Study G-200 January 31, 2011

Memorandum 2011-7

Charter Schools and the Government Claims Act (Discussion of Issues)

The Legislature has authorized the Commission to study the "legal and policy implications of treating a charter school as a public entity for the purposes of Division 3.6 (commencing with Section 810) of Title 1 of the Government Code" (hereafter "Government Claims Act"). 2009 Cal. Stat. res. ch. 98 (ACR 49 (Evans)).

This study was prompted by an appellate decision holding that a charter school organized as a nonprofit corporation, independent of the chartering district, is not a public entity for the purposes of the Government Claims Act. See *Knapp v. Palisades Charter High School*, 146 Cal. App. 4th 708, 717, 53 Cal. Rptr. 3d 182 (2007). See also *Wells v. One2One Learning Foundation*, 39 Cal. 4th 1164, 141 P.3d 225, 244, 48 Cal. Rptr. 3d 108 (2006) (charter school not public entity for purposes of California False Claims Act or Unfair Competition Law).

Prior staff memoranda presented in this study have discussed the effect and purpose of the Government Claims Act (see Memoranda 2010-6, 2010-7, 2010-16); the effect and purpose of the Charter Schools Act (see Memorandum 2010-26); the treatment of "quasi-public entities" in California (see Memorandum 2010-17); and the status of charter schools in other jurisdictions (see Memorandum 2010-35).

The Commission specifically requested public input on the policy issues discussed in the prior memoranda, as well as

> concrete information about charter school operational structure, degree of independence from the chartering entity, accountability to the chartering entity, insurance availability before and after *Knapp*, hardships associated with charter failure, hardships that would result from expanded tort liability, the appropriateness or inappropriateness of subjecting charter schools to punitive

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

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

damages, and any other matter that would be helpful in resolving the policy question before us.

See Memorandum 2010-26, p. 33.

We have received three comment letters, which are attached in the Exhibit as follows (along with related background material):

Exhibit p.

- Nancy Peverini, Consumer Attorneys of California (1/24/11) 1
- Gregory V. Moser, California Charter Schools Association (1/24/11) 4
- *Dubose v. Excelsior Educ. Ctr.* (C.D. Cal. 2010) 14
- Beth Hunkapillar, California Department of Education, Charter Schools Division (1/27/11) 41

The purpose of this memorandum is to present the views of the commenters, for Commission consideration. No policy decisions are required in connection with this memorandum. Future memoranda will discuss alternative ways to proceed in completing this study.

The staff would like to express its appreciation to Jennifer Maguire, a student at the UC Davis School of Law, who assisted with some of the research involved in preparing this memorandum.

BACKGROUND SUMMARY

This memorandum begins with a recap of the main points discussed in prior memoranda. Commissioners who would like a fuller discussion of the legal and policy background in this study should review the prior memoranda listed above (especially Memorandum 2010-26).

Charter Schools Generally

Charter schools are publicly funded schools of choice. They are creatures of statute. See Educ. Code §§ 47600-47664 ("Charter Schools Act of 1992"). They possess many of the characteristics of traditional 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.
- They are entitled to a fair allocation of public school facilities.
- They are required to conduct standardized testing in the same manner as traditional public schools.
- Their teachers must be certificated.
- Their employees are eligible to participate in state retirement programs.

See generally Memorandum 2010-26.

However, with limited exceptions, charter schools are exempt from "the laws governing school districts." See Educ. Code § 47610. This exemption allows charter schools to innovate with respect to educational programs and methods, while maintaining the core standards of the public school system.

The entity that charters a charter school is responsible for oversight of the charter school. The required oversight is limited to the following:

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

See Educ. Code § 47604.32. To finance its oversight activities, the chartering entity may charge the charter school the actual costs of oversight, up to one percent of the charter school's revenue. See Educ. Code §§ 47604.32(f), 47613.

Entity Status of Charter Schools

The California Supreme Court has held that charter schools are part of the "public school system," as defined in Article IX of the California Constitution, are under the jurisdiction of the public school system, and are under the exclusive control of officers of the public schools. See *Wilson v. Dep't of Educ.*, 75 Cal. App. 4th 1125, 89 Cal. Rptr. 2d 745 (1999); see also Educ. Code § 47615.

Despite being part of the public school system, a charter school may be formed and may operate as a nonprofit public benefit corporation. See Educ. Code § 47604(a). By statute, if a charter school is organized as a nonprofit public benefit corporation, the chartering public entity "is not liable for the debts or

obligations of the charter school, or for claims arising from the performance of acts, errors, or omissions by the charter school, if the authority has complied with all oversight responsibilities required by law." See Educ. Code § 47604(c).

In other words, despite being part of the public school system as a whole, a charter school can be formed as an entity that is legally separate from the school district, in a form often used by private persons to establish nongovernmental organizations. This creates a question as to the status of separately incorporated charter schools. Are they public entities? Or are they private entities performing delegated public functions? To what extent should they enjoy the sovereign immunities conferred on public entities?

Charter Schools as Public Entities for All Purposes

One approach would be to view charter schools as public entities for *all* purposes. A reasonable argument can be made for this view. As discussed earlier, charter schools possess many of the characteristics of traditional public schools. In addition, both the Legislature and the California Supreme Court have indicated that charter schools are part of the constitutionally mandated public school system, under the jurisdiction of the public schools, and under the exclusive control of public officials. See *Wilson v. Dep't of Educ.*, 75 Cal. App. 4th 1125, 89 Cal. Rptr. 2d 745 (1999); see also Educ. Code § 47615.

Incorporated Charter Schools as Limited Public Entities

The view that charter schools are public entities for all purposes has not been followed by the California courts. In *Wells v. One2One Learning Foundation*, 39 Cal. 4th 1164, 141 P.3d 225, 48 Cal. Rptr. 3d 108 (2006), the Supreme Court expressly held that incorporated charter schools are not public entities for the purposes of the California False Claims Act ("CFCA") (Gov't Code § 12650 *et seq.*) or the Unfair Competition Law ("UCL") (Bus. & Prof. Code § 17200 *et seq.*). Those holdings are incompatible with the notion that charter schools are public entities for all purposes.

Rather, the court in *Wells* described charter schools as "distinct outside entities," comparable to private contractors, which are not invested with sovereign significance. See Memorandum 2010-26, pp. 21-23. Consequently, the court has held that charter schools may be considered public for some purposes (e.g., Article IX of the California Constitution), but not for other purposes (e.g., the CFCA and UCL).

That view was reinforced in a subsequent appellate decision holding that an incorporated charter school is not a public entity for the purposes of the Government Claims Act. See *Knapp v. Palisades Charter High School*, 146 Cal. App. 4th 708, 53 Cal. Rptr. 3d 182 (2007).

Incorporated Charter Schools as Quasi-Public Entities

In a number of contexts, California law recognizes the concept of a "quasi-public entity." As discussed in Memorandum 2010-17, a quasi-public entity is a private legal entity that is created with government involvement in order to perform a delegated public function. Many statutes that govern public entities have also been applied to quasi-public entities. For example, the following open government laws have been applied to some quasi-public entities:

- The Fair Political Practices Commission has opined that the Political Reform Act of 1974 applies to quasi-public entities if (1) the impetus for formation of the entity originated with the government, (2) the entity is substantially funded by the government, (3) one of the principal purposes of the entity is to perform delegated public functions, and (4) the entity is treated as a public entity by other statutes. See *In re Siegel*, 3 FPPC Ops 62 (1977). The FPPC has found that charter schools satisfy all of those criteria and are subject to the Political Reform Act. See *Walsh* Advice Letter, No. A-98-234 (1998); *Fadely* Advice Letter, No. A-02-223 (2002).
- The Ralph M. Brown Open Meeting Act ("Brown Act") applies, by its terms, to a private entity that is created by "an elected legislative body to exercise authority that may lawfully be delegated by the elected governing body to a private corporation, limited liability company, or other entity." Gov't Code § 54952(c)(1)(A). At least one trial court has held that an incorporated charter school meets that standard and is therefore governed by the Brown Act. See Memorandum 2010-17, p. 4.
- The California Public Records Act has the same application to a quasi-public entity as the Brown Act (it expressly incorporates the standard used in the Brown Act). Gov't Code § 6252(a). Thus, if a charter school is governed by the Brown Act under the standard described above, it is also governed by the Public Records Act.

Notwithstanding the analysis above, there does not appear to be a consensus that charter schools are subject to the Political Reform Act, Brown Act, and Public Records Act. Bills have been introduced to expressly apply those open government laws to charter schools, but they have been opposed by some charter

school advocates and have not been enacted. See, e.g., AB 572 (Brownley) (2010) (vetoed).

The staff did not find any court decisions discussing the application of the Government Claims Act to a quasi-public entity. However, there is a statute that expressly applies portions of the Government Claims Act to one type of quasi-public entity, a privately owned "public land trust" (which is formed in cooperation with government to provide public recreational access to unimproved land). Gov't Code § 831.5. That demonstrates some legislative willingness to extend governmental immunities to a quasi-public entity (in order to encourage the private performance of public functions). See Memorandum 2010-17, pp. 8-9.

Application of Government Claims Act to Charter Schools

The Government Claims Act is a complex statute, and it would not be helpful to attempt to summarize all of its effects in this memorandum. (For a fuller discussion, see Memoranda 2010-6, 2010-7, 2010-16.) Instead, the most significant effects of applying the Government Claims Act to charter schools are listed below:

- Those wishing to sue a charter school would be required to follow a pre-filing claims presentation procedure. See Gov't Code §§ 900-950.8; see also Memorandum 2010-16.
- A charter school would be immune from liability for common law torts. See Gov't Code § 815. See also the Senate Judiciary Committee Comment to Section 815, which explains:

  > This section abolishes all common law or judicially declared forms of liability for public entities, except for such liability as may be required by the state or federal constitution, e.g., inverse condemnation. In the absence of a constitutional requirement, public entities may be held liable only if a statute (not including a charter provision, ordinance or regulation) is found declaring them to be liable. Because of the limitations contained in Section 814, which declares that this part does not affect liability arising out of contract or the right to obtain specific relief against public entities and employees, the practical effect of this section is to eliminate any common law governmental liability for damages arising out of torts. The use of the word "tort" has been avoided, however, to prevent the imposition of liability by the courts by reclassifying the act causing the injury.
- A charter school would be immune from punitive damages. See Gov't Code § 825; see also Memorandum 2010-6, pp. 13-14.

- A charter school would be immune from liability for an employee's discretionary act. See Gov't Code § 820.2; see also Memorandum 2010-6, p. 12.
- A charter school would be subject to special rules on liability for a dangerous condition of property (including a defense based on "reasonable" precautions). See Gov't Code § 835(b); see also Memorandum 2010-6, pp. 15-16.

Status of Charter Schools in Other Jurisdictions

The staff has surveyed the law of the other 39 U.S. charter school jurisdictions, to determine the extent to which charter schools in those jurisdictions are treated as public entities. See generally Memorandum 2010-35.

Of those 39 jurisdictions, 24 appear to treat charter schools as public entities for all purposes. *Id*. at p. 2. In the other fifteen jurisdictions, there is no clear statutory indication whether charters are considered public for all purposes. *Id*.

Eighteen of the jurisdictions expressly provide that charter schools are public entities for the purposes of government tort liability. *Id*. at pp. 2-3.

There is overlap between those two groups, as some states treat charter schools as public for all purposes *and* expressly declare them to be public for the purposes of public entity tort liability law. When the two groups are combined, we find that 30 of the 39 charter school jurisdictions treat charters as public entities for the purposes of government tort liability or for all purposes (which includes government tort liability). *Id*. at p. 3.

On its face, that data suggests a strong national trend toward treating charter schools as public entities. However, the data requires more careful parsing.

The reason we are questioning whether California charter schools are public entities is because they can be formed as separate legal entities. If the law required that they be formed as an indivisible part of a public school district, then it would be plain that they were public entities.

We found that 19 of the jurisdictions permit charter schools to be formed as separate legal entities. Of those, 16 treat charter schools as public entities. In the remaining three, the treatment is unclear. *Id*. at pp. 3-4.

Again, that suggests a strong trend in favor of treating independent charter schools as public entities. However, there is one more piece of data that is relevant to evaluating the significance of the findings described above. As discussed in Memorandum 2010-26, pp. 14-15, California charter schools are exempt from a number of health and safety laws, that were specifically enacted to protect school children. Consequently, charter schools appear to enjoy greater

discretion than traditional public schools with respect to student health and safety policies. Recall that the Government Claims Act immunizes public officials from liability for injuries that result from discretionary policy decisions. In Memorandum 2010-26, pp. 27-28, the staff questioned whether looser health and safety regulation combined with discretionary policy immunity might lead to greater health and safety risks in charter schools.

In light of that, the staff looked to see how many of the jurisdictions described above also exempt charter schools from the health and safety laws that govern traditional public schools. Of the 16 jurisdictions that permit charter schools to be formed as separate legal entities, we did not find any that clearly exempt charter schools from public school health and safety laws. See Memorandum 2010-35, pp. 4-5.

So while there is a clear national trend toward treating charter schools as public entities, even if formed as separate legal entities, it is not clear how relevant that data is to California charter schools, which appear to be unique in the extent to which they are exempted from public school health and safety laws.

PUBLIC COMMENT GENERALLY

The Commission has received three letters commenting on the issues raised in this study.

Nancy Peverini writes on behalf of the Consumer Attorneys of California ("Consumer Attorneys"). See Exhibit pp. 1-3. The Consumer Attorneys argue that charter schools should not be treated as public entities for purposes of the Government Claims Act. They believe that governmental immunities should not be extended to charter schools if they are exempt from school health and safety laws and are not subject to the general laws guaranteeing public accountability and transparency (like the Brown Act, Public Records Act, and Political Reform Act). *Id*.

Gregory V. Moser writes on behalf of the California Charter Schools Association ("Charter Schools Association"). See Exhibit pp. 4-13. The Charter Schools Association supports treating charter schools as public entities under the Government Claims Act. *Id*. at 4. The main arguments offered in support of that position are as follows:

- A recent federal court decision held that California charter schools are public entities for the purposes of the Government Claims Act.

- Charter schools are like all other public schools in important ways.
- Tort liability is not required to deter risky behavior in charter schools.

Id. at 4-8, 10, 13.

In addition, the Charter Schools Association has provided information requested by the Commission relating to "dependent" charter schools and the availability of liability insurance. *Id*. at 8-10, 11-13. (A "dependent" charter school is one that is not formed as a legal entity, separate from the local school district.)

Finally, we received a letter from Beth Hunkapillar, Director of the Charter Schools Division of the California Department of Education ("CDE"). See Exhibit p. 41. The CDE letter raises a general point about how the ambiguous legal entity status of charter schools can also complicate the process of winding up the affairs of a charter school that has closed. CDE intends to provide a more detailed discussion of their concern prior to the Commission's April 2010 meeting. *Id*.

The points raised by the commenters in their letters are discussed more fully below. The federal court decision cited by Mr. Moser is discussed first, to determine the extent to which it changes the legal landscape in which our study is grounded. The memorandum then turns to discussion of the policy arguments.

FEDERAL COURT DECISION

Mr. Moser points out a recent federal trial court decision, which to our knowledge has not been published, in which the court held that a California charter school is a "public entity" for the purposes of the Government Claims Act. See Dubose v. Excelsior Educ. Ctr., No. EDCV 10-0214 GAF (C.D. Cal. Sept. 22, 2010); Exhibit pp. 14-40.

In that case, one of the plaintiff's claims rested on an assertion that the defendant charter school had terminated her employment in violation of public policy. The defendant responded that it was immune from this common law "*Tameny*" claim because it was a public entity governed by the Government Claims Act (and therefore immune to liability for common law torts). See Exhibit p. 32. The court agreed and dismissed the plaintiff's *Tameny* claim.

The court offered two arguments to support its conclusion that a charter school is a public entity under the Government Claims Act: (1) A charter school is an "arm of the state" and therefore immune from suit under the Eleventh Amendment to the U.S. Constitution, and (2) a charter school that is organized as

a nonprofit public benefit corporation provides a "public benefit" and is therefore similar to a public authority, public agency, and public corporation, all of which are governed by the Government Claims Act.

In making these arguments, the court acknowledged a statement of the California Supreme Court, in *Wells v. One2One Learning Foundation*, 39 Cal. 4th at 1214, that charter schools do not "fit comfortably within any of the categories defined, for purposes of the [Government Claims Act], as 'local public entities.'" See Exhibit p. 33. However, the *Dubose* court characterized that statement as dictum that did not provide any "real guidance concerning public entity immunity from tort claims." See Exhibit pp. 33-34. The staff agrees that the statement in *Wells* was dictum, but, as explained below, does not agree that *Wells* provides no "real guidance" on the application of the Government Claims Act to charter schools.

The *Dubose* court's arguments are discussed below.

Significance of Eleventh Amendment Immunity

The *Dubose* court cites another unpublished federal decision, *Doe ex rel. Kristen D. v. Willits Unified School District*, 2010 U.S. Dist. LEXIS 33152 (N.D. Cal. 2010), for its holding that a California charter school is an "arm of the state" for the purposes of Eleventh Amendment state immunity from suit in federal court.

In *Kristen D.*, the court concluded that a charter school is an "arm of the state" because a money judgment against the school would be satisfied out of state funds, and because a charter school performs a "central governmental function." *Id*. at **11-**13. The court noted that charter schools are similarly situated to school districts, "at least for funding purposes," and school districts have been held to be arms of the state for the purposes of Eleventh Amendment immunity. *Id*. at **12-**13.

The *Dubose* court asserts that treatment of a charter school as an arm of the state for Eleventh Amendment purposes "tends to support" the idea that a charter school is a public entity for the purposes of the Government Claims Act. See Exhibit p. 35.

That assertion is not explained, but it seems to be grounded in an assumption that the scope of application of the Eleventh Amendment and the California Government Claims Act are coextensive. That is not necessarily the case. The Eleventh Amendment serves different policy purposes than California's Government Claims Act. The California Legislature was not bound by the

Eleventh Amendment when determining the scope of the Government Claims Act.

Furthermore, the opinion in *Kristen D*. seems to implicitly recognize that the scope of the Eleventh Amendment and Government Claims Act are not coextensive or interdependent. In *Kristen D*., the plaintiff argued that charter schools cannot be arms of the state for Eleventh Amendment purposes because charter schools are not public entities for purposes of the Government Claims Act. *Kristen D.* at 15-16. The court rejected that argument as "misplaced," because the question of whether a charter school is a public entity under the Government Claims Act "does not affect" whether a charter school is an arm of the state for Eleventh Amendment purposes. In other words, an entity might be an arm of the state for Eleventh Amendment purposes, even though it is not a public entity under the Government Claims Act.

The California Supreme Court made this point expressly, in considering whether a charter school is a public entity for the purposes of the California False Claims Act, Unfair Competition Law, and Government Claims Act:

> Equally beside the point are federal and California decisions holding that California school districts are "arms of the state," and thus enjoy the state's sovereign immunity, under the Eleventh Amendment, from suits in federal court. … When we decide whether the California Legislature intended a California statute to include or exclude California government entities, we are not concerned with issues of federalism, constitutional or statutory.

Wells, 39 Cal. 4th at 1199. The *Dubose* court dismissed the California Supreme Court's argument, without clearly explaining its reason for doing so. See Exhibit p. 34, n. 6.

Nonprofit Public Benefit Corporations "Similar" to Public Entities, Because All Provide "Public Benefit"

In *Dubose*, the plaintiff noted that the defendant's charter provided for the charter school to be organized as a nonprofit public benefit corporation. Presumably, the plaintiff's point in raising that issue was to suggest that a nonprofit public benefit corporation is a *private* entity, and therefore is not a *public* entity under the Government Claims Act's definition:

> "Public entity" includes the state, the Regents of the University of California, the Trustees of the California State University and the California State University, a county, city, district, public authority,

> public agency, and any other political subdivision or public corporation in the State.

See Gov't Code § 811.2.

In response, the *Dubose* court observed:

> [The] language [of the charter] provides little assistance in determining the character of a charter school. The description suggests that the entity is operated for "public benefit," that it is operated as a not-for-profit organization, and thus would seem to operate similarly to a "public authority, public agency, . . . [and] public corporation" all of whom are granted immunity under Cal. Gov't Code §§ 811.2 and 815. For these reasons, though there is no controlling authority on the question, the Court concludes that Excelsior is immune from suit for the *Tameny* claim and the Court need not address the merits of that particular claim.

See Exhibit p. 35.

The court seems to be suggesting that a nonprofit public benefit corporation should have the same public entity status as a public authority, public agency, or public corporation, because they all provide public benefits on a non-profit basis.

If that is the court's argument, the staff finds it unpersuasive. Under that reasoning, all nonprofit public benefit corporations would be entitled to sovereign governmental immunity, even if they have little or no governmental character. For example, the Central California chapter of the Girl Scouts is organized as a nonprofit public benefit corporation. Should the Girl Scouts be considered a public entity entitled to sovereign immunity?

The staff could not find any authority supporting that line of reasoning. To the contrary, there are authorities holding that nonprofit public benefit corporations are not public entities (for specific statutory purposes).

For example, *Service Employee's International Union, Local No. 22 v. Roseville Community Hospital*, 24 Cal. App. 3d 400, 101 Cal. Rptr 69 (1972), addressed whether a hospital formed as a nonprofit public benefit corporation is a "public corporation" and therefore a public entity (for the purposes of specific labor laws). The court held that a nonprofit public benefit corporation is not a public corporation (and therefore not a public entity), stating: "Public corporations are 'those corporations formed for political and governmental purposes and vested with political and governmental powers.'" *Id*. at 407.

Similarly, the Attorney General opined that a city could not establish a joint powers agency with a nonprofit public benefit corporation that it created,

because the governing statute only authorized "public agencies" to participate in a joint powers agency. Although the governing definition of "public agency" included a "public corporation," it did not include a nonprofit public benefit corporation (because a nonprofit public benefit corporation is not formed for political or governmental purposes and is not vested with political and governmental powers). 81 Ops. Cal. Atty. Gen. 213 (1998). The Attorney General noted that all of the entities listed in the definition of "public agency" shared a common characteristic; they were all *governmental* entities. *Id.*

Although those authorities are not directly on point, they do suggest that the essential characteristic common to all public entities is a governmental or political character. The Girl Scouts plainly do not meet that standard. Do charter schools? One could argue that charter schools are governmental in character, but the *Dubose* court does not make that argument.

Conclusion

The staff is not persuaded by either of the *Dubose* court's arguments.

The scope of the Eleventh Amendment is not necessarily the same as that of the Government Claims Act, because they serve different purposes. There is no evidence that the California Legislature intended for the Government Claims Act to have the same scope of application as the Eleventh Amendment.

The fact that a nonprofit public benefit corporation provides a "public benefit" on a nonprofit basis is not enough to justify treating it as a public entity. That approach fails to capture the essential characteristic of public entities and would sweep in many nongovernmental entities.

HEALTH AND SAFETY RISK

As discussed above, charter schools are exempt from a number of health and safety laws that were enacted to protect children in public schools. For example, charter schools are not subject to the "Field Act" earthquake safety standards. See Educ. Code §§ 17280-17317, 17365-17374, 81050-81149. Nor are charter schools required to prepare comprehensive school safety plans and disaster procedures that are required for all other public schools under Education Code Sections 32280-32289. See generally Memorandum 2010-26, p. 15.

One of the main purposes of tort liability is to deter risky behavior. See Arvo Van Alstyne, *A Study Relating to Sovereign Immunity*, 5 Cal. L. Revision Comm'n Reports 1, 271-72 (1963); Memorandum 2010-6, pp. 1-2. If a person is immunized

against tort liability for a particular type of harm, the person will probably tolerate a higher level of risk.

As noted earlier, public officials are immunized against liability for injuries that result from discretionary policy decisions. This could lead school officials to adopt policies that result in higher levels of risk to student health and safety. However, the Legislature has constrained public school discretion on health and safety matters, by enacting a number of non-discretionary health and safety requirements. This provides a regulatory backstop, ensuring that all public schools will achieve a specified minimum level of health and safety protection.

If charter schools are granted discretionary immunity for health and safety policy decisions and simultaneously exempted from the regulatory backstop provided by public school health and safety statutory requirements, it is possible that the level of health and safety risk to students in charter schools would exceed the level of risk allowed in traditional public schools.

This is one of the main concerns expressed by the Consumer Attorneys:

> Parents trust that the utmost care is exercised to create a safe learning environment for their children. To grant charters special legal protections from this responsibility without imposing appropriate and similar regulations undermines the public trust and threatens the safety of unsuspecting students.
>
> …
>
> Charter schools unquestionably serve a laudable public function. This does not, however, change the fact that they are largely exempt from many laws governing school districts. Although this freedom enables them to offer alternative methods of education to California students, it also frees them from the strict oversight and code compliance that applies to traditional public entities. Exposure to potential liability encourages responsible conduct. If the Legislature chooses not to enact additional legislation guaranteeing the state increased control over the safety and conditions of charter schools, diminished liability could lead to unsafe schools. Thus, while further definition of their status within the state may be advisable, application of Government Claims Act protections to charters at this point would do a disservice to the families and children of this state.

See Exhibit p. 3.

The Charter Schools Association does not agree that application of the Government Claims Act tort immunities to charter schools would result in increased health and safety risks, notwithstanding the fact that charter schools are exempt from some school safety statutes. They believe that charter schools

have two other strong incentives to make good policy decisions regarding student health and safety: (1) An unsafe charter school can have its charter revoked for cause, and (2) parents will pull their students out of a charter school that is unsafe.

> In reality, charter schools are far more accountable to their "customers" to maintain safe premises than ordinary public schools. Your report asks whether providing immunities might reduce the incentive a charter school has to take appropriate precautions against risks. (Study G-200, Memorandum 2010-26, pp. 26-28.) A charter school that fails to take common sense steps to protect students faces scrutiny by its authorizer, and could face revocation proceedings or be denied renewal when its maximum 5-year term expires. Indeed, if a charter school operates in a manner that puts students at risk of severe and imminent harm, it could find its charter revoked swiftly. (Ed. Code § 47607(d).) Under this provision of law, a charter school is not entitled to any opportunity to cure a safety problem before losing its right to operate.
>
> In addition, in our experience charter schools are often viewed by parents and students as safe havens from dangerous neighborhood schools, especially in urban areas plagued by gangs and other social ills. A common reason charter school students give to us for switching to a charter school is personal safety. Because charter schools are schools of choice for *every* student, parents can always decide to withdraw their children. Many charter schools have innovated to reduce risks by developing smaller schools with lower student/teacher ratios, reducing neighborhood gang influences by drawing students from a larger area, and insisting on more parent and volunteer involvement in campus life. If a charter school is not perceived as safe by its "customers" they will disenroll and the school will be forced to close.
>
> Like district schools, charter schools should be obligated to take reasonable actions to prevent injuries on their campuses, rather than the arguably greater burden imposed on private persons to exercise "ordinary care" in the maintenance of their facilities. Charter schools face the same resource and public policy limits which you note constrain choices at other public schools. (Study G-200, Memoranda 2010-6 (p. 16), 2010-26 (p. 29).) Charter schools have every incentive to maintain safe facilities to avoid injury to students, parents and members of the community. Charter schools are public institutions that cannot selectively close their doors to the public. But unlike district-run schools, they can close simply because parents choose to take their children elsewhere.

See Exhibit, pp. 7-8 (emphasis in original).

The staff agrees that the incentives described above should help to deter some risky policy choices. However, it is not clear whether those incentives would be

as effective with respect to non-obvious risks, prior to the manifestation of any harm. Many parents will not notice the absence of affirmative precautions and will not know that their children are facing risks higher than might otherwise exist in a traditional public school. For example, many parents would not notice the absence of an earthquake response plan, and won't see the heightened risk that could result from the absence of such a plan as a reason to change schools.

Furthermore, the authority of a chartering entity to revoke a charter is limited by statute to the following grounds:

> (c) A charter may be revoked by the authority that granted the charter under this chapter if the authority finds, through a showing of substantial evidence, that the charter school did any of the following:
>
> (1) Committed a material violation of any of the conditions, standards, or procedures set forth in the charter.
>
> (2) Failed to meet or pursue any of the pupil outcomes identified in the charter.
>
> (3) Failed to meet generally accepted accounting principles, or engaged in fiscal mismanagement.
>
> (4) Violated any provision of law.

Educ. Code § 47607(c).

Suppose that a charter school decides, as a matter of policy, to forego a safety precaution that is not required by law (because charter schools are exempt from the requirement) and is not required by the terms of its charter. That decision could create a greater risk to student safety than would exist in traditional public schools, without creating any justification for revocation of the charter under Section 47607(c).

ACCOUNTABILITY AND TRANSPARENCY

In addition to liability, there is another important check on the exercise of policy discretion by a public entity: the body of laws requiring that public entities be transparent and open to public observation. If a public school policy maker is considering a policy decision that might lead to unacceptable risk to students, that decision should be made in the open. Parents and other interested persons could then raise objections to the policy and bring political pressure to bear through their elected representatives.

Laws like the Brown Act, Public Records Act, and Political Reform Act ensure that public entity policy discussions are held in open meetings, that records

relating to policy matters are subject to inspection by citizens and the press, and that public officials are barred from making decisions that affect their own economic interests (which must be publicly disclosed).

The Consumer Attorneys believe it would be inappropriate to extend governmental policy making immunity to a body that is not subject to the ordinary oversight laws that regulate governmental entities. See Exhibit p. 3.

In response to a question about whether charter schools are exempt from open government laws, the Charter Schools Association writes that it is "unnecessary for the Commission to answer this question in order to decide whether the [Government Claims] Act is applicable to charter school organizations and their employees." See Exhibit p. 13. "Instead, the Commission can leave that to case-by-case determinations by the courts or the Legislature." *Id*.

The staff agrees that the Commission need not make any recommendation on the separate policy question of whether charter schools *should* be subject to general open government laws. However, the staff believes that it is appropriate to consider how exemption from those laws would affect policy making if charter schools were granted discretionary immunity for their policy decisions. Immunity without public transparency and accountability could lead to bad policy choices.

PRACTICAL REASONS IN FAVOR OF APPLYING GOVERNMENT CLAIMS ACT TO CHARTER SCHOOLS

The Charter Schools Association also offers the following "practical reasons" for application of the Government Claims Act to charter schools:

- Charter schools cannot charge tuition to cover costs associated with risk avoidance. See Exhibit p. 10.
- Application of the Government Claims Act would give charter schools greater flexibility to defend employees in criminal, administrative, or disciplinary proceedings. *Id*.
- Charter schools should not face the same liability as private schools, for wrongful acts of employees or private contractors. *Id*.

ADDITIONAL INFORMATION

In response to specific inquiries, the Charter Schools Association has provided information on the character and prevalence of "dependent" charter schools, and the availability of liability insurance for charter schools in the wake

of the decision in *Knapp*. That information is briefly summarized below. See Exhibit pp. 8-13.

Dependent Charter Schools

As discussed above and in prior memoranda, uncertainty about the legal status of charter schools is largely a consequence of the fact that charter schools can be formed as separate legal entities, distinct from their chartering authorities.

The entity status of a charter school seems straightforward when the charter school is instead formed as an organizational subdivision of an existing public entity, rather than as a separate legal entity. In that case, it would seem that the charter school is an integral part of a public entity and so should be treated in the same way as that public entity.

The Charter Schools Association reports that about 40% of charter schools are dependent. For a discussion of the extent to which dependent charter schools rely on school district resources, see Exhibit pp. 8-10.

Availability of Liability Insurance

One question posed by the Commission in an earlier memorandum was whether the decision in *Knapp*, that charter schools are not public entities for the purposes of the Government Claims Act, has had any deleterious effect on the availability of liability insurance to charter schools in California. See Memorandum 2010-26, p. 33.

The Charter Schools Association reports that there was very little change to the availability of commercial liability insurance or coverage by joint powers authorities after *Knapp*. They attribute this to insurers having already decided that charter schools should be insured in the same way as private nonprofit corporations. Consequently, *Knapp* affirmed their prior assumptions and did not lead to any change in coverage. See Exhibit p. 11.

However, the Charter Schools Association contends that the existing treatment of charter schools by insurers is problematic. The available insurance does not cover some activities for which public entities would be immune (e.g., "law enforcement" activities). This leaves a gap for charter schools. They are not immune for those activities, but cannot obtain insurance coverage for them. *Id.*

In evaluating this concern, it would be helpful to know whether private schools face the same difficulty, and if so how they manage the problem. **The staff invites comment on that point.**

CONCLUSION

The staff greatly appreciates the comments that we have received in this study. Further comment is welcome and encouraged, to help answer any new questions posed in this memorandum or to provide fuller information on any of the issues that were discussed.

The staff recommends that the next memorandum in this study be a description of alternative recommendations that the Commission might make. The Commission can then choose which course it wishes to follow and the staff will draft an implementing "tentative recommendation" for public distribution and comment.

Respectfully submitted,

Brian Hebert
Executive Director

CONSUMER ATTORNEYS OF CALIFORNIA

Seeking Justice for All

President John A. Montevideo | CEO • Chief Lobbyist Nancy Drabble | Senior Legislative Counsel Nancy Peverini | Political Director Lea-Ann Tratten | Associate Legislative Counsel Paloma V. Pérez

January 24, 2011

TO: THE CALIFORNIA LAW REVISION COMMISSION

FR: NANCY PEVERINI, SENIOR LEGISLATIVE COUNSEL

RE: GOVERNMENTAL LIABILITY STUDY: CHARTER SCHOOLS AND THE GOVERNMENT CLAIMS ACT.

The Commission has been requested by the California Legislature to study the legal and policy implications of treating a charter school as a public entity for purposes of the Government Claims Act, often referred to as the "Tort Claims Act." (2009 Cal. Stat. res. ch. 98, ACR 49 Evans.) In addition to our previously submitted comments, please accept these additional comments.

At the center of the debate is whether or not a charter school is a "public entity" and therefore subject to the tort privileges and special legal protections that a public entity receives. We think it instructive that the charter schools claim they are public entities for this tort purpose, while at the same time resisting most, if not all, legislative attempts to require the charters be the same as other educational institutions.

In the 2009-2010 session, the Charter School Association opposed conflict of interest regulation, opposed enhanced guidelines regarding charter establishment and renewals, resisted the implementation of academic and fiscal accountability standards, fought to allow funds to be diverted away from traditional public schools, and argued against repaying its fair share of emergency apportionment funds. Meanwhile the Association has argued for higher levels of ADA funding for charters, supported expanding the bodies that can lawfully authorize charter petitions, requested mandatory funding for new charters that are established, sought an alternative renewal process for those charters that are identified as persistently low achieving schools, and advocated for alternative academic accountability standards for charter schools. The Charter School Association's record clearly demonstrates that it views itself as an autonomous non-public body that should not be burdened by regulations or requirements that uniformly apply to public schools.

Questions surrounding the potential liability of charter schools and their administrators have existed since charters were first formed in 1992. State laws differ greatly on this topic, with a broad spectrum of methods used to clarify charter liability. CLRC notes that Education Code Section 47615(a)(1) establishes charter schools as part of the public school system for the purposes of certain provisions of the California Constitution. California law, however, otherwise exempts these institutions from the laws that govern traditional school districts.

Parallels have been drawn to other instances of the application of various government statutes to "quasi government entities." Although the Charter School Association seeks to gain the protections afforded to public entities by the Government Claims Act, its position is wholly

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inconsistent with its stance on legislation. In actuality, the Charter School Association has consistently fought to maintain its autonomy by challenging the notion that charter schools should be held to the same standards as public entities. The following is a short review of the bills the Association has actively lobbied the past two years, clearly demonstrating that even the charters themselves do not view the schools the same as public entities.

AB 572 (Opposed): Required charter schools to comply with the same conflict of interest requirements as school districts by specifying that charter schools are subject to the Ralph M. Brown Act, the California Public Records Act; Article 4 of Chapter 1 of Division 4 of Title 1 of the Government Code; and, the Political Reform Act of 1974.

AB 788 (Opposed): Prohibited the State Superintendent of Public Instruction or a state appointed administrator or trustee from transferring or allocating any funds appropriated to the Oakland Unified School District to a charter school located within the territorial jurisdiction of the district.

AB 980 (Opposed): Required charter schools located within the boundaries of a school district that is repaying an emergency apportionment to pay a prorated amount of the annual payment made by the district on the apportionment.

AB 1950 (Opposed): Established various academic and fiscal accountability standards related to charter schools.

AB 1982 (Opposed): Established a statewide cap on the number of charter schools that can operate in the state (1450) until December 2016. Prohibited charter school personnel with hiring authority from employing relatives.

AB 2320 (Opposed): Added new requirements to the charter school petition process, deleted the authority of a charter school petitioner to submit a petition to a County Board of Education to serve pupils that would otherwise be served by the County Office of Education, and eliminated the ability of the State Board of Education to approve charter school petitions.

AB 2543 (Opposed): Established timelines for charter school renewals and appeals.

AB 284 (Supported): Allowed the governing board of a community college district to authorize a petition to establish a charter school and require direct funding for those charter schools that are established.

SB 108 (Supported): Provided that no joint powers authority for risk-pooling shall refuse to admit to membership or provide coverage to a charter school.

SB 191 (Supported): Limited the application of a charter school funding formula, and provided that schools converted to charter status in a unified district on or after January 1, 2010 would be entitled to receive general purpose funding per pupil based on statewide averages of school revenue limit per pupil.

AB 1991 (Supported): Required charter school petitions to be granted for five years; authorized charter school renewals to be granted for five to ten years; established an alternative renewal process for charter schools identifies as persistently lowest achieving and schools that do not meet specified academic criteria; authorized the Superintendent

of Public Instruction (SPI) to establish alternative academic accountability standards for charter schools; and, combined the renewal appeals process with the revocation appeals process.

Further, the CLRC has noted that Government Claims Act protections have been applied to Private Land Trusts. Although one may make comparisons between the public functions served by these trusts and charter schools, such comparisons are misguided. Private land trusts serve to ensure that sensitive natural areas are preserved. Although individuals who choose to enter these otherwise private lands may consequently be exposed to undiscovered conditions that compromise their safety, these parties are often familiar with the possibility of encountering such dangers and are capable of voluntarily assuming the risks associated with entering. Such is not the case with charter schools. Parents trust that the utmost care is exercised to create a safe learning environment for their children. To grant charters special legal protections from this responsibility without imposing appropriate and similar regulations undermines the public trust and threatens the safety of unsuspecting students.

California law does not establish charter schools as public entities for tort purposes. Those agencies that have been granted Government Claims Act protection work under strict public and regulatory oversight. Charter schools are not subject to such oversight. Thus, granting Government Claims Act protections to charters without simultaneously requiring their strict compliance with public school health, safety and other standards gives them a significant advantage over their competition.

Charter schools unquestionably serve a laudable public function. This does not, however, change the fact that they are largely exempt from many laws governing school districts. Although this freedom enables them to offer alternative methods of education to California students, it also frees them from the strict oversight and code compliance that applies to traditional public entities. Exposure to potential liability encourages responsible conduct. If the Legislature chooses not to enact additional legislation guaranteeing the state increased control over the safety and conditions of charter schools, diminished liability could lead to unsafe schools. Thus, while further definition of their status within the state may be advisable, application of Government Claims Act protections to charters at this point would do a disservice to the families and children of this state.

Thank you for considering our views.

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January 24, 2011

Brian Hebert, Executive Secretary
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California Law Revision Commission
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Re: Comments on Calfornia Law Revision Commission Study G-200 on Charter Schools and the Government Claims Act

Dear Mr. Hebert and Ms. Dole:

On behalf of the California Charter Schools Association ("CCSA"), we appreciate the opportunity to respond to your invitation to comment on your thoughtful analysis of the liabilities faced by California charter schools, and whether they are entitled to sovereign immunity under the Government Claims Act ("Act"). In general, CCSA believes that based upon recent federal court decisions, California charter schools are entitled to the same immunities as governmental entities covered by the Act, and that the Commission should propose legislation making this clear. We recognize that the Commission is not intending to make recommendations on whether charter schools should be treated as public agencies under other provisions of law, thus the scope of our comments is limited to the Act.

The Act provides a consistent statutory scheme applicable to *all types* of entities that perform governmental functions—replacing the chaotic and unpredictable *ad hoc* distinctions developed by the courts for various types of governmental agencies and operations, and finally decried by the California Supreme Court as nonsensical in *Muskopf v. Corning Hospital District* (1961) 55 Cal.2d 211. The same uniform public policy applicable to the governmental entities covered by the Act operating in the state should apply equally to charter schools.

Charter Schools Warrant Sovereign Immunity Protections.

Before commenting on the specific questions on which you requested input from the charter community, we wished to explain further why recent decisions have determined that charter schools are entitled to sovereign immunity under the Act.

Since your last report was written, a federal court ruled (on September 22, 2010) that a California charter school operated by a nonprofit public benefit corporation is a "public entity" as that term is defined in Government Code §§811.2 and 815, and therefore is covered by the Act, including immunity from punitive damages under section 818. (*Dubose v. Excelsior Education Center* (C.D. Cal. 2010) ___F. Supp.___ (Case No. EDCV 10-0214 GAF).) The

Dubose court held that members of the charter school's board were immune from suit. Further, *Dubose* concluded that the California Supreme Court's decision in *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164 "provides no real guidance" on whether the Act applies to charter schools. The *Dubose* court simply rejected the conclusion of *Knapp v. Palisades Charter High School* (2007) 146 Cal.App.4th 708 that *Wells* dictated a different result. Instead, the *Dubose* court found persuasive the analysis of another federal district court ruling issued in March 2010, which concluded that a California charter school is an arm of the state for Eleventh Amendment immunity purposes, and therefore not subject to suit as a "person" under 42 U.S.C. §1983. (*Doe ex rel. Kristen D. v. Willits Unified School District* (N.D.Cal. 2010) ____ F.Supp. _____, 2010 WL 890158.)

These rulings are consistent with the findings of the final report in your series, surveying the practices of other states across the country. You found that some form of sovereign immunity has been granted to charter schools in the vast majority of states which have charter school laws. (Study G-200, Memorandum 2010-35, p.3, dated August 5, 2010 (29 of 39 states).) Thus, sovereign immunity for charter schools is far more common than not, and a natural complement to their role as public schools which are part of a state's public education system.

As the federal courts have recognized, charter schools act as "arms" of the state in carrying out California's constitutional obligation to provide a common system of public education. As public schools, charter schools are required to admit students who apply for admission, regardless of their place of residence, and without discrimination. (Ed. Code §47605(d).) Charter schools may not charge tuition. (Ed. Code §47605(d).) As part of the public school system under Article IX, §5 of the California Constitution, charter school officials exercise their discretion to enforce state laws, safeguard the rights of students and the public, establish school policies and conduct administrative proceedings. Charter school employees may participate in public employee pension programs. (Ed. Code §47611) and organize under the supervision of the Public Employee Relations Board. As employers, charter schools must follow the laws giving their employees such rights. (Ed. Code §47611.5.)

Recent legislation illustrates the expectations of the public that charter schools will meet Constitutional obligations as governmental entities. This year, the California Legislature enacted SB 438, expressly treating charter schools as governmental agencies for purposes of the First Amendment and the corresponding provision of the California Constitution. By making Education Code section 48907 applicable to charter schools, the Legislature requires chartered schools to adopt and administer policies that recognize employees' and students' free speech rights under the federal and state constitutions. (*Smith v. Novato Unified School Dist.* (2007) 150 Cal. App. 4th 1439 [district and their employees had potential liability for violating Education Code §48907].)

In these and other fundamental ways, charter schools operate like other public schools—and unlike their private school counterparts. Consequently, charter school officials are entitled

to the same protections as other public school officials. As you have noted,[1] sovereign immunity is essential to protect the freedoms enjoyed by public servants to make difficult policy and resource allocation decisions without worrying about facing personal liability for their choices. Charter school board members, who are overwhelmingly unpaid volunteers, are entitled to that protection.

Public Policy Supports Treating Charter Schools As Public Schools Under the Act.

We agree with the public policy reasons described in your reports which support the conclusions of the federal courts that charter schools are covered by the Act:

1. No right to deny service. Charter schools, unlike private schools, can't simply decide to exclude some students who are too expensive or risky to serve. Under the Charter Schools Act, they must admit any student who seeks to enroll, regardless of residence, and must conduct a random public lottery if there are more applications than spaces. They cannot discriminate in admissions based on race, religion, national origin, disability or any other grounds specified by law. (Ed. Code §47605(d).) Not only must they take all comers, they must succeed in educating them. If their students do not achieve minimum performance standards, their charters cannot be renewed. (Ed. Code §47607(b).)

2. No profit motive. Charter schools, like other governmental entities that are covered under the Act, don't get any special benefits by selling services to more "customers." Regardless of enrollment, charter schools must provide the same level of service to students. Growth provides no direct benefits, although in some respects it can lead to economies of scale. The concerns of the *Wells* court about profiteering practices were addressed by the Legislature in major reforms enacted in 1999. Nonclassroom-based charter schools now face special scrutiny: they must show that they are spending a substantial fraction of their revenues on student instruction or face funding reductions. (Ed. Code §47612.5(c).) Charter-authorizing districts can no longer ask charter petitioners for a substantial "cut" of state revenues in exchange for favorable consideration of a charter proposal. "Oversight" fees collected by chartering authorities are capped at 1% of certain school revenues (3% if a substantially rent-free facility is provided to the school).

The vast majority of charter schools today are organized as nonprofit public benefit corporations, as authorized by the 1999 law (see, Ed. Code §47604). Nonprofit corporations may only use their funds to further the charitable purposes set out in their articles of incorporation. (*In re Veterans' Industries, Inc.* (1970) 8 Cal.App.3d 902, 918.) Their assets are "impressed with a charitable trust by virtue of the express declaration of the corporation's purposes" found in their articles. (*Queen of Angels Hospital v. Younger* (1977) 66 Cal.App.3d 359.) Nonprofit corporations are prohibited from making distributions to their members (the

[1] Study G-200, Memorandum 2010-06, p.4.

nonprofit equivalent of shareholders). Their governing boards and officers can be sued personally for breach of fiduciary duties in the handling of charter school funds by the California Attorney General and certain other persons. (See Corp. Code § 5142, subd. (a).) Moreover, nonprofit corporations that pay excessive compensation to their management employees face sanctions from the IRS, including fines and loss of tax-exempt status for the corporation. (*E.g.*, IRC §4958 imposing excise taxes on excess benefit transactions.)

Thus, charter schools are not designed to make profits for anyone. To the extent charter schools do obtain services from educational management organizations ("EMOs"), which may be for-profit organizations, the Act excludes independent contractors from its protections, as you have noted. (Study G-200, Memorandum 2010-06, p. 9.)

3. No right to charge "customers" for risks. Charter schools can't address their operating risks by just raising prices, as private schools can. Charter schools must provide a free public education, and are prohibited from charging tuition. (Ed. Code §47605(d).) They face the same budgetary limitations as school districts—but, without the rights that districts have to seek additional operating funds from local parcel taxes, or capital funds from local property tax levies. Consequently, like public officials covered by the Act, charter school officials need to make hard policy choices regarding how to address the risks they face.

In reality, charter schools are far more accountable to their "customers" to maintain safe premises than ordinary public schools. Your report asks whether providing immunities might reduce the incentive a charter school has to take appropriate precautions against risks. (Study G-200, Memorandum 2010-26, pp.26-28.) A charter school that fails to take common sense steps to protect students faces scrutiny by its authorizer, and could face revocation proceedings or be denied renewal when its maximum 5-year term expires. Indeed, if a charter school operates in a manner that puts students at risk of severe and imminent harm, it could find its charter revoked swiftly. (Ed. Code §47607(d).) Under this provision of law, a charter school is not entitled to any opportunity to cure a safety problem before losing its right to operate.

In addition, in our experience charter schools are often viewed by parents and students as safe havens from dangerous neighborhood schools, especially in urban areas plagued by gangs and other social ills. A common reason charter school students give to us for switching to a charter school is personal safety. Because charter schools are schools of choice for *every* student, parents can always decide to withdraw their children. Many charter schools have innovated to reduce risks by developing smaller schools with lower student/teacher ratios, reducing neighborhood gang influences by drawing students from a larger area, and insisting on more parent and volunteer involvement in campus life. If a charter school is not perceived as safe by its "customers" they will disenroll and the school will be forced to close.

Like district schools, charter schools should be obligated to take reasonable actions to prevent injuries on their campuses, rather than the arguably greater burden imposed on private

persons to exercise "ordinary care" in the maintenance of their facilities. Charter schools face the same resource and public policy limits which you note constrain choices at other public schools. (Study G-200, Memoranda 2010-6 (p. 16), 2010-26 (p.29).) Charter schools have every incentive to maintain safe facilities to avoid injury to students, parents and members of the community. Charter schools are public institutions that cannot selectively close their doors to the public. But unlike district-run schools, they can close simply because parents choose to take their children elsewhere.

Comments on dependent charter schools.

You asked for comment on the extent to which charter schools that are not incorporated are, in fact, "fully integrated" into their authorizing school district. (Study G-200, Memorandum 2010-26, p.26.) Based upon the California Department of Education's public schools database (http://www.cde.ca.gov/ds/si/ds/pubschls.asp) more than 60 percent of all charter schools are incorporated. Based on the more than 15 years of experience of the authors of this letter, the proportion of incorporated, independent, charter schools is growing rapidly (since the 1999 law noted above) because of the legal protections incorporation provides for authorizers, and the autonomy incorporating provides for charter schools.

As *originally* enacted, the Charter Schools Act ("CSA") did not specifically provide that a charter school may be operated as a nonprofit public benefit corporation. A petition could be submitted to the governing board of a school district for review only after it was signed by at least ten percent of all teachers employed by the school district, or by half of the teachers currently employed at a particular school. (See former Ed. Code § 47605, subd. (a), added by Stats. 1992, ch. 781, § 1.) A school board had broad discretion to grant or deny a charter petition – even if the petition was legally sufficient. (See *id.*, subd. (b).) Not surprisingly, many of the charter schools initially approved under the CSA were "dependent" charter schools.

That changed in 1998, when Assembly Bill No. 544 ("AB 544") substantially increased the autonomy of charter schools. Perhaps the most significant provision in AB 544 was the addition of Education Code § 47604 which allows charter schools to elect to operate as, or be operated by, a nonprofit public benefit corporation. (See Ed. Code § 47604, subd (a).) While a charter authorizer is entitled to one representative on the board of directors of charter school's corporate board (see Ed. Code § 47604, subd. (b)), this is insufficient to give it control over the corporation. Consistent with this independence, AB 544 also declared that where a charter school is incorporated its authorizer is not liable for the debts or obligations of the charter school. (See former Ed. Code § 47604, subd. (c), added by Stats. 1998, ch. 34, section 3.)[2]

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[2] Education Code section 47604, subdivision (c), has been amended. It provides, "An authority that grants a charter to operate a charter school to be operated by, or as, a nonprofit public benefit corporation is not liable for the debts or obligations of the charter school, or for claims . . . if the

In incorporated charter schools, the corporate board of directors provides oversight, planning, policy-making and decision-making for operations. The charter authorizer, whether a school district, county office of education or the State Board of Education, has limited oversight responsibilities (see fn. 2), no substantive role in the operations of the charter school, and no authority to exercise decision-making authority over corporate affairs. Thus, in contrast to the situation described in *Hovd v. Hayward Unified School District* (1977) 74 Cal.App.3d 470, a charter school does not merely operate under a fictitious name at premises away from the authorizing district's—it is truly a separate entity when incorporated.

Based on the experience of the authors, unincorporated (sometimes called "dependent" charter schools typically operate in district-owned space and receive a wide variety of administrative services comparable to those received by other district-run schools, including use of district teachers and staff. Indeed, there may or may not be a formal agreement (usually called a memorandum of understanding) under which the charter school purchases financial management services, including payroll, accounts payable, procurement services, provides human resources services (including access to the district's substitute teachers pool), mail, food services, risk management (including self-insurance and insurance). The district may provide some access to legal counsel on risk management matters, especially where the charter school has adopted the district's policies.

In unincorporated charter schools, the charter school's governing body is typically responsible for budgeting, setting employee compensation and benefits, and decisions about the curriculum, in the authors' experience.[3] (In some cases, these governing bodies have no final decision-making power and must yield to its authorizer's ultimate decisions.) However, when charter school decisions result in litigation (commonly employment-related decisions), authorizers typically require these dependent charter schools to hire counsel and bear the costs of suit where the charter provides that the school is the "public school employer" pursuant to Education Code §47611.5. The charter petition may also expressly allocate responsibility for all liabilities, such as requiring the charter school to first use its assets to indemnify the district against claims (per Education Code §47605(g).)

Thus, in these unincorporated, "dependent" charter schools, responsibility for operations are typically shared between the district and school, the facilities are owned by the district, and the charter school is not a separate corporate entity. In these circumstances, the district should be ultimately liable for the operations of its captive school, just as it would be for the operations of any other district program under *Hovd*—except perhaps for liabilities arising out of employment

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authority has complied with all oversight responsibilities required by law, including, but not limited to, those required by Section 47604.32 and subdivision (m) of Section 47605."

[3] Examples of such arrangements can be found in the San Diego Unified School District and Chula Vista Elementary School District

matters (given that the charter school's teachers are usually district employees) in the circumstance in which the charter school has elected to be the "public school employer" for collective bargaining purposes under Education Code §47611.5.

Practical reasons for application of the Act to charter schools.

Your reports also point out the practical reasons certain immunities have been afforded to public schools. (E.g., Study G-200, Memorandum 2010-06: p.3, inability to charge tuition and limited resources compared to private schools; p.9, high risks of law enforcement, licensing and dangerous conditions of public property; p.16, financial and political constraints.) These apply with equal force to charter schools.

Without the protections of the Act, incorporated charter schools would lack the authority to defend employees charged in criminal, administrative or disciplinary proceedings. For example, you note that a school district could not otherwise defend an employee charged with assault for removing a bully from school grounds without the provisions of the Act. Yet, charter school employees likely would take the same action, and should also be able to act with zeal, without fear of personal liability, especially when setting policies and enforcing laws, regulations and policies.

You point out that school district board members cannot be held liable for acts of employees of the school, while private schools and their board members may be liable for fraud, corruption or malicious acts of their employees. In this respect, charter school board members—who are often unpaid volunteers—should not face greater liabilities than their district counterparts.[4]

You explain that other public schools are not responsible, generally, for most conduct of the independent contractors they hire, while private schools may be held fully liable for independent contractors' acts. (Study G-200, Memorandum 2010-06, p.9.) Charter schools, which tend to be smaller organizations and have fewer employees than most school districts , may make more extensive use of independent contractors than school districts to provide a wide variety of services (food services, special education services, transportation, etc.). Yet, were the rules applicable to private schools to govern charter schools, they would be more exposed to liablity for the acts of their contractors than school districts contracting with the same firms would be for the same activities. This has no rational justification.

[4] A variety of additional examples are found in footnote.5, infra.

Comments on availability of insurance and consequences of lack of coverage for charter schools.

You requested comment on insurance availability before and after *Knapp*, hardships associated with charter failure, and hardships that would result from expanded tort liability. (Study G-200, Memorandum 2010-26, pp.32, 33.) As we have already suggested, charter school board members and employees operate in a public school environment and are exposed to the same risks as other public school officials. Immediately following *Knapp*, the authors encountered some limited re-examination of the coverage of charter schools by joint powers authorities that primarily cover school districts (the dominant form of insurance for public schools throughout California), some of which decided to exclude charter schools from participation in some circumstances, notwithstanding the authority provided by Government Code §6528 for charter schools to participate in such liability pools.

Ultimately, however we saw little change among commercial insurers or among joint powers authorities as a result of *Knapp*. This was to be expected, because *Knapp* did not change the basis on which such schools were being underwritten by either of them. As explained below, commercial carriers had generally assumed that charter schools were simply another kind of nonprofit corporation—not a public entity—and their policies already excluded risks faced uniquely by governmental entities. *Knapp* validated their assumption.

Joint powers authorities issue coverage contracts that generally mirror their regulated counterparts' policies, and depend on the immunities provided by the Act to protect their members from governmental risks. Like commercial insurers, they exclude from coverage liabilities based on the exercise of governmental authority. After *Knapp*, it appeared that the claims presentation requirements of the Act might be inapplicable to charter schools, but the scope of liability coverage offered by joint powers authorities was largely unaffected. Consequently, joint powers authorities (including the California Charter Schools Association Joint Powers Authority represented by the author of this letter) concluded that *Knapp* increased their risks only modestly.

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

Commercial coverage also excludes a variety of "wrongful acts," such as liabilities for breaches of mandatory duties imposed by statute. The Act protects school districts against liability solely because of errors in recordkeeping (*Grenell v. City of Hermosa Beach* (1980) 103 Cal.App.3d 864 (city not liable because homebuyer relied on erroneous city records showing dwelling unit was properly permitted); not adopting a policy (*Wood v. County of San Joaquin*

(2003) 111 Cal.App.4th 960 (county not liable for motor boat injury because it failed to adopt boating rules for lake); or failing to follow detailed state regulations in some respects (*Clausing v. San Francisco Unified School District* (1990) 221 Cal.App.3d 1224 ((failure to adopt specific rules on corporal punishment).[5] Charter schools are entitled to these protections, too.

Insurers in California may not insure intentional misconduct under Insurance Code section 533. Certain kinds of misconduct and damages (such as punitive damages) are not insurable because they are deemed to be against public policy. A decision by a board of a charter school to enforce a statute or adopt a policy will often fall within these exclusions. Yet, we allow school districts to defend employees against criminal proceedings and pay punitive damages on their behalf, albeit under statutorily-prescribed conditions. (E.g., Gov. Code §825(b).) Charter schools should have equivalent flexibility.

In a recent case (August 2010, *Alderson v. Eagles Peak Charter School,* San Diego Superior Court, Case No.37-2009-00088878-CU-WT-CTL) a charter school settled for $1million a wrongful termination claim brought by an ex-employee who asserted various alternative theories of liability and claims for damages, including punitive damages, retaliation in violation of public policy and violation of open meetings laws. While some claims could not be asserted against a district-run school, and other claims could not be asserted against a private organization, under the trial court's rulings the jury could have treated the charter school as either public or private—or perhaps both simultaneously. Faced with these risks, the charter

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[5] There are many other examples. A school official should be able to carry out his or her reporting and investigatory duties when there is suspected child abuse involving a student—without fear of suit. (*Newton v. County of Napa* (1990) 217 Cal.App.3d 1551.) A school and school counselor should not be liable for refusal of collegiate association to accept coursework from high school (*Brown v. Compton Unified School District* (1998) 68 Cal.App.4th 114). School districts are protected against a student's claim that requirements for passing a course were fraudulently concealed by a teacher (*Chevlin v. Los Angeles Community College District* (1989) 212 Cal.App.3d 382).) Charter school employees should be able to enforce such policies as school dress codes, rules on student assemblies, picketing on campus, searching of lockers, or seizure of student property, without having to be experts on constitutional law. (*E.g., O'Toole v. Superior Court* (2006) 140 Cal.App.4th 488.) Charter school board members should not have personal liability for making the important decision as to whether to hire or terminate a school director's employment. (*Caldwell v. Montoya* (1995) 10 Cal.App.4th 972 (case specifically cited in *Dubose*.) A principal should be protected from suit for suspending, or expelling a student, or rejecting funds associated with religious advertisements. (*Skinner v. Vacaville Unified School District* (1995) 37 Cal.App.4th 31; *Nicole M. v. Martinez Unified School District* (1997) 964 F.Supp. 1369.) If school officials carefully consider how much supervision of the schoolyard is needed, they are protected from liability. (*Biggers v. Sacramento City Unified School District* (1972) 25 Cal.App.3 269.)

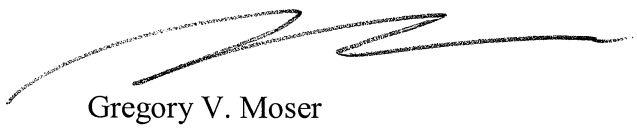
school (and its commercial insurer) settled. While these situations are rare, it will not take many such stories for insurers and self-insurance pools to react by shutting their doors to charter schools.

How broadly should Education Code section 47610 be interpreted?

You also requested comments on whether Education Code section 47610, the so-called "megawaiver" should be interpreted as broadly exempting charter schools from all laws applicable to school districts, or only the laws "that apply specially to school districts as school districts." (Study G-200, Memorandum 2010-26, p.2.) We believe that it is unnecessary for the Commission to answer this question in order to decide whether the Act is applicable to charter school organizations and their employees. As the *Dubose* court concluded, to the extent charter schools operate as arms of the state, they should be treated as public agencies under the Act. As mentioned above, the Commission need not determine whether they should be treated as public agencies under other provisions of law. Instead, the Commission can leave that to case-by-case determinations by the courts or the Legislature.

For the reasons described above, we recommend that charter schools simply be added to the list of "public entities" in Government Code section 811.2. The Law Revision Commission and the Legislature have already refined and carefully balanced the liabilities and immunities of public agencies and employees over decades since the California Supreme Court swept away the case-by-case approach to governmental immunities in *Corning Hospital District v. Muskopf* (1962) 57 Cal.2d 488. As charter schools are part of the state system of public education, and their obligations are fundamentally the same as those of the governmental entities covered by the Act, no rebalancing is needed.

Very truly yours,



Gregory V. Moser

LINK: 39, 46, 48

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

DOROTHY DUBOSE, Plaintiff, v. EXCELSIOR EDUCATION CENTER, a California corporation and public charter school under the jurisdiction of the VICTOR VALLEY UNION HIGH SCHOOL DISTRICT, et al., Defendants.	**Case No. EDCV 10-0214 GAF (OPx)** MEMORANDUM & ORDER REGARDING DEFENDANTS' MOTIONS TO DISMISS

I.

INTRODUCTION & BACKGROUND

Plaintiff Dorothy Dubose ("Dubose"), a former employee of defendant Excelsior Education Center ("Excelsior"), brings suit against Excelsior, a number of Excelsior-related entities, several Excelsior board members, managers and employees, and the Victor Valley Union High School District ("Victor Valley") for alleged discrimination, harassment, and retaliation she suffered as an Excelsior employee. The suit encompasses claims under both federal and state law. Although Dubose, who is African-American, acknowledges that she worked for Excelsior for several years without incident, she contends that she began to suffer repeated acts of race- and gender-based harassment, discrimination and retaliation beginning in early 2006. She

claims that she was wrongfully demoted and eventually terminated because of her race, gender and her pursuit of her legal rights in proceedings before the EEOC.

Several defendants now move to dismiss the pending claims. Victor Valley seeks dismissal because it had nothing to do with any of the alleged acts of discrimination and it lacked the degree of control over Excelsior to establish a basis for holding Victor Valley liable for the acts of Excelsior, its board, management and employees. Excelsior and its affiliates attack the complaint on numerous grounds including the following:

(1) that the complaint fails to state facts sufficient to establish a prima facie case of disparate treatment to support a claim for racial or gender discrimination or to identify a neutral practice with a disproportionate impact on African-Americans sufficient to establish a disparate impact claim;

(2) that the facts alleged are insufficient to establish a claim for direct harassment by Excelsior and three employees;

(3) that the complaint fails to allege facts sufficient to demonstrate that Excelsior failed to take adequate steps to prevent harassment or discriminatory conduct;

(4) that the facts alleged fail to establish any causal connection between DuBose's protected activity (the filing of complaints with the EEOC) and the alleged retaliatory acts; and

(5) that the facts alleged fail to establish a cause of action for failure to re-hire or to state any tortious conduct under California law, including defamation, intentional and negligent infliction of emotional distress.

Members of Excelsior's Board of Directors also move to dismiss on the ground that they are immune from suit.

For reasons that are discussed in greater detail below, the refusal to rehire claim against Excelsior; the Tameny claim against Excelsior; the negligent infliction of emotional distress claim; the intentional infliction of emotional distress claim; the

negligent supervision claim; the claims against the individual board members; and the punitive damages claims against Excelsior are **DISMISSED WITHOUT LEAVE TO AMEND.** All claims against Victor Valley are **DISMISSED WITH LEAVE TO AMEND**. In addition, the disparate impact and defamation claims are **DISMISSED WITH LEAVE TO AMEND**. The motion to dismiss all remaining claims is **DENIED.**

II.

BACKGROUND

A. ALLEGATIONS REGARDING FORMAL CLAIMS FILED BY DUBOSE

This case arises out of event that go back to at least 2006. Dubose avers that she "filed a formal complaint" with the Excelsior administration "against a fellow co-worker, Brigitte Gossage, for her continuous harassment," on June 7, 2006. (FAC ¶ 60f.) Dubose also states that she filed a "charge of Discrimination based upon Retaliation in violation of Title VII...with the Equal Employment Opportunity Commission ('EEOC')" on June 30, 2008. (Id. ¶ 25.) She subsequently amended her complaint in July 2008, September 2008, and May 2009. (Id. ¶¶ 27, 29, 32.) This case arises out of the events that gave rise to those administrative complaints.

B. ALLEGATIONS REGARDING RACIAL DISCRIMINATION

Dubose, an African-American female, indicates that in 2003, she "received her preliminary designated subject credential . . . which qualified her to teach at Excelsior;" she then claims that she needed the opportunity to teach "to complete, or 'CLEAR' her credential." (Id. ¶ 53.) But while Excelsior "denied [her] the [opportunity] to teach," it "signed the credential of Margaret Gilmore, a Caucasian female who received her preliminary credential at the same time as [Dubose], and approved Ms. Gilmore as a Facilitator/Teacher." (Id.)

Dubose also avers that throughout "her employment," she was "subjected to a hostile work environment based on her race," in part because of "[o]ffensive and demeaning racist graffiti and writings...prevalent in...[the] workplace." (Id. ¶ 55.)

Dubose was also "exposed to racist remarks and actions directed towards herself as well as other minority employees of Excelsior, at the hands of Excelsior and its employees, including . . . referring to African-Americans as 'Niggers.'" (Id.) Despite the fact that other employees reported these incidents to Newbold, "no action was taken against the offending employees, and in fact, one was promoted instead." (Id.)

In December 2007, defendant Gehrke "re-hired Mike Barley, a male Caucasian, who had resigned in June 2006, to supervise the Enrollment Department, despite the fact that [Dubose] had trained for that position and was already performing the position's job duties satisfactorily." (Id. ¶ 72a.)

Finally, on December 11, 2007, Dubose "overheard staff members saying that [the] Excelsior 'Administration' was accusing...African-American employees of writing an anonymous letter." (Id. ¶ 55.) Because Dubose was "one of only four African-American employees," she was made "significantly uncomfortable from these statements." (Id.)

Although Dubose "repeatedly complained either verbally and/or in writing to her supervisors and Excelsior's administration about the hostile working environment and racial[ly] discriminatory practices...no investigation was conducted by Excelsior." (Id. ¶ 56.)

C. ALLEGATIONS REGARDING HOSTILE WORK ENVIRONMENT AND HARASSMENT

Dubose also claims that she "was exposed to demeaning and hostile conduct at the hands of Excelsior and its employees." (Id. ¶ 60.) First, while "working as a receptionist," Dubose "was constantly yelled at and humiliated unjustifiably by" Excelsior employees Gehrke and Wright "in the presence of other co-workers and/or parents." (Id. ¶ 60a.) She was also "constantly reassigned positions on a daily basis," and "forced to wait for her immediate supervisor to order her to a particular location," although no other employees were treated in this way. (Id. ¶ 60b.) Dubose has also offered some time-specific examples of harassment and hostile conduct.

In April 2006, Excelsior allegedly "received a bomb threat but failed to advise" Dubose or her husband (another Excelsior employee) of the threat "despite knowing that he was required to unlock all doors on campus...with which [Dubose] assisted him." (Id. ¶ 60c.) Dubose and her husband therefore "unlocked all doors on campus the next day for the arriving staff and students, endangering both of their lives." (Id.)

Dubose also claims that on May 23, 2006, her husband "was verbally attacked and humiliated in a meeting by [the] Excelsior administration"; after Dubose's husband "filed both a worker's compensation claim and a DFEH claim regarding this incident...Excelsior and Excelsior's employees' harassing and discriminatory conduct towards [Dubose] intensified." (Id. ¶ 60d.)

Soon after she filed her June 2006 formal complaint against her co-worker (in August 2006) Dubose's supervisor Gehrke began to "constantly call [her] personal cell phone to inquire as to [her] location...and would become extremely aggravated if she did not answer quickly." (Id. ¶¶ 60e, 72.) This treatment caused Dubose "to become extremely stressed, ill and sick to her stomach," and no other employees were treated in this way. (Id. ¶ 60e.) Additionally, between August and October 2006, Dubose was "relocated to the Band Room where she was kept isolated from all staff," despite her supervisor's directions that she was "assigned permanently to the 'Enrollment Department.'" (Id. ¶ 72c.)

Subsequently, in May 2007, defendant Wright "approached [Dubose] at a meeting to discuss her daughter's summer school books," informed her that she should not "approach [him] with an attitude," and then "leaned into her face...while staring in a threatening manner." (Id. ¶ 64a.) Dubose "was so visibly shaken that other employees visibly noted her distress." (Id.)

Finally, in May 2008, Newbold allegedly "demoted [Dubose] and reduced her from a 12-month hour[ly] employee to a 10-month hourly employee, which resulted in a loss of pay. No justification...was provided....[and] no other Excelsior employees were demoted or had their hours/working months and salary reduced in spite of a satisfactory

job performance." (Id. ¶ 64b.) Newbold had allegedly promised Dubose that she would be able to "continue as a 12-month paid employee" in or around that time. (Id. ¶ 72d.) But instead of continuing Dubose's employment, "Excelsior paid another employee, Margaret Gilmore, a Caucasian female, to work the summer months as a 12-month employee in...[Dubose's] Enrollment Department position." (Id.)

D. ALLEGATIONS REGARDING TERMINATION

Dubose has also provided allegations describing her alleged wrongful termination. She states that on "April 28, 2009, the Excelsior Board specifically selected" her for termination, and that on "May 1, 2009," while she was taking a day off, Newbold "called [her] and stated that...the Excelsior Board decided to terminate her...for alleged 'budget restrictions' and 'program restructuring.'" (Id. ¶¶ 43-44.) In addition to Dubose, Excelsior also terminated approximately seventeen other employees, "the majority of which had also filed grievances and claims similar to" those filed by Dubose, stating "discrimination, harassment or retaliation." (Id. ¶¶ 45, 52b.)

Dubose alleges that Excelsior had sufficient funds to pay the salaries for the terminated employees because: (1) "in March 2009, Excelsior hired" a new executive director who made approximately $75,000 more in salary than the prior director; (2) "on or about June 2, 2009, Excelsior approved multiple stipends for staff members"; (3) Excelsior discovered in June or July 2009 that it had "$1.2 million extra in [its] budget...of which [it was] allegedly 'unaware'"; and (4) in June 2009, Excelsior "began advertising for the exact same positions...from which [Dubose was]...terminated." (Id. ¶¶ 52a, 52e, 52f, 52g.) Furthermore, Dubose claims, "Excelsior's stated basis for terminating [her] was a pretext for Excelsior's true and wrongful basis of discriminating against her on the basis of her race, gender, religion and lodging of grievances and complaints based upon the same." (Id. ¶ 44.)

E. ALLEGATIONS REGARDING GENDER DISCRIMINATION

Dubose has also provided some allegations to support her gender discrimination claim. She states (1) that she was a female employee of Excelsior; (2) that "all

facilitators/teachers terminated on May 1, 2009 were female"; and (3) that Excelsior and her Excelsior-employee supervisors "terminated [her], in whole or in part, because of her gender," and "discriminated against her on the basis of her gender." (Id. ¶¶ 121-24.)

III.

DISCUSSION

A. RULE 12(B)(6) LEGAL STANDARD

On a motion to dismiss brought pursuant to Rule 12(b)(6), a court must accept as true all factual allegations pleaded in the complaint, and construe those facts and draw all reasonable inferences therefrom "in the light most favorable to the nonmoving party." Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337–38 (9th Cir. 1996); see also Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120–21 (9th Cir. 2007). A court may dismiss a complaint under Rule 12(b)(6) only if it appears beyond doubt that the alleged facts, even if true, will not entitle the plaintiff to relief on the theories asserted. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 560–61 (2007); Stoner, 502 F.3d at 1120–21; see also Cahill, 80 F.3d at 338.

While a complaint need not contain detailed factual allegations, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (citation, alteration, and internal quotation marks omitted). Likewise, the court is not "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001) (emphasis added). In other words, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. . . . While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949–50 (2009) (citing Twombly, 550 U.S. at 555); see also Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003). Moreover, the Supreme Court clarified in Iqbal that "only a complaint that states a

plausible claim for relief survives a motion to dismiss. . . . [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'shown'—that the pleader is entitled to relief." 129 S. Ct. at 1950.

B. APPLICATION

1. DUBOSE'S CLAIMS AGAINST VICTOR VALLEY

The Court first considers Dubose's claims against Victor Valley, and concludes that these claims lack adequate factual support.

As the preceding background indicates, it was Excelsior and Excelsior's employees—not Victor Valley employees per se—who allegedly discriminated against Dubose and terminated her without cause. Dubose's only substantial allegations implicating Victor Valley in this suit are found at paragraphs 16 and 17 of the FAC.

a. Board Control

Dubose first alleges that Victor Valley's "control over Excelsior...is such that from February 2007 through April 2007, [Victor Valley]...replaced the entire Excelsior Board mid-term with hand selected board members of its own choosing, who serve until the Excelsior Charter ends, or until [Victor Valley] chooses alternate board members....Such actions...control Excelsior to the point that [Victor Valley] is an employer of Ms. Dubose." (FAC ¶ 16.)

The California Court of Appeal has discussed the general corporate structure of charter schools, and "reasoned that...charters schools [are] operated, not by the public school system but by distinct outside entities—including nonprofit public benefit corporations with independent legal identities...that are given substantial freedom to achieve academic results free of interference by the public educational bureaucracy." Knapp v. Palisades Charter High Sch., 53 Cal. Rptr. 3d 182, 187 (Ct. App. 2007) (citing Wells v. One2One Learning Found., 39 Cal. 4th 1164, 1201, 141 P.3d 225 (2006) (internal citations and quotation marks omitted)). Thus, in general, the "sole relationship between the charter school operator and the chartering district is through

the charter governing the schools' operation"; charter school "operators exercise considerable autonomy and independent responsibility as to financial matters." Knapp, 53 Cal. Rptr. 3d at 187 (citing Wells, 39 Cal. 4th at 1201) (internal quotation marks omitted)). Excelsior's charter (Victor Valley Req. Jud. Not., Ex. A.) evinces a similar independent relationship with Victor Valley, indicating that it "will be a directly funded independent charter school and will be operated as a California Nonprofit Public Benefit Corporation, pursuant to California law upon approval of this charter." (Id. at 6.)

For purposes of Title VII, claims that a particular employee was subject to control by "joint employers," or claims that state "a theory of consolidation" between two particular employers, are highly fact-specific. E.E.O.C. v. Pac. Maritime Ass'n, 351 F.3d 1270, 1275 (9th Cir. 2003); Morgan v. Safeway Stores, Inc., 884 F.2d 1211, 1214 (9th Cir. 1989). Thus, "whether businesses should be treated as a single employer" involves a complex consideration of "interrelated operations...common management...centralized control of labor relations, and...common ownership or financial control," even where a parent-subsidiary relationship between the two employers allegedly exists. Morgan, 884 F.2d at 1213. Likewise, "determining joint employment" involves an "elaborate collection" of factors, dependent upon numerous "specific fact situations." Pac. Maritime, 351 F.3d at 1275.

Under FEHA, the single-employer inquiry also involves the four-factor test referenced in Morgan. See Laird v. Capital Cities/ABC, Inc., 80 Cal. Rptr. 2d 454, 460-61 (Ct. App. 1998). Joint or dual-employer inquiries involve analyzing the "right to control and direct the activities of the alleged employee or the manner and method in which the work is performed." Kowalski v. Shell Oil Co., 588 P.2d 811, 815 (Cal. 1979) (internal quotation marks omitted); Mathieu v. Norrell Corp., 10 Cal. Rptr. 3d 52, 58-59 (Ct. App. 2004) (applying Kowalski in FEHA context).

Given these authorities, the Court concludes that Dubose's mere conclusory allegations regarding Victor Valley's control of Excelsior board composition do not

provide adequate factual support for the conclusion that Victor Valley and Excelsior operated as joint or consolidated employers. Indeed, Dubose's allegations appear particularly thin when compared against the complex factual circumstances implicated by joint-employer or consolidated-employer relationships.

Before Dubose can proceed with dual or joint employer-based claims against Victor Valley, the allegations regarding the legal relationship between Victor Valley and Excelsior must be augmented by "further factual enhancement." Iqbal, 129 S. Ct. at 1949.

b. Additional Allegations Implicating Victor Valley

A second allegation against Victor Valley is even weaker than the preceding allegations, stating merely that Victor Valley:

> failed to comply with all of the oversight responsibilities required by law, including, but not limited to, those required by California Education Code section 47604.32 and subdivision (m) of Section 47605, and as such [is] liable for the...claims arising from the performance of acts, errors or omission[s] by EXCELSIOR.[1]

(FAC ¶ 17.) This allegation is essentially a verbatim recitation of the statutory language in California Education Code § 47604, which governs limited school-district liability for charter-school obligations and provides that an "authority that grants a charter...is not liable" unless a failure to comply with "oversight responsibilities" has occurred. CAL. EDUC. CODE § 47604. As Twombly teaches, a "formulaic recitation" of a defendant's grounds for liability cannot adequately support a plaintiff's claim for relief. 550 U.S. at 555.

In Dubose's third allegation against Victor Valley, she contends that Excelsior and Victor Valley "are agents for each other in regards to the facts alleged in this

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[1]Section 47604.32 describes reporting and fiscal condition monitoring for chartering authorities. CAL. EDUC. CODE § 47604.32. Section 47605(m) describes the charter school's "financial audit report." CAL. EDUC. CODE § 47605(m).

complaint." (FAC ¶ 17.) However, the Court need not accept this agency allegation as true. It merely asserts, in the most conclusory terms, the supposed joint responsibility of Victor Valley and Excelsior without any other factual support—beyond that rejected above as inadequate.

c. Conclusion

The Court **GRANTS** Victor Valley's motion and **DISMISSES** all of Dubose's claims against Victor Valley with leave to amend. All of the claims are derived from the inadequately-supported theory that Victor Valley is Dubose's second or joint employer. (See FAC ¶ 16.)

2. DUBOSE'S CLAIMS AGAINST EXCELSIOR AND EXCELSIOR EMPLOYEES

a. Racial Discrimination in Violation of Title VII

Dubose states claims against Excelsior for racial discrimination based on disparate treatment and disparate impact.

i. Disparate Treatment

To state a Title VII claim for racial discrimination based on disparate treatment, a plaintiff must show that: (1) he belongs to a protected class; (2) he was performing according to his employer's legitimate expectations; (3) he suffered an adverse employment action; and (4) other employees with qualifications similar to his own were treated more favorably. See Godwin v. Hunt-Wesson, Inc., 150 F.3d 1217, 1220 (9th Cir. 1998); Vazquez v. County of Los Angeles, 349 F.3d 634, 640 n.5 (9th Cir. 2003).

Here, Dubose has adequately pled a prima facie case for Title VII purposes. As just one example, she has alleged that she is African American and that throughout "her career...[she] performed her job in a satisfactory manner." (FAC ¶¶ 39, 41.) However, in May 2008, Newbold allegedly "demoted [Dubose] and reduced her from a 12-month hour[ly] employee to a 10-month hourly employee, which resulted in a loss of pay. No justification was provided." (Id. ¶ 64b.) As discussed above, instead of continuing Dubose's employment, "Excelsior paid another employee, Margaret Gilmore, a Caucasian female, to work the summer months as a 12-month employee in...[Dubose's]

Enrollment Department position." (Id. ¶ 72d.)

Taken as true and construed alongside the other allegations of racial discrimination at Excelsior, these averments adequately state all four required elements for a Title VII disparate-treatment claim, under Godwin. Excelsior's motion to dismiss the disparate-treatment claim is **DENIED**.

ii. Disparate Impact

Claims of disparate impact "involve employment practices that are facially neutral in their treatment of different groups but...in fact fall more harshly on one group than another." Raytheon Co. v. Hernandez, 540 U.S. 44, 52-53 (2003) (internal quotation marks and citations omitted). Thus, to establish a prima facie case of disparate impact under Title VII, the plaintiff must show: "(1) the occurrence of certain outwardly neutral...practices" by an employer and "(2) a significantly adverse or disproportionate impact on persons of a particular" race "produced by the [defendant's] facially neutral acts or practices." Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 711 (9th Cir. 2009) (citing Pfaff v. U.S. Dep't of Housing & Urban Dev., 88 F.3d 739, 745 (9th Cir. 1996)) (internal quotation marks omitted).

Although Dubose's Title VII discrimination claim (FAC ¶¶ 105-114.) indicates that Excelsior or its employees directly harassed her, directly discriminated against her, and ultimately "terminated [her] because of her race and/or color" (id. ¶ 111.), she does not specifically point to a neutral practice by Excelsior that had a "disproportionate impact" on employees of a certain race. Cmty. Improvement, 583 F.3d at 711. Dubose has alleged that the May 2009 termination had a disproportionate impact on female workers (FAC ¶ 124, "all facilitators/teachers terminated...were female"), and she has stated that "the majority of the seventeen employees terminated by Excelsior had filed complaints...or had conflicts with...Newbold and...Wright" (Id. ¶ 46.); however, the FAC does not contain any allegations squarely addressing disproportionate racial impact due to Excelsior policies.

In her opposition to the present motion, Dubose points to her allegations in

paragraph 72 (Opp. at 11.), where she stated that Gehrke "re-hired Mike Barley, a male Caucasian...to supervise the Enrollment Department, despite the fact that...[Dubose] had trained for that position." (FAC ¶ 72a.) She also points to her claim that "Dubose...hired another employee, Margaret Gilmore, a Caucasian female, for [an] open position and did not consider...Dubose for the...position." (Id. ¶ 72d; Opp. at 11.) However, as the Court discussed above, these allegations evince disparate treatment, not disparate impact. Dubose's disparate-impact claim is **DISMISSED WITH LEAVE TO AMEND** and more squarely allege the existence of a neutral Excelsior policy that was disproportionately harmful to members of her race.

b. Racial Discrimination in Violation of FEHA

Dubose then claims that Excelsior committed racial discrimination in violation of FEHA. To state a "prima facie case" of discrimination under FEHA, the plaintiff must establish "(1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action...and (4) some other circumstance suggests discriminatory motive." Guz v. Bechtel Nat'l, Inc., 8 P.3d 1089, 1113 (Cal. 2000).

As discussed above, Dubose has pled that she is African-American and that she performed her work competently during her entire period of employment at Excelsior. (FAC ¶¶ 39, 41.) Clearly, being demoted would constitute an adverse employment action, and Dubose was demoted to the status of a 10-month employee, while a Caucasian employee was retained "to work the summer months as a 12-month employee in...[Dubose's] Enrollment Department position." (Id. ¶¶ 64b, 72d.) Dubose has directly alleged that the "adverse treatment" she experienced was "because of her race and/or color" (Id. ¶ 98.), and the allegations are properly considered alongside Dubose's claim that "no investigation" of the alleged racially-related incidents "was conducted by Excelsior." (Id. ¶ 56.)

The complaint adequately describes the elements of a FEHA racial discrimination claim, and Excelsior's motion to dismiss this particular claim is

DENIED.

c. Gender Discrimination in Violation of FEHA

Under FEHA, to establish a prima facie case of disparate treatment based on gender, a plaintiff must "show membership in a protected class, qualification for the position at issue, adverse employment action, and at least an inference of intentional discrimination." Hall v. County of Los Angeles, 55 Cal. Rptr. 3d 732, 738 (Ct. App. 2007). Here, Dubose has alleged that: (1) she is female (FAC ¶ 39.); (2) she performed her job in a satisfactory manner (id. ¶ 41.); (3) she was terminated (id. ¶ 44.); and (4) she was "wrongfully terminated...based on...her...gender." (Id. ¶ 80.) Dubose supports these allegations by pointing out that "all facilitators/teachers terminated on May 1, 2009 were female" (Id. ¶ 124.), while a number of male employees, such as Newbold and Wright, were not terminated. (See id. ¶ 52d.)

The complaint adequately describes the elements of a gender discrimination claim, and Excelsior's motion to dismiss this claim is **DENIED**.

d. Harassment in Violation of Title VII and FEHA

i. Direct Harassment Claims

To establish a prima facie case for harassment under Title VII, a plaintiff must state: "(1) she was 'subjected to verbal or physical conduct' because of her" race or other characteristics; "(2) 'the conduct was unwelcome,' and (3) 'the conduct was sufficiently severe or pervasive to alter the conditions of...employment and create an abusive work environment.'" Manatt v. Bank of Am., 339 F.3d 792, 798 (9th Cir. 2003) (citing Kang v. U. Lim Am., Inc., 296 F.2d 810, 817 (9th Cir. 2002)). California law similarly permits harassment claims under FEHA, provided that "hostility" to an employee "was pervasive and effectively changed the conditions of...employment." Roby v. McKesson Corp., 219 P.3d 749, 764 (Cal. 2009) (supervisor's (1) "rude comments and behavior, which occurred on a daily basis," (2) "reprimands...in front of...coworkers," (3) "shunning" of the plaintiff "during weekly staff meetings," and (4) "belittling" plaintiff's job was "sufficient to allow the jury to conclude that the hostility

was pervasive").

Among other allegations, Dubose has indicated that: (1) she was "exposed to racist remarks and actions directed towards herself as well as other minority employees" (FAC ¶ 55b.); (2) between August 2006 and November 2007, her supervisor Gehrke "would constantly call [her] personal cell phone to inquire as to [her] location and...would become extremely aggravated if she did not answer quickly, causing her to become extremely stressed, ill, and sick to her stomach" (id. ¶ 60e.); (3) she was "constantly yelled at and humiliated unjustifiably by" Gehrke and Wright "in the presence of other co-workers and/or parents" (id. 60a.); (4) she was "relocated" and "kept isolated from all staff" between August 2006 and October 2006 (id. ¶ 72c.); (5) she was "constantly reassigned positions on a daily basis," activities which no other employee was "required" to do (id. ¶ 60b.); and (6) she was demoted by Newbold. (Id. ¶ 64b.) She has also claimed that the harassment occurred "because of her race and/or color, sex, and religion." (Id. ¶ 161.)

At this stage of the proceedings, these averments must be construed in the light most favorable to Dubose, Cahill, 80 F.3d at 337-38, and in that light, Dubose has adequately pled that her conditions of employment were altered by an unwelcome, pervasive, and race and gender-based atmosphere of hostility. Manatt, 339 F.3d at 798; Roby, 219 P.3d at 764. Excelsior's motion to dismiss the Title VII and FEHA harassment claims is **DENIED**. Because Newbold, Wright, and Flynn are alleged to have been directly involved in the alleged harassment (FAC ¶¶ 55, 60a, 64b, 72d, 161.), the motion is likewise **DENIED** as to the FEHA-harassment claims pled against these three defendants.

ii. Failure To Investigate

Under Title VII, "[o]nce an employer knows or should know of harassment, a remedial obligation kicks in." Fuller v. City of Oakland, 47 F.3d 1522, 1525 (9th Cir. 1995); Nichols v. Azteca Restaurant Enters., Inc., 256 F.3d 864, 875 (9th Cir. 2001). Similarly, the California Supreme Court has stated that FEHA "makes it a separate

unlawful employment practice for an employer to 'fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.'" State Dept. of Health Servs. v. Superior Court, 79 P.3d 556, 562 (Cal. 2003) (quoting CAL. GOV'T CODE § 12940(k)). Numerous other California courts have recognized a separate cause of action against an employer for failure to investigate or take reasonable steps to prevent harassment or discrimination. See, e.g., Northrop Grumman Corp. v. Workers' Comp. Appeals Bd., 127 Cal. Rptr. 2d 285, 296 (Ct. App. 2002) ("Prompt investigation of a discrimination claim is a necessary step by which an employer meets its obligation to ensure a discrimination-free work environment").

Dubose avers that despite her numerous complaints to Excelsior regarding the alleged harassment and racial incidents (FAC ¶¶ 56, 61.), "no investigation was conducted" regarding the racism (id. ¶ 56.) or alleged harassment. (id. ¶ 61.) Therefore, the Title VII and FEHA harassment claim may likewise proceed against Excelsior on this separate and alternative theory.

e. Retaliation in Violation of Title VII and FEHA

To "make out a prima facie case of retaliation under Title VII," a plaintiff must show that "(1) she engaged in a protected activity, (2) she suffered an adverse employment action, and (3) there was a causal link between her activity and the employment decision." Raad v. Fairbanks N. Star Borough Sch. Dist., 323 F.3d 1185, 1196-97 (9th Cir. 2003). Under FEHA, employees "may establish a prima facie case of...retaliation by showing that (1) they engaged in activities protected by...FEHA, (2) their employers subsequently took adverse employment action against them, and (3) there was a causal connection between the protected activity and the adverse employment action." Nazir v. United Airlines, Inc., 100 Cal. Rptr. 3d 296, 332 (Ct. App. 2009) (citing Miller v. Dep't of Corr., 36 Cal. 4th 446, 472, 115 P.3d 77 (2005)).

Dubose clearly alleged that she engaged in a protected activity under FEHA and Title VII when she filed a "charge of Discrimination based upon Retaliation" with the EEOC in June 2008, and amended the complaint on multiple occasions. (FAC ¶¶ 25, 27,

28.) Similarly, she has alleged that an adverse employment action was taken against her in May 2009, when she was terminated. (Id. ¶¶ 44, 172, 80.) Excelsior's opposition does not even suggest that these two elements are not satisfied. (Mem. at 17-18; Reply at 4.)

Dubose's averment that she was "wrongfully terminated from her employment...based on...Retaliation for...[her] EEOC claims, " (Id. ¶ 80.), viewed in light of the temporal relationship between the two events according to the facts stated in the complaint, is sufficient to establish the existence of a retaliation claim. This is further corroborated by the allegation that "the seventeen terminated employees included the only two employees, Ms. Dubose and Kathy Thomas, who had ongoing EEOC investigations." (Id. ¶ 52b.) Excelsior argues that the "inference of a causal connection based on timing alone is simply too weak." (Reply at 4.) Even if that were true in principle (which the Court does not concede here), the temporal relationship together with the other averments more than satisfies Plaintiff's pleading obligation. Cahill, 80 F.3d at 337-38. Excelsior's motion to dismiss the retaliation claims is **DENIED**.

f. Refusal to Rehire

Dubose's next claim for "Refusal to (Re-)Hire" (FAC at 31.) relies on California Education Code section 45298 (Opp. Victor Valley Mot. Dismiss at 17.); that statute requires school districts to rehire certain classified employees who have been laid off.[2]

The claim fails, because under Education Code section 47610, a charter school is "exempt from the laws governing school districts, except" all statutes in Title 2, Division 4, Part 26.8 of the Education Code (describing charter schools), and a limited

[2] Under section 45298 and related portions of the Education Code, classified employees of a school district who are "laid off because of lack of work or lack of funds are eligible to reemployment for a period of 39 months and shall be reemployed in preference to new applicants." CAL. EDUC. CODE §§ 45100, 45298.

number of other statutes.[3] Because (1) section 45298 falls outside Part 26.8 of the Education Code, and (2) section 45298 is not one of the limited alternative statutes applicable to charter schools, it cannot be applied against Excelsior.[4] Accordingly, the refusal-to-rehire claim is **DISMISSED WITHOUT LEAVE TO AMEND**.

g. Defamation

To plead a claim for defamation, Dubose must describe: (1) a publication that is (2) false, (3) unprivileged, and (4) tends directly to injure a person in respect to his office or profession by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires. CAL. CIV. CODE §§ 44, 46. A publication of a defamatory statement occurs when a statement is communicated to any person other than the defamed party. Kelly v. Gen. Tel. Co., 186 Cal. Rptr. 184, 186 (Ct. App. 1982).

Here, Dubose's defamation claim pertains to two alleged false statements. First, Dubose alleges that "during a staff meeting," Newbold, and Wright allegedly informed current employees that "Dubose and the others recently terminated...were terminated because they had issues related to 'moral integrity, and refusal to perform job duties.'" (FAC ¶ 177.) Second, Dubose claims that when current "Excelsior employees...inquire of Excelsior as to why the previously terminated employees were not being reconsidered for...available positions," they are "told by Excelsior['s] administration that it is because the terminated employees 'were really fired.'" (Id. ¶ 179.)

The California Supreme Court has ruled that in "defamation actions the First Amendment...requires that the statement on which the claim is based must specifically refer to, or be 'of and concerning' the plaintiff in some way." Blatty v. N.Y. Times Co.,

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[3] Under section 47610, a "charter school shall comply with this part and all of the provisions set forth in its charter, but is otherwise exempt from the laws governing school districts, except" Education Code § 47611 (State Teacher's Retirement Plan rules); Education Code § 41365 (Charter School Revolving Loan Fund rules), all "laws establishing minimum age for public school attendance," and provisions of the "California Building Standards Code." CAL. EDUC. CODE § 47610.

[4] Dubose acknowledges that Excelsior is a "public charter school." (FAC ¶ 11.)

728 P.2d 1177, 1182 (Cal. 1986). Thus, this "specific reference requirement limits the right of action for injurious falsehood, granting it to those who are the direct object of criticism and denying it to those who merely complain of nonspecific statements that they believe cause them some hurt." Id. at 1183. Statements "without specific reference" are likewise immunized. Id. at 1184.

Based on Dubose's factual averments, it is not completely clear whether the two statements at issue referenced Dubose as an individual, or as part of a collective group of former employees. The defamation claim is **DISMISSED WITH LEAVE TO AMEND** to permit Dubose an opportunity to describe (1) the alleged defamatory statements, and (2) the circumstances surrounding those statements, in greater detail.

h. Remaining Tort Claims

The Court then proceeds to consider Dubose's remaining tort claims for wrongful termination in violation of public policy, negligent infliction of emotional distress ("NIED"), negligent supervision, and intentional infliction of emotional distress ("IIED").

i. Wrongful Termination in Violation of Public Policy

To attack Dubose's claim for termination in violation of public policy, Excelsior first argues that (1) it is a "public entity," and (2) as a result, this claim "is not properly asserted" against it. (Mem. at 6.)[5]

Miklosy v. Regents of the Univ. of Cal., 188 P.3d 629, 644 (Cal. 2008), on which Excelsior relies, holds that a Tameny action for wrongful termination in violation of public policy is "bar[red]...against public entities," as that term is defined in California Government Code §§ 811.2 and 815. Miklosy, 188 P.3d at 644; Tameny v. Atl. Richfield Co., 27 Cal. 3d 167 (1980). But the argument begs the question of whether Excelsior fits within the definition of a public entity under Government Code

[5] Excelsior also argues that the wrongful-termination claim is barred by the exclusive remedy of worker's compensation law. (Mem. at 22.) Excelsior is wrong. In Miklosy v. Regents of the Univ. of Cal., 188 P.3d 629 (Cal. 2008), the California Supreme Court indicated that a wrongful-termination claim will lie "despite the workers' compensation exclusive remedy rule." 188 P.3d at 646.

sections 811.2 and 815.

Government Code section 815 establishes immunity for public entities and their employees. Government Code section 811.2 states that the term "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.

CAL. GOV'T CODE § 811.2. Whether charter schools constitute public entities came under discussion in Wells, where the argument was made that a plaintiff must exhaust administrative remedies under the Tort Claims Act before filing a lawsuit for violation of the California False Claims Act (CFCA). First, the California Supreme Court noted:

> Under [the TCA], claims must be presented to 'the state' [CAL. GOV'T CODE § 905.2.] or 'local public entities.' [Id. § 905.] For purposes of the TCA, "'[l]ocal public entity' includes a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the [s]tate, but does not include the [s]tate." [Id. § 900.4]....[C]harter schools are part of the public school system and, for specified purposes, are deemed to be school districts. However, these purposes do not expressly include coverage by the TCA and...the charter school defendants do not fit comfortably within any of the categories defined, for purposes of the TCA, as "local public entities."

Wells, 39 Cal. 4th at 1214. However, the court never definitively answered the question because it concluded that the California False Claims Act (CFCA) cause of action brought against the charter school fell outside the Government Code's claim presentment requirement in the first place, and further concluded that a charter school fell within the definition of "person" under the CFCA even though the definition does not encompass a school district. Id. at 1214 et seq. In short, because Wells suggests that the CFCA is outside the scope of the immunity provisions of the Government Code and contains its own definition of persons within the scope of its prohibitions, it

provides no real guidance concerning public entity immunity from tort claims.[6]

Moreover, the Wells dictum regarding the meaning of "public entity" is not particularly helpful because a charter school's characteristics, some of which suggest a public entity while others are more typical of a private organization, do not "fit comfortably" within ***any*** classification that distinguishes public from private entities. See Doe ex rel. Kristen D. v. Willits Unif. Sch. Dist, 2010 WL 890158, at *6, 2010 U.S. Dist. LEXIS 33152 (N.D. Cal. Mar. 8, 2010); but see Knapp, 53 Cal. Rptr. 3d at 183 (claim presentment requirements of Government Code § 900.4 not applicable to claims against charter school because it is not a "public entity" under the Government Tort Claims Act). For these reasons, Wells provides less guidance than suggested by Excelsior's motion papers. However, that is not the end of the discussion.

Kristen D., a district court Eleventh Amendment decision, provides further insight on the issue. 2010 WL 890158, at *6. In Kristen D., the district court was asked to determine whether a charter school constituted an arm of the state for the purpose of Eleventh Amendment immunity from a Section 1983 claim brought in federal court.. The district court described the issue and analysis as follows:

> The question of whether a particular state agency has independent status or is considered an "arm of the state" for Eleventh Amendment analysis is a question of federal law, but one that "can be answered only after considering the provisions of state law that define the agency's character." [Citation.] Determining whether a state agency is entitled to Eleventh Amendment immunity turns on the multi-factored balancing test summarized in Mitchell v. Los Angeles Community College Dist., 861 F.2d 198, 201 (9th Cir.1988). The

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[6]Wells also rejected the application of Eleventh Amendment immunity jurisprudence because it provided little assistance in determining whether the California legislature intended a California statute to include or exclude California government entities from liability under California legislation. 39 Cal. 4th at 1199. While that observation was particularly apt in Wells, the question of whether an entity is an "arm of the state" provides more assistance in determining the "public entity" character of that entity in the present context. Thus, as discussed below, the Court looks to the Eleventh Amendment immunity cases for their assessment of the character of charter schools.

Mitchell test looks to the following five factors to determine whether a state government agency qualifies an "arm of the state:" (1) whether a money judgment would be satisfied out of state funds, (2) whether the entity performs central governmental functions, (3) whether the entity may sue or be sued, (4) whether the entity has the power to take property in its own name or only the name of the state, and (5) the corporate status of the entity. Mitchell, 861 F.2d at 201. In Belanger v. Madera Unif. Sch. Dist., the Ninth Circuit employed the Mitchell analysis and held that California school districts are "arms of the state" for the purposes the Eleventh Amendment. 963 F.2d 248, 251 (9th Cir.1992). Kristen D., 2010 WL 890158, at *3.

After finding no published authority on the issue, the district court concluded that, because a money judgment would be satisfied out of state funds and the charter school performed a central government function, among other things, the school was an arm of the state and was entitled to Eleventh Amendment immunity. Id. at *6-7. The district court's conclusion tends to support the argument that a charter school is a public entity within the meaning of the California Government Code.

On the other hand, DuBose points to Excelsior's charter, which states that it "will be operated as a California Nonprofit Public Benefit Corporation, pursuant to California law." (Victor Valley Req. Jud. Not., Ex. A, at 6.) But the language provides little assistance in determining the character of a charter school. The description suggests that the entity is operated for "public benefit," that it is operated as a not-for-profit organization, and thus would seem to operate similarly to a "public authority, public agency, . . . [and] public corporation" all of whom are granted immunity under CAL. GOV'T CODE §§ 811.2 and 815. For these reasons, though there is no controlling authority on the question, the Court concludes that Excelsior is immune from suit for the Tameny claim and the Court need not address the merits of that particular claim.

The Tameny claim is therefore **DISMISSED WITHOUT LEAVE TO AMEND.**

ii. Negligent Failure to Supervise, NIED, and IIED

The pending complaint contains purported causes of action for negligent failure to supervise, for negligent infliction of emotional distress, and for intentional infliction of emotional distress. However, the California courts have long held that such claims are subsumed under the exclusive remedial provisions of the workers' compensation law. E.g., Miklosy, 188 P.3d at 646; Mueller v. County of Los Angeles, 98 Cal. Rptr. 3d 281 (Ct. App. 2009). Following a long line of California Supreme Court precedent, the Mueller court stated:

> Injuries sustained and arising out of the course of employment are generally subject to [the] exclusive remedy [of worker's compensation law]. The exclusive remedy applies even when the damages result from intentional conduct by the employer that is a normal part of employment relationships, and even though such conduct may be described as egregious, harassment, manifestly unfair, or intended to cause emotional distress.

98 Cal. Rptr. 3d at 292 (citing Cole v. Fair Oaks Fire Prot. Dist., 43 Cal.3d 148, 159-60, 233 Cal. Rptr. 308, 729 P.2d 743 (1987)). In Cole, supra, the plaintiff, a firefighter, alleged that he was "placed on medication" for "elevated blood pressure...due to unreasonable stress and pressure by" a superior employee. 729 P.2d at 744. He was "deliberately harassed" and was "informed by various members of the fire department that the assistant chief and members of the management intended to take punitive action against him because of his union activities." Id. The assistant chief then allegedly "notified [the plaintiff] by mail" that he should appear at a disciplinary hearing and "falsely asserted dishonesty as" a ground for the hearing. Id. at 745. He was subsequently demoted and ordered to perform "humiliating and menial duties," and the assistant chief later "filed an application with the state to force [the plaintiff] to retire involuntarily." Id.

As indicated in Mueller, the Cole court "held that the alleged actions of the assistant chief, though asserted to have been undertaken with the purpose of causing the

plaintiff emotional distress, nevertheless came within the exclusive provisions of workers' compensation law....[A]ctions that are a normal part of employment relationships, such as demotions...criticism of work practices, friction in the workplace, and harassment by supervisors do not cause an employee's claims to fall outside of workers' compensation law...." 98 Cal. Rptr. 3d at 293. In Miklosy, the California Supreme Court reached the same conclusion on very similar facts. 188 P.3d, at 646.

Here, Dubose's negligent supervision, NIED, and IIED claims implicate Excelsior's agents and "supervisors['].....unlawful behavior," and their actions in "asserting their power over" her. (FAC ¶¶ 187, 202, 206.) The Court cannot conclude that this alleged supervisorial and workplace-related misconduct differs in kind from the Cole supervisor's alleged misdeeds, and thus, these three claims are barred by worker's compensation exclusivity.[7] The claims are **DISMISSED WITHOUT LEAVE TO AMEND**.

3. CLAIMS AGAINST INDIVIDUAL BOARD MEMBERS

Individual Excelsior Board members, John Cordero, Richard Spring, Paul Robinson, Ernie Moran, and Mike Davis have also moved to dismiss all claims against them, arguing that they are immune from suit. (Excelsior Reply at 7-8.) This particular immunity claim is persuasive.

In Wilson v. State Board of Educ., 89 Cal. Rptr. 2d 745 (Ct. App. 1999), the Court of Appeal stated:

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

[7] The Court recognizes that the Worker's Compensation exclusivity applies only to certain specific tort claims, and that a number of other theories of relief are available to Plaintiff. The pending complaint contains such claims, which include her causes of action under Title VII and FEHA relating to the alleged workplace harassment, racial discrimination, gender discrimination, and retaliation that she allegedly experienced. Thus, the Court's ruling does not deprive Plaintiff of any cognizable workplace claim arising out of the alleged wrongful conduct of her employer and its supervisory personnel.

school board members.

89 Cal. Rptr. 2d at 756. In Caldwell v. Montoya, 897 P.2d 1320 (Cal. 1995), the California Supreme Court held that a school board's "collective determination whether to hire or fire a person as the district's superintendent must be considered a basic policy decision, immune from civil damage actions that seek to hold individual board members liable for the motives behind their votes." 897 P.2d at 1327.

Dubose has alleged, in conclusory fashion, that the Excelsior board members "had full responsibility for administration of all programs within Excelsior," that the board ratified discrimination, and harassment, and that these actions, including "selecting [Dubose] for termination," create "individual liability on behalf of each and every one of the five board members." (FAC ¶ 13.) However, each Board member is sued in his or her official "capacity as a Board Member." (FAC at 1.) Caldwell and Wilson suggest that individual board members enjoy immunity in these circumstances. In particular, the decision to lay off employees based on "budget restrictions" and "program restructuring" (FAC ¶ 44.) is readily comparable to Caldwell. Dubose does not specifically explain her theory of individual board-member liability in her opposition. (See Opp. at 17-18.)

Accordingly, the Court **GRANTS** the individual board member defendants' motion and the claims against them are **DISMISSED WITHOUT LEAVE TO AMEND**.

4. PUNITIVE DAMAGES

Excelsior finally argues that Dubose's claims for punitive damages against it[8] should be dismissed because under Government Code section 818, "a public entity is not liable for damages...imposed primarily for the sake of example and by way of punishing the defendant." (Mem. at 23.)

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[8]Excelsior and related defendants have acknowledged that Dubose "has made...specific allegations of intentional misconduct against defendants Newbold, Gehrke, Wright, and Flynn" and apparently do not seek to dismiss the punitive-damages claims against these parties. (Reply at 8.)

As the Court has discussed above, Excelsior is a "public entity" within the meaning of Government Code section 811.2, and it is this definition which controls the limitations on punitive damages discussed in section 818. Because "punitive damages are not available against a public entity pursuant to section 818," see Lozada v. City & County of San Francisco, 52 Cal. Rptr. 3d 209, 221 (Ct. App. 2006); Curcini v. County of Alameda, 79 Cal. Rptr. 3d 383, 391 (Ct. App. 2008), Excelsior's motion to dismiss the punitive damages allegations is **GRANTED**, and the punitive damages allegations against Excelsior are **DISMISSED WITHOUT LEAVE TO AMEND**.

IV.

CONCLUSION

Consistent with the foregoing reasoning, the Court:

(1) **GRANTS WITH LEAVE TO AMEND** Victor Valley's motion to dismiss all claims against it;

(2) **GRANTS WITHOUT LEAVE TO AMEND** individual board members' motions to dismiss all claims stated against them;

(3) **GRANTS WITH LEAVE TO AMEND** Excelsior's motion to dismiss Dubose's disparate-impact Title VII claim;

(4) **GRANTS WITH LEAVE TO AMEND** the parties' motion to dismiss Dubose's defamation claim;

(5) **GRANTS WITHOUT LEAVE TO AMEND** the parties' motion to dismiss the IIED, NIED, and negligent supervision claims;

(6) **GRANTS WITHOUT LEAVE TO AMEND** Excelsior's motion to dismiss the refusal-to-rehire claim;

(7) **GRANTS WITHOUT LEAVE TO AMEND** Excelsior's motion to dismiss the Tameny claim;

(8) **GRANTS WITHOUT LEAVE TO AMEND** Excelsior's motion to dismiss the punitive damages allegations pled against it; and

(9) **DENIES** Excelsior and related parties' motions in all other respects.

Leave is given until October 8, 2010 to file an amended complaint in conformance with the foregoing memorandum and order.

IT IS SO ORDERED.

DATED: September 22, 2010

Judge Gary Allen Feess
United States District Court

CALIFORNIA
DEPARTMENT OF
EDUCATION

TOM TORLAKSON
STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

January 27, 2011

California Law Review Commission
c/o Brian Hebert
Director of the California Law Review Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739

RE: Charter Schools and the Government Claims Act (Study G-200)

Director and Members of the Commission:

As you have requested, The California Department of Education ("CDE") provides you with the following information and comments in connection with the Commission's Charter Schools and Government Claims Act Study (the "Study"). The CDE intends to submit additional comments and information before the next Commission meeting, but wanted to identify a few issues for the Commissions consideration.

As your staff memoranda have noted, the governance structures of charter schools vary widely and the legal status of charter schools can be somewhat ambiguous. For these and other reasons, charter school closures raise a number of issues, which have been reviewed and addressed by the State Board of Education. Approximately forty California charter schools have closed in the last two years, increasing focus on closure issues. Charter schools do not typically go through bankruptcy proceedings before they close and wind down their operations. Claims that might be brought in connection with closure include both financial and non-financial issues, such as transfer of student records and property and parental and teacher rights. A closed charter school has limited staff and other resources, raising questions as to the administrative capacity of a closed charter school to perform its responsibilities in administering claims under the Government Claims Act. The issues currently raised in the staff memoranda surrounding the application of the Fair Political Practices Act, the Public Records Act, the Brown Act and the Bagley-Keane Act further complicate the resolution of claims following closure.

The CDE thanks the Commission for the opportunity to raise these issues.

Sincerely,

Beth Hunkapiller

Beth Hunkapiller
Director
Charter Schools Division