Study G-200 February 8, 2010

First Supplement to Memorandum 2011-7

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

The Commission has received further letters commenting on the issues discussed in Memorandum 2011-7. Those letters are attached in the Exhibit as follows:

The issues raised in these new communications are discussed below.

Also, the staff would like to thank Michael Lew, who served as a volunteer law clerk for the Commission last fall, for his assistance in researching matters discussed in Memorandum 2011-7.

PUBLIC HOSPITAL RUN BY NONPROFIT CORPORATION

Memorandum 2011-7 discusses a recent unpublished federal court decision holding that a California charter school, organized as a nonprofit public benefit corporation, is a "public entity" for the purposes of the Government Claims Act. See Dubose v. Excelsior Educ. Ctr., ___ F. Supp. ___ (C.D. Cal. 2010); Memorandum 2011-7, Exhibit p. 14-40.

One of the court's arguments in favor of that holding appears to be that an entity providing a public benefit on a nonprofit basis is sufficiently similar to a public corporation or public authority that it should be treated in the same way as those kinds of entities (i.e., it should be treated as a public entity for the purposes of the Government Claims Act). See Memorandum 2011-7, pp. 11-12. The court seems to be suggesting that any nonprofit public benefit corporation should be treated as a public entity.

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

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

The staff believes that proposition is incompatible with California cases holding that a nonprofit public benefit corporation is not a public entity for various statutory purposes. See, e.g., Service Employee's International Union, Local No. 22 v. Roseville Community Hospital, 24 Cal. App. 3d 400, 101 Cal. Rptr 69 (1972) (nonprofit public benefit corporation operating public hospital not public entity for purposes of public employer labor law); 81 Ops. Cal. Atty. Gen. 213 (1998) (nonprofit public benefit corporation not a public entity and so cannot participate in joint powers authority). Both opinions rejected the notion that a nonprofit public benefit corporation is necessarily a public entity.

Mr. Moser now directs the Commission's attention to an appellate decision holding that a "private, nonprofit, public-benefit corporation which operates Marin General Hospital pursuant to the terms of a 30-year lease from the Marin Hospital District" is not a local public entity for the purposes of local government open meeting law (i.e., the "Brown Act"; Gov't Code § 54950 *et seq*.). See Yoffie v. Marin Hosp. Dist., 193 Cal. App. 3d 743, 238 Cal. Rptr. 502 (1987).

The *Yoffie* court's holding is grounded in close textual analysis of the definitions of "local agency" and "legislative body" that are used to define the scope of application of the Brown Act. See Gov't Code §§ 54951-54952. As noted in prior discussion of "quasi-public entities," the Brown Act applies to a private corporation if it meets certain specified criteria. See Gov't Code § 54952(c). The court held that the corporation at issue in *Yoffie* did not meet the statutory criteria.

Because that decision was grounded in specific statutory language that does not have any analog in the Government Claims Act, it doesn't really shed new light on the merits of the argument made in *Dubose*.

Mr. Moser notes that the Legislature subsequently amended Section 54952 to specifically include certain lessees of public hospitals in the definition of "legislative body" that governs the application of the Brown Act. See Exhibit p. 1; Gov't Code § 54952(d).

Finally, Mr. Moser reports that the Legislature did not make any change to reverse the holding in the *Roseville Community Hospital* case (i.e., the holding that a privately incorporated public hospital is not a public entity for the purposes of labor laws). See Exhibit p. 1.

He concludes:

> The lesson I draw from this is that it is a statute by statute determination. Given the broad reach the Government Claims Act

> is designed to have and the fact that the State is obliged to create a common system of free public schools — of which charter schools are a part — I believe the Dubose court got it right.
>
> There's no comparable state obligation to provide hospitals, 85% of which are private organizations (nonprofit and for profit). I believe that's a key distinction.

Id.

ASSOCIATION OF CALIFORNIA SCHOOL ADMINISTRATORS

The Association of California School Administrators ("ACSA") opposes treating a separately incorporated charter school as a public entity for the purposes of the Government Claims Act. See Exhibit p. 2. ACSA offers the following reasons for its position:

- The exemption of charter schools from some health and safety laws that otherwise govern public schools weighs against granting charter schools discretionary immunity with respect to health and safety policies. See Exhibit pp. 2-3.
- The exemption of charter schools from some health and safety laws that otherwise govern public schools weighs against treating charter schools as public entities with respect to liability for dangerous conditions of public land. See Exhibit p. 3.
- The greater discretion enjoyed by charter schools with respect to financial matters weighs against treating charter schools as public entities for purposes of the Government Claims Act. See Exhibit p. 3.

However, ACSA believes that a "dependent" charter school should be treated as a public entity, because it is not legally separate from the public school district that chartered it. "In the dependent charter scenario, there is no question that the Government Claims Act should apply, and a Government Claim would need to be submitted to the authorizing school district prior to filing a lawsuit." See Exhibit p. 2.

Respectfully submitted,

Brian Hebert
Executive Director

EMAIL FROM GREGORY V. MOSER, CALIFORNIA CHARTER SCHOOLS ASSOCIATION (2/2/11)

Re: Additional background on public hospital management by nonprofit corporations

I thought you should be aware of the other cases addressing the operation of publicly-owned hospitals by nonprofit corporations.

The attached case [Yoffie v. Marin Hosp. Dist., 193 Cal. App. 3d 743, 238 Cal. Rptr. 502 (1987)] looks at the history of public hospitals, and concludes the Brown Act doesn't apply to a hospital leased to a nonprofit. A decision from the same era involving Desert Hospital near Palm Springs reached a contrary conclusion and was depublished.

The Legislature responded to the "contracting out" of public hospital management by strictly limiting the practice (Health & Safety Code section 32121(p))and by amending the Brown Act to grandfather in deals done before 1994, but subjecting all other lessees in the future to the open meeting law. (Gov. Code 54952(d)).

The Legislature left alone the Roseville judicial determination as to what labor laws apply.

The lesson I draw from this is that it is a statute by statute determination. Given the broad reach the Government Claims Act is designed to have and the fact that the State is obliged to create a common system of free public schools--of which charter schools are a part -- I believe the Dubose court got it right.

There's no comparable state obligation to provide hospitals, 85% of which are private organizations (nonprofit and for profit). I believe that's a key distinction.

Greg V. Moser

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February 8, 2011

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

RE: Charter School and the Government Claims Act

Dear Mr. Hebert:

On behalf of the Association of California School Administrators, ACSA, I am pleased to provide our comments regarding charter schools and the Government Claims Act. By way of background, charter schools are deemed to be "school districts" for certain statutory purposes and are part of the public school system for purposes of Article IX, Section 8 of the California Constitution (Education Code Sections 47162, 47165.) The position has been taken that because charter schools are part of the public school system and operate with public funds, they are subject to the laws that are generally applicable to other public schools regardless of whether that school is specified in the Charter Schools Act.
The same policy arguments used to support a position/conclusion that, for instance, charter schools are subject to the Brown Act and conflict of interest laws (e.g. need for transparency and accountability) do not apply in this context of the Government Claims Act. Extending the Government Claims Act to independent charter schools grants them extra benefits on top of the cache of benefits which they already enjoy.
ACSA would oppose extending the Government Claims Act to independent charter schools for the following reasons:

1. What is the frequency of arrangement where charter schools are fully integrated into the operations of the school district, operating as an arm of the district rather than as a separate entity, and details of their integration into district operations?

   This type of dependent or district-operated charter school arrangement is more common than ever. For multiple reasons, many school districts throughout California have created their own charter schools. In most instances, dependent charters are governed by the authorizing entity's (e.g. school district) board. For all purposes, they are a school of the authorizing entity. The employees working at the charter school are employees of the authorizing entity and the authorizing entity's collective bargaining agreements often apply in whole or part. In the dependent charter scenario, there is no question that the Government Claims Act should apply, and a Government Claim would need to be submitted to the authorizing school district prior to filing a lawsuit.

2. Discretionary Immunity: Is the freedom from regulation granted to charter schools (e.g. not required to follow the Field Act or comprehensive school safety plans) compatible with a grant of immunity for discretionary decisions? Or would the combination of immunity and deregulation remove too much of the incentive to take appropriate precautions against risk?

   A charter school must specify in its charter what procedures it will implement in order to ensure the health and safety of its students and staff. Furthermore, the charter must include an assurance that the charter school facilities will

comply with state building codes, the Americans with Disabilities Act (ADA), access requirements, and any other applicable fire, health and structural safety requirements, and that it will maintain on file readily accessible records documenting such compliance. The charter school must also provide an assurance that a charter school safety plan will be developed and kept on file for review, and that staff will be trained annually on the safety procedures outlined in the plan. (Education Code Section 47605(b)(5)(F); 5 Cal. Code Regs. Section 11967.5.1(f)(6).) It is the authorizing entity's obligation to make sure this is addressed in the charter or in another controlling MOU between the authorizer and charter school and a part of its oversight to follow-up and make sure a safety plan is developed. Additionally, independent charter schools are required to obtain/maintain insurance coverage.

Despite the above requirements, it is true, as recognized by the Commission in the memorandum that charter school safety plans "could vary from district to district in quality and specificity of planning." Due to this lack of continuity, ACSA believes that the policy disfavors granting immunity. Since charter schools are not obligated to follow the same rules as other public schools, then why should they share the benefit of discretionary immunity? They cannot have it both ways.

3. Punitive Damages: The Commission states in the original draft that "Furthermore, a charter school may be controlled by a for-profit corporation and the corporation may be making an unjustifiable profit at the expense of educating children. Charter operators have been known to enter into contracts with for-profit corporations for services, e.g. back of house services and public monies flow to those for-profit corporations. This scenario describes one of abuse (misappropriation of public funds) which would subject the charter to revocation.

4. The staff invites public comment on whether lowering the standard of care for dangerous property conditions (from "ordinary care" applicable to private entities to "reasonable action" applicable to public entities) while also exempting charter schools from health and safety regulations that govern school districts would cause problems.

   Charter schools are still required to maintain insurance and to minimize the costs associated with such insurance. Basic health and safety of facilities should be provided considering they are subject to local and state building code requirements.
5. Government Claims Act immunity to charter schools: Charter schools can be distinguished from traditional public schools in some key areas. Charter schools can have a limited existence and are schools of choice. Also, charter schools may be organized as or operated by private entities which have a significant amount of financial discretion. That financial discretion could lead to abuse. Liability as a private entity could provide a significant deterrent to such abuse. ACSA suggests that this is a reason against giving independent charter schools immunity.

While charter schools do offer a choice for educational quality for some schools, it is important to remember they are public schools for the benefit of collecting public funds. With that designation comes responsibility. Charter schools are public schools for the purposes of receiving public funds, plain and simple.

Sincerely,

Laura Preston

Laura Preston
Legislative Advocate