

## The Legal Status of Charter Schools in State Statutory Law

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### Introduction

Since 1991, forty-two states and the District of Columbia have enacted legislation for charter schools.<sup>1</sup> In the 2012-13 school year, there were more than 6,000 charter schools,<sup>2</sup> serving almost 2.3 million students.<sup>3</sup> While charter schools are generally characterized as “public schools,” courts have had a difficult time determining their legal status because charter schools exhibit both public and private characteristics.<sup>4</sup> For example, New York’s charter school statute defines a charter school as an “independent and autonomous public school, except as otherwise provided in [the charter school statute], and a political subdivision having boundaries coterminous with the school district or community school district in which the charter school is located.”<sup>5</sup> However, self-appointed boards of trustees instead of governmental appointees “have final authority for policy and operational decisions of the school.”<sup>6</sup> Further, charter schools are “exempt from all other state and local laws, rules, regulations or policies governing public or

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<sup>1</sup> Nat’l Ctr. for Educ. Stats., *Fast Facts*, available at <http://nces.ed.gov/fastfacts/display.asp?id=30> (noting that the only states not to pass legislation are Alabama, Kentucky, Montana, Nebraska, North Dakota, South Dakota, Vermont, and West Virginia).

<sup>2</sup> Nat’l All. of Pub. Charter Schs. Dashboard, *Total Number of Schools*, available at <http://dashboard.publiccharters.org/dashboard/schools/page/overview/year/2013>.

<sup>3</sup> Nat’l All. of Pub. Charter Schs. Dashboard, *Total Number of Students*, <http://dashboard.publiccharters.org/dashboard/students/page/overview/year/2013>.

<sup>4</sup> *New York Charter Ass’n v. Smith*, 940 N.E.2d 522, 525 (2010).

<sup>5</sup> N.Y. EDUC. LAW § 2853(1)(c) (McKinney’s 2014).

<sup>6</sup> *Id.* § 2853(1)(f).

private schools, boards of education, school districts and political subdivisions, including those relating to school personnel and students, except as specifically provided in the school's charter or [the charter school statute].”<sup>7</sup>

Several law review articles have examined the legal status of charter schools pursuant to 42 U.S.C. § 1983, a federal statute that establishes a cause of action for deprivations of federal constitutional and statutory rights under the color of state law.<sup>8</sup> Most law review articles that have analyzed whether charter schools are public under state law focus on state constitutions.<sup>9</sup> To our knowledge, only one law review article has examined how courts have treated the legal status of charter schools under state statutes.<sup>10</sup> We address this gap by examining how courts have treated the hybrid nature of charter schools in a variety of state statutory contexts.

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<sup>7</sup> *Id.* § 2854(1)(b).

<sup>8</sup> See, e.g., Bradley T. French, Comment: *Charter Schools: Are For-Profit Companies Contracting for State Actor Status*, 83 U. DET. MERCY L. REV. 251 (2006); Justin M. Goldstein, Note: *Exploring “Unchartered” Territory: An Analysis of Charter Schools and the Applicability of the U.S. Constitution*, 7 S. CAL. INTERDISC. L.J. 133 (1998); Preston C. Green III *et al.*, *Charter Schools, Students of Color and the State Action Doctrine: Are the Rights of Students of Color Sufficiently Protected*, 18 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 253 (2012); Fiona M. Greaves & Preston C. Green III, *The Legal Issues Surrounding Partnerships between Charter Schools and For-Profit Management Companies*, 206 ED. L. REP. 27 (2006); Maren Hulden, Note: *Charting a Course to State Action: Charter Schools and § 1983*, 111 COLUM. L. REV. (2011); Catherine LoTempio, Comment: *It's Time to Try Something New: Why Old Precedent Does Not Suit Charter Schools in the Search for State Actor Status*, 47 WAKE FOREST L. REV. 435 (2012); Aaron Saiger, *Charter Schools, The Establishment Clause, and the Neoliberal Turn in Public Education*, 34 CORDOZO L. REV. 1163 (2013); Alyssa M. Simon, “Race” to the Bottom?: *Addressing Student Body Diversity in Charter Schools after Parents Involved*, 10 CONN. PUB. INT. L.J. 399 (2011); Jason Lance Wren, Note: *Charter Schools: Public or Private? An Application of the Fourteenth Amendment's State Action Doctrine to These Innovative Schools*, 19 REV. LITIG. 135 (2000).

<sup>9</sup> See, e.g., L.K. Beale, Note & Comment: *Charter Schools, Common Schools and the Washington State Constitution*, 72 WASH. L. REV. 535 (1997); Andrew Broy, Comment: *Charter Schools and Education Reform: How State Constitutional Challenges Will Alter Charter School Legislation*, 79 N.C. L. REV. 493 (2001); Anne Marie Deprey, Case Note: *Utah School Board Association v. Utah State Board of Education: The Constitutionality of Utah Charter Schools*, 5 J.L. FAM. STUD. 149 (2003); Preston C. Green III, *Are Charter Schools Constitutional?*: Council of Organizations and Other for Education about Parochialism v. Governor, 125 ED. L. REP. 1 (1998); William Haft, *Charter Schools and the Nineteenth Century Corporation: A Match Made in the Public Interest?*, 30 ARIZ. ST. L.J. 1023 (1998); Nathaniel J. McDonald, Note: *Ohio Charter Schools and Educational Privatization: Undermining the Legacy of the State Constitution's Common School Approach*, 53 CLEV. ST. L. REV. Robert J. Martin, *Charting the Court Challenges to Charter Schools*, 109 PENN ST. L. REV. 43 (2004); Karla A. Turekian, *Traversing the Minefields of Education Reform: The Legality of Charter Schools*, 29 CONN. L. REV. 1365 (1997).

<sup>10</sup> Ralph D. Mawdsley, *Charter Schools and Charter School Officials: Have States Adequately Defined the Status and Responsibilities of These Schools?*, 269 ED. LAW REP. 443 (2011).

The first part of this article examines whether charter schools, charter school officials, and the educational management organizations (EMOs) that provide services to charter schools are entitled to governmental immunity. The second part examines how courts have applied public accountability laws to charter schools, charter school officials, and EMOs. The third part examines whether charter schools are public entities subject to prevailing wage statutes. The fourth part analyzes whether charter schools are public schools that must follow student expulsion requirements. The fifth part provides a tally of these cases in terms of whether: (1) charter schools and EMOs are subject to the same rules as public schools; and (2) charter school officials are governmental agents subject to the same rules as other public officials. The final part identifies cases that raise concerns that legislatures should address through statutory amendments.

### **Part I: Governmental Immunity**

Because of their status as governmental agencies, public schools are generally immune from tort liability in connection with their operations, unless legislative or constitutional provisions impose liability.<sup>11</sup> In addition, the doctrine of qualified immunity protects public school teachers and administrators from liability in taking discretionary action, unless they have committed a willful or malicious wrong.<sup>12</sup> Charter schools, charter school employees, and EMOs have sought immunity from litigation by asserting that they are governmental agencies or political subdivisions. This part summarizes the case law on this topic.

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<sup>11</sup> Allan E. Korpela, *Modern Status of Doctrine of Sovereign Immunity as Applied to Public Schools and Institutions of Higher Learning*, 33 A.L.R. 703 (1970).

<sup>12</sup> Mary A. Lentz, § 5:33 *Official Immunity*, LENTZ SCHOOL SEC. (2013).

## A. Charter Schools

The courts of Colorado and Pennsylvania have concluded that charter schools are entitled to governmental immunity under state statutes. In the Colorado case, *King v. United States*,<sup>13</sup> the owners of property that was destroyed by a fire set by charter school students brought action in federal district court against the charter school claiming negligence and other state law claims. The charter school moved to dismiss the plaintiffs' claims for lack of subject matter jurisdiction under Federal Rules of Procedure 12(b)(1).<sup>14</sup> The school asserted that it was a "public entity" under the Colorado Governmental Immunity Act (CGIA) and was thus entitled to immunity.<sup>15</sup> The CGIA defined a "public entity" as:

the state, county, city and county, municipality, school district, special improvement district, and every other kind of district, agency, instrumentality, or political subdivision thereof organized pursuant to law and any separate entity created by intergovernmental contract or cooperation only between or among the state, county, city and county, municipality, school district, special improvement district, and every other kind of district, agency, instrumentality, or political subdivision thereof.<sup>16</sup>

The district court looked at whether the charter school was an "agency, instrumentality, or political subdivision" of the school district in which it was located.<sup>17</sup> Because the CGIA failed to define "agency," "instrumentality," or "political subdivision," the court analyzed the plain meaning of these terms.<sup>18</sup> It found that "agency" was defined as "[t]he relation created by express or implied contract or by law whereby one party delegates the transaction of some lawful business with more or less discretionary power to another."<sup>19</sup> The court observed that

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<sup>13</sup> 53 F. Supp.2d 1056 (D.Colo. 1999); *rev'd, in part, on other grounds*, 301 F.3d 1270 (10th Cir. 2002).

<sup>14</sup> *Id.* at 1064.

<sup>15</sup> *Id.* The CGIA provides that "[a] public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort...except as provided otherwise in this section." COLO. REV. STAT. ANN. § 24-10-106(1) (2014).

<sup>16</sup> COLO. REV. STAT. ANN. § 24-103(5) (2014).

<sup>17</sup> *King*, 53 F.Supp.2d at 1065.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 1065-66 (*quoting* BLACK'S LAW DICTIONARY 62 (1990, 6th ed.)).

“instrumentality” was defined as “[s]omething by which an end is achieved; a means medium, or agency.”<sup>20</sup> “Political subdivision” was defined as “[a] division of the state made by proper authorities thereof, acting within their constitutional powers, for purposes of carrying out a portion of those functions of state which by long usage and inherent necessities of government have always been regarded as public.”<sup>21</sup>

The court then examined the language of the charter school act to determine whether the charter school satisfied the definition of agency, instrumentality, or subdivision.<sup>22</sup> It noted that the overarching goal of the charter school statute was to encourage the development of flexible, innovative educational opportunities for parents, students, teachers, and community members “*within the public school system.*”<sup>23</sup> This language showed that the state had clearly delegated authority to the charter school “to conduct the business of educating public school pupils.”<sup>24</sup> Moreover, the statute authorized the charter school “to operate quasi-independently from the school district, and allow[ed] the charter school to contract with the school district to obtain this agency power.”<sup>25</sup>

The court rejected the assertion that the charter school was too autonomous to be an agency or instrumentality of the school district. The charter school law held charter schools accountable to local boards of education with respect to “applicable laws and charter provisions.”<sup>26</sup> Article IX, § 15 of the state constitution also held charter schools accountable by placing control of public instruction in the hands of local boards of education.<sup>27</sup> The court disagreed with the plaintiffs’ assertion that the charter school was merely a licensee of the

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<sup>20</sup> *Id.* at 1066 (quoting BLACK’S LAW DICTIONARY 801 (1990, 6th ed.)).

<sup>21</sup> *Id.* (quoting BLACK’S LAW DICTIONARY 1159 (1990, 6th ed.)).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* (emphasis in original).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

district instead of a public entity.<sup>28</sup> The charter school statute repeatedly declared that charter schools operated within the public school system.<sup>29</sup> Further, the term “charter,” which meant “an instrument in writing from the sovereign power of the state,” clearly showed that the charter school was not a licensee.<sup>30</sup>

Moreover, the court dismissed the argument that the charter school was not entitled to immunity because it operated like a private school instead of a public school.<sup>31</sup> Although the charter school statute permitted an elected board to govern the school, local and state boards of education had ultimate authority.<sup>32</sup> The court was not swayed by the argument that the charter school was a private entity because it was not fully funded by the school district.<sup>33</sup> The school district provided 85% of the charter school’s operating expenses as well as “unreimbursable human resources,” such as “business services, payroll services, risk management services, insurance coverage, and legal services.”<sup>34</sup> Indeed, the amount of the charter school’s expenses “not provided directly by the School District or indirectly from the State of Colorado or state taxpayers [was] minimal compared to the amount provided directly or indirectly from state sources.”<sup>35</sup>

In addition, the court rejected the argument that the charter school operated like a private school because it contracted with the school district and entered into employment contracts with its teachers. While the charter school statute authorized the school to contract for services, prepare its budget and handle its own personnel affairs, “a charter school’s authority is subject to

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<sup>28</sup> *Id.* at 1067.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 1067-68

<sup>35</sup> *Id.* at 1068.

a charter school application which must be approved by the local board of education consistent with the General Assembly’s declared purposes.”<sup>36</sup>

Finally, the court refused to find that the charter school was a private entity because of its nonprofit corporate status.<sup>37</sup> While it was true that a nonprofit corporation could sue or be sued under state law, the plain language of the charter school statute provided that “a charter school’s nonprofit corporate status does not affect its status as a public school for *any* purposes pursuant to Colorado law.”<sup>38</sup>

In the Pennsylvania case, *Warner v. Lawrence*,<sup>39</sup> a student brought a negligence claim against a charter school for injuries that he had received while on school grounds. The charter school moved for summary judgment on the ground that the state’s charter school law entitled the school to immunity under the Tort Claims Act in the same fashion as political subdivisions and local agencies.<sup>40</sup> The trial court granted summary judgment and the student appealed.<sup>41</sup>

On appeal, the Commonwealth Court of Pennsylvania affirmed the lower court’s of granting of summary judgment.<sup>42</sup> It rejected the plaintiff’s claim that the provisions of the charter school law were inconsistent because one section stated that charter schools could sue and be sued while another section limited liability solely to the charter school and its board of trustees.<sup>43</sup> The court reasoned that, when read together, the first provision explained *how* charter schools could be sued while the second section identified *who* at the charter school could be sued.<sup>44</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* (emphasis in original).

<sup>39</sup> 900 A.2d 980 (Pa.Cmwth. 2006).

<sup>40</sup> *Id.* at 982.

<sup>41</sup> *Id.* at 983.

<sup>42</sup> *Id.* at 989.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* (emphasis in the original).

Thus, these provisions did not contradict each other.<sup>45</sup> Instead, these provisions supported the legislature’s goal of ensuring that charter schools were treated in the same manner as political subdivisions and local agencies in tort actions, while also protecting local school board directors from liability for the actions of the charter school or its board of trustees.<sup>46</sup>

The court also denied the argument that the legislature’s grant of immunity to charter schools under the Tort Claims Act violated the Open Courts Provision of the state constitution,<sup>47</sup> which provided that “every man for an injury done him . . . shall have remedy by due course of law.”<sup>48</sup> The plaintiff pointed out that private individuals and non-sectarian, non-profit corporations could establish charter schools.<sup>49</sup> Therefore, the plaintiff continued, granting immunity to “disparate individuals and entities who are given wide powers” would prevent the public from obtaining judicial remedies from tortious acts.<sup>50</sup>

The court countered that on several occasions, the judiciary had held that the legislature could limit liability, as long as the entity had the characteristics of a political subdivision or local agency.<sup>51</sup> The court then concluded that charter schools had these traits.<sup>52</sup> The local school board exercised considerable control over the existence of charter schools because it approved charter school applications.<sup>53</sup> Also, charter schools were subject to other statutes that applied to other public schools and received funding through tax dollars from local school districts.<sup>54</sup> Further,

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<sup>45</sup> *Id.* at 985.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 985.

<sup>48</sup> PA. CONST. Art. I, § 11.

<sup>49</sup> *Warner*, 980 A.2d at 985.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 986-88.

<sup>52</sup> *Id.* at 988.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*



charter schools could have their charters revoked, were required to participate in the state assessment program, and were subject to annual assessments from local school boards.<sup>55</sup>

While the Colorado and Pennsylvania courts held that charter schools were entitled to governmental immunity, the Supreme Court of California found that charter schools were not immune. In *Wells v. One2One Learning Foundation*,<sup>56</sup> charter school students, their parents and guardians claimed that several charter schools, their operators, and their chartering districts violated the state's false claim and unfair competition statutes by failing to provide their students with promised distance learning through the Internet. Instead, the plaintiffs asserted that the charter schools existed only to enable the schools and districts to collect public educational funding from the state in a fraudulent manner.<sup>57</sup>

The issue in this case was whether any of the defendants were "persons" who could be sued under the state's false claims and unfair competition statutes.<sup>58</sup> The California False Claims Act (CFCA) provided that "[a]ny person who . . . [k]nowingly presents or causes to be presented to . . . the state or . . . any political subdivision thereof a false claim for payment or approval . . . shall be liable to the state or subdivision for three times the amount of damages" sustained by the state or political subdivision.<sup>59</sup> The statute's definition of "person" included "any natural person, corporation, firm, association, organization, partnership, limited liability company, business, or trust."<sup>60</sup> The state's unfair competition law (UCL) provided relief by civil litigation against "[a]ny person who engages, has engaged, or proposed to engage in unfair

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<sup>55</sup> *Id.*

<sup>56</sup> 141 P.3d 225 (Cal. 2006).

<sup>57</sup> *Id.* at 228.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 234.

<sup>60</sup> *Id.* (internal quotations and citations omitted).

competition.”<sup>61</sup> This statute defined the term “person” to include “natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons.”<sup>62</sup>

The state’s court of appeal ruled that the school districts, charter schools, and the charter operators were “persons” under the CFCA; thus, all were exposed to liability.<sup>63</sup> The appellate also court held that the charter school defendants were “persons” under the state’s unfair competition act, and were, therefore, subject to liability.<sup>64</sup> Conversely, the appellate court ruled that the school districts were not “persons” under the UCL and were thus immune.<sup>65</sup>

On appeal to the Supreme Court of California, the school districts, charter schools, and their operators challenged the lower court’s conclusion that they were subject to liability under the CFCA.<sup>66</sup> The students, parents, and guardians challenged the lower’s court’s finding that the charter schools and their operators were immune from the UCL.<sup>67</sup>

The state supreme court ruled that school districts were not considered “persons” under the CFCA, and were thus immune.<sup>68</sup> It observed that the words and phrases used to define “persons” were most commonly connected with private individuals and entities.<sup>69</sup> Also, the legislature had demonstrated in other contexts that it knew how to include public entities in the definition of “persons” when it wished to do so.<sup>70</sup> The legislative history of the statute also showed that school districts were not “persons” under the statute.<sup>71</sup> The original bill included “*district, county, city, the state, and any of the agencies and political subdivisions of these*

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 235.

<sup>63</sup> *Id.* at 232.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 233.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 242.

<sup>69</sup> *Id.* at 236.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 237.

entities” as covered “persons.”<sup>72</sup> However, “[a] subsequent amendment to the bill *excised the references to governmental entities*, and the definition of ‘person’ was changed to the form finally adopted.”<sup>73</sup> This deletion prior to the passage of the statute signified that the legislature intended to exclude school districts from civil liability.<sup>74</sup>

By contrast, the court ruled that charter schools were “persons” who could be liable under the CFCA.<sup>75</sup> The court observed that the act’s definition of “persons,” included “corporations,” “limited liability companies,” “organizations” and “associations.”<sup>76</sup> Four of the charter school defendants involved in the complaint were corporations.<sup>77</sup> While a fifth charter school was not itself a corporation, corporations operated it. Consequently, that charter school was “certainly an ‘organization’ within the meaning of the statutory definition.”<sup>78</sup>

The court was not swayed by the argument that the charter schools were entitled to immunity under the CFCA because the charter school law declared that charter schools were part of the public school system.<sup>79</sup> Although charter schools were part of the school system, the school system did not operate these schools.<sup>80</sup> Rather, non-profit corporations, which had substantial freedom from public school bureaucracy and financial oversight, ran charter schools.<sup>81</sup> The legislature designed the CFCA “to help the government recover public funds from outside entities with which it deals.”<sup>82</sup> Thus, the court reasoned, “[t]he statutory purpose is equally served by applying the CFCA to the independent corporations that receive public monies

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<sup>72</sup> *Id.* (emphasis in the original; internal quotations omitted).

<sup>73</sup> *Id.* (emphasis in the original).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 243.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 244.

under the [charter school law] to operate schools at issue here on behalf of the public education system.”<sup>83</sup>

The court also determined that the application of the CFCA to charter school operators did not infringe upon the government’s sovereign power over education.<sup>84</sup> School districts had the primary responsibility for operating the state’s system of education.<sup>85</sup> It followed that “[t]he *districts’* continuing financial ability to carry out this mission at basic levels of adequacy” was critical in carrying out the state’s constitutional educational obligation.<sup>86</sup> Accordingly, the legislature did not intend to undermine the ability to perform its constitutional duty by subjecting public school districts to the severe monetary sanctions of the CFCA.<sup>87</sup>

By contrast, the charter school law did not assign a similar obligation to charter school operators.<sup>88</sup> Charter schools served terms of up to five years, subject to renewal, “dependent upon satisfaction of statutory requirements.”<sup>89</sup> If a charter school ceased to exist, the chartering school district’s traditional public schools took over the educational responsibility of its students, and the funding for those students reverted to the district.<sup>90</sup> Thus, the monetary remedies imposed by the statute on the charter school defendants “cannot be said to infringe the exercise of the sovereign power over public education.”<sup>91</sup> For similar reasons, the court concluded that charter schools were not “persons” under the UCL, and were thus not immune from liability under this statute.<sup>92</sup>

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* (emphasis in the original).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 245-46. In *Knapp v. Palisades Charter High Sch.*, 53 Cal.Rptr. 182 (Cal.App. 2007), a prospective high school student sued a charter school on the grounds of sexual harassment and intentional infliction of emotion

B. Charter School Boards and Board Members

In *Hope Academy Broadway Campus v. Integrated Consulting and Management*,<sup>93</sup> the Court of Appeals of Ohio addressed whether charter school boards and individual board members were entitled to governmental immunity. In this case, the boards of 19 charter schools contracted with Integrated Consulting and Management, LLC (ICM), for security services.<sup>94</sup> Shortly after contracting with ICM, the boards executed consulting agreements with Community Educational Partnerships, LLC (CEP) for a variety of educational services.<sup>95</sup> The contract with ICM prohibited that corporation from contracting with any other service provider hired by the schools.<sup>96</sup> At the time of the execution of the contracts, Joe Fouche, the owner of ICM and Angela Perry, joint owner of CEP “were romantically involved and had children together.”<sup>97</sup>

Because of financial and billing concerns, the boards tried to renegotiate the security agreement with ICM.<sup>98</sup> When those negotiations failed, the boards terminated the contracts with both ICM and CEP “because board members had discovered that ICM had a business relationship with CEP” in violation of ICM’s contract.<sup>99</sup> Additionally, a board member, James Haynes, informed the owner of ICM that the hiding of the relationship indicated the possibility of fraudulent behavior on the part of ICM and CEP.<sup>100</sup>

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distress. The charter school moved for summary judgment on the ground that the plaintiff had failed to satisfy the claim presentation requirements of the state tort claims act. The California Court of Appeal used the analysis in *Wells* to conclude that a charter school was not a “public entity” within the meaning of the state tort claims act. Thus, the plaintiff was not required to satisfy the presentation requirements.

<sup>93</sup> 2011 WL 6780186 (Ohio.App. 8 Dist. Dec. 22, 2011).

<sup>94</sup> *Id.* at \*1.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

ICM sued the boards for breach of contract. ICM also claimed that the boards, Haynes and another board member, James Stubbs, tortiously interfered with the corporation's contracts.<sup>101</sup> The boards, Haynes, and Stubbs moved for summary judgment on the ground that they were immune from liability under the Political Subdivision Tort Liability Act.<sup>102</sup> They also moved for partial summary judgment claiming that the liability act granted them immunity from punitive damages.<sup>103</sup> After the trial court denied their motions, the boards, Haynes and Stubbs appealed to the appellate court.<sup>104</sup>

The appellate court ruled that the boards were entitled to immunity from the tortious interference with contracts claim.<sup>105</sup> The tort liability act generally provided that political subdivisions were immune for acts or omissions related to governmental functions.<sup>106</sup> The act specifically defined "the provision of a system of education" as a governmental function.<sup>107</sup> Consequently, charter school boards were entitled to immunity even though the charter schools were privately managed.<sup>108</sup> Further, ICM's allegation of tortious interference did not fall within the exceptions established by the tort liability statute, which applied "only to allegations of negligent acts or when civil liability is expressly imposed upon the political subdivision by statute."<sup>109</sup> Conversely, the court ruled that Haynes and Stubbs were not immune to liability from the tortious interference with contracts claim.<sup>110</sup> The court reached this conclusion because

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<sup>101</sup> *Id.* at \*2.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at \*3.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

ICM had claimed that the two board members had acted with malicious and bad faith when they terminated the contracts.<sup>111</sup>

With respect to the punitive damages claim, the court found that the boards were immune because the tort liability act explicitly prohibited punitive damages against political subdivisions.<sup>112</sup> ICM had alleged that Haynes and Stubbs acted with malicious purpose and in bad faith.<sup>113</sup> Thus, the claim for punitive damages against these board members was in their individual capacity instead of their official capacity.<sup>114</sup> Because ICM alleged that Haynes and Stubbs had acted outside the scope of official their capacity, they were not entitled to immunity.<sup>115</sup>

#### C. Educational Management Organizations and Their Employees

In *Cunningham v. Star Academy of Toledo*,<sup>116</sup> an Ohio appellate court examined whether an EMO providing services to a charter school and the principal who was employed by the EMOz were entitled to immunity under the Political Subdivision Tort Liability Act. A student attending that charter school was severely injured when a television fell on him.<sup>117</sup> The student's mother sued Constellation LLC, the EMO that was providing management for the day-to-day activities of the school.<sup>118</sup> The mother also sued the principal, who had been hired by Constellation.<sup>119</sup> Both Constellation and the principal moved for summary judgment on the

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> 2014 WL 523196 (Ohio.App. 6 Dist. Feb. 7, 2014).

<sup>117</sup> *Id.* at \*1.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

ground that they were entitled to immunity.<sup>120</sup> A state trial court denied Constellation’s motion because it was not a political subdivision under the statute.<sup>121</sup> It denied the principal’s motion because he was an employee of Constellation, and thus, did not work for a political subdivision.<sup>122</sup>

The defendants then appealed.<sup>123</sup> The appellate court upheld the denials of summary judgment because Constellation was not a political subdivision.<sup>124</sup> For purposes of immunity, the Political Subdivision Tort Liability Act defined “political subdivision” as “a municipal corporation, township, county, school district or other body corporate and politic responsible for governmental activities in a geographic area other than the state.”<sup>125</sup> While the statute explicitly identified charter schools as political subdivisions, it did not include EMOs.<sup>126</sup> Also, the EMO failed to qualify as a “body corporate and politic” because the courts had defined this term to cover public organizations and public corporations instead of private, for-profit corporations.<sup>127</sup> If the state legislature had wanted to provide charter school management organizations with immunity, the court stated that it would have explicitly listed these entities as political subdivisions.<sup>128</sup>

## **Part II: Public Accountability**

Recently, a number of high-profile exposés have claimed that charter schools are not sufficiently accountable to the public. For example, an investigative report by the *Detroit Free*

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at \*2.

<sup>126</sup> *Id.* at \*3.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*



*Press* claimed that the Michigan spent \$1 billion on charter schools, but provided these schools with insufficient oversight over these schools.<sup>129</sup> Further, according to a study of Pennsylvania’s charter schools, the state’s charter operators had engaged in fraud and abuse totaling \$30 million intended for the state’s students, and state oversight agencies needed to increase staffing in order to uncover and eliminate fraud.<sup>130</sup> The Annenberg Institute at Brown University issued a report calling for charter schools to be subject to the same process and transparency rules as traditional public schools.<sup>131</sup> Charter schools, charter school officials, and EMOs have challenged attempts to hold them to heightened accountability standards. Not surprisingly, courts have had to determine the legal status of these entities and individuals with respect to public accountability statutes.<sup>132</sup> In Part II, we summarize the case law on this topic.

#### A. Ethics Laws

In *New Hope Academy Charter School v. School District of City of York*, the Pennsylvania Commonwealth Court upheld an agency’s finding that the board of trustees of a charter school violated the state’s Ethics Act in its contracts with the business of the school’s founder.<sup>133</sup> This statute prohibited public officials from entering into any contract of \$500 or more with a governmental body with which the official was associated unless the contract was awarded through a public process.<sup>134</sup>

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<sup>129</sup> *State of Charter Schools: How Michigan Spends \$1 Billion But Fails to Hold Schools Accountable* (Jul. 16, 2014), available at <http://www.freep.com/article/20140622/NEWS06/140507009/State-of-charter-schools-How-Michigan-spends-1-billion-but-fails-to-hold-schools-accountable>.

<sup>130</sup> Ctr. for Popular Democ., et al., *Fraud and Financial Mismanagement in Pennsylvania’s Charter Schools* (Sep. 2014), available at <http://populardemocracy.org/sites/default/files/charter-schools-PA-Fraud.pdf>.

<sup>131</sup> Annenberg Inst. For Sch. Ref., *Public Accountability for Charter Schools: Standards and Policy Recommendations for Effective Oversight* (2014), available at <http://annenberginstitute.org/sites/default/files/CharterAccountabilityStds.pdf>.

<sup>132</sup> Mawdsley, *supra* note 10.

<sup>133</sup> 89 A.3d 731, 741 (Pa.Cmmwth. 2014).

<sup>134</sup> 65 PA. CONS. STAT. ANN. § 1103(f) (2014).

The court rejected the argument that the contracts were outside the scope of the Ethics Act because the charter school’s founder was not a “public official.”<sup>135</sup> The charter school statute stated that school administrators were public officials for purposes of the ethics statute.<sup>136</sup> This term included “the chief executive officer of a charter school and all other employees of a charter school who by virtue of their positions exercise management or operational responsibilities.”<sup>137</sup> The charter school’s founder qualified as an administrator and thus was a “public official” because the charter formally designated him to be the founder during the period in which the unethical behavior had occurred.<sup>138</sup> Also, the charter school’s tax filings listed the founder as its principal officer and managing director during the period in question.<sup>139</sup>

#### B. Freedom of Information Laws

In *Zager v. Chester Community Charter School*,<sup>140</sup> the Supreme Court of Pennsylvania held that charter schools were “agencies” subject to the state’s Right-to-Know Act. The statute defined agencies that were required to disclose records in the following manner:

“Agency.” Any office, department, board or commission of the executive branch of the Commonwealth, any political subdivision of the Commonwealth, the Pennsylvania Turnpike Commission, the State System of Higher Education or any State or municipal authority or similar organization created by or pursuant to a statute which declares in substance that such organization performs or has for its purpose the performance of an essential governmental function.<sup>141</sup>

Although the Right-to-Know Act did not specifically list charter schools in the definition of “agency,” the statute included a catch-all provision that included organizations that performed an

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<sup>135</sup> *New Hope Acad. Charter Sch.*, 89 A.3d at 741.

<sup>136</sup> 24 PA. CONS. STAT. ANN. § 17-1715-A(12) (2014).

<sup>137</sup> *Id.*

<sup>138</sup> *New Hope Acad. Charter Sch.*, 89 A.3d at 741.

<sup>139</sup> *Id.*

<sup>140</sup> 934 A.2d 1227 (Pa. 2007).

<sup>141</sup> 65 PA. CONS. STAT. § 66.1 (repealed 2008).

essential governmental function.<sup>142</sup> The court found that charter schools were agencies under this definition because they performed the essential governmental function of education.<sup>143</sup> The state constitution made it clear that education was an indispensable governmental service.<sup>144</sup> Also, the charter school law defined charter schools as independent public schools that were designed to provide this essential government function in a constitutional manner.<sup>145</sup>

The court denied the assertion that the charter school law did not require charter schools to comply with the Right-to-Know Act.<sup>146</sup> The charter school law identified only the charter appeal board as being subject to the requirements of the Right-to-Know Act.<sup>147</sup> Another section of the charter school law required the charter school board of trustees to comply with the state's Sunshine Act.<sup>148</sup> The charter school claimed that these two sections demonstrated the legislature's intent to exclude charter schools from the requirements of the Right-to-Know Act by limiting compliance to the charter appeal board.<sup>149</sup> The court rejected this argument because "charter schools in general are subject to the Act's requirements by virtue of their function of providing the essential, constitutionally mandated service of education."<sup>150</sup> In addition, because the Right-to-Know Act predated the charter school law by forty years, the court presumed that the legislature was aware that charter schools would have to comply with the Right-to-Know Act.<sup>151</sup> For this reason, the court determined that the legislature may have declined to reference

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<sup>142</sup> *Zager*, 934 A.2d at 1231.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 1232.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

the Right-to-Know Act in the charter school statute, or to specifically include charter schools within the definition of “agency” when it amended the Right-to-Know Act in 2002.<sup>152</sup>

In *Chester Community Charter School v. Hardy*, the Pennsylvania courts are grappling with the question of whether the records of an EMO that contracted with a charter school were subject to the Right-to-Know Act. A newspaper reporter asked the charter school to produce several salary and contract documents.<sup>153</sup> The charter school responded by letter that it was refusing the request because, *inter alia*, many of the materials were outside of the scope of the Right-to-Know Act.<sup>154</sup> The Office of Open Records (OOR) directed the charter school to provide the documents.<sup>155</sup> The trial court then affirmed the OOR’s decision.<sup>156</sup>

The charter school appealed to the Commonwealth Court.<sup>157</sup> It claimed, *inter alia*, that the documents possessed by the EMO were not public records.<sup>158</sup> The court held that the charter school waived this argument because it failed to describe the records requested, or cite to legal authority, as required by the Right-to-Know Act.<sup>159</sup> The court went on to conclude that the EMO’s business records were subject to the statute.<sup>160</sup> The Right-to-Know Act contained a section that addressed public records that were in the custody of a private entity. This section stated, in pertinent part, that:

A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.<sup>161</sup>

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

<sup>153</sup> 38 A.3d 1079, 1081-82 (Pa.Cmmwlth. 2012).

<sup>154</sup> *Id.* at 1082.

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

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 1083.

<sup>159</sup> *Id.* at 1085.

<sup>160</sup> *Id.* at 1087.

<sup>161</sup> 65 PA. CONS. STAT. ANN. § 67.506(d)(1) (2014).

Because charter schools performed the governmental function of educating children, the court found that the private entity's management records were related to this function.<sup>162</sup>

The Supreme Court of Pennsylvania vacated the decision and remanded the case.<sup>163</sup> On remand, it directed the appellate court to decide whether the charter school had waived its right to deny the request to produce specific documents in subsequent appeals to the Office of Open records and the courts when it failed to specify these documents in the initial letter to the requester.<sup>164</sup>

### C. Accountability for Public Funds and Property

Two Ohio cases have examined whether charter schools and EMOs are accountable for public educational funds and property purchased with such funds. In *Cordray v. International Preparatory School*,<sup>165</sup> the Supreme Court of Ohio analyzed whether the treasurer of a charter school was a public official who could be strictly liable to the state for public funds lost when the school accepted money to which it was not entitled. A state audit found that a closed charter school had received more than \$1.4 million in overpayments from the state department of education.<sup>166</sup> The Ohio Attorney General brought action against the treasurer of the non-profit corporation that operated the charter school, under a state statute that authorized the attorney general to retrieve misappropriated funds.<sup>167</sup>

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<sup>162</sup> *Chester Comm. Charter Sch.*, 38 A.3d at 1087.

<sup>163</sup> *Chester Comm. Charter Sch. v. Hardy*, 74 A.3d 118 (Pa. 2013).

<sup>164</sup> *Id.*

<sup>165</sup> 941 N.E.2d 1170 (Ohio 2010).

<sup>166</sup> *Id.* at 1172.

<sup>167</sup> *Id.* The attorney general acted pursuant to OHIO REV. CODE § 117.28 (2014).

The state supreme court ruled that the treasurer was a public official who was liable for misappropriated funding.<sup>168</sup> It was well settled under state law that public officials were strictly liable for public funding.<sup>169</sup> The crucial question was whether the treasurer of a charter school was a “public official.”<sup>170</sup> The court concluded in the affirmative because charter schools were “public offices” under state law.<sup>171</sup> Charter schools fell within the definition of public office because the legislature created them to be part of Ohio’s constitutionally required system of public schools.<sup>172</sup>

In *Hope Academy Broadway Campus v. White Hat Management*,<sup>173</sup> the Supreme Court of Ohio is contemplating whether EMOs have a fiduciary duty to charter schools that entitles the schools to all property that the EMOs have purchased with public funds. Several charter schools entered into management contracts with EMOs owned by White Hat Management.<sup>174</sup> The schools paid White Hat a “continuing fee,” consisting of a fixed percentage of the per-pupil funding they received from the state.<sup>175</sup> White Hat used the funds to purchase furniture, computers, books and other equipment for the day-to-day operations of the schools.<sup>176</sup>

The charter schools claimed in trial court that the contracts created a formal general fiduciary duty requiring White Hat to give the property to the schools without compensation.<sup>177</sup> The trial court found that the agreements did not create a general fiduciary relationship because the parties had negotiated at arm’s length, and the contracts specifically provided that they did

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<sup>168</sup> *Cordray*, 941 N.E.2d. at 1173.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> 5 N.E.3d 666 (Table) (Ohio 2014).

<sup>174</sup> *Hope Acad. Broadway Campus v. White Hat Mgmt*, 4 N.E.3d 1087, 1091 (Ohio.App. 10 Dist. 2013).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 1100.

not create a joint venture between the parties.<sup>178</sup> On appeal, the schools contended that White Hat was barred from taking the title to the property, even if the schools had the authority to convey it, because White Hat was a public official and a fiduciary that could not use its position for private benefit.<sup>179</sup> The appellate court disagreed because White Hat's gain was not due to some form of financial misconduct.<sup>180</sup> Rather, the corporation obtained this benefit from the expenditure of its own income derived from formerly public funds.<sup>181</sup> In addition, the schools provided no evidence showing that White Hat had entered into a mutually beneficial relationship with the schools.<sup>182</sup> As noted above, the Supreme Court is reviewing the decision on appeal.

### **Part III: Prevailing Wage Statutes**

Prevailing wage statutes are the third area in this article in which courts have addressed the legal status of charter schools. Prevailing wage statutes "require that workers on public works projects be paid wages prevailing in the locality."<sup>183</sup> In *New York Charter School Association v. Smith*, the Court of Appeals of New York held that the state commissioner of education could not issue a blanket rule subjecting all charter school projects to the prevailing wage statute.<sup>184</sup> The court disagreed with the commissioner's claim that the prevailing wage law applied to charter schools in this case because they were public entities that were party to a contract "involving the employment of laborers, workmen or mechanics."<sup>185</sup> The law specifically identified only four entities: the state, public benefit corporations, municipal corporations, and

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *What Are "Prevailing Wages," or the Like, for the Purpose of State Statute Requiring Payment of Prevailing Wages on Public Work Projects?*, 7 AM. L. REP. 5th 400 (1992).

<sup>184</sup> *Smith*, 940 N.E.2d at 526.

<sup>185</sup> *Id.* at 524.

commissions appointed under law.<sup>186</sup> Because the prevailing wage statute specifically excluded educational corporations, the court concluded that charter schools were excluded from the statute's coverage.<sup>187</sup>

The court acknowledged that charter schools had some of the characteristics of public entities because “[t]he legislature designated them as ‘independent and autonomous *public* school[s],’ and granted them powers that ‘constitute the performance of essential public purposes.’”<sup>188</sup> Nevertheless, charter schools were different from the other public entities identified under the prevailing wage law because a self-selected board of trustees that had final say over policy and operational matters instead of governmental appointees governed them.<sup>189</sup> Also, charter schools were exempt from all state and local laws governing public schools, unless the legislature specifically stated otherwise.<sup>190</sup> “While charter schools are a hybrid of sorts and operate on different models,” the court observed, “they are significantly less ‘public’ than the entities in those four categories, and thus, it is clear that these charter schools do not fall within any of the four categories to which the prevailing wage law applies.”<sup>191</sup>

The court rejected the argument that charter schools had entered into a contract involving workers because they were third-party intermediaries acting on behalf of the state or the Board of Regents.<sup>192</sup> The commissioner based this assertion on an amendment to the wage law that applied its requirements to private parties that were carrying out public work projects on behalf of public owners.<sup>193</sup> The court found that neither the legislative history of the prevailing wage

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<sup>186</sup> *Id.* at 525.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* (quoting NY Educ. Law § 2853 (McKinney’s 2014)).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 526.

<sup>193</sup> *Id.*



law nor the amendment indicated that charter schools were included.<sup>194</sup> Additionally, charter schools had to secure resources for building projects on their own and assumed the risks associated with these projects.<sup>195</sup> Because the renovation contracts were solely for the benefit of the charter schools, the prevailing wage law did not apply.<sup>196</sup>

The court cautioned that its holding did not exempt every contract in which the charter school was a party to the prevailing wage laws because there may be instances in which charter schools were acting on behalf of a public entity.<sup>197</sup> However, the court did not need to address whether the prevailing wage statute applied to those situations because the facilities projects in the *Smith* case consisted of projects in which the charter school or the foundations supporting the charter schools owned the buildings, and the charter schools assumed the responsibility of all construction, renovation, repair and maintenance of the buildings.<sup>198</sup>

#### **Part IV: Student Discipline**

The final issue that this article addresses is student discipline. In *Goss v. Lopez*,<sup>199</sup> the Supreme Court ruled that public school students subject to suspensions of ten or fewer days were entitled to due process. A student facing such a suspension had a right to “be given oral and written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.”<sup>200</sup> The *Goss* Court also observed that: “longer suspensions or expulsions for the remainder of the school term, or

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<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> 419 U.S. 565 (1974).

<sup>200</sup> *Id.* at 581.

permanently, may require more formal procedures.”<sup>201</sup> States have implemented due process requirements for suspensions and expulsions that public schools must follow in response to the *Goss* decision.<sup>202</sup> By contrast, most state statutes exempt charter schools from school district discipline policies, instead allowing charter schools to devise their own policies subject to the approval of the charter school authorizer.<sup>203</sup>

In *Scott B. v. Board of Trustees of Orange High School of Arts*,<sup>204</sup> a California appellate court ruled that public school student expulsion requirements did not apply to charter school dismissals because of their different legal status. In this case, a charter school dismissed a student for bringing a knife to school.<sup>205</sup> The school’s Board of Trustees upheld the dismissal in a one-sentence letter.<sup>206</sup> The student alleged that the charter school violated the state’s education code by failing to provide him with an evidentiary hearing prior to his expulsion.<sup>207</sup> The student also claimed that the Board failed to set forth its findings in support of the charter school’s decision to dismiss him.<sup>208</sup>

The appellate court denied the student’s claim, stating that the code’s expulsion statute did not apply to charter schools.<sup>209</sup> The court observed that the education code generally

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<sup>201</sup> *Id.* at 584.

<sup>202</sup> For example, in Pennsylvania, public schools must provide students with an informal hearing for out-of-school suspensions from 4-10 days. 22 PA. CODE § 12.6 (2014). The school must provide parents with written notification of the time and the place of the hearing. The student has the right to speak and produce witnesses at the hearing as well as the right to question witnesses present at the hearing. Pennsylvania regulations also require formal hearings for school exclusions of more than 10 days. 22 PA. CODE § 12.8 (2014). Formal hearings require the school to provide parents with a copy of the expulsion policy, notice that the student may obtain counsel, and the procedures for the expulsion hearing. The student has the power to cross-examine, testify, and present witnesses. Further, the school must maintain an audio recording of the hearing. *Id.*

<sup>203</sup> Jaclyn Zubrzycki *et al.*, *Charter Schools’ Discipline Policies Face Scrutiny*, 32 EDUC. WK., Feb. 20, 2013, available at [http://www.edweek.org/ew/articles/2013/02/20/21charters\\_ep.h32.html](http://www.edweek.org/ew/articles/2013/02/20/21charters_ep.h32.html).

<sup>204</sup> 158 Cal.Rptr.3d 173 (Cal.App. 4 Dist. 2013).

<sup>205</sup> *Id.* at 175.

<sup>206</sup> *Id.* at 176.

<sup>207</sup> *Id.* at 178.

<sup>208</sup> *Id.* at 179.

<sup>209</sup> *Id.* at 178.

exempted charter schools from the laws governing school districts with several exceptions.<sup>210</sup> Moreover, the expulsion statute was not included in the exceptions.<sup>211</sup> The court also distinguished between expulsions from public schools and dismissals from charter schools. Students who had been expelled from public schools were generally required to complete the term of their expulsions.<sup>212</sup> Such time away from school resulted in delays that impinged on students' legitimate interest in an education.<sup>213</sup> Charter school dismissals did not raise such concerns because they were "schools of choice" that students were not required to attend.<sup>214</sup> When a charter school dismissed a student, he or she was free to enroll in another school with no loss of class time.<sup>215</sup> Therefore, charter school dismissals did not infringe upon a student's property right to an education.<sup>216</sup>

#### **Part V: Analysis of How Courts Have Treated the Status of Charter Schools, Charter School Officials, and EMOs**

The previous parts of this article have analyzed whether charter schools, charter school officials, and EMOs are public with respect to four areas of state statutory law: (1) governmental immunity; (2) public accountability; (3) prevailing wage laws; and (4) student discipline. In these cases, courts have examined how these laws apply to charter schools, charter school officials, and the EMOs that provide educational services to charter schools. This part summarizes the holdings of the courts with respect to these groups.

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<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 179.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

A. Are Charter Schools Public Entities That Should Be Subject to the Same Treatment As Other Public Entities?

In six cases discussed in this article, courts addressed whether charter schools were public entities that should be subject to the same treatment as other public entities. In three cases, the courts answered this question in the affirmative. In two cases, *King v. United States*,<sup>217</sup> and *Zager v. Community Charter School*,<sup>218</sup> the courts found that charter schools were entitled to the same treatment as governmental entities because charter school statute declared that they were carrying out the governmental function of education. However, in *Warner v. Lawrence*, a Pennsylvania appellate court ruled that charter schools were entitled to immunity because the charter school law made it clear that charter schools would be treated in the same manner as other political subdivisions, while providing protection from liability to local school directors from the actions of charter schools or their boards of trustees.<sup>219</sup>

In three cases, the courts held that charter schools were not public entities under state statutes. At first glance, there appears to be no unifying theme for these cases. In *Wells v. One2One Learning Foundation*, the Supreme Court of California rejected the argument that charter schools should be entitled to immunity from the state's false claims and unfair competition statutes because they were a part of the public school system. The court found that the charter schools were "persons" under these statutes that were not entitled to immunity because they were operated by non-profit corporations that had substantial freedom from the requirements to which school districts were subject.<sup>220</sup> In *New York Charter School Association v. Smith*, the Court of Appeals of New York found that charter schools were not public entities under the state prevailing wage statute because: (1) the law specifically excluded educational

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<sup>217</sup> *King*, 53 F.Supp.2d at 1066 (charter schools are entitled to immunity the Colorado Governmental Immunity Act).

<sup>218</sup> *Zager*, 934 A.2d at 1231 (charter schools were public agencies under Pennsylvania's Right-to-Know Act).

<sup>219</sup> *Warner*, 900 A.2d at 985.

<sup>220</sup> *Wells*, 141 P.3d at 243, 245-46.

corporations;<sup>221</sup> and (2) charter schools were less “public” than the other entities that were specifically beholden to the statute.<sup>222</sup> In *Scott B. v. Board of Trustees of Orange High School of Arts*, a California appellate court that charter schools were not subject to the same student expulsion requirements as traditional public schools, in part, because the education code’s expulsion provision did not apply to charter schools.<sup>223</sup> The court also distinguished between expulsions from traditional public schools and dismissals from charter schools because charter schools were “schools of choice.”<sup>224</sup> Students could attend other schools upon being dismissed from charter schools without loss of class time.<sup>225</sup>

In summary, the courts used the same reasoning to reach its conclusion in only two of the six cases. While these cases may seem very different at first glance, upon closer inspection, there appears to be an overarching theme: in each case, the court reached its holding based on the pertinent statutory language, sometimes going as far as interpreting the legislative intent.<sup>226</sup>

#### B. Are Charter School Officials Public Officials?

In three cases, courts concluded that charter school officials were public officials who were subject to the same treatment as other public officials. In *Hope Academy Broadway Campus v. Integrated Consulting and Management*, an Ohio appellate court ruled that a charter school board was immune from suit, in part, because charter schools were performing a governmental function entitling them to governmental immunity under the state tort liability statute.<sup>227</sup> In *Cordray v. International Preparatory School*, the Supreme Court of Ohio held that

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<sup>221</sup> *New York Charter Ass’n*, 914 N.Y.S.2d at 699.

<sup>222</sup> *Id.*

<sup>223</sup> *Scott B.*, 158 Cal.Rptr.3d at 178.

<sup>224</sup> *Id.* at 179.

<sup>225</sup> *Id.*

<sup>226</sup> *Wells*, 141 P.3d at 136-37.

<sup>227</sup> *Hope Acad. Broadway Campus*, 2011 WL 6780186 at \*3.

a charter school treasurer was a public official who was strictly liable for governmental overpayments because charter schools were “public offices” under state law.<sup>228</sup> In *New Hope Academy Charter School v. School District of City of York*, a Pennsylvania appellate court held that a charter school’s founder was a public official under the state’s ethics statute because the charter school statute declared that school administrators were public officials under the ethics law.<sup>229</sup> Thus, in all three of these decisions, the courts looked to the statutory language to determine whether charter school officials were public officials who were subject to the same treatment as other public officials.

C. Are Educational Management Organizations Public Entities?

In three cases surveyed in this article, courts have analyzed whether EMOs are public entities subject to the requirements or protections afforded to other public entities. In *Cunningham v. Star Academy of Toledo*, an Ohio appellate court held that an EMO that was providing day-to-day management services for a charter school and the principal whom it hired were not entitled to governmental immunity under the state’s tort liability act. The court ruled in this fashion because: (1) the statute did not identify EMOs as political subdivisions that were entitled to immunity; and (2) charter schools did not qualify as “bodies corporate and politic” under the statute because the courts had defined this term to cover only public organizations.<sup>230</sup>

In *Hope Academy Broadway Campus v. White Hat Management*, an Ohio appellate court held that an EMO was not a public official with a fiduciary duty to return property to charter schools. The court reached this conclusion because the corporation obtained the property from its

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<sup>228</sup> *Cordray*, 941 N.E.2d. at 1173.

<sup>229</sup> *New Hope Acad. Charter Sch.*, 89 A.3d at 741.

<sup>230</sup> *Cunningham*, 2014 WL 523196 at \*3.

own income derived from formerly public funds.<sup>231</sup> The Ohio Supreme Court is reviewing this decision on appeal.<sup>232</sup>

By contrast, in *Chester Community Charter School v Hardy*, a Pennsylvania appellate court ruled that charter school business records in the possession of an EMO were public records under the state's Right-to-Know Act. The court reached this conclusion because of a provision that subjected such records to the Act's requirements as long as they were related to a governmental function.<sup>233</sup> The Supreme Court of Pennsylvania remanded the case to determine whether the charter school had waived its right to deny a request to produce specific documents in subsequent appeals when it failed to specify these documents to the initial requester.<sup>234</sup> Once again, in all three cases, the court looked to the language of the pertinent statutes to determine whether EMOs were public entities.

## **Part VI: Areas of Concern That Might Warrant Future Legislative Amendments**

From our review of the charter-school, legal-status, state-statute cases, we have found that courts look to the language of pertinent statutory provisions. Therefore, legislatures should clarify their intentions regarding the legal status of charter schools, charter school officials, and EMOs. We have identified two areas that are especially concerning and may warrant future legislative amendments.<sup>235</sup> One area is the fiduciary obligations of EMOs. Legislators should be especially concerned about the implications of the *Hope Academy Broadway Campus* case. In

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<sup>231</sup> *Hope Acad. Broadway Campus*, 4 N.E.3d at 1100.

<sup>232</sup> *Hope Acad. Broadway Campus*, 5 N.E.3d at 666.

<sup>233</sup> *Chester Comm. Charter Sch.*, 38 A.3d at 1087.

<sup>234</sup> *Chester Comm. Charter Sch.*, 74 A.3d at 118.

<sup>235</sup> It is reasonable for legislatures to amend charter school statutes to address judicial decisions that they find unsatisfactory. For example, after a Colorado appellate court ruled that charter schools lacked the authority to enforce contracts with their school districts due to their subordinate status, the state legislature amended the statute to authorize charter schools for breach of contract. In *Academy of Charter Sch. v. Adams Sch. District*, 32 P.3d 456, 468 (Colo. 2001), the Supreme Court of Colorado reversed the appellate court's decision in light of this amendment.

this case, the Supreme Court of Ohio is contemplating whether to affirm an appellate court's ruling that an EMO had a fiduciary duty to return property purchased with public funds to the charter schools that it was managing. Although White Hat Management, the EMO litigant in this case, received \$90 million in public funds to run the charter schools that were suing in this case, the EMO's attorney declared in oral argument that they were not public officials.<sup>236</sup> The attorney also claimed that the state had never chosen to treat EMOs as public officials or the property purchased pursuant to the agreement as public property.<sup>237</sup>

This position is disturbing, especially in light of the fact that the Ohio legislature has a constitutional duty to provide a "thorough and efficient system of common schools."<sup>238</sup> One wonders whether a system that allows EMOs to abscond with millions of dollars in publicly funded school equipment is truly "efficient." Regardless of how the Supreme Court of Ohio rules on this matter, state legislatures should at the very least designate that property purchased with public funding remain the property of the charter school. Such an amendment would be consistent with the advice of the National Association of Charter School Authorizers (NACSA) for contracts between charter schools and EMOs. Specifically, NACSA advises that all contracts between charter schools and EMO include a provision that "[r]equire[s] all instructional materials, furnishings, and equipment purchased or developed with public funds to be the property of the school, not the third party."<sup>239</sup> We suggest that legislators incorporate this language into their charter school legislation.

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<sup>236</sup> Patrick O'Donnell, *What Obligations Do Charter School Operators Have to Taxpayers?* *Ohio Supreme Court Heard Arguments*, THE PLAIN DEALER, Sep. 23, 2014, available at [http://www.cleveland.com/metro/index.ssf/2014/09/post\\_247.html](http://www.cleveland.com/metro/index.ssf/2014/09/post_247.html).

<sup>237</sup> *Id.*

<sup>238</sup> OHIO. CONST. VI, § 2.

<sup>239</sup> Nat'l Ass'n of Charter Sch. Authorizers, *Principles & Standards for Quality Charter School Authorizing* (2012 Edition) 24, available at [http://www.qualitycharters.org/assets/files/images/stories/publications/Principles.Standards.2012\\_pub.pdf](http://www.qualitycharters.org/assets/files/images/stories/publications/Principles.Standards.2012_pub.pdf).



The other area of concern is student expulsions and dismissals. In *Scott B.*, a California appellate court held that dismissals from charter schools, which were designated as “schools of choice,” did not interfere with a student’s property right to an education because students could immediately return to a district’s public schools.<sup>240</sup> Soon after the *Scott B.* decision, a federal district court in Hawaii held in *Lindsey v. Matayoshi*<sup>241</sup> that a charter school did not have to provide a due process hearing to a student expelled from a charter school under the Due Process Clause because the child could return to a public school. Consequently, she did not suffer a deprivation of her property interests.<sup>242</sup>

The belief expressed in *Scott B.* and the *Matayoshi* decisions that a dismissed charter school student can immediately enroll in a traditional public school has not always been supported by reality.<sup>243</sup> The California Department of Education has instructed school districts that they may treat students expelled from charter schools in the same manner as children expelled from a school district.<sup>244</sup> The San Diego County Department of Education has advised school officials to review removals from charter schools to determine whether a school district would have expelled the student.<sup>245</sup> If the district would have acted in the same manner, the agency has advised the district to enroll the child in an alternative school, thus preventing students from attending traditional public schools.<sup>246</sup> Therefore, legislators should consider amending their charter school statutes to require these schools to comply with public-school, due-process provisions.

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<sup>240</sup> *Scott B.*, 158 Cal.Rptr.3d at 179.

<sup>241</sup> 950 F.Supp.2d 1159 (D.Hawaii 2013).

<sup>242</sup> *Id.* at 1171.

<sup>243</sup> Rosa K. Hill, *Are Charter Schools Upholding Student Rights?*, AMERICAN BAR ASS’N., Jan. 14, 2014, available at <http://apps.americanbar.org/litigation/committees/childrights/content/articles/winter2014-0114-charter-schools-upholding-student-rights.html>.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

Legislators should also think about how courts might analyze expulsion and dismissal cases in school districts that have converted their traditional public schools to charter schools. In December 2013, New Orleans announced that it would become the nation's first all-charter school district in September 2014.<sup>247</sup> Similarly, in December 2014, a Pennsylvania trial court judge ruled that the state would take over the York City School District.<sup>248</sup> The court-appointed recovery officer planned to convert all of York's schools into charter schools.<sup>249</sup> The advent of all-charter districts gives rise to the following questions: (1) What are the due process rights of students who are dismissed or expelled from charter schools in these districts?; and (2) What happens if other charter schools in these districts refuse to enroll a dismissed or expelled student because of their "school of choice" status?

A federal circuit court case, *Logiodice v. Trustees of Maine Central Institute*,<sup>250</sup> suggests that students in all-charter districts might not have due process protection from dismissals or expulsions. This case also suggests that other charter schools may not have to accept these students. In this case, a Maine school district had contracted with a private school to educate its high-school-age students at public expense.<sup>251</sup> A student attending the school claimed that the school violated his due process rights by suspending him for 17 days without a hearing.<sup>252</sup> According to the contract, the school's board of trustees had sole authority over school disciplinary matters.<sup>253</sup>

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<sup>247</sup> Danielle Drellinger, *Recovery School District Will Be Country's First All-Charter District in September 2014*, NOLA.COM, available at [http://www.nola.com/education/index.ssf/2013/12/recovery\\_school\\_district\\_will\\_3.html](http://www.nola.com/education/index.ssf/2013/12/recovery_school_district_will_3.html).

<sup>248</sup> *In re: Appointment of a Receiver for the School Dist. of the City of York*, 2014-SU-004190-49, (Ct. of Common Pleas, York Cnty., Dec. 26, 2014).

<sup>249</sup> *Id.*

<sup>250</sup> 296 F.3d 22 (1st Cir. 2002).

<sup>251</sup> *Id.* at 22-23.

<sup>252</sup> *Id.* at 25.

<sup>253</sup> *Id.* at 28.

The First Circuit ruled that the private school did not have to provide due process in suspending the student because the school was not a state actor under 42 U.S.C. § 1983, a federal statute that establishes a cause of action for deprivations of federal constitutional and statutory rights under the color of state law.<sup>254</sup> The First Circuit acknowledged that it could create an ad hoc exception that would require the private school to provide due process because “Maine has undertaken in its Constitution and statutes to assure secondary education to all school-aged children.”<sup>255</sup> Further, the private school was “for those in the community the only regular education available for which the state will pay.”<sup>256</sup> Another significant consideration was that while “[a] school teacher dismissed by a private school without due process is likely to have other options for employment[,] a student wrongly expelled from the only free secondary education in town is in far more trouble,”<sup>257</sup> However, to make an exception, the court had to be convinced that “the threat is serious, reasonably wide-spread, and without alternative means of redress.”<sup>258</sup> The court concluded that “[n]one of these elements is satisfied in this case.”<sup>259</sup>

One reason for this conclusion was that state law required the school district to provide the child with a free secondary education.<sup>260</sup> If the private school had wrongly expelled the student, the school district could still be required to educate him.<sup>261</sup> While this solution would be problem in this case because the school district so heavily relied on the private school to provide an education, it was likely that “a Maine court would compel the school district to satisfy its obligation by providing him an education.”<sup>262</sup>

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<sup>254</sup> *Id.* at 26-31.

<sup>255</sup> *Id.* at 29.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* (emphasis in the original).

<sup>260</sup> *Id.* at 30.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

The analysis in *Logiodice* suggests that a state court might find that students who are expelled from schools in all-charter districts might not have a property right to due process. Also, students may not be able to compel other charter schools in those districts to enroll them. Schools in all-charter districts might successfully argue that the state can satisfy a student's property right to an education under state law by providing that child with other educational options, such as alternative schools. Legislators should consider whether such a scenario is acceptable.

### **Conclusion**

This article has explored how courts have determined whether charter schools, charter school officials, and EMOs are “public” under state statutory provisions. Our review of the case law focused on four statutory categories: (1) governmental immunity; (2) public accountability; (3) prevailing wages; and (4) student discipline. Six cases addressed whether charter schools were public entities subject to the same treatment as other public entities. In three of these cases, courts answered this question in the affirmative. In three cases, courts addressed whether charter school officials were public officials who were subject to the same treatment as other public officials. All three cases answered this question in the affirmative. Finally, in three cases surveyed in this article, a court analyzed whether EMOs are public entities subject to the same treatment as other public entities. One case answered this question in the affirmative. In all of the cases surveyed in this article, the courts based their conclusion on the pertinent statutory language.

From this review, we suggest that legislatures should consider amending their student discipline and EMO fiduciary requirements to be more aligned with the requirements that apply to public schools.