

CHARTER SCHOOL BASICS - PLUS

Presented by

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I. WHAT IS A CHARTER SCHOOL?

A. What is a charter school? A charter school is a public school that operates independently from an existing school district structure and may provide instruction in any of grades kindergarten through 12. A charter school is usually created or organized by a group of teachers, parents, community leaders, a community-based organization, or by a school district. Charter schools are authorized by an existing local public school board, county board of education (CBE), or by the California State Board of Education (SBE). Specific goals and operating procedures for the charter school are detailed in an agreement, or "charter," between the authorizing board and charter organizers, and additional details are often set forth in a memorandum of understanding (MOU) between the granting agency and the charter school.

B. What is the purpose of a charter school? The California Legislature has stated the purpose of charter schools is to provide new opportunities for teachers, parents, students, and communities to:

1. Improve student learning;
2. Increase learning opportunities for all students, especially those who are academically low achieving;
3. Encourage the use of different and innovative teaching methods;
4. Create new professional opportunities for teachers;
5. Provide parents and students with expanded choice within the public school system;
6. Hold schools accountable for meeting measurable performance outcomes;
7. Provide competition within the public school system to spur improvement in all schools.

[Education Code Section 47601] (All subsequent references to code sections are to the California Education Code unless otherwise indicated.)

C. What was the intent of the Legislature? In adopting charter law, the Legislature identified what it intended for charter schools, including the following major points, each of which has legal significance supporting the creation of charter schools:

1. Charter schools are an integral part of the California educational system;
2. The establishment of charter schools should be encouraged;
3. Charter schools are part of the public school system but are free from most of the state laws that uniquely apply to school districts;

4. Charter schools are under the jurisdiction of the public school system and the exclusive control of the officers of the public schools, and are entitled to full and fair funding;
5. The laws governing charter schools are to be liberally construed to effectuate their intent.

[47615]

D. What laws/rules apply to charter schools? Attached to these materials is a list of most of the statutes and regulations that apply to charter school petitions and operations. Basically, charter schools are exempt from most rules expressly applying to school districts, but are not exempt from rules applying to governmental agencies in general. In practice, this means most of the Education Code does not apply, unless expressly made applicable, but charter schools still must comply with:

1. Constitutions, both state and federal.
2. The California Charter Schools Act.
3. All federal laws (e.g., special education).
4. Laws generally applying to governmental entities but not specifically aimed at school districts (e.g., open meeting laws).
5. Laws that are a condition of funding for a specific program in which the charter school elects to participate.
6. Minimum age laws.
7. Laws governing nonclassroom-based study programs (independent study, home schooling, distance learning, etc.).
8. Educational Employees Relations Act.
9. State pupil testing programs.
10. Provisions of law related to teacher retirement and employee relations.

[47610]

E. What are the legal obligations of a charter granting agency? Generally, school districts, CBEs, and the SBE may grant charters in various situations. There is one set of rules for school districts and both similar and different rules for CBEs and the SBE. The SBE rules are not discussed in detail in these materials [5 California Code of Regulations (“CCR”), Section 11967], as those rules provide mere guidance, at best, for districts and CBEs.

Both school districts and CBEs can be involved in charter petition review and if a charter is granted, they are involved in the subsequent oversight, renewal, and the potential for revocation of the charter schools they authorize. While the following areas are discussed in more detail later in these materials, these are the basic areas of charter granting agency involvement:

1. Petition Review. On receipt of a charter petition, granting agencies must schedule and hold a public hearing, after giving proper notice, and review the petition to determine if various conditions exist. The agency must vote on whether or not to grant the charter, making written “findings” if the charter is not granted. [47605(b)]
2. Petition Appeal. If a petition is denied, the charter petitioners may take the matter to another level, either a CBE or the SBE depending on the circumstances. [47605(j)] Regulations govern the appeals of a charter denial. A district or CBE that denies a charter has no obligation to participate in the “appeal” but many do participate.
3. Charter Oversight. The agency that granted a charter, whether district, CBE, or SBE, has the obligation to provide oversight of the charter school. The minimum oversight obligations are set forth in Section 47604.32. A failure to provide adequate oversight may subject the granting authority to liability for the debts and obligations of the charter school.
4. Charter Renewal. The initial term of a charter is not specified but generally accepted to be limited to a maximum of five years. Upon impending expiration of a charter, the terms of the charter and/or the MOU control the renewal process. All renewals are fixed by law as being for a period of five years. [47607(a)(1)] Denial of a charter renewal may be appealed and the appeal is to follow the same process as appeal from denial of the initial charter. [47607.5] For charters granted on appeal by the SBE, the renewal must first be submitted to the school district that initially denied the charter. [47605(k)(3)]
5. Charter Revocation. A charter may be revoked for numerous reasons, which are further detailed later in these materials. A charter may be revoked for specified reasons by the granting/oversight agency or by the SBE. Revocation regulations are pending.
 - a. By the Granting Agency - Section 47607 sets forth the grounds on which a granting/oversight agency may revoke a charter, which include violation of the charter or any law.
 - b. By the SBE - The SBE may revoke a charter for specified fiscal reasons or where there is a departure from educational practices that would jeopardize the educational development of a charter school’s pupils. [47604.5]

F. Important Definitions. There are several concepts which define both the charter school being examined and the rules by which that school must operate. With the onset of penalties/interventions from failed school improvement programs and the potential reauthorization of the federal Elementary and Secondary Education Act, some school districts are experiencing, even initiating, charter school conversions of existing district schools, sometimes as preemptive measures against takeover by outside agencies.

1. Independent versus Dependent versus Conversion versus Something Else. There is an increasing interest in the distinctions between a dependent and an independent charter school, especially where the school is converted from an existing district school. (The terms “dependent” and “independent” are not found in charter law but are creative terms arising from the charter movement.)

a. Dependent. The traditional view of a “dependent” charter school has been that the school is “just another school” of the district, meaning, among other things, the district is the employer, the employees of the school are members of any existing bargaining units, and the governance and oversight of the charter school is handled by the district in the same manner as with other district schools.

b. Independent. The opposite of the dependent school is the “independent” charter school, which traditionally is the employer of the school’s employees, or has a management company providing that service, with its own separate and distinct governance structure and oversight by the granting agency. Independent charter schools are often operated as, or by, a nonprofit corporation, complete with a board of directors; however, nothing in charter law mandates use of a nonprofit corporation and a charter school could also be operated by individuals, partnerships, joint venture associations, and even for-profit companies.

c. Conversion Schools. The traditional concept of a conversion charter school is where a district “converts” one of its schools to a charter school, using the same site and as many of the same personnel as want to work in the charter school. [47605(a)(2) and 47606] Traditionally, the school would become a dependent charter school. It is also possible for teachers, with or without outside assistance, to petition to convert an existing district school into an independent charter school. Likewise, a district may convert an existing school into an independent charter school, with an outside agency providing the governance. In fact, this is one of the Program Improvement options, called the “restart” model, under the Elementary and Secondary Education Act.

d. Something Else. There is a growing trend within the traditional public school arena to be creative with the foregoing definitions. This creativity often follows failure under Program Improvement and is used as a preemptive strike against an outside takeover, or other interventions, of a failed school. Thus, there are “dependent” charters started by school districts by conversion of some but not all programs at an existing school site, with the school as the employer, employees not being unit members, and a governance structure using friendly appointees on an advisory committee with only enough authority to qualify as “independent” of the district such that charter school “startup” grant funds are available to feed what may be the same old failed program.

2. LEA Status. In some respects, the status of the charter school as a Local Educational Agency (LEA) depends on the foregoing discussion on independence but also arises regularly in connection with the charter school’s proposal for meeting its special

education obligations. Charter petitioners have two options: either they become just another school of the chartering agency for special education purposes or they become an LEA and join a SELPA. [47641] The choices for special education do not determine the status of the school for other purposes, nor does the school's dependence or independence automatically determine who is responsible for the charter school's special education obligations.

3. Classroom Based versus Nonclassroom-Based Instruction. Charter schools providing nonclassroom-based instruction must file an application for funding approval of their program and may be funded at a discounted rate. [47634.2] Currently, nonclassroom-based instruction is defined as everything that is not classroom-based instruction and classroom-based instruction is defined as:

... when charter school pupils are engaged in educational activities required of those pupils and are under the immediate supervision and control of an employee of the charter school who possesses a valid teaching certification in accordance with subdivision (l) of Section 47605. For purposes of calculating average daily attendance for classroom-based instruction apportionments, at least 80 percent of the instructional time offered by the charter school shall be at the schoolsite, and the charter school shall require the attendance of all pupils for whom a classroom-based apportionment is claimed at the schoolsite for at least 80 percent of the minimum instructional time

4. Virtual versus Independent Study. Independent study (I/S) has not changed its definition, but that term is often applied to everything that is nonclassroom-based instruction. As discussed later, real-time virtual schools are seeking to be included in the same category as classroom-based instruction, and to no longer be considered the same as I/S. The concept of virtual schools operating in real-time does not include an online charter, which permits work to be performed by students at any time according to the student's own schedule.

5. Countywide Charters. If a charter intends to operate in a manner that cannot be served by a single school district, the school may apply to a CBE for approval of a charter school that may operate anywhere within that county. [47605.6] Reasons for such requests could include the intent to have multiple sites or classroom facilities located in the territory of various school districts around the county. There are restrictions applicable to such schools and the CBE has extra authority to deny the petition on any grounds justifying denial. [47605.6(b)(6)] This is typically interpreted by CBEs to permit them to mandate inclusion of various terms and conditions of interest to the CBE in the charter, such as mandating the school be operated as or by a nonprofit corporation or the school becoming the LEA for special education purposes.

6. Statewide Charters. If a charter intends to operate in a manner that cannot be served by a school within a single school district or within a single county, the school may apply to the SBE for approval of a charter school that may operate anywhere within the

state. [47605.8] Reasons for such requests could include the intent to have multiple sites or classroom facilities located in the territory of various school districts around the state. There are restrictions applicable to such schools and the SBE has the same authority to add additional requirements as a CBE does for a countywide charter. [47605.8(d)]

7. Highly Qualified Teachers. The No Child Left Behind (NCLB) Act applies to teachers employed by all public schools, including charter schools, and under NCLB, a highly qualified teacher 1) holds appropriate state certification, 2) holds a minimum of a bachelor's degree, and 3) has demonstrated subject area competence in each of the academic subjects in which the teacher is assigned to teach. For core and college preparatory courses, the credentialing requirements for charter school and traditional school teachers are the same; however, the credentialing requirements may also vary, depending on whether the charter school deems the subject being taught to be a "core" subject. As noted below, the definition of "core" may vary from charter to charter, as may a teacher's credential.

8. Core Academic Subjects. NCLB defines core academic subjects as English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, art, history, and geography; however, NCLB defers to state law regarding credentialing requirements. California law does not define core subjects so the California Department of Education (CDE) recommends that charter schools and their charter authorizing entity specify which subjects and courses are considered to be core and college preparatory. This at least implies a cooperative effort to specify what is deemed to be at least the minimal core subjects.

II. CHARTER SCHOOL PETITIONS AND RENEWALS

Most of the rules are the same on initial petition review and renewals, and differences will be pointed out where they exist. These materials address charter school considerations both before and after a petition arrives, and include references to any legal obligations as well as suggestions for an approval process.

A. Before the Storm.

1. Have a Policy in Place. It is important to have a comprehensive charter school policy, one that addresses petition review, grounds for granting or denying, oversight/supervision, renewal and revocation, and the process for appeals in any of those actions. Some form of policy would be better than nothing. A charter school policy put out by CSBA, CASBO, or CCSESA would be a good beginning, or anything that is at least as comprehensive as one of those policies.

2. Identify Possible Sources of Assistance/Expertise. Charter school petition review will involve all aspects of operating a school, from instruction to special education to finance and governance, as well as others. To be prepared for a charter petition, you should identify where assistance may be needed and, if possible, who will be available on

your behalf for the review and comment on the petition, in their areas of expertise. If your agency does not have in-house expertise, you could make contact with available local resources, such as agencies that do have such expertise or your brother agencies around the state. Your goal is to make an initial contact and have an understanding whether you can count on these resources should you ever have the need to call on them.

3. Be Aware of What's Going on Around You. Stay as connected to the public school system, and to your community, as you can, working to build positive connections, communication, and information exchange. While your agency may be running smoothly in your mind, notice when and where there is dissension, dissatisfaction, and/or resistance to change. While not all charter schools arise from these situations, a number of them do. For example:

a. Are you terminating a special program or closing a school? Charter schools have arisen from teacher and/or parental resistance to such decisions.

b. Have other agencies in the area received charter petitions from a group looking for a place to land?

c. Is there any particular political movement in the community that could involve the education of students?

4. Petitioner Meetings. An at-times controversial recommendation is that you have a designated employee of the agency, the superintendent or a designee, ready to meet with charter petitioners who contact your agency. Not all agencies are willing to support this effort, which takes valuable time. The time it takes to meet, however, is but a fraction of the time it will take to meet your agency's statutory obligations if you receive a petition in an adversarial setting. Whether you are for or against any particular charter petition, meeting in advance of the petition being "served" on you is a good idea. Even if it only creates a relationship where you "agree to disagree" on the petition, creating some form of relationship with the charter petitioners will make the future easier to handle.

5. Extra Credit - Taking It to the Next Level. When information comes to you about dissension, dissatisfaction, or resistance, or you get any other information that indicates someone may see a void in your agency, consider taking action to fill the "perceived" void. Remember, their opinion on a void in the agency, even if "wrong" in your eyes, may be what drives them to become a charter petitioner. Their view is just as valid to them as your view is to you. Taking the position that they are simply "wrong," and doing nothing more, is what may drive them to try establishing a charter school.

B. Required Steps to Meet Legal Obligations During the Petition Review Process.

1. Schedule and hold a public hearing before the agency's governing body, or designee, after giving proper notice. The agency has no obligation to comment or answer questions or discuss matters with petitioners at the public hearing.

2. Review the petition to determine if it is consistent with sound educational practice, noticing if any of the following conditions exist:
 - a. The charter school presents an unsound educational program for the pupils to be enrolled. [47605(b)(1)]
 - b. The petitioners are demonstrably unlikely to successfully implement the program set forth in the petition. [47605(b)(2)]
 - c. The petition does not contain the required number of signatures. [47605(b)(3)]
 - d. The petition does not contain an affirmation of each of the required conditions. [47605(b)(4)]
 - e. The petition does not contain reasonably comprehensive descriptions of all of the required elements. [47605(b)(5)]
3. Vote on whether or not to grant the charter, making “findings” as needed. The vote on whether or not to grant the charter must be taken within the timeline set forth in the Education Code, and if the vote is to deny the charter, the reviewing agency must make written factual findings supporting the denial. There are only a few possible actions when voting on whether or not to grant a charter. Those choices are:
 - a. Grant the charter. This is typically accomplished by way of resolution, which is typically provided by petitioners. Review any proposed resolution carefully to ensure it will reflect the intent of the agency.
 - b. Grant the Charter with Conditions. The granting agency may believe there are matters requiring correction or change before a charter school commences operations. The resolution either lists those items, or refers to a list of the items, that must be fixed to the satisfaction of the board or a designated individual before the charter school opens for business. A timeline may also be set forth, ending either in fulfillment of the conditions or revocation of the charter.
 - c. Conditionally Grant the Charter. Using the same list of items as noted for granting with conditions, the agency may use this option but the charter is not deemed granted until the conditions are fulfilled. If this is the agency’s choice, the charter will not be recognized by the state until the conditions are lifted. For this reason, there is great opposition to, and some significant legal question on, the validity of a conditionally granted charter. There may be tactical reasons for risking use of this method, including the apparent absence of any appeal rights since there was no denial of the petition. Consultation with legal counsel is highly recommended.

d. Deny the charter. The final option is to deny the charter and make the required written findings. The findings must be based and worded in factual terms rather than the mere expression of an opinion, no matter how accurate that opinion appears.

4. MOU. Most charters require an MOU to further identify and clarify the relationship between the granting agency and the charter school, including information on such issues as funding, special education, and business relationships. The MOU is also a great place to list any issues that must be resolved before the charter is permitted to start educating pupils, with the corrections becoming amendments to the charter. A template for the MOU used by the SBE for its charter schools is found on the CDE website, which can be accessed through <http://www.cde.ca.gov/sp/cs/>. The MOU should state that it may be enforced as a part of the charter, so that violations of the MOU could lead to revocation of the charter. The charter should reference the MOU, making the existence of an MOU a part of the charter, so that failure to have an MOU could lead to revocation. The best practice is to have the MOU negotiated before any vote on the charter, though this may be avoided where and when circumstances warrant.

C. There is a Timeline and the Clock is Ticking.

1. Things To Do NOW! If a charter petition has come to you, and it is not a draft or a voluntary “free look” but is the real thing, the clock has started ticking on your obligations to act. While it may be that charter petitioners will contact you in advance, and even work with you to accept something that is mutually agreeable, that is not always the case. Sometimes, the first thing you hear or see is a petition in your in-basket. Find out if a copy of the petition has been sent to your board members. If not, provide the members with a copy, confirming the date on which the petition was received by the agency.

2. Things To Do in the First Week. As set forth in your charter school policy, the agency representative should appoint staff and others as needed in the areas of curriculum, finance, facilities, special education, and any other subject matters needed, as a committee to review the petition and provide advice on the viability of the proposed educational program as it applies to their specialty areas. It is suggested that the superintendent or designee initiate these staff appointments instead of having the board organize a committee in order to avoid the committee having to comply with “open meeting” requirements should they have the need to meet.

At the same time, you should also be checking the petition signatures to determine validity, whether they are signatures of teachers or parents. Do they represent at least half of the anticipated first-year teachers or parents of at least half of the first-year’s anticipated students? [47605(a)(1)(A) and (B)] Some agencies interpret charter law to permit refusal to review the petition if the signatures are not believed to be valid or sufficient. The safer view is to do the review anyway, especially since invalid or insufficient signatures is a basis for denial of the petition.

Select a date and give notice of a public hearing, in the fashion of noticing other public hearings, for the purpose of ascertaining the level of support for the petition from teachers, staff, parents, and others. Send a letter to the petitioners advising them of the date, time, and location of the public hearing.

Some agencies believe there is no obligation to give notice of the public hearing to the petitioners, believing anyone wanting to do business with the agency must watch the agency's website where meeting agenda are posted. The safer view is to send petitioners notice of the public hearing and an invitation to attend and participate, thereby preserving the agency's appearance as a fair and impartial body. This hearing may be set for the time of a regular board meeting or at any other time the board desires to hold the hearing by calling a special meeting of the board. Whether at a regular or special meeting, the hearing must be held within 30 days of your receipt of the petition. If the timing requires calling a special meeting, the special meeting must be set. Again, some agencies believe the timeline starts from approval of the signatures and not receipt by the agency.

You should send a written request for the following information [47605(g)], if not included with the petition and other material received:

Information regarding the proposed operation and potential effects of the school, including but not limited to:

- a. The facilities to be utilized by the school, specifying where the school intends to locate;
- b. The manner in which administrative services of the school are to be provided;
- c. The potential civil liability effects, if any, upon the school and upon the school district;
- d. Financial statements that include a proposed first-year operational budget, including startup costs, and cash flow and financial projections for the first three years of operation.

Provide your legal counsel with a copy of the petition, hearing notice, and letter to petitioners, and request legal counsel and other members of the review committee to begin their review and comments on the petition.

Remember that most if not all SELPAs have charter school provisions in their plans. Many of the SELPA plans require their members to timely submit a copy of any charter petition received to the SELPA for review. You should send a copy of the petition to your SELPA and it is likely that any request for feedback on the special education provisions of the charter petition would be well received.

3. Things to be Done Within the First 30 Days. Hold the public hearing. [47605(b)]
At the public hearing, any interested individuals should be permitted to speak on the

subject. You may limit the time, both for individual speakers and for the hearing as a whole, just as you do for other public hearings. The board does not have to answer questions at the hearing, if any are raised, and the board is not required to ask questions or do anything except permit others to talk. It is permissible to ask questions if it appears advisable to do so. It is customary to permit petitioners an opportunity to make a brief presentation to the board if they so desire, but this is not required by law. The purpose of the hearing is for the agency to “. . . consider the level of support for the petition by teachers employed by the district, other employees of the district, and parents” Common practice is to interpret “district” to mean reviewing agency.

4. Things to be Done Within the First 60 Days.

a. Vote whether or not to approve the charter petition. [47605(b)] Depending on the policy and practices of your agency, it may be the responsibility of the committee and other staff to develop a recommendation for the board and/or express an opinion as to whether or not the proposed educational program is viable, capable of implementation, and meets the requirements of the code.

b. Decide whether you need more time to complete the review and if so, negotiate more time with the charter petitioners. [47605(b)] If additional time is not needed, complete the review of the charter petition and determine what recommendation to make to the board.

c. Negotiate an MOU if there is any likelihood the petition will be granted. The standard method of enforcing any changes or other imposed requirements is to mandate an MOU and include the requirements as part of the MOU.

5. Extra Credit - Taking It to the Next Level. The next level involves looking into the future. It may be that the agency believes the petition should be denied, but what are others likely to say on appeal? Does the petition meet the minimal requirements set for approval by the SBE? Do petitioners or their friends have significant funding and/or political power? If so, is it possible the charter petition you are reviewing will be granted by someone, whether it be the CBE or the SBE? If you believe this petition will ultimately be granted, you have an opportunity to contemplate whether it would be better for an outside agency, such as the state (which provides little oversight) or your agency or another local agency, to provide the oversight of the future charter school.

Adverse impact on your agency is not a valid reason to deny a charter petition. Contemplating the true motivation behind the charter petition, and the potential impact of the charter school on your agency, may give you valuable information for future proactive action to mitigate potentially adverse impacts.

If you identify some significant dissatisfaction with your agency’s educational program, you have a window of opportunity to take some remedial action. If the petition illustrates valuable educational opportunities not currently available within your agency, you can take quick action to obtain and offer such opportunities first. Both of these courses of action

could give you a head start in the upcoming competition for students. If you see something good, you can use the idea, improve on it, and start offering it before they begin to offer it. If they propose a sound program, you can clone it and operate it first.

D. Can the Reviewing Agency Revise the Petition? The answer depends on the nature of the reviewing agency. For school districts reviewing an initial charter petition, the answer is no, the district has no authority to make unilateral revisions to the petition. The answer is the same for a CBE reviewing an initial petition, unless the petition is for a countywide charter school, in which case the CBE has authority to impose any requirement deemed appropriate to a proper educational program under threat of denial if not met. The petitioners either comply or the CBE has authority to deny the petition on that basis. It is the same with the SBE when it reviews a petition for statewide charter schools. Agencies reviewing petitions on appeal do not have the authority to mandate changes, but any agency, whether a district, CBE, or the SBE, can negotiate a petition revision in exchange for an approval of the charter petition.

E. Can the Reviewing Agency Provide Input to Improve the Petition? Yes, but reviewing agencies are not obligated to provide input, nor are charter petitioners obligated to listen. If the agency is creating its own charter school, the answer is obvious and the question is not even likely to arise. The question is more likely to arise only if the reviewing agency finds the petition for an independent charter school to be mostly complete and potentially worthy of approval, but also finds that the petition has some room for improvement or requires correction in certain areas. Reviewing agencies have different approaches to petition review and the answer to this question depends on the approach taken by the reviewing agency. Answers for some of the more common approaches are as follows:

1. No Charter Approval Approach. Some agencies perceive receipt of a charter petition as a challenge or threat to the stability and security of the agency, one that must be avoided at all costs. For these agencies, it is noted that the agency has no legal obligation to suggest revisions or provide input to petitioners, even though charter law is intended to favor charter schools. No communication with the charter school is required, except for holding the required public hearing and vote. These agencies may take the results of their petition review and prepare written findings to be used to support a denial of the petition. They may or may not share them with petitioners prior to the agency's vote. The petition gets resolved, one way or another, through the appeals process.

2. Fix or Fail Approach. Some agencies provide their petition review findings to the charter petitioners in advance of the agency vote, affording the charter petitioners an opportunity to revise the petition in those areas noted in the review findings. The concept here is that the petition may be approved if these findings are appropriately addressed. The input provided by the agency may include a description of the "fix" deemed by the agency to be appropriate. If the petition is appropriately fixed, it may be approved but this is not done in the context of a proactive, give-and-take negotiation process.

3. "Perfect World" Approach. In a perfect world, the agency would have worked out any differences with the charter petitioners before receipt of the petition for official review. In an only "slightly less perfect" world, the reviewing agency would work closely with

petitioners, negotiating corrections or revisions to the petition, obtaining a result that holds the best chance for approval by the agency. While there is nothing in the law requiring or authorizing this practice, it is supported by the legislative intent behind charter schools and the state will not object or oppose such activity.

4. On appeal, reviewing agencies have the same options as noted above. While the reviewing agency is supposed to start with the petition “as denied” by the initial agency, there is no recognized legal restriction on input, revisions, or negotiation of a mutually acceptable result.

F. What Elements in a Proposal are Predictors of Success or Potential Problems? There are a few issues that continue to pop up but none more often than those concerning budgets and the appropriate rules to be followed concerning conflicts of interest. These are discussed in detail elsewhere in these materials. More subtle are the indications obtained from observations about the petitioners themselves, their supporters, and the groundswell of support for the petition. While these factors weigh on the question of successful implementation of the charter program, they should not override the requirements of a complete and appropriate charter petition. The following are general observations and the opinions of the author:

1. Predictors of Success. Predictors of success may include a high support level from parents and community members, conversion of an existing program into a charter, good funding plan and financial backing, and “cloning” of a program already operating and proven successful.

2. Predictors of Problems. Predictors of problems many include lack of backing by the community, especially by parents, lack of requisite experience in operation or management of a school, budget numbers that are barely adequate or less, the potential for conflicts of interest, the absence of any legal advice, and any perceived motivations that are outside the context of doing what is best for students.

III. CRITERIA FOR APPROVING OR DENYING A CHARTER

A. Review Process. The timeline and the process are detailed above. Briefly, the process involves reviewing the signatures, reviewing the petition, holding a public hearing and taking a vote, along with making findings if the petition is denied or negotiating an MOU if the petition is approved.

B. Review Criteria. According to Section 47605(b), a charter shall be granted if the charter is consistent with sound educational practice. According to the SBE, a charter is consistent with sound education practice if “it is likely to be of educational benefit to pupils who attend.” The regulations that fix the rules for the SBE to grant a charter on appeal are not applicable to other granting agencies but do illustrate the likelihood that a charter not deemed worthy by a district and/or CBE may still be deemed worthy by the SBE. For example only, interesting SBE rules are included in the following list, indicated in brackets. By code, a petition shall not be denied unless

the reviewing agency makes written factual findings setting forth specific facts to support one or more of the following findings:

1. The charter school presents an unsound educational program for the pupils to be enrolled in the charter school. [The SBE believes a petition presents an unsound program if it is not believed to be of educational benefit to the pupils or is felt to present a risk of physical, educational, or psychological harm to pupils.]
2. The petitioners are demonstrably unlikely to successfully implement the program set forth in the petition. [For the SBE, a history of charter failures would imply that success is unlikely.]
3. The petition does not contain the number of signatures required. [The SBE is bound only to count the signatures on the petition as of the time it was first submitted to the initial agency, not to determine their validity.]
4. The petition does not contain an affirmation of each of the required conditions. [The SBE is serious about the affirmations, which must be clear, unequivocal affirmations, not just general statements of intent. The SBE looks in the charter and in the supporting documents for any evidence that the charter will fail to comply.]
5. The petition does not contain reasonably comprehensive descriptions of each of the required elements. [See comments below.]

C. Required Elements of a Charter Petition. The 16 minimum required elements of a charter petition are found in Section 47605(b)(5)(A-P) and are listed in order, although numbered 1 through 16, as follows:

1. “A description of the educational program of the school, designed, among other things, to identify those whom the school is attempting to educate, what it means to be an ‘educated person’ in the 21st century, and how learning best occurs. The goals identified in that program shall include the objective of enabling pupils to become self-motivated, competent, and lifelong learners.

“If the proposed school will serve high school pupils, a description of the manner in which the charter school will inform parents about the transferability of courses to other public high schools and the eligibility of courses to meet college entrance requirements. Courses offered by the charter school that are accredited by the Western Association of Schools and Colleges may be considered transferable and courses approved by the University of California or the California State University as creditable under the ‘A’ to ‘G’ admissions criteria may be considered to meet college entrance requirements.

2. “The measurable pupil outcomes identified for use by the charter school. ‘Pupil outcomes,’ for purposes of this part, means the extent to which all pupils of

the school demonstrate that they have attained the skills, knowledge, and attitudes specified as goals in the school's educational program.

3. "The method by which pupil progress in meeting those pupil outcomes is to be measured.
4. "The governance structure of the school, including, but not limited to, the process to be followed by the school to ensure parental involvement.
5. "The qualifications to be met by individuals to be employed by the school.
6. "The procedures that the school will follow to ensure the health and safety of pupils and staff. These procedures shall include the requirement that each employee of the school furnish the school with a criminal record summary as described in Section 44237.
7. "The means by which the school will achieve a racial and ethnic balance among its pupils that is reflective of the general population residing within the territorial jurisdiction of the school district to which the charter petition is submitted.
8. "Admission requirements, if applicable.
9. "The manner in which annual, independent financial audits shall be conducted, which shall employ generally accepted accounting principles, and the manner in which audit exceptions and deficiencies shall be resolved to the satisfaction of the chartering authority.
10. "The procedures by which pupils can be suspended or expelled.
11. "The manner by which staff members of the charter schools will be covered by the State Teachers' Retirement System, the Public Employees' Retirement System, or federal social security.
12. "The public school attendance alternatives for pupils residing within the school district who choose not to attend charter schools.
13. "A description of the rights of any employee of the school district upon leaving the employment of the school district to work in a charter school, and of any rights of return to the school district after employment at a charter school.
14. "The procedures to be followed by the charter school and the entity granting the charter to resolve disputes relating to provisions of the charter.
15. "A declaration whether or not the charter school shall be deemed the exclusive public school employer of the employees of the charter school for the

purposes of Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code.

16. "A description of the procedures to be used if the charter school closes. The procedures shall ensure a final audit of the school to determine the disposition of all assets and liabilities of the charter school, including plans for disposing of any net assets and for the maintenance and transfer of pupil records."

D. What Constitutes a "Reasonably Comprehensive" Description? The quick answer is "That depends on who is asking." There are rules only for the SBE [5 CCR, Section 11967.5] and the SBE's rules do not apply to any other charter granting agency. They are, however, useful to other granting agencies as they provide the ability (and opportunity) to project the final outcome of the charter school should a granting agency deny a petition and an appeal be taken all the way to the SBE. Even within the SBE's rules there is room for subjective interpretation. It is the purpose of the questioner that ultimately determines what is "reasonably comprehensive."

The term "reasonably comprehensive" is undefined, even within the SBE's regulations for charter approval. Found in Title 5, CCR Section 11967.5.1(f)(1)(A)-(F), those rules address only the perceived minimal requirements for approval of a charter by the SBE, implying a reasonably comprehensive petition would include this information. The real question here is reasonable to whom? If we accept that reasonable people could disagree, then we can accept that what is reasonable to one may not be reasonable to another and vice versa.

An illustrative example would be two lawyers arguing before a jury on the question of someone's negligence in a case. The standard for negligence is the "reasonable person" standard, meaning "how would a reasonable person have acted in those circumstances." The case is won or lost on the attorneys' ability to sway the minds of the jurors to believe a reasonable person would have acted in a manner that supports their client's position in the case. The jury could go one way or the other, and so long as there is some substantial evidence to support that jury's decision, the finding will not be overturned on appeal. Regardless of what actually happened, the "truth" of reasonableness in this case is decided with a vote. So too is the question whether or not the element descriptions in a petition are reasonably comprehensive, going to be decided by a vote, and the majority will fix the truth of the petition in the eyes of the reviewing agency.

BOTTOM LINE: If the description of the educational program and all of the required elements are reasonable to the reviewer and other staff doing the review, and is adopted as reasonable by the governing board of the reviewing agency, then the agency is fully authorized to grant the petition. Even if not deemed to be "reasonably comprehensive" in someone's mind, the governing board may grant the petition, requiring that additional details be provided. The failure to provide what is deemed to be a "reasonably comprehensive description" of a required element may be used as a basis for denial, but a denial is not required by law. The obligation is to deny it or have it fixed, and if the reviewing agency does not fix the petition, someone else may on appeal.

E. Special Education. There are ongoing problems with the charter school special education issue, especially with the question of I/S. The issue arises when a student with an IEP tries to enroll in an I/S charter school but the pupil's IEP does not specifically provide for the pupil's

participation in I/S. A pupil with an IEP that specifically provides for I/S would be enrolled, but the dispute is over what happens to the pupil whose IEP does not specifically provide for I/S participation.

In the past, the CDE has insisted that the only acceptable procedure is for I/S charter schools to enroll all students, regardless of what their IEP states. This position is disputed as calling for I/S charter schools to commit a violation of not one but two California statutes. If correct, the CDE position is risky for I/S charters because if they do enroll students with IEP's that do not specifically provide for I/S participation, the charter school may be said to be violating those laws, which could lead to revocation of the charter under Section 47607(c)(4).

The position of CDE is best described as an assertion that refusal to enroll a student with an IEP that does not approve the I/S placement is discrimination on the basis of a protected classification. The support for CDE's position is unknown.

The position against the alleged obligation of automatic enrollment is based on the obligation imposed by statute to evaluate all students seeking to engage in I/S, whether they are general or special education pupils, in order to ensure that the I/S placement is appropriate. Since the obligation exists as to all students seeking to participate in an I/S program, the determination of that question is not discriminatory. The support for this position follows:

1. Applicable Statutes.

a. 47612.5(b) "Notwithstanding any other provision of law . . . a charter school that provides independent study shall comply with Article 5.5 (commencing with Section 51745) of Chapter 5 of Part 28 and implementing regulations adopted thereunder."

b. Code Sections within Article 5.5:

51745(c). "No individual with exceptional needs, as defined in Section 56026, may participate in independent study, unless his or her individualized education program developed pursuant to Article 3 (commencing with Section 56340) of Chapter 4 of Part 30 specifically provides for that participation."

51746. "It is the intent of the Legislature that school districts and county offices of education offering independent study shall provide appropriate existing services and resources to enable pupils to complete their independent study successfully In addition, the services and resources may include, but need not be limited to, any of the following:

"(b) The services of qualified personnel to assess the achievement, abilities, interests, aptitudes, and needs of participating pupils to determine each of the following:

“(1) Whether full-time independent study is the most appropriate alternative for the pupil being referred”

2. Interpretation. Code Section 51746 appears to permit, if not require, a COE or district to evaluate every student referred for full-time I/S. Since charter schools are mandated under Section 47612.5(b) to comply with this section, it appears any program of I/S can, and perhaps must, evaluate all pupils seeking to become involved in an I/S program. It is noted that the last quoted portion of Section 51746(b)(1) identifies pupils “being referred” which implies the student is not already taking part in the I/S program but is being considered for placement. This goes to the very heart of the enrollment question. Pupils with “achievement, abilities, interests, aptitudes, and needs” that indicate a full-time I/S program would not be “the most appropriate alternative for the pupil” should not be placed in the program. Since the evaluation applies to all students, regardless of whether or not they have special needs status, the evaluation is not discriminatory.

There is statutory support for screening all pupils as to the propriety of placement into an I/S program, and there is an express prohibition against participation in an I/S program by pupils with IEPs unless the IEP “specifically provides for that participation.” This means that an IEP team has evaluated and discussed and determined that I/S would be an appropriate placement providing FAPE for the pupil with exceptional needs. It is doubtful that an IEP team would intentionally indicate I/S as an appropriate placement for a pupil when the placement, in fact, is not appropriate.

The pupil with an IEP not specifically providing for I/S who seeks to participate in a full-time I/S charter program should undergo a pre-enrollment screening, the same as all other pupils, to determine whether full-time I/S placement is “the most appropriate alternative for the pupil being referred” based on the pupil’s achievement, abilities, interests, aptitudes, and needs. While some may say this discriminates against students with exceptional needs, there can be no discrimination if the same assessment applies to all students. The whole purpose of Section 51746 is to protect the interests of the pupils by permitting full-time I/S only where it is the most appropriate placement.

The pupil who presents for admission with an IEP already specifically providing for I/S participation still goes through the screening process to confirm that I/S is the most appropriate placement. While the screening process may adopt the IEP team’s determination that placement in full-time I/S would be appropriate, the screening process may, in theory, also result in a determination that full-time I/S is not the most appropriate placement. Again, since that determination is based on the pupil’s individual achievement, abilities, interests, aptitudes, and needs, and not the pupil’s protected status, the determination is not impermissibly discriminatory.

F. Grade Level Requirements.

1. The Law. Section 47605(a)(6) contains the following requirements as to grade levels:

“Commencing January 1, 2003, a petition to establish a charter school may not be approved to serve pupils in a grade level that is not served by the school district of the governing board considering the petition, unless the petition proposes to serve pupils in all of the grade levels served by that school district.”

2. The Dispute. On occasion, charter schools propose to serve grade levels that do not match, but expand, the grade levels being served by the district receiving a charter petition. Some of the charter petitions propose to start with the identical grade levels, then expand into the grade levels not covered by the district. This proposal likely meets little or no opposition, as it would appear to comply with the law.

However, other charter petitions sometimes propose to either begin in the extra grade levels or propose some combination of covered and non-covered grade levels. These petitions often meet objections based on the cited law.

3. Interpretation. In the frequently asked questions section of its charter school website, the CDE had expressed its “opinion” on phasing in grade levels. The CDE indicated that grade levels beyond those served by the granting agency may properly be provided before all of the mandatory grades are served, and that the mandatory grades may be phased in. However, the CDE also indicated that the phase-in period must be reasonable and set a maximum limit of the five-year life of the charter. The recommendation is no longer found on the CDE website, which now only repeats the language of the code section on this issue. Some charter proponents assert that any “proposal” to serve the mandated grades meets the code requirement, regardless of how many years it may take for the proposal to become reality.

Others disagree with the position formerly taken by the CDE and these charter school proponents. Instead, they assert it would be improper for the charter school to offer grade levels not served by the school district until all the grade levels served by the district are being offered in the charter school, and that it is not proper to phase-in the required grade levels while serving extra grade levels. Some assert that all grades served by the district must be served by the charter school before any other grades may be added.

The code is silent on the propriety of a charter school that “proposes” to serve grades outside those of the granting agency before serving mandated grade levels, regardless of how long it takes to serve the mandated grade levels. Since the code is silent, the granting agency gets to determine what, in their case, the code requirement means. Apparently it is entirely proper for one agency to determine the code requires immediate compliance, while another agency may determine a phased-in compliance is adequate, and each are correct for their own circumstances until a court interprets the language of Section 47605(a)(6) or the Legislature provides further definition of its intent.

G. Geographical Limitations on Charter Schools. In 2002, the Legislature passed AB 1994 which, among other things, imposed territorial limitations on charter schools. For the most part, those limitations include that for classroom-based programs, schoolsites must be within the

territorial limitations of the granting agency. For nonclassroom-based programs, most commonly called I/S programs, the limitations on sites are the same but I/S programs are also permitted to have various facilities located elsewhere. The nature and extent of the facilities limitations are still uncertain and subject to dispute.

1. The Law. AB 1994 was intended to generally require a charter school petition and renewal petitions from January 1, 2003, onward to identify a single charter school and specify its geographic and site requirements. Geographical limitations were intended to be established for all charter schools granted and operating after July 1, 2002. In doing so, the Legislature required the following:

a. Section 47602(a)(1) required the number assigned to a charter school to correspond to a single petition identifying a school that will operate within the specified geographical limitations. Sites that shared an educational program and served a similar pupil population were not to be counted as separate schools. The geographical limitations were not to be waived by the SBE.

b. Section 47605(a)(1) required petitions for establishment of a charter school to identify a single charter school that will operate within the geographical boundaries of the granting school district. While it is permissible to operate at multiple sites within the granting school district, each site must be identified in the petition.

c. Section 47605(a)(4) permits addition of new sites during the life of the charter by requesting a material revision to the charter, setting up various requirements for that process. The new sites are also to be within the jurisdictional boundaries of the granting school district.

d. Section 47605(a)(5) permits one site located outside the jurisdiction of the district, but within the county, if specified notices are given and where the charter school proves a suitable facility is unavailable or a temporary site is needed during construction or expansion.

e. Section 47605(g) requires the petition to describe the facilities and specify where the charter school intends to locate.

f. Section 47605(j)(1) imposes on charter schools approved by county offices of education or by the SBE on appeal the same geographical limitations as would have applied if the charter had been approved by the agency to which it was initially submitted. In most instances, this would apply the geographical limitations of the initial school district.

g. Section 47605.1(g) declares geographical limitations inapplicable to specified partnership charter schools involving the federal Workforce Investment Act of 1998, any federally affiliated Youth Build programs, federal Job Corps training, or instruction provided pursuant to an MOU with the federal provider, the California

Conservation Corps, or a certified local conservation corps, or to instruction provided to juvenile court school pupils pursuant to subdivision (c) of Section 42238.18 or pursuant to Section 1981 for individuals who are placed in a residential facility.

2. Limitations Discussion. The actual geographical limitations are found in Section 47605.1, which imposed various timelines on compliance with territorial limitations. While there was some discussion at the time about certain charter schools being “grandfathered” into their existing geographical limitations, the passage of time has resulted in the general acceptance that all charter schools now must comply with the limitations.

Basically, charter schools are limited to having school sites (classroom-based) only within the geographic boundaries of the agency to which the charter petition is initially submitted, regardless of how the charter petition ultimately gets approved. There are additional provisions for nonclassroom-based programs and limited flexibility allowing temporary sites during construction or where a suitable site is unavailable within the jurisdiction.

A charter school may establish a resource center, meeting space, or other satellite facility located in a county adjacent to that in which the charter school is authorized if the facility is used exclusively for the educational support of pupils who are enrolled in nonclassroom-based I/S of the charter school and the charter school provides its primary educational services in, and a majority of the pupils it serves are residents of, the county in which the school is authorized. Although this language for nonclassroom-based programs sounds simple, there is no definition of what constitutes a “resource center,” “meeting space,” or “other satellite facility.” For this reason, different agencies have interpreted this exemption in different ways, some excluding virtually all facilities, some permitting rented, temporary facilities, and some permitting facilities to be owned or leased long-term for use by appropriate charter schools.

For charter schools that submit a petition directly to a CBE, as authorized by Sections 47605.5 or 47605.6, the school is generally limited to operations only within the geographical boundaries of the granting county. Some questions remain as to whether these limitations apply to an I/S charter school granted by a CBE.

H. Appeal. The first rule on appeal is that there are no rules applicable to a denying agency on appeal. This is especially true when appeals get to the SBE. The SBE will do its own review based on its own regulations for approval, which are not onerous and appear to be subjectively applied, and will do what it thinks is correct. This is not about the other agencies that have looked at the petition, especially if the SBE asks for or requires changes. Predicting the outcome of an appeal through the SBE is difficult. Petitions which appear defective are being approved by the SBE. That being the case makes the decisions at the local level all the more important. Remember that the SBE has limited criteria by which to evaluate the instructional program and ascertain the school’s objectives and how student progress will be measured. The SBE presumes that the required racial and ethnic balance will be met and the SBE may approve a charter’s statements of employee return rights if they do not violate a law, even if they would violate an

agency's collective bargaining agreements. Whether the leave and return rights are enforceable or binding on the local agency remains an open question.

1. The Appeal Process. For a charter petition denied by a local school district, the petitioners may appeal the denial to the local CBE. The CBE's review is essentially the same process, with a timetable, that was followed by the local district. The decision by the local CBE is based on the same criteria and the same rules, subject to the CBE's own interpretations as to what appears reasonably comprehensive. Nothing done by the local district is anything more than "information" to the local CBE.

If a petition is denied by the local CBE, the petitioners can appeal that denial to the SBE, which has its own rules and timetable. Some petitioners request quick denials at the local level in order to get to the SBE even quicker, as that is where they think they will get approved.

If no action is taken by the local CBE or by the SBE, the petitioners may seek court action on the petition denial and the defendant in that action would be the agency initially denying the petition and not any agency reviewing that denial on appeal. It appears there is no right to court action if a CBE and the SBE both deny an appeal. No appeal may be taken to the SBE following denial of a petition for a countywide charter by a CBE, nor is court action permitted.

2. Participation in the Appeal Process. Your findings resolution, based on your approval process (even if following CASBO and/or CSBA recommendations, and perhaps because of that), is not likely to have any impact on the SBE panel. The SBE is not judging you and is not likely to willingly listen to adverse impacts of the proposed charter school on the district. Adverse impact on the local agencies is not relevant to the question of whether or not to approve the petition.

The SBE will grant the appeal if the charter is "consistent with sound educational practice" in its judgment; it will be found to be consistent if it will "be of educational benefit to pupils who attend." Pointing out how it will not be of educational benefit may have some merit if you provide a factual foundation to support your opinion.

As to the budget, the SBE looks for a "realistic" plan and lists criteria that show an unrealistic plan. You can compare your budget findings for any correlation with an impression as being "unrealistic." For example, you could argue that the budget assumptions are unreasonable, depending on your experience with public support for the petition. The SBE likes to see a budget that "in its totality appears viable and over a period of no less than two years of operations provides for the amassing of a reserve equivalent to that required by law for a school district of similar size" You may be able to show noncompliance. All in all, your review of the budget may impact the SBE's thinking but the SBE will be doing its own budget analysis.

If you really want to participate in the SBE appeal process, we suggest you consider creating a matrix using the SBE's criteria, not your own, then using the data from your

petition review to identify any issues within the SBE matrix and presenting your opinions on why the charter does not meet the SBE's rule requirements. At least you will be playing with the same rules. Remember, the SBE does not require charter schools to comply with Government Code Section 1090, as discussed elsewhere in these materials, and readily permits teachers and others who are interested parties to sit on charter governing boards.

The most benefit a district can expect from an SBE approval on appeal pertains to the LEA status of the charter school for special education purposes. At least the district will not have to meet the charter school's special education obligations. The SBE mandates that change, as the SBE cannot be an LEA for special education.

IV. EFFECTIVE MONITORING PROCESSES AND PROCEDURES

A. Oversight - What does the approving agency need to do? Oversight is minimally defined by Section 47604.32 to include but not be limited to the following:

1. Identify at least one staff member as a contact person for the charter school.
2. Visit each charter school at least annually.
3. Ensure that each charter school under its authority complies with all reports required by law of charter schools.
4. Monitor the fiscal condition of each charter school under its authority.
5. Provide timely notification to CDE if any of the following circumstances occur or will occur with regard to a charter school for which it is the chartering authority:
 - a. A renewal of the charter is granted or denied.
 - b. The charter is revoked.
 - c. The charter school will cease operation for any reason.
6. The cost of performing the duties required by this section shall be funded with supervisory oversight fees collected pursuant to Section 47613.

B. Oversight - What are the best practices? Since performance of the oversight obligation is what saves a granting agency from potential liability for the debts and obligations of the charter school, the question could be: What will keep the district out of court? Or: What would a jury think I should have done? The question of reasonable action is likely to be involved in court. The legal action, of course, arises after something bad has happened. By that time, it is too late to do more oversight.

The best you can do is always be aware of what is going on in the school and document efforts to have the charter school resolve issues that arise. Forming at least a neutral relationship will help build trust and foster open communication, two positive factors in oversight. Requirements include: review the charter school audit, ensure audit findings are resolved or a process for resolution is in place, and track experiences over time to see if policies, practices, and preferences are working. If not, the oversight agency should suggest they be revised and then track the revision process. Violation of any law could lead to revocation of the charter, which is the incentive for charter schools to cooperate with oversight efforts.

C. Revocation. Granting agencies may revoke charters they grant and there is an appeal process for any such revocation. [47607(c)] Revocation requires substantial evidence in support of the grounds for revocation and includes a violation “cure” period; however, that process does not apply to revocations where the oversight agency finds the violation constitutes a severe and imminent threat to the health or safety of pupils.

1. Grounds for Revocation. The grounds include allegations the charter:
 - a. Committed a material violation of any of the conditions, standards, or procedures set forth in the charter;
 - b. Failed to meet or pursue any of the pupil outcomes identified in the charter;
 - c. Failed to meet generally accepted accounting principles or engaged in fiscal mismanagement; or
 - d. Violated any provision of law.

[47607(c)(1)-(4), inclusive]

2. Revocation Process. The following is the statutory process mandated for non-emergency violations. The process includes:
 - a. Notification to the school of any violation of this section [47607(d)];
 - b. A reasonable opportunity to remedy the violation;
 - c. Expiration of the school's reasonable opportunity to remedy without successfully remedying the violation;
 - d. Written notice to the charter school of intent to revoke and notice of facts in support of revocation; [47607(e)]
 - e. Holding a public hearing within 30 days of the written notice on the issue of whether evidence exists to revoke the charter;

f. Issuing a final decision no later than 30 days after the public hearing, unless the time is extended by mutual agreement;

g. If the charter is revoked, the chartering agency must make written factual findings supported by substantial evidence specific to the charter school that support its findings.

3. Revocation Appeals. If its charter is revoked, the charter school may appeal unless the chartering agency made a determination that the violation constituted a severe and imminent threat to the health or safety of the pupils. In such cases, there is no appeal in the code. In all other cases, the appeal process is set up in the code [47607], as follows:

a. School District Revocation. If a school district is the chartering authority and revokes the charter:

(i) The charter school may within 30 days appeal the revocation to the CBE;

(ii) The CBE may reverse the revocation, if it determines the revocation was not supported by substantial evidence, and the school district may appeal the reversal to the SBE;

(iii) If the CBE does not issue a decision within 90 days or the CBE upholds the revocation, the charter school may appeal to the SBE;

(iv) The SBE determines whether the school district's findings are supported by substantial evidence and if so, upholds the revocation; if not, reverses it.

b. CBE Revocation. If a CBE is the chartering agency and it revokes a charter:

(i) The charter school may within 30 days appeal the revocation to the SBE;

(ii) The SBE may reverse the revocation if it finds the CBE's findings are not supported by substantial evidence.

c. In Either Situation. Whether revocation was by a school district or a CBE, the revoking agency remains the oversight agency if the revocation is reversed on appeal and the charter school can remain open and be funded during the appeals process in order to ensure that the education of pupils enrolled in the school is not disrupted. The code also sets up other changes if a revocation is reversed on appeal.

D. Renewal. Upon the approaching expiration of any charter granted, the charter school may petition for renewal of the charter. The same rules apply to renewal petitions as to original petitions, except any new laws must be dealt with upon renewal. Denial of a renewal is handled the same as denial of an original petition.

1. Renewal Requirements. Before a charter can be renewed, the charter school must show it met at least one of the following:
 - a. Attained its Academic Performance Index (API) growth target in the prior year, in two of the last three years, or in the aggregate for the prior three years;
 - b. Ranked in deciles 4 to 10, inclusive, on the API in the prior year or two of the last three years;
 - c. Ranked in deciles 4 to 10, inclusive, on the API for a demographically comparable school in the prior year or two of the last three years;
 - d. The granting agency determines that the academic performance of the school is at least equal to the academic performance of the public schools that the charter pupils would otherwise have attended, as well as the academic performance of the schools in the district where the charter school is located;
 - e. Qualified for an alternative accountability system. [47607(b)]
2. Not Automatic. It is recommended that granting agencies not permit an automatic renewal or agree to any renewal timeline shorter than the petition review timeline or longer than one year. Ideally, the charter renewal process should be a cooperative effort, starting at the beginning of the last year of the charter, to permit time for review, revisions, and appeals, as needed.
3. Renewal Appeals. In the event a granting agency refuses to grant a renewal of the charter, the charter school has the same rights of appeal as following the denial of a petition for establishment of a charter school. [47607.5]

V. GOVERNANCE ISSUES AND GOVERNMENT CODE SECTION 1090

A. Whose Rules Apply? This is the “ultimate” question regarding rules for charter schools. The issue arises from one of the primary purposes of charter schools, which is a tradeoff of restrictions/rules in favor of performance accountability. Since 1999 there has been what is known as the “mega-waiver” of Education Code Section 47610. Section 47610 reads as follows:

“A charter school shall comply with this part and all of the provisions set forth in its charter, but is otherwise exempt from the laws governing school districts, except all of the following:

- “(a) As specified in Section 47611.
- “(b) As specified in Section 41365.
- “(c) All laws establishing minimum age for public school attendance.

“(d) The California Building Standards Code (Part 2 (commencing with Section 101) of Title 24 of the California Code of Regulations), as adopted and enforced by the local building enforcement agency with jurisdiction over the area in which the charter school is located.

“(e) Charter school facilities shall comply with subdivision (d) by January 1, 2007.”

The next question becomes: If charter schools are exempt from the laws governing school districts, what laws remain? The answer to this question is what school districts and their advocates have been arguing with charter schools and their advocates for over 10 years. The Legislature seems to have an idea but cannot get its opinion past the Governor, who has vetoed potentially enlightening legislation. It has become generally understood and accepted that rules applying to governmental agencies may apply, but rules specifically focused on school districts likely do not, such as the competitive bidding rules of Public Contract Code Section 20111.

Because there are so many opinions and no solution in sight, we endeavor to provide as many sides of the argument as known. However, the opinions expressed in these materials are simply those of the author and it is recommended that local agencies consult with their own legal counsel for (potentially) yet another opinion.

B. Government Code Section 1090. The problems surrounding the determination of which laws apply or do not apply to charter schools are perhaps best exemplified by discussion of the application of Government Code Section 1090 to charter schools. Application of this rule is the most commonly seen dispute over application of laws to charter schools. It arises in one form or another in a majority of charter petitions. Government Code Section 1090 reads as follows:

“Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.

“As used in this article, ‘district’ means any agency of the state formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries.

In the past, charter proponents argued that charter schools are not “districts” within the meaning of Government Code Section 1090. School district advocates argue that charter schools are part of the California public school system and are legally funded using tax dollars, so they must be agencies of the state, they are formed, whether under general or special act, and they perform a governmental function within limited boundaries. Charter proponents argue that they have no boundaries since they cannot restrict admissions on the basis of residence. School districts have designated territories but can accept students from outside those boundaries. Section 47605.1, adopted in 2002, imposes “geographic and site” limitations on charter schools so the “limited boundaries” question would seem to be answered.

Charter proponents now argue that Government Code Section 1090 does not apply to charter school officials because it only applies to school board members because of Section 35233, which does not apply to charter schools. However, Government Code Section 1090 has been applied to school board members by the courts since the early 1950's, which predates Section 35233. This provides a basis for application of Government Code Section 1090 to school district boards, and thus also to charter school boards, outside the inapplicable Education Code.

Charter proponents also argue that the Governor's veto of 2008's AB 2115, and September 27, 2010, veto of AB 572, each of which would have expressly applied Government Code Section 1090 to charter schools, shows that Section 1090 does not currently apply. When he issued his veto of AB 572, the Governor indicated his belief that the bill would have imposed new obligations on charter schools, implying that Government Code Section 1090 did not already apply. The veto message on AB 572 indicates the Governor's belief that ". . . the proposed changes apply new and contradictory requirements, which would put hundreds of schools immediately out of compliance, making it obvious that it is simply another veiled attempt to discourage competition and stifle efforts to aid the expansion of charter schools." School districts and others counter that it is more likely that the Legislature, whose intent is clear by its passage of AB 2115, merely wanted to reign in the SBE and CDE who are not requiring application of Government Code Section 1090 to charter schools.

The veto of this bill leaves the question unanswered. The good news is, this means local agencies are free to decide for themselves whether or not the rule should apply and whether or not to require it, as they see fit. The only way for the rule to be found inapplicable is for a court to make that determination, and the likelihood of court action on a petition denial issue is minimal. It is likely that the first time the issue is addressed by the courts will be in the context of criminal prosecution of a charter school officer/employee for violation of the rule.

C. Other Rules That "May" Apply. While the main disputes seem to arise over the application of Government Code Section 1090, other areas of dispute may arise and some seem to be accepted. The following discussion is not intended to be all inclusive, nor to imply there will be issues in these areas in a particular instance.

1. Government Code Section 1099. As with Section 1090, application of this section is subject to argument. It is in the same article of the code as Section 1090 and reads, in part, as follows:

"(a) A public officer, including, but not limited to, an appointed or elected member of a governmental board, commission, committee, or other body, shall not simultaneously hold two public offices that are incompatible. Offices are incompatible when any of the following circumstances are present, unless simultaneous holding of the particular offices is compelled or expressly authorized by law:

"1. Either of the offices may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over the other office or body.

“2. Based on the powers and jurisdiction of the offices, there is a possibility of a significant clash of duties or loyalties between the offices.

“3. Public policy considerations make it improper for one person to hold both offices”

This section, if applicable, would seem to preclude charter school officers from holding incompatible offices. Questions in this area include whether a charter school board member is an “officer” and whether a charter school is a “governmental body” within the meaning of this section.

Government Code Section 1099 has been applied by staff of at least one local district attorney’s office to remedy a situation where a member of a charter school’s nonprofit board also got elected to the board of trustees of the local school district. A resignation from one office satisfied this district attorney, but the section does not appear to be uniformly applied across the state to all charter schools. If charter school officers hold the same status as officers of school districts, as the courts have ruled, the same “incompatible offices” situations are likely to arise for charter school board members.

2. Government Code Section 1126. Section 1126 involves the concept of incompatible activities and the prohibitions include the following:

“(a) . . . a local agency officer or employee shall not engage in any employment, activity, or enterprise for compensation which is inconsistent, incompatible, in conflict with, or inimical to his or her duties as a local agency officer or employee or with the duties, functions, or responsibilities of his or her appointing power or the agency by which he or she is employed. The officer or employee shall not perform 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”

The arguments for application of this section are as strong as those for application of Government Code Section 1090, as the section refers to a “local agency” and Government Code Section 1125 defines “local agency” to include districts. The California Attorney General has stated: “This all encompassing definition clearly includes a school district.” If the definition is all encompassing, it should apply to charter schools as well.

3. Government Code Section 53227. This section prohibits any employee from sitting on the governing board of the employing local agency, which would seem to preclude teachers sitting on charter school boards. Section 53227 reads, in part, as follows:

“An employee of a local agency may not be sworn into office as an elected or appointed member of the legislative body of that local agency unless he or she resigns as an employee. If the employee does not resign, the

employment shall automatically terminate upon his or her being sworn into office”

Government Code Section 53227.2 defines “local agency” to include districts and any other public agency of the state. “Legislative body” is defined by that same section to include the governing body of a district or other public agency of the state. This would seem to include any form of governance structure of any charter school, especially since the courts deem charter schools to be part of the public school system and their officers to be public officers, as are their counterparts in traditional public schools.

Charter proponents argue that it must be legal to have teachers on the boards of charter schools because so many schools operate that way. The CDE, long a supporter of teachers holding seats on charter boards, has changed its frequently asked questions section on employee seats on governing boards from an affirmation to “consult with an attorney for advice on this question.” Given the lack of a definitive answer, it appears your agency can decide what rule should apply.

4. Political Reform Act. Many charter schools agree to comply with the Political Reform Act (PRA), which is part of the Government Code, but the PRA is not expressly required by charter law. The definitions within the PRA are broad, more so than many others in the Government Code. The PRA applies to public officials of a local governmental agency, which are defined as follows:

“82041. ‘Local government agency’ means a county, city or district of any kind including school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission or other agency of the foregoing.

.....

“82048. (a) ‘Public official’ means every member, officer, employee or consultant of a state or local government agency.”

The area of greatest discussion regarding the PRA is on the subject of conflicts of interest. The prohibitive rule of the PRA is as follows:

“87100. No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.”

A charter school would appear to be a local government agency and employees of charter schools would appear to be public officials. Under the PRA, the cure for conflicts issues is, in many cases, a disclosure of the conflict and abstention from participation in the decision, thus allowing a majority of the governing body to go forward and make the decision. Government Code Section 1090 prevents the governing body from making the decision where there is a financially interested member, but the PRA is a more relaxed

rule. It is mostly in accord with the typical conflict of interest rules applicable to nonprofit corporations, which are the rules charter proponents argue to be the rules applicable to charters. This would explain the willingness to abide by the PRA rules but not by Government Code Section 1090.

D. Other Governance Issues

1. A Seat on the Charter Board? Section one of the template MOU between the SBE and charter schools granted by the SBE contains an interesting provision mandating that the charter school be operated as or by a nonprofit corporation, and reserving to the SBE the choice whether to have a voting representative on the charter board. This position supports the position taken by school district advocates for years on this question. While charter advocates continue to assert that a voting district-appointed seat on the nonprofit board is not required by law, they also appear willing to provide such a seat if the reviewing agency demands one. The seat should not be taken by an elected official from the granting agency, as that may present an “incompatible office” issue, although there is authority for arguing that holding these two offices is still legal.

2. “Open Meeting” Laws? While discussions about whether or not to grant a charter petition are required to be held in open session under the Brown Act, there is no clear requirement that charter school board meetings follow the Brown Act or other open meeting laws. However, charter proponents often add this provision to their petitions. Legislative efforts to make this obligation clear have either failed to pass or been vetoed, so the question remains open. The CDE, however, provides curious support on its charter website in the frequently asked questions section, which includes the following response:

“Q.3. Are charter schools subject to open meeting requirements?”

“Yes. Although charter schools are exempt from most laws applicable to school districts, they are not exempt from laws that generally apply to public agencies, including the legal requirement to hold open meetings. California Government Code Section 54950 et seq. (Outside Source) (commonly referred to as the ‘Brown Act’) requires that the deliberations and actions taken by local (public) agencies be conducted openly.”

One of the side effects of the CDE’s assertion that open meeting rules apply to charter schools is that they are generally applicable to governmental agencies, as noted by the CDE, but so are the conflict of interest rules contained in Government Code Section 1090 and the other rules discussed in these materials. While the CDE believes the generally applicable open meeting rules apply to charter schools, they believe the generally applicable conflict of interest rules do not. It appears this provision may or may not be mandated by a reviewing agency at the discretion of the agency.

VI. PROP 39 REGULATIONS REGARDING FACILITIES – WHAT FACILITIES ARE YOUR AGENCY OBLIGATED TO PROVIDE?

A. In General. A school district is obligated to share its facilities fairly among all students, including those enrolled in charter schools. This obligation was codified as part of Proposition 39 from a few years ago. Viewed by many as a “tradeoff,” the charter school facilities obligations arose in exchange for a reduced General Obligation Bond passage rate. When school districts seek bonds, their plans are to include consideration of facilities needs of existing and potential future charter schools operating within the district. Whether or not charter facilities are included in bond planning, the facilities obligations exist. The school district does not have to be the chartering agency for the facilities obligation to arise.

B. Facilities Obligations. The charter school facilities obligations applicable to school districts are found in Section 47614 and in the implementing regulations, amended in 2008, starting with Title 5, CCR Section 11969.1. The code and regulations set up a complex process and procedure for use in making and considering facilities requests. The charter school and school district are, by regulation, expressly permitted to implement any other accommodations mutually agreeable to themselves.

The obligations of the parties related to charter facilities include:

1. School districts are required to provide facilities for their own students in charter schools. The school district is not required to provide facilities for students of another district in the same charter school. The term used is “in-district” which is defined to mean any student entitled to attend a district-operated school. A request for facilities may be denied if it projects fewer than 80 units of average daily classroom attendance for the year.
2. The facilities must accommodate the in-district students in conditions reasonably equivalent to what those students would receive if they were attending public schools of the district. This includes reasonably equivalent furnishings and equipment, all of which remain the property of the school district.
3. The facilities are to be contiguous, which means reasonably close together at the very least, and on the same campus whenever reasonably possible. This has been the subject of some litigation and the full extent of the obligation for contiguous facilities is not clear. A district must make findings based on specific factual circumstances that would demonstrate a reasonable basis for offering facilities that are not contiguous.
4. The facilities need not be exactly what or where requested, but the school district must make reasonable efforts to provide facilities near where the charter school wishes to locate. Once located, the school district should not move the charter school unnecessarily, meaning a reasonably required move is possible.
5. The ongoing operations and maintenance of facilities, furnishings, and equipment are the responsibility of the charter school. The school district is to perform work eligible for its deferred maintenance plan and to replace furnishings and equipment in accordance

with school district schedules and practices. A quick rule appears to be: What is the district doing with its own schools' buildings, furnishings, and equipment?

6. The charter school may be charged a fee for the facilities provided by the school district based on a formula fixed in the regulations. The charter school must also pay for over-allocated space, unless notice is given to the school district within the timetable set forth in the regulations.

C. Process. The regulations set forth a detailed timetable for various actions regarding facilities requests and take into account new as well as existing charters.

1. New Charters. A facilities request may be made and a new charter school is eligible for facilities if the charter petition is submitted for review by November 1 and granted, by someone, by March 15 of the fiscal year before the facilities are needed.

2. All Charters. Facilities requests must be made by November 1 and the school district is to object to any of the projections made within the facilities request by December 1. The charter school is to respond by January 2 to any school district objections to the projections in the request. By February 1, the school district is to make a preliminary facilities offer, including proposals on all the required elements specified in the regulations. The charter school is to respond to the initial district proposal by March 1 and the school district is to make a final proposal by April 1, with the charter school indicating by May 1 whether it intends to occupy the proposed facilities.

3. Disputes. If there are disputes over facilities, and if both sides agree, the CDE will appoint a mediator to facilitate resolution of the dispute. The process is set forth in the regulations and the cost is shared equally by the parties. Since the process is voluntary, court action is an alternative to mediation.

California Education Code Sections Applicable to Charter Schools

General Provisions 47600 - 47604.5

Establishment Of Charter Schools 47605 - 47608

Charter School Operation 47610 - 47615

Notice 47616.5 - 47616.7

University Charter Schools

 Article 1. UCLA Elementary Charter School 47620 - 47625

 Article 2. Employer 47626

Funding

 Article 1. General Provisions 47630 - 47632.5

 Article 2. Charter School Block Grant 47633 - 47635

 Article 3. Other Operational Funding Available to Charter Schools 47636 - 47638

 Article 4. Special Education Funding 47640 - 47647

 Article 5. Apportionment of Funds 47650 - 47652

 Article 6. Computations Affecting Sponsoring Local Educational Agencies 47660 - 47664

California Code of Regulations Sections Applicable to Charter Schools

Appeals on Charter Petitions That Have Been Denied 5 CCR 11967

Charter School Average Daily Attendance 5 CCR 11960

Charter School Facilities 5 CCR 11969.1 - 11969.9

Closure Procedures 5 CCR 11962, 11962.1

Definitions, including Satisfactory Progress and Private Schools 5 CCR 11965

Independent Study 5 CCR 11700, 11700.1, 11701, 11701.5, 11702, 11703, 11704, 11705

Numbering of Charter School Petitions 5 CCR 11968, 11969

Revocation Procedures 5 CCR 11968.5

SB740 Funding Determination 5 CCR 11963, 11963.1 - 11963.7

Statewide Benefit Petitions to the State Board of Education 5 CCR 11967.6, 11967.7, 11967.8

CHARTER SCHOOL BASICS - PLUS

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