

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

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

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

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

186 *Id.* at 750.

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

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

6      ***Health and Safety Risk***

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

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

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

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

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

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

32      ***Public Accountability***

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

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

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

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

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

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

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

19     ***Pedagogical Innovation***

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

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

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

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

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

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189 See Educ. Code § 47601.

1      **Protecting the Public Fisc**

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

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

14     ...

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

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

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

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

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

191 *Id.* at 1201.

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

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

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

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

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

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

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

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192 This would probably be a rare occurrence. Punitive damages are only available for egregious intentional misconduct (“oppression, fraud, or malice”) that must be proven by clear and convincing evidence. See Civ. Code § 3294.

193 Gov’t Code § 818.

194 Educ. Code § 47605(d).

1       **#5 Application of the Government Claims Act to a charter school would  
2 help to preserve a charter school's scarce fiscal resources from  
3 depletion, and thereby prevent the negative consequences associated  
4 with closing a charter school, which could occur in the event of a  
5 judgment that is not covered by readily available liability insurance.**

6       ***Uniquely Public Obligations***

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

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

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

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

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

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

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

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

1      **Summary**

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

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

23                    **ALTERNATIVE APPROACHES**

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

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

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

35      The Commission makes no recommendation on which of the alternative  
36      approaches should be adopted. Each presents a different balancing of contending  
37      policy considerations. Those considerations involve fundamental questions about  
38      the value of charter schools within the public education system and the importance  
39      of any heightened level of risk to student health and safety that might result from  
40      extending sovereign immunity to charter schools. There are likely to be sharp

1 differences in perspective on how best to balance those important concerns.  
2 Consequently, there is no clear answer as to which alternative approach would  
3 best serve the People of California. An issue of this fundamentally political  
4 character would be best decided by the People's elected representatives, not by the  
5 Commission.

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

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

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

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

21 ***Liability of Chartering Entity***

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

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

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195 See Educ. Code § 47604.

1      **Legal Identity**

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

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

9      **Public Comment Invited**

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

16     Such a distinction could be expressed as follows:

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

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

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

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

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

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

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

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

36     The Commission is not authorized to evaluate the substantive merits of treating  
37     a charter school as a public entity for the purposes of laws other than the

1 Government Claims Act, and has not done so.<sup>196</sup> The alternative discussed here is  
2 offered only to provide the Legislature with a complete range of options for its  
3 consideration.

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

9 ***Advantages***

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

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

32 ***Disadvantages***

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

- 35 • **Compensation Undermined.** Some innocent persons injured by charter  
36 schools would not be compensated for their injuries.
- 37 • **Heightened Student Health and Safety Risks.** Declaring that a charter  
38 school is a public entity would not affect the exemption of charter schools

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

1 from the student health and safety laws that regulate school districts. That  
2 exemption, combined with the discretionary policy immunity conferred by  
3 the Government Claims Act, could lead to an increased risk of harm to  
4 students in charter schools, as compared to students in traditional public  
5 schools.

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

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

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

12 ***Advantages***

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

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

28 ***Disadvantages***

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

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

- 1       • **New Legal Uncertainty.** The application of the Government Claims Act to  
2 charter schools could lead to uncertainty about the continuing validity of the  
3 holdings in *Wells* (i.e., that charter schools lack “sovereign significance”  
4 sufficient to justify exempting them from suit under the False Claims Act  
5 and Unfair Competition Law).

6 **Alternative #3. Combined Approach**

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

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

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

18 The Commission is not authorized to evaluate the substantive merits of treating  
19 a charter school as a public entity for the purposes of good government or health  
20 and safety laws and has not done so.<sup>197</sup> The alternative discussed here is offered  
21 only to provide the Legislature with a complete range of options for its  
22 consideration.

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

28 **Advantages**

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

- 31     • **Legal Clarity.** There would be no ambiguity as to whether a charter school  
32 is governed by the Government Claims Act.  
33     • **No Chilling of Pedagogical Innovation.** Immunity from liability for  
34 discretionary decisions would make it easier for charter schools to adopt  
35 pedagogical innovations that might otherwise impose too great a risk of  
36 liability.

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

- 1      • **Protection of Limited Fiscal Resources.** The immunities conferred by the  
2      Government Claims Act would help to avoid the loss of investment, loss of  
3      pedagogical benefit, disruption, and transition costs that might result if a  
4      charter school were forced to close as a result of a large judgment against  
5      the school. This would only be an advantage with respect to types of  
6      liability for which liability insurance is not readily available (e.g., punitive  
7      damages or liability for intentional wrongs).
- 8      • **Health and Safety Risks Minimized.** The application of general student  
9      health and safety laws would reduce the likelihood that immunity for  
10     discretionary policy decisions would lead to a higher level of student health  
11     and safety risk. The application of good government laws to charter schools  
12     would have a similar effect.

13     ***Disadvantages***

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

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

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

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

29     Thus:

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

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

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

- 1     • A claim alleging that a charter school violated Education Code Section  
2       47605(d) (requiring that charter schools be nonsectarian).
- 3     • A claim alleging that a charter school violated Education Code Section  
4       56145 (requiring that a charter school serve students with exceptional needs  
5       in the same manner as such students are served in other public schools).
- 6     • A claim alleging that a charter school violated Education Code Section  
7       48907 (protecting student expression in public schools).

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

- 11    • A general tort or contract claim.
- 12    • A claim brought pursuant to the California False Claims Act.<sup>198</sup>
- 13    • A claim alleging that a charter school violated the general whistleblower  
14    protections provided in Labor Code Section 1102.5.

15    ***Advantages***

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

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

34    ***Disadvantages***

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

- 37    • **Likely Increase in Litigation.** A rule that provides significantly different  
38       treatment for different types of claims is likely to lead to confusion and

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198 Gov't Code § 12650 *et seq.*

1 increased litigation, as parties misunderstand or dispute the proper  
2 classification of particular claims. These problems are likely to be pervasive,  
3 given that each individual claimant must determine, in a short period of  
4 time, whether his or her claim is subject to the claims presentation  
5 requirements of the Government Claims Act. Because an error on this point  
6 could lead to dismissal of a claim, it seems likely that the issue would be  
7 litigated frequently.

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

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

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

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

15 ***Advantages***

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

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

30 ***Disadvantages***

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

- 33 • **Chilling of Pedagogical Innovation.** Charter schools could be deterred  
34 from adopting pedagogical innovations as a result of liability concerns.
- 35 • **Limited Fiscal Resources at Risk.** Unlimited exposure to tort liability  
36 (including possible punitive damages) could threaten the viability of charter  
37 schools, to the extent that liability insurance is not available for certain types  
38 of activities. If a charter school fails as a result of liability, the public school  
39 system would suffer a loss of investment, a loss of pedagogical benefit,  
40 disruption, and transition costs. This could significantly impair a school  
41 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.

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