

STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

RECOMMENDATION

Charter Schools and  
the Government Claims Act

August 2012

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

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

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STATE OF CALIFORNIA

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August 17, 2012

To: The Honorable Edmund G. Brown, Jr.  
*Governor of California*, and  
The Legislature of California

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

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

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

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

This report sets out the Commission's findings on the matter. It discusses the advantages and disadvantages of a range of possible reform alternatives, but makes no recommendation on which would strike the best policy balance. Each of the alternatives

discussed involves competing policy considerations, which would best be weighed by the elected representatives of the public (with the benefit of the Commission's analysis), rather than by the Commission.

Respectfully submitted,

Crystal Miller-O'Brien  
*Chairperson*

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Inclusion of the name of an individual or organization should not be taken as an indication of the individual's opinion or the organization's position on any aspect of this recommendation. The Commission regrets any errors or omissions that may have been made in compiling these acknowledgments.

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# CHARTER SCHOOLS AND THE GOVERNMENT CLAIMS ACT

## INTRODUCTION

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

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

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

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

In the same case, the Court declared that charter schools “do not fit comfortably within any of the categories defined, for purposes

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

2. See Educ. Code § 47610.

3. See Educ. Code § 47604.

4. For a discussion of quasi-public entities in another context, see *Administrative Adjudication by Quasi-Public Entities*, 26 Cal. L. Revision Comm’n Reports 277 (1996).

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

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

of the [Government Claims Act<sup>7</sup>] as ‘local public entities.’”<sup>8</sup> Although that statement was not a necessary part of the Court’s holding, it did signal that the Court was inclined against viewing a charter school as a public entity for the purposes of the Government Claims Act.

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

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

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

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7. See Gov’t Code § 810 *et seq.* Although these provisions are often referred to as the “Tort Claims Act,” the California Supreme Court now refers to the statute as the “Government Claims Act,” because some of its provisions apply to contract claims and other non-tort claims. See *City of Stockton v. Superior Ct.*, 42 Cal. 4th 730, 741, 171 P.3d 20, 68 Cal. Rptr. 3d 295 (2007). The Commission will follow the Court’s practice.

8. *Wells*, 39 Cal. 4th at 1214.

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

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

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

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## CHARTER SCHOOLS ACT

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

Charter schools are publicly funded schools of choice.<sup>13</sup> In other words, they receive public funding in a manner similar to traditional public schools, but no student is required to attend a

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12. Educ. Code § 47600 *et seq.*

13. R. Zimmer & R. Buddin, *Making Sense of Charter Schools: Evidence from California* (2006), available at [http://www.rand.org/pubs/occasional\\_papers/2006/RAND\\_OP157.pdf](http://www.rand.org/pubs/occasional_papers/2006/RAND_OP157.pdf).

charter school.<sup>14</sup> Nor may a student be denied admission to a charter school, if there is sufficient capacity.<sup>15</sup>

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

The stated purpose of charter schools is to:

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

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

- Cannot charge tuition.<sup>19</sup>
- Must have nonsectarian programs, admission policies, and employment practices.<sup>20</sup>

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14. Educ. Code § 47605(f).

15. Educ. Code § 47605(d)(2).

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

17. Educ. Code § 47601.

18. Educ. Code § 47610.

19. Educ. Code § 47605(d)(1).

20. *Id.*

- Must not discriminate.<sup>21</sup>
- Must provide for special education students in the same manner as traditional public schools.<sup>22</sup>
- Must comply with statewide testing programs.<sup>23</sup>
- Must have credentialed teachers for “core” courses.<sup>24</sup>

### **Creation and Revocation of Charter**

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

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

A charter must provide specific information about the structure and operation of the proposed charter school.<sup>31</sup> The petitioner must also provide a proposed budget for the first year of operation of the

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21. *Id.*

22. Educ. Code § 56145.

23. Educ. Code § 47605(c)(1).

24. Educ. Code §§ 47605(l), 47605.6(l).

25. Educ. Code §§ 47605, 47606.

26. Cal. Dep’t of Educ., *supra* note 16, at 100.

27. Educ. Code § 47602(b).

28. Educ. Code §§ 47605, 47606.

29. Educ. Code §§ 47605, 47605.5.

30. Educ. Code § 47605.8.

31. Educ. Code §§ 47605(b)(5)(A)-(P), 47605(g), 47605.6(h).

charter school that includes start up costs, and cash flow and financial projections for the first three years.<sup>32</sup>

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

A charter may be revoked if there is substantial evidence that the school materially violated the charter, did not meet student outcomes, did not follow generally accepted accounting principles, engaged in fiscal mismanagement, or violated the law.<sup>34</sup> The Charter Schools Act provides a procedure for revocation.<sup>35</sup>

### **Oversight and Accountability**

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

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

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

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32. Educ. Code § 47605(g).

33. Educ. Code § 47605(b).

34. Educ. Code § 47607(c).

35. Educ. Code § 47607(d)-(k).

36. Educ. Code § 47604.3.

37. Educ. Code § 47604.32.

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

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

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

### **Governance Structure**

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

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

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

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38. Educ. Code § 47604(b).

39. Educ. Code §§ 47604.32(f), 47604.33(c), 47613.

40. Educ. Code § 47604.33.

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

42. See Educ. Code § 47604.

43. Educ. Code § 47604(c).

44. Educ. Code § 47615.

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

## **Operational Issues**

### *Personnel*

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

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

### *Financing*

For purposes of the state constitution and school financing, a charter school is considered to be under the exclusive control of the officers of the public schools.<sup>49</sup> Charter school funding is similar to traditional public school funding. The funding follows

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45. Gov't Code § 6528. Before 1998, many charter schools were members of a joint powers agreement ("JPA"). After charter schools were authorized to organize as nonprofit public benefit corporations, an attorney for one of the risk-pooling JPAs determined that an incorporated charter school would not be eligible to participate in the JPA. The purpose of Government Code Section 6528 was to remove confusion and unambiguously allow a charter school to participate in JPAs, notwithstanding its corporate form. See Senate Local Government Committee Analysis of AB 101 (Mar. 30, 2000), p. 2.

46. Educ. Code § 47611.5(a).

47. Educ. Code § 47611.5(b).

48. Educ. Code § 47611.

49. Educ. Code § 47612(a).

the student, whether the student attends a traditional public school or a charter school.<sup>50</sup>

### ***Facilities***

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

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

### **Health and Safety Issues**

#### ***The Field Act***

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

An Attorney General opinion concluded that charter schools are not required to follow the Field Act, unless the school’s charter

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

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

52. Educ. Code § 47614(a).

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

54. Educ. Code § 17280.

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

requires it. The opinion used a plain language interpretation of the Charter Schools Act to come to its conclusion, because Section 47610 exempts charter schools from most of the laws applicable to school districts.<sup>56</sup>

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

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

### ***General Building Standards***

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

### ***School Health and Safety Standards***

The Education Code contains a number of health and safety provisions. Most of the provisions apply to public schools, without making any express reference to charter schools.<sup>61</sup> Some health and safety provisions apply to both public and private schools

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56. *Id.*

57. Educ. Code §§ 17320-17336.

58. Educ. Code § 17322.

59. Educ. Code § 47610(d). But see Educ. Code § 47610.5.

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

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

without express reference to charter schools.<sup>62</sup> Under the general provision exempting charter schools from laws governing private schools, it appears that none of those health and safety requirements apply to a charter school.

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

## GOVERNMENT CLAIMS ACT

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

- (1) It shifts losses away from an innocent injured party and to the responsible party.
- (2) It deters behavior likely to cause injury.
- (3) It encourages the use of precautions to prevent injury.

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

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62. See, e.g., Educ. Code §§ 32001 (duty to provide fire alarms and conduct fire drills), 32020 (gates must be wide enough to allow emergency vehicles to access all portions of the buildings), 32030-32034 (eye protection must be available), 32040-32044 (duty to equip schools with first aid kit), 32060-32066 (art supplies with certain toxic substances are prohibited).

63. Educ. Code § 47605(b)(5)(F).

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

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

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

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

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

Sovereign immunity accommodates the unique nature of government. It protects the public fisc from depletion and allows

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65. See *Recommendation Relating to Sovereign Immunity, Number 1 – Tort Liability of Public Entities and Public Employees*, 4 Cal. L. Revision Comm’n Reports 801, 810 (1963) (hereinafter, *Number 1 – Tort Liability of Public Entities and Public Employees*).

66. *Id.* A comparison between public and private schools provides an example of how two apparently analogous services can be quite different. Public schools must provide an education to all who qualify and must abide by nondiscrimination rules. Private schools may have selective admissions policies. Public schools may not charge tuition but private schools have no such financial constraint. Cal. Const. art. IX, § 5; see also Educ. Code § 200; *Number 1 – Tort Liability of Public Entities and Public Employees*, *supra* note 65, at 810.

government to govern.<sup>67</sup> It also reduces the possibility of judicial interference in the development of public policy.<sup>68</sup>

The Government Claims Act<sup>69</sup> balances the competing policies of governmental liability and immunity. The Act was the result of a Commission study and recommendation.<sup>70</sup> It codified a patchwork of local rules, state rules, and case law.<sup>71</sup>

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

Relevant features of the Government Claims Act are summarized below.

### **Scope of Application**

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

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67. See, e.g., *Alden v. Maine*, 527 U.S. 706, 750-51 (1999) (discussing how protecting government fisc keeps resources from being shifted away from important governmental activities and allows government to govern by allowing government to allocate limited resources without diverting too many resources toward defending lawsuits and paying claims).

68. *Id.* at 750 (discussing possibility of government making policy decision about acceptable levels of risk and having court rule on reasonableness of that policy decision if sovereign immunity is not available).

69. Gov’t Code §§ 810-998.3.

70. 1963 Cal. Stat. ch. 1681.

71. *Number 1 – Tort Liability of Public Entities and Public Employees*, *supra* note 65, at 807.

72. See Gov’t Code § 815 & Comment; *Hoff v. Vacaville Unified Sch. Dist.*, 19 Cal. 4th 925, 932, 968 P.2d 522, 80 Cal. Rptr. 2d 811 (1998).

73. “‘Public entity’ includes the State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the state.” Gov’t Code § 811.2. The definition is meant to be applied broadly and includes the state and all of its local and regional subdivisions. See Gov’t Code § 811.2 Comment.

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

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

### **Claim Presentation**

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

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

Claim presentation requirements serve several policy goals. They protect the public fisc and allow some injured parties to be

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74. “‘Public employee’ means an employee of a public entity.” Gov’t Code § 811.4. Independent contractors are specifically excluded from the definition of a public employee and receive special treatment under the Government Claims Act. Gov’t Code §§ 810.2, 815.4.

75. Gov’t Code §§ 900.3, 900.4, 900.6.

76. Gov’t Code §§ 900.4, 940.4.

77. See, e.g., *Wright v. Compton Unif. School Dist.*, 46 Cal. App. 3d 177, 181-82, 120 Cal. Rptr. 115 (1975).

78. See Gov’t Code §§ 905, 910, 950, 950.2, 950.6(a).

79. *City of Stockton v. Super. Ct.*, 42 Cal. 4th 730, 739, 171 P.3d 20, 68 Cal. Rptr. 3d 295 (2007).

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

compensated quickly.<sup>81</sup> The early presentation of claims also provides timely notice of a dangerous activity or condition, allowing a public entity to take corrective steps promptly.<sup>82</sup>

### *Time Limits*

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

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

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

82. *Id.*

83. Gov't Code § 911.2(a)-(b) (specifying that six-month claims include cause of action for death, or for injury to person, personal property, or growing crops, while one-year claims include any other causes of action). A single incident may give rise to both six-month and one-year claims. For example, a tort could damage both real property and personal property. In such cases, the claimant must follow the shorter deadline in order to include all claims. See, e.g., *Baillargeon v. Dep't. of Water & Power*, 69 Cal. App. 3d 670, 682, 138 Cal. Rptr. 338 (1977). The accrual date of a cause of action for purposes of a claim is determined in the same manner as the accrual date for the cause of action underlying the claim. Gov't Code § 901.

84. See, e.g., Code Civ. Proc. §§ 340(c) (allowing one year to file cause of action for libel or slander); 335.1, 339 (allowing two years for personal injury and oral contracts); 338(b), (c), (d) (allowing three years for fraud or injury to real or personal property); 337, 337.2, 343 (allowing four years for written contracts, collection of debt on account, collection of rents, and any other cause of action not currently listed).

85. *State v. Super. Ct.*, 32 Cal. 4th 1234, 1239, 90 P.3d 116, 13 Cal. Rptr. 3d 534 (2004) (holding that failure to present timely claim bars lawsuit).

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

### *Identification of Public Entity*

In order to present a claim, the proper public entity must be identified. To facilitate identification, a local public entity must file an information statement with the Secretary of State.<sup>87</sup> In addition, a public entity must identify itself as such on letterhead and identification cards.<sup>88</sup> A public entity that does not properly identify itself cannot use a claimant's misidentification as a reason to dismiss a claim.<sup>89</sup>

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

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

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

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

88. Gov't Code § 7530.

89. Gov't Code § 946.4.

90. *Hovd v. Hayward Unified Sch. Dist.*, 74 Cal. App. 3d 470, 472, 141 Cal. Rptr. 527 (1977).

91. See *id.*

92. See, e.g., *id.*

### *Content of Claims*

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

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

### **Public Entity Liability**

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

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

- A public entity is vicariously liable for an injury caused by an act or omission of an employee within the scope of employment (unless the employee is immune from liability).<sup>97</sup>

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93. Gov't Code § 910 (requiring information about the claimant, circumstances that gave rise to the claim, nature of the indebtedness, obligation, injury, damage, or loss, and amount of claim).

94. See, e.g., *Stockett v. Ass'n of Cal. Water Agencies Joint Powers Ins. Auth.*, 34 Cal. 4th 441, 447, 99 P.3d 500, 20 Cal. Rptr. 3d 176 (2004) (requiring facts in claim to correspond to facts in subsequent complaint with enough detail to support one or more theories of recovery).

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

96. Gov't Code § 815(a).

97. Gov't Code § 815.2.

- A public entity is liable for an injury caused by an act or omission of an independent contractor, to the same extent that a private person would be.<sup>98</sup>
- A public entity may be liable for an injury that results from the breach of a mandatory duty imposed by an enactment that is designed to protect against the type of injury that occurred.<sup>99</sup>
- A public entity may be liable for an injury caused by a “dangerous condition” of its property.<sup>100</sup>

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

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

## **Relevant Immunities**

### *Discretionary Act*

A public employee is generally “not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.”<sup>103</sup> This immunity also shields the public

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98. Gov’t Code § 815.4.

99. Gov’t Code § 815.6. See also Gov’t Code § 810.6 (“enactment” defined).

100. Gov’t Code §§ 830, 835.

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

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

103. Gov’t Code § 820.2.

employer against vicarious liability for the employee's act or omission.<sup>104</sup>

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

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

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

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

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104. Gov't Code § 815.2(b).

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

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

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

108. *Caldwell v. Montoya*, 10 Cal. 4th 972, 982, 897 P.2d 1320, 42 Cal. Rptr. 2d 842 (1995) (granting immunity to school board for its decision to fire superintendent despite allegations of discrimination, because board was given statutory discretion to hire and fire superintendent); but see *Sullivan v. County of Los Angeles*, 12 Cal. 3d 710, 527 P.2d 865, 117 Cal. Rptr. 241 (1974) (holding that jailer who refused to release prisoner after all charges had been

### ***Misrepresentation***

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

### ***Punitive or Exemplary Damages***

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

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

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

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dismissed was not immune); see generally California Government Tort Liability Practice, *supra* note 101, §§ 10.8-10.29, at 616-52.

109. Gov’t Code § 818.8.

110. *Id.*

111. Gov’t Code § 818.

112. Gov’t Code § 825(a).

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

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

### ***Execution of Law***

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

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

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

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

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

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

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

116. Gov't Code § 821.6.

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

118. Gov't Code § 820.6.

### **Defense and Indemnification**

The potential for personal liability might inhibit public employees' willingness to fully perform their jobs. To alleviate those concerns, the defense and indemnification provisions of the Government Claims Act were adopted.<sup>119</sup> These provisions encourage public employees to execute their employment duties with zeal and without fear that they would be personally required to pay for the costs of a judgment or defense.<sup>120</sup> These statutory rights to defense and indemnification are in addition to any rights that may exist under another enactment or contract.<sup>121</sup>

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

## STATUS OF CHARTER SCHOOLS UNDER EXISTING LAW

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

By statute, charter schools are deemed to be part of the public school system for constitutional purposes, operating under the

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119. Gov't Code §§ 825-825.6.

120. See Gov't Code §§ 825.4, 825.6; *Johnson v. State*, 69 Cal. 2d 782, 791-92, 447 P.2d 352, 73 Cal. Rptr. 240 (1968); *Number 1 – Tort Liability of Public Entities and Public Employees*, *supra* note 65, at 814; *Recommendation Relating to Sovereign Immunity, Number 4 – Defense of Public Employees*, 4 Cal. L. Revision Comm'n Reports 1301, 1307 (1963).

121. Gov't Code § 996.6.

122. Lab. Code §§ 2802, 2804; see, e.g., *Jacobus v. Krambo Corp.*, 78 Cal. App. 4th 1096, 1100, 93 Cal. Rptr. 2d 425 (2000).

jurisdiction of the public schools and under the exclusive control of public officials.<sup>123</sup> A court of appeal has affirmed that status.<sup>124</sup>

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

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

- They are funded with public money.
- They are nonsectarian.
- They cannot charge tuition.
- They are bound by the same nondiscrimination rules as traditional public schools.
- They must offer a minimum duration of days and minutes of instruction.
- They must provide for special education students in the same manner as traditional public schools.
- They are entitled to a fair allocation of public school facilities.
- They are required to conduct standardized testing in the same manner as traditional public schools.
- Their teachers must be certificated.
- Their employees are eligible to participate in state retirement programs.

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

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123. Educ. Code § 47615.

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

125. Gov't Code §§ 6528, 20610.

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

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

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

All of these issues are discussed more fully below.

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

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

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

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

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

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

of public schools as long as they administer charter schools according to the law and their charters.<sup>129</sup>

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

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

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

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

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

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

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

131. *Id.* at 1134.

132. *Id.* at 1135.

Legislature can refine it and expand, reduce or abolish charter schools altogether.<sup>133</sup>

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

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

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133. *Id.*

134. *Id.* at 1139.

the Board exercises continuous control over charter schools through its authority to promulgate implementing regulations. ... Finally, public funding of charter schools rests in the hands of the Superintendent.<sup>135</sup>

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

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

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

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

### **Wells v. One2One Learning Foundation**

In *Wells*, a group of students and their parents sued a group of charter schools. All but one of the charter school defendants were

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

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

137. *Id.* at 1141.

138. *Id.* at 1147.

organized as nonprofit public benefit corporations. All of the charter school defendants, including the unincorporated school, were operated by a California nonprofit public benefit corporation.<sup>139</sup>

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

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

The California Supreme Court reversed on several grounds.

### *Application of False Claims Act*

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

In its analysis, the Court first focused on the text of the False Claims Act, which has a statutory definition of a “person” who may be sued under the act. That definition makes no mention of public entities. Consequently, on its face, it is unclear that the False

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

140. *Id.* at 1183.

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

Claims Act should apply to a public entity. The definition expressly includes “corporations,” suggesting that the act was intended to apply to charter schools operated as corporations.

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

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

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

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142. *Id.* at 1192.

143. *Id.* at 1193-97.

144. *Id.* at 1198-99.

145. *Id.* at 1201.

146. *Id.*

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

### *Government Claims Act*

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

In its analysis, the Court acknowledged that charter schools are part of the public school system and are deemed to be school districts for specific purposes. However, the Court found that those purposes do not explicitly include the Government Claims Act, and that "for reasons previously discussed in connection with the [False Claims Act]," charter schools "do not fit comfortably within any of the categories defined, for purposes of the [Government Claims Act], as 'local public entities.'"<sup>148</sup>

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

However, the Court's statements on this point may have been *dicta* (i.e., statements unnecessary to its decision and thus of limited precedential value), because the Court had another reason for concluding that the claims were not subject to the Government

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147. *Id.* at 1202.

148. *Id.* at 1214.

Claims Act. The Court decided that False Claims Act claims are not subject to the Government Claims Act. The Court also noted that the False Claims Act imposes special sealed filing requirements that would be defeated by presentation of a claim against a defendant.<sup>149</sup>

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

### *Unfair Competition Law*

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

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

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

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149. *Id.* at 1215.

150. *Id.* at 1204.

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

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

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

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

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

### **“Good Government” Laws**

Traditional public school districts are subject to certain “good government” laws that require open public board meetings (the

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

152. *Id.* at 717.

153. *Id.* at 711-12.

154. *Id.* at 713.

155. *Id.* at 717.

Brown Act<sup>156</sup>), public access to district records (the California Public Records Act<sup>157</sup>), and restrictions on conflicts of interest in decision making (the Political Reform Act of 1974<sup>158</sup>).

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

### ***Political Reform Act of 1974***

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

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

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

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156. Gov’t Code § 54950 *et seq.*

157. Gov’t Code § 6250 *et seq.*

158. Gov’t Code § 81000 *et seq.*

159. Gov’t Code § 83114.

160. See *In re Siegel*, 3 FPPC Ops 62 (1977).

161. *Id.*

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

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

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

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

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

The Brown Act’s standard for application of the Act to a quasi-public entity would seem to encompass a charter school that is approved by a local school district. Such a charter school is created by an elected legislative body (the local school board) to exercise lawfully delegated authority of the school board (the operation of a public school). Although there is no published appellate decision on whether the Brown Act applies to a charter school that is

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162. See *Walsh* Advice Letter, No. A-98-234 (1998); *Fadely* Advice Letter, No. A-02-223 (2002).

163. Gov’t Code § 54951.

164. Gov’t Code § 54952(c)(1)(A). See, e.g., *Epstein v. Hollywood Entertainment Dist. II Bus. Improvement Dist.*, 87 Cal. App. 4th 862, 104 Cal. Rptr. 2d 857 (2000) (Brown Act applies to private property owners association to which city delegated certain public functions).

formed as a nonprofit public benefit corporation, at least one trial court has held the Act to be applicable to such a charter school.<sup>165</sup>

### ***California Public Records Act***

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

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

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

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

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

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

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165. See Garretson, *Charter Board in Violation of Meeting Act, Judge Sends Directors Back to School*, Marin Ind. J., July 10, 2001, at 1J.

166. See generally Gov't Code §§ 6250-6276.48.

167. Gov't Code § 6252(a).

168. AB 572 (Brownley) (2010).

169. *Id.* (veto message).

## TREATMENT OF CHARTER SCHOOLS IN OTHER JURISDICTIONS

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

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

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

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

172. Hawaii (Haw. Rev. Stat. § 302B-9(d) ("Notwithstanding any law to the contrary, as public schools and entities of the State, neither a charter school nor the office may bring suit against any other entity or agency of the State."); see also Hawaii Office of Information Practices, Op. Ltr. 05-09 (charter schools are "agencies" subject to sunshine laws)); Nevada (Nev. Rev. Stat. Ann. § 386.549 ("The governing body of a charter school is a public body.")); New Jersey (N.J.

appear to apply state governmental immunity laws to their charter schools.<sup>173</sup>

However, it should be noted that only one of those 28 jurisdictions appears to broadly exempt charter schools from the health and safety laws that govern public schools.<sup>174</sup> Twenty-three of the 28 jurisdictions expressly provide by statute that charter schools are subject to school health and safety laws, in whole or in part.<sup>175</sup> The four remaining jurisdictions that apply governmental

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Stat. Ann. § 18A:36A-11(a) (“A charter school shall operate in accordance with its charter and the provisions of law and regulation which govern other public schools...”)); Wyoming (Wyo. Stat. Ann. § 21-3-304(e) (“A charter school, as a public school, is a governmental entity.”)).

173. In the remaining 11 jurisdictions, the status of charter schools under governmental liability laws has not been clearly addressed. Alaska (Alaska Stat. § 14.03.255(a)); Arizona (Ariz. Rev. Stat. § 15-181; 2000 Ariz. AG LEXIS 5); Connecticut (Conn. Gen. Stat. § 10-66ff); Georgia (Ga. Code Ann. §§ 20-2-2062(3), 20-2-2065); Iowa (Iowa Code §§ 256F.1-256F.10); Indiana (Ind. Code § 20-24-8-4 (not subject to statutes that govern school boards and school districts)); Kansas (Kan. Stat. Ann. § 72-1903); Louisiana (La. Rev. Stat. Ann. § 17:3996; 2010 U.S. Dist. LEXIS 6019 (“The fact that the charter school performs a governmental function does not make it a political subdivision of the state. The Supreme Court has stated that “a private entity perform[ing] a function which serves the public does not make its acts state action.”); 2004 La. AG LEXIS 424, 7-8 (La. AG 2004) (“A type 2 charter school is an independent public school that is operated pursuant to a charter between a nonprofit corporation and the Board of Elementary and Secondary Education. La. R.S. 17:3973. A charter school is not a political subdivision of the state and is therefore not subject to the mandates set forth in Title 43, Chapter 4 of the Louisiana Revised Statutes.”)); Maryland (Md. Code Ann., Educ. § 9-102); New Mexico (N.M. Stat. Ann. § 22-8B-4(P)); Wisconsin (Wis. Stat. § 118.40(7)(am) (district to determine whether charter school is “instrumentality” of the school district)).

174. Idaho Code Ann. § 33-5210(4).

175. Arkansas (Ark. Code Ann. § 6-23-103); Delaware (Del. Code Ann. tit. 14, § 512(12)); District of Columbia (D.C. Code § 38-1802.04(c)(4)(B)); Florida (Fla. Stat. § 1002.33(16)(a)(5)); Hawaii (Haw. Rev. Stat. § 302B-9(a)(3)); Illinois (105 Ill. Comp. Stat. 5/27A-5(d)); Louisiana (La. Rev. Stat. Ann. § 17:3996(A)); Massachusetts (Mass. Gen. Laws ch. 71, § 89(bb)); Michigan (Mich. Comp. Laws § 380.503(6)); Minnesota (Minn. Stat. § 124.D.10 subd.

immunity law to charter schools permit regulatory requirements to be waived on the approval of specified public authorities.<sup>176</sup> The Commission does not know whether, as a practical matter, such waivers are granted for health and safety requirements.

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

## LEGAL AND POLICY ANALYSIS

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

### Legal Implications

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

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8(a)); Missouri (Mo. Rev. Stat § 160.405(5)(2)); Nevada (Nev. Rev. Stat. Ann. § 386.527(8) (facilities)); New Hampshire (N.H. Rev. Stat. Ann § 194-B:8(II)); New Jersey (N.J. Stat. § 18A:36A-11(a)); New York (N.Y. Educ. Code § 2854(1)(b)); Ohio (Ohio Rev. Code Ann. § 3314.072(B) (school building safety standards)); Oklahoma (Okla. Stat. tit. 70, § 3-136(a)(1)); Oregon (Or. Rev. Stat. § 338.115(j)); Pennsylvania (Pa. Cons. Stat. § 17-1722-A (regulation of facilities); see also Pa. Cons. Stat. § 17-1732-A (specified health and safety laws applicable)); South Carolina (S.C. Code Ann. § 59-40-50(B)(1)); Tennessee (Tenn. Code Ann. §§ 49-13-105(b)(2), 49-13-11(c)(1)); Texas (Tex. Educ. Code § 12.104(b)(2)(K)); Utah (Utah Code Ann. § 53A-1a-507(3)).

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

177. See discussion below.

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

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178. Gov't Code §§ 900-950.8.

179. Gov't Code §§ 818, 825.

180. Gov't Code § 815.

181. Gov't Code § 820.2.

182. Gov't Code § 818.8.

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

184. Gov't Code § 821.6.

185. Gov't Code § 820.6.

186. Gov't Code § 835.

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

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

Those indirect effects are discussed more fully below.

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

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

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

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

In addition, a recent unpublished federal trial court decision contradicted *Knapp*, holding that a charter school is a public entity

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

for the purposes of California's Government Claims Act.<sup>188</sup> It is unclear why the federal court did not defer to California appellate authority in construing a California statute.<sup>189</sup> Nonetheless, the federal decision arguably creates a division of authority on the issue, whatever its precedential or persuasive weight.

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

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

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

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

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

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

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

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

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

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

### **Policy Implications**

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

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

- (1) It shifts losses away from an innocent injured party and to the responsible party.
- (2) It deters behavior likely to cause injury.
- (3) It encourages the use of precautions to prevent injury.<sup>190</sup>

Applying the fault theory of tort liability to government entities can be problematic. Government engages in many activities that serve the public at large. These activities are mandated by law and reflect policy decisions made by the people through their

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

legislators. A public entity may not have the luxury of halting a service simply because it is deemed too costly or risky.<sup>191</sup>

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

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

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

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

### ***Compensation***

One of the main policy justifications for tort liability is that it provides for compensation of an innocent injured person, by the

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

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

193. *Id.* at 750.

person whose breach of duty caused the injury. This allocation of the cost of an injury is grounded in basic fairness.

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

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

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

*Health and Safety Risk*

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

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

Charter schools are exempt from a number of health and safety laws that were enacted to protect school children. For example, charter schools are not subject to the Field Act earthquake safety standards.<sup>194</sup> Nor are charter schools required to prepare the comprehensive school safety plans and disaster procedures that are

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

required of all other public schools.<sup>195</sup> Charter schools are also exempt from the law mandating the expulsion of students for specified dangerous offenses, including weapons possession, drug sales, and sexual assault.<sup>196</sup>

These exemption remove an important constraint on the discretion of charter schools in making health and safety policy decisions. Charter schools are not required to meet all of the same standards that apply to other public schools. In combination with immunity from liability for injuries that result from discretionary policy decisions, this could lead to higher levels of health and safety risk in charter schools than would be allowed in traditional public schools.<sup>197</sup>

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

## **#2 The combination of discretionary immunity and exemption from public school health and safety**

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

196. See Educ. Code § 48915(c)-(d). The examples provided in this report are not intended to be exhaustive.

197. It should be noted that charter schools are schools of choice. Parents are never required to enroll their children in charter schools and are free to withdraw them and enroll them in other schools. This could create an additional check on student health and safety risks in charter schools that does not exist in a traditional public school. To the extent that parents become aware of risks to student health and safety in a charter school, they may choose to withdraw their children from the school.

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

**laws could lead to riskier health and safety policies in charter schools than in traditional public schools.**

*Public Accountability*

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

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

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

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

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

### *Pedagogical Innovation*

The principal purpose of charter schools is to foster pedagogical innovation and improvement in the public school system.<sup>198</sup> By exempting charter schools from most of the requirements of the Education Code and granting them a significant degree of operational independence from school districts, the Charter Schools Act frees charter schools to experiment.

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

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

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

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

### *Protecting the Public Fisc*

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

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198. See Educ. Code § 47601.

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

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Hence, there can be no doubt that public education is among the state's most basic sovereign powers. Laws that divert limited educational funds from this core function are an obvious interference with the effective exercise of that power. Were the [False Claims Act] applied to public school districts, it would constitute such a law. If found liable under the [False Claims Act], school districts, like other [False Claims Act] defendants, could face judgments — payable from their limited funds — of at least two, and usually three, times the damage caused by each false submission, plus civil penalties of up to \$10,000 for each false claim, plus costs of suit. Such exposure, disproportionate to the harm caused to the treasury, could jeopardize a district financially for years to come. It would injure the districts' blameless students far more than it would benefit the public fisc, or even the hard-pressed taxpayers who finance public education.<sup>199</sup>

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

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

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

The [Charter Schools Act] was adopted to widen the range of educational choices available within the public school system. That is a salutary policy. Yet application of the [False Claims Act's] monetary remedies, however harsh, to the charter school defendants presents no fundamental threat to maintenance, within the affected districts, of basically adequate free public educational services. Thus, application of the [False Claims Act] to the charter school operators in this case cannot be said to infringe the exercise of the sovereign power over public education.<sup>200</sup>

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

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

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

Furthermore, if the potential financial instability of charter schools were significant enough, it might deter the creation of new

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200. *Id.* at 1201.

charter schools. That could undermine the legislative policy embodied in the Charter Schools Act.

For the most part, charter schools can avoid these fiscal threats through liability insurance. However, there are some sources of liability that may be difficult or impossible to insure against. For example, general liability insurance does not cover punitive damages, because they are considered punishment for intentional wrongful acts. Consequently, a charter school could face a large punitive damage award against which it would not be insured.<sup>201</sup> Under the Government Claims Act, public entities are immune from punitive damages.<sup>202</sup>

In addition, charter schools, like traditional public schools, cannot charge tuition.<sup>203</sup> This places a limit on the fiscal resources available to charter schools. Unlike private schools, they cannot simply raise tuition rates in order to self-insure or pay litigation costs. This makes them more vulnerable than private schools to having their finances depleted as a result of tort liability.

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

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

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

202. Gov't Code § 818.

203. Educ. Code § 47605(d).

### *Uniquely Public Obligations*

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

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

These uniquely public obligations could give rise to types of liabilities that could only be faced by a school within the public school system (either a charter school or a traditional public school). For example, Education Code Section 48907 protects student free speech rights in all public schools, including charter schools. A charter school faces potential liability under that provision that a purely private school would not face.<sup>204</sup>

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

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

This problem would be minimized if a charter school were treated as a public entity for purposes of the Government Claims Act. Any liability that a charter school faces as a consequence of

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204. A charter school could also face liability under the Unruh Act or the Bane Act for illegal discrimination or a violation of civil rights, arising from the charter school's obligations as part of the public school system. See Civ. Code §§ 51, 52.1. Standard commercial liability insurance may not cover all injuries arising from such wrongs. See, e.g., Civ. Code § 2773 (barring indemnity for future unlawful act); Ins. Code § 533 (barring coverage of wilful act).

its public obligations would be subject to the same procedures and immunities that govern similar claims against traditional public schools.

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

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

### *Summary*

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

- #1 Some innocent persons injured by charter schools would not be compensated for their injuries.
- #2 The combination of discretionary immunity and exemption from public school health and safety laws could lead to riskier health and safety policies in charter schools than in traditional public schools.
- #3 The coupling of discretionary immunity with the possible exemption from good government laws could lead to the adoption of riskier health and safety policies in charter schools than in traditional public schools.
- #4 Discretionary immunity could facilitate pedagogical innovation, by removing liability as a deterrent to experimentation.
- #5 Application of the Government Claims Act to a charter school would help to preserve a charter school's scarce fiscal resources from depletion, and

thereby prevent the negative consequences associated with closing a charter school, which could occur in the event of a judgment that is not covered by readily available liability insurance.

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

## ALTERNATIVE APPROACHES

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

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

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

The Commission makes no recommendation on which of the alternative approaches should be adopted. Each presents a different balancing of contending policy considerations. Those considerations involve fundamental questions about the value of charter schools within the public education system and the importance of any heightened level of risk to student health and safety that might result from extending sovereign immunity to charter schools. There are likely to be sharp differences in perspective on how best to balance those important concerns. Consequently, there is no clear answer as to which alternative approach would best serve the People of California. An issue of

this fundamentally political character would be best decided by the People's elected representatives, not by the Commission.

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

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

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

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

### ***Liability of Chartering Entity***

A chartering entity is not liable for the debts, obligations, or torts of a charter school that is formed as a nonprofit public benefit corporation.<sup>205</sup> This means that the finances of the chartering school district will not be directly affected by any liability imposed on an incorporated charter school. Consequently, concerns about conserving the public fisc are not strongly implicated with respect to the liability of an incorporated charter school. No matter what liability such a school incurs, none will directly reach the chartering school district.

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205. See Educ. Code § 47604.

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

### ***Legal Identity***

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

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

Such a distinction could be expressed as follows:

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

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

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

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

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

A charter school is deemed to be a public entity.

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

The Commission is not authorized to evaluate the substantive merits of treating a charter school as a public entity for the purposes of laws other than the Government Claims Act.<sup>206</sup> Because it lacks that authority, the Commission has not undertaken such an analysis. The alternative discussed here is offered only to provide the Legislature with a complete range of options for its consideration.

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

### *Advantages*

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

- **Legal Clarity.** There would be no ambiguity as to whether a charter school is governed by the Government Claims Act. Nor would there be any ambiguity regarding the status of charter schools under other laws affecting public entity liability (e.g., the False Claims Act).
- **Good Government Laws as a Check on Policy Discretion.** The application of good government laws

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

to charter schools would act as a check on policy-making discretion. This would reduce the likelihood that immunity for discretionary policy decisions would lead to a higher level of student health and safety risk.

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

### *Disadvantages*

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

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

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

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

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

#### ***Advantages***

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

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

### *Disadvantages*

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

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

### **Alternative #3. Combined Approach**

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

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

to account for the special character of charter schools).

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

The Commission is not authorized to evaluate the substantive merits of treating a charter school as a public entity for the purposes of good government or health and safety laws.<sup>207</sup> Because it lacks that authority, the Commission has not undertaken such an analysis. The alternative discussed here is offered only to provide the Legislature with a complete range of options for its consideration.

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

### *Advantages*

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

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

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

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

### *Disadvantages*

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

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

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

A statute could be enacted to declare that a charter school is a public entity for the purposes of the Government Claims Act, but only with respect to a claim arising from a charter school’s

uniquely public obligations. That is, the Government Claims Act would only apply to a claim against a charter school if the claim is a type of claim that can only be brought against a public entity.

Thus:

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

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

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

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

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

- A general tort or contract claim.

- A claim brought pursuant to the California False Claims Act.<sup>208</sup>
- A claim alleging that a charter school violated the general whistleblower protections provided in Labor Code Section 1102.5.

### *Advantages*

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

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

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208. Gov't Code § 12650 *et seq.*

### *Disadvantages*

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

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

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

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

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

### *Advantages*

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

- **Compensation Preserved.** Sovereign immunity would not be available to preclude the compensation of innocent persons injured by charter schools.

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

### *Disadvantages*

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

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

## CONCLUSION

There are competing legal and policy considerations for each of the approaches presented in this report. None of the approaches is

clearly superior to the others. They each present a different balancing of legitimate policy concerns. For that reason, the Commission makes no recommendation on which of the alternatives would strike the best policy balance.

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

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

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

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