Understanding "Dependent" Charters

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Although the term "dependent charter" is a commonly-used term in charter school lexicon, the term is not defined in the Charter Schools Act ("CSA"). (Ed. Code §47600, *et. seq*.) Consequently, this loosely-used term has taken on widely divergent meanings in different contexts.

The term "dependence" has been used to connote various characteristics of charter school/district relations, including the origin of the school's formation, its governance structure, its funding mechanism, the interpersonal relationship between the district's and the charter school's operators, the charter school's level of political acceptance in the community, and the extent to which the charter school depends upon the district for administrative services. More recently, the Education Code ("Ed. Code") has been amended to provide for formation of "parental empowerment" charters – adding to the various "types" of charters recognized in the Education Code. (Ed. Code §53300)

Regardless of whether a charter school is perceived as "independent" or "dependent," the relationship between an authorizing agency and a charter school should follow certain precepts to ensure that charter schools maintain operational independence from the school district structure, remain subject to the oversight of their charter-granting agencies, and are ultimately accountable to them for complying with the terms of their charter and the law.

The CSA

The CSA does not define the term "dependent" charter. Rather, that statute recognizes two primary forms of charter schools – "conversion" charters and "startup" charters." [1] A "conversion" charter is defined as one that is converted from an existing public school (Ed. Code §47605(a)(2)), while a "startup" charter involves "the establishment of a charter school." (Ed. Code §47605(a)(1)) [2]

The primary distinction between "startup" and "conversion" charters is made during the inception of the charter – more specifically, with the identity of the petitioners. A "conversion" charter requires the signatures of "not less than 50% of the permanent status teachers currently employed at the public school to be converted." (Ed. Code §47605(a)(2)) A "startup" charter requires signatures of "a number of parents or guardians of pupils that is equivalent to at least one-half of the number of pupils that the charter school estimates will enroll in the school," or "at least one-half of the number of teachers that the charter school estimates will be employed at the school." (Ed. Code §47605(a)(1)(A)(B))

Recent case law and regulatory amendments also appear to confer upon a "conversion" charter a presumption that it can remain in the site of the converted public school. The court in *California School Boards Assn. v. State Bd. of Educ.* (2010) 191 Cal.App.4th 530, stated that "[w]e have concluded the State Board has reasonably chosen to adopt regulations giving 'conversion' charter schools what amounts to a presumptive right to remain at their existing school site." (*Id*. at 575).

In many remaining respects, the CSA treats "startup" and "conversion" charters alike. Judge Burger-Plavan, in the *Sacramento City* case, noted a few exceptions: conversion charter admissions preference for existing students (Ed. Code §47605(d)), ineligibility for certain loans (Ed. Code §43165) and grants (Ed. Code §47614.5), and the reasonable equivalence presumption under Ed. Code §47614. (5 C.C.R §§11969.3 and 11969.9) The most recent revision to the Proposition 39 regulations also prohibits a district from changing a converted district school's former attendance area without obtaining a waiver. (Cal. Admin. Code tit. 5, §11969.3(d)(2)(B))

Despite the limited variations between "startup" and "conversion" charters, nothing in the Ed. Code and regulations demonstrate the intent to abrogate the stated objective that charter schools "operate independently from the existing school district structure." (Ed. Code §47601.) The rules defining the oversight relationship between the charter school and its sponsoring agency apply to conversion charters and start-ups alike. By extension, the practice of designating charter schools as "independent" or "dependent" has no express derivation in the CSA, and that statute contains no indication that the authorizer's oversight duties, or potential liability for the charter school's acts, differ according to the "type" of charter.

Common Perceptions of "Independent" vs. "Dependent" Charters

Because the term "dependent" charter is not defined in the Education Code, the common understanding of the term is more a function of local practice than considered legal analysis. Most commonly, this perception arises from the extent to which the charter school is operationally integrated into school district operations.

A certain level of statutory integration of charter school functions into district operations is called for under the CSA. For example, Ed. Code §47651 defines two funding methods for charter schools – direct and indirect. A "direct" funded charter will receive its state funding directly (usually through the county) (Ed. Code §47651(a)(1)), while an "indirectly" funded charter will receive it on a pass-through basis through the sponsoring school district. (Ed. Code §47651(a)(2)) For special education purposes, a charter school may be considered a "school of the district," or may join a Special Education Local Plan Area ("SELPA") as a Local Educational Agency ("LEA"). (Ed. Code §47641(a),(b)) Finally, in its petition, a charter school can elect whether the sponsoring district or the charter school shall be considered the exclusive employer for the purposes of the Educational

Employment Relations Act ("EERA"), the collective bargaining law for school districts. (Ed. Code §§47605(b)(5)(O) and 47611.5)

While the above instances provide some limited levels of operational integration, any further degrees of operational integration must be assessed in the context of the larger designs of the CSA. As the California Supreme Court stated in *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, the charter-granting school district has a statutory role as supervisory agency over the charter school:

> Though charter schools are deemed part of the system of public schools for purposes of academics and state funding eligibility, and are subject to some oversight by public school officials [citation omitted], the charter schools here are operated, not by the public school system, but by distinct outside entities-which the parties characterize as non-profit corporations-that are given substantial freedom to achieve academic results free of interference by the public educational bureaucracy. The sole relationship between the charter school operators and the chartering districts in this case is through the charters governing the school's operation. (*Id*. At 1200-1201)

Although the California Supreme Court places some weight in the status of the charter school as non-profit corporations, the statutory design of the CSA does not appear to vary an authorizer's oversight duties based on this status. The inherent "independence" required by the authorizer relationship that every charter-granting agency must hold with a charter school under its oversight will be discussed in the context of the five operational areas below.

Petitioners

Charter schools are sometimes considered to be "dependent" if the impetus for forming the charter school originated from within the district – either from the governing board or district administrators. By contrast, charter schools that have their origin in third-party groups external to the district are more often considered to be "independent" charters.

The CSA, outside of the context of "conversion" and "parent empowerment" charters, does not further differentiate between forms of charter schools based solely on the impetus for their origination. The statute states that a petition "may be circulated by any one or more persons seeking to establish the charter school" (Ed. Code §47605(a)(1)), but does not tie any notion of dependence or independence upon the identity of those petitioners. Regardless of the origins of the petition, the requirement of petition signatures remains, including the 50% numerical threshold applicable to both teacher and parent signatures. (Ed. Code §§47605(a)(1) and (2)) The signature requirement applies to all petitions submitted under Ed. Code §47605(b).[3]

There are other principles of law that would affect the ability of a district board or administration to participate in the formation of a charter school, even though Ed. Code §47605(a)(1) allows "any one or more persons" to circulate a petition to establish a charter school. For example, under Government

Code §1126, district officials and administrators are prohibited from performing "any work, service or counsel for compensation outside of his or her local agency employment where any part of his or her efforts will be subject to approval by any other officer, employee, board or commission of his or her employing body," unless otherwise approved in the statute or by the local agency. This statute might be invoked if a district administrator's duties in creating a charter school are subject to approval or oversight by the district's governing board.

Governing Board/Administration

Although the CSA does not explicitly prohibit a district governing board from serving as the charter school's governing board, reconciling this practice with the basic concepts of conflict of interest law is difficult.

The CSA contemplates that each charter school shall have its own governance structure. (Ed. Code §47605(b)(5)(D)) That governance structure must "reflect a seriousness of purpose necessary to ensure that … [t]here will be active and effective representation of interested parties, including, but not limited to parents …" (5 C.C.R. §11967.5.1 (f)(4)(B)(2))

A school district's governing board has specific statutory duties with respect to the charter school. The district's board determines whether a petition meets the legal requirements for approval (Ed. Code §47605(b)), and is obligated to perform its oversight duties as prescribed by law or expose the district to potential liability for the acts, errors, or omissions of the charter school. (Ed. Code §47604) The district's board also determines whether the charter should be materially revised or renewed (Ed. Code §47607(a)), has committed one of the conditions for revocation, and has the power to revoke the charter if the charter school commits any of the prescribed violations. (Ed. Code §47607(c)) These duties exist regardless of whether the charter school is a "conversion" or a "startup," or whether it is a "dependent" or "independent" charter school.

Under the doctrine of incompatible offices, a public officer cannot sit on the board of two entities if one has supervisory oversight powers over the other. (*People ex rel. Chapman v. Rapsey* (1940) 16 Cal.2d 636, 641-2) Practically speaking, one wonders how a district governing board can perform oversight over a charter school that it also governs. If the district's governing board is involved in creating the petition, it cannot evaluate with any neutrality whether the petition contains a reasonably comprehensive description of the 16 required elements. (Ed. Code §§47605(b)(1) – (5)) Furthermore, a school district that acts as the governing board of its own charter school cannot ensure that it can determine whether a charter school should be revoked (*i.e,* whether it is meeting the conditions set forth in Ed. Code §47607(c)), without raising issues of divided loyalty.

The doctrine of incompatible offices applies where one jointly-held office holds supervisory powers over the other:

> The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other. (*Deputy Sheriff's Association of Santa Clara County v. County of Santa Clara* (1996) 49 Cal.App.4th 1471, 1481)

For example, the State Attorney General has issued an opinion that a school board member cannot simultaneously hold the position of county planning commissioner where the latter office might have jurisdiction over the school district's location of school facilities. (56 Ops.Cal.Atty.Gen. 488 (1973).)[4]

The obligation of the district's governing board to perform statutory oversight duties over the charter school also raises the question of divided loyalties should the same board also govern the charter school. Therefore, although not expressly prohibited by the CSA, the practice of a district governing board also governing the charter school is difficult to harmonize with existing conflict of interest law.

Fiscal Independence

Charter schools are intended to maintain fiscal independence from their charter-granting districts, and the charter school is responsible for managing

its own financial affairs. It is equally clear that the sponsoring school district is obligated to ensure that the charter school maintains fiscally sound practices and conducts annual financial audits. (Ed. Code §§47604.32 and 47604.33.) As the court stated in *Wells*:

> The autonomy, and independent responsibility, of charter school operators extend, in considerable degree, to financial matters. Thus, where a charter school is operated by a nonprofit public benefit corporation, the chartering authority is not liable for the school's debts and obligations. (Id., § 47604, subd. (c).) A 2003 amendment to the [CSA] makes clear that the chartering authority's immunity from financial liability for a charter school extends to "claims arising from the performance of acts, errors, or omissions by the ... school, if the authority has complied with all oversight responsibilities required by law." (*Wells*, *supra*, 39 Cal.4th 1164, 1201)

To the extent that a charter-granting district commingles its finances with that of the charter school, or makes fiscal decisions on the charter school's behalf, such a practice blurs the line of demarcation set forth in the CSA.

Charter schools receive their own funding in the form of a general purpose entitlement. (Ed. Code §47633) Although the charter school can opt to receive its funding through the district on a pass-through basis (Ed. Code §47651(a)(2)), there is no indication that the intent behind this arrangement is to commingle funds with district resources. In fact, the district's fiscal oversight duties belie this – the

district must ensure that a charter petitioner provides "financial statements that include a proposed first-year operational budget, including startup costs, and cashflow and financial projections for the first three years of operation" (Ed. Code §47605(g)); the charter school must submit preliminary budgets, interim reports, and financial audits to the sponsoring agency (Ed. Code §47604.33); the charter school must follow generally-accepted accounting principles and not commit fiscal mismanagement (Ed. Code §47607(c)(3)); and the charter school must conduct "annual, independent, financial audits." (Ed. Code §47605 (b)(5)(I))

Therefore, regardless of whether a charter school is perceived to be an "independent" or "dependent" charter, the CSA is clear that it must maintain independent fiscal operation and finances from the sponsoring district, and that the district's only nexus to such fiscal activities is through its oversight duties.

Employment Relationships

The CSA states that a charter petition must elect whether the charter school or the district shall be considered the exclusive employer of the charter school's employees for the purposes of the EERA. (Ed. Code §§47605(b)(5)(O) and 47611.5) However, this designation is intended largely to determine which entity – the school district or charter school – would carry the obligations under the EERA (most predominantly, the duty to bargain the terms and conditions of employment) if the charter school's employees designate an exclusive representative. Administrative Law Judges with the Public Employment Relations Board ("PERB") have applied the obligations of the EERA to the party that the charter petition designates as the exclusive employer. (*See, e.g., Chula Vista Educators v. Chula Vista Elementary School District* (2002) 26 PERC 33031 (No. LA-CE-4125-E); *Ravenswood Teachers Association v. Ravenswood City School District* (2002) 26 PERC 33118 (Nos. SF-CE-2218-E, SF-CE-2236-E))

Less explicit under the CSA is the role of the charter-granting district in the charter school's duties as an employer. It is important for districts to limit their potential liability for charter school actions to that delineated by their oversight duties in Ed. Code §47604(c). Districts must take steps to avoid potential vicarious forms of liability deriving from any action vis-à-vis the charter school's employees; for example, screening applicants, reference checks, hiring decisions, evaluation and discipline, and decisions to dismiss or terminate. Because districts generally do not dictate the day-to-day personnel decisions affecting the charter school's employees, they must ensure that the charter school is fulfilling its legal obligations as an employer, and that the district limits its role as that of an authorizer ensuring that the charter school complies with all applicable laws.

A charter petition should ideally reflect the election that the charter school be the exclusive employer of its own employees. Though the CSA allows the petition to identify the district as the exclusive employer, such a designation is at odds with the

practical reality that charter schools function as the employer of their own employees. Nonetheless, there are some limited instances where charter school employees are treated functionally as district employees. (*See*, *e.g., Orcutt Union Elementary School District* 36 PERC ¶ 1 (No. LA-UM-829-E) (PERB held that charter school teachers shared a community of interest with district teachers for the purposes of the unit modification determination.)) However, PERB expressly noted in the *Orcutt* decision that a different result could ensue if the charter designated the charter school as the exclusive employer.

Non-Profit Corporate Status

The CSA provides for the incorporation of a charter school as a non-profit public benefit corporation. (Ed. Code §47604(c)) Incorporation as a non-profit public benefit corporation will give a charter school legal status distinct and separate from the district. California courts have begun to consider a charter school's non-profit corporate status in determining whether charter schools bear the obligations adhering to public entities. For example, the court in *Knapp v. Palisades Charter High School* (2007) 146 Cal.App.4th 708, cited a charter school's non-profit corporate status in holding that a claimant did not need to comply with the requirements of the Tort Claims Act before suing the charter school. (*Knapp*, *supra,* 146 Cal.App.4th 708) The California Supreme Court held that a charter school's non-profit corporate status made it a "person" subject to suit under the False Claims Act and unfair competition laws. (*Wells, supra,* 39 Cal.4th 1164, 1203-4)

Incorporation as a non-profit public benefit corporation is a step that a charter school can take to affirm that, legally speaking, it is an entity separate and distinct from the district. While the effect of such a step is still being developed by the courts, becoming a non-profit public benefit corporation generally signals an intent by the charter school to legally codify its independent status from the district.

Conclusion

Because the CSA does not define the term "dependent" charter, the operational and administrative relationships between school districts and their charter schools vary throughout the state. However, school districts should ensure that their operational relationships with their charter schools are harmonized with their statutory role as the charter school's oversight agency, as well as with the statutory directive that charter schools operate independently from the public school system.

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[1] Although the term "startup" charter is not used anywhere in the CSA, it was used by Judge Trena H. Burger-Plavan to refer to a non-conversion charter school in her "Statement of Decision" in the trial court matter *Rogers et al. v. Governing Board of the Sacramento City Unified School District* (2003), Sacramento County Superior Court Case No. 03CS00523, p. 10. (Trial Court decisions are not citable as binding precedent.)

[2] As noted above, Ed. Code §53300 (which is outside of the CSA) provides for the formation of "parent empowerment" charters as well.

[3] The newly-enacted regulations for "Parent Empowerment" charters provide a separate signature requirement for petitions submitted under Ed. Code §53300 for the school to be operated by a charter or educational management organization. (5 Cal. Admin. Code tit. 5, §4802.2)

[4] Opinions from the Office of the Attorney General are not binding legal precedent, but have persuasive authority.