



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
428 J Street • Suite 620 • Sacramento, CA 95814-2329
(916) 322-5660 • Fax (916) 322-0886

March 10, 2016

Jerome M. Behrens
Attorney at Law
Lozano Smith
7404 N. Spalding Avenue
Fresno, California 93720-3370

Re: Your Request for Advice
Our File No. 16-009

Dear Mr. Behrens:

This letter responds to your request for advice regarding the provisions of the Political Reform Act (the "Act").¹

QUESTION

Is the School of Unlimited Learning ("SOUL") Charter School a local public agency for the purposes of the Act and must the school file a conflict of interest code to which the board members must adhere?

CONCLUSION

Yes. Not only is SOUL a local public agency based on the plain language of the statute (Section 87300), it meets the factors the Commission has defined to assist in making that determination. SOUL must adopt a conflict of interest code or be listed in its chartering authority's code.

FACTS

You represent SOUL and its governing board, the Economic Opportunities Commission ("EOC"). SOUL is a charter school and is a program of the EOC. The EOC operates as a non-profit public benefit corporation with a board of directors made up of 24 members. The County of Fresno has contacted SOUL to request that it draft a conflict of interest code as the County believes that SOUL is a local government agency under the Act and must submit a conflict of interest code to the County. The EOC disagrees and you write to inquire whether the charter school qualifies as a public entity for purposes of the Act.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

In your analysis, you state that the Siegel test is not met and that by vetoing a bill that would explicitly apply the Act to charter schools, Governor Brown expressed a policy that the Act should not apply. The vetoed bill (AB 709, 2014) would have expressly subject charter schools to the following:

- The Brown Act or the Bagley-Keene Act, open meetings laws;
- The California Public Records Act;
- Section 1090, conflicts in public contracts; and
- The Political Reform Act.

AB 709 also contained this statement: “A meeting of the governing body of a charter school to discuss items related to the operation of the charter school shall not include discussion of any item regarding an activity of the governing body that is not related to the operation of the charter school.”

In the Governor’s veto, he wrote that he supports transparency, which the bill would have accomplished by explicitly applying the California Public Records Act and the Political Reform Act to charter schools. Under the Act, for example, board members would disclose their financial interests and be subject to the conflict of interest rules. But he also stated that the bill “goes further than simply addressing issues of potential conflicts of interest and goes too far in prescribing how these boards must operate.”² Despite AB 709, for the reasons set forth below, we find SOUL charter school is a local government agency subject to the Act.

ANALYSIS

A “public official” means “every member, officer, employee or consultant of a state or local government agency . . .” (Section 82048.) Public officials are subject to the conflict provisions of the Act. (Section 87100.) Under the Act, a “local government agency” includes “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.” (Section 82041.) Every agency³ must adopt of conflict of interest code. (Section 87300.) The question here is whether the SOUL charter school is a local government agency under the Act.

When passing the Charter Schools Act of 1992, the Legislature stated that its intent was “to provide opportunities . . . to establish and maintain schools that operate independently from the existing school district structure . . .” (Education Code Section 47601.) When read with the Charter Schools Act in its entirety, there is no indication that the Legislature intended the charter schools to be separate, non-public entities, but rather, that the charter schools’ operations would be independent within the existing school district. In Education Code Section 47601, subdivision (g), for example, the Legislature stated that it views charter schools as a method to “provide vigorous competition within the public school system . . .” The implication here is that the charter schools are brought into the existing school system, rather than creating an entirely new structure.

² The author who introduced a similar bill in 2015 has ordered the bill to the inactive file. (AB 913.)

³ The Act defines agency as “any state agency or local government agency.” (Section 82003.)

Similarly, the Legislature has explicitly stated that charter schools are considered public schools for the purposes of the California Constitution, Articles 9, Section 8 (no public funds for “religious curriculum sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools . . .”), and Article 16, Section 8 and 8.5 (public funds allocated for public schools). (See Education Code Section 47612, subds. (a) and (c).) As above, though the charter schools may operate independently for purposes of their curriculum, for example, they are not entities that are wholly independent. Additionally, charter schools receive public funding per student similar to that which is allotted to traditional public schools. (Education Code Section 47612.)

The Charter Schools Act defines charter schools to be part of their chartering district as well as deemed a “district:”

(a) A charter school shall be deemed to be under the exclusive control of the officers of the public schools for purposes of Section 8 of Article IX of the California Constitution, with regard to the appropriation of public moneys to be apportioned to any charter school, including, but not necessarily limited to, appropriations made for purposes of this chapter.

...

(c)) A charter school shall be deemed to be a “school district” for purposes of Article 1 (commencing with Section 14000) of Chapter 1 of Part 9 of Division 1 of Title 1, Section 41301, Section 41302.5, Article 10 (commencing with Section 41850) of Chapter 5 of Part 24 of Division 3, Section 47638, and Sections 8 and 8.5 of Article XVI of the California Constitution.

(Education Code Section 47612.) These provisions alone suggest that charter schools fit squarely in the Act’s definition of “local government agency” under Section 82041 (a local government agency includes a “district of any kind including [a] school district”). Even so, the Commission has adopted, through a Commission Opinion, facts to assist an entity in determining if it fits within the definition. (*In re Seigel* (1977) 3 FPPC Ops 62.) The criteria used in Siegel include:

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

As we have previously found, because of the responses to the factors above, charter schools are local government agencies under the Act. (See, e.g., *Walsh* Advice Letter, No. A-98-234.) We apply your facts to each of these four factors:

(1) Whether the impetus for formation of the corporation originated with a government agency.

In your request, you point out that it was a non-profit corporation, not a government agency that formed SOUL. While this is true for the individual charter school (as it is for a majority of charter schools), the non-profit would not be able to start a charter school but for the Legislature's passing the Charter School's Act, and the school's chartering authority granting the charter. EOC applied with the Fresno Unified School District for the authority to start SOUL. That permission must be renewed periodically.

(2) Whether the corporation is substantially funded by, or its primary source of funds is, a government agency.

The Charter Schools Act provides that the Superintendent of Public Instruction will make specific enumerated apportionments from the State School Fund to those schools organized under the Charter Schools Act. (Education Code Section 47612.) Furthermore, charter schools may participate in the State Teacher's Retirement System. (Education Code Section 47611.) In addition, the California Legislature enacted Education Code section 41365 in 1996 to provide for the Charter School Revolving Loan Fund. School districts may borrow money from this fund, with the approval of the Superintendent of Public Instruction, for use by its charter schools for start-up costs. These provisions are sufficient to conclude that charter schools organized under the Charter Schools Act are "substantially funded" by the State of California. Moreover, SOUL's charter petition states, "The charter school receives funding directly from the Department of Education as specified by Education Code Section 47651" and "... the fiscal impact of SOUL Charter School on Fresno Unified School District would be \$879,310."⁴

(3) Whether one of the principal purposes for which the corporation is formed is to provide services or undertake obligations which public agencies are legally authorized to perform and which, in fact, they traditionally have performed.

Education Code section 47601 states that charter schools are formed to accomplish all of the following:

- “(a) Improve pupil learning.
- (b) Increase learning opportunities for all pupils, with special emphasis on expanded learning experiences for pupils who are identified as academically low achieving.
- (c) Encourage the use of different and innovative teaching methods.
- (d) Create new professional opportunities for teachers, including the opportunity to be responsible for the learning program at the school site.
- (e) Provide parents and pupils with expanded choices in the types of educational opportunities that are available within the public school system.

⁴ See SOUL's Charter Petition Renewal at: <https://www.fresnou.org/sites/board/Documents/20130306-Backup-Material-2-of-2.pdf>.

(f) Hold the schools established under this part accountable for meeting measurable pupil outcomes, and provide the schools with a method to change from rule-based to performance-based accountability systems.”

These functions are traditionally performed by the public school system. The state closely monitors and regulates the authority of the charter schools to take over these functions. The following are a few examples. First, only a certain number of charter schools may operate within the state and only a certain number may operate within any particular district during any single school year. (Education Code section 47602.) Charter schools must meet the statewide performance standards and conduct the pupil assessments required pursuant to Education Code section 60602.5 (Education Code section 47605, subd. (c).) The school district or county board of education that granted the charter can revoke it. (Section 47607.) The State Department of Education reviews the educational effectiveness of the charter school approach. (Education Code section 47616.)

There is no mistaking that charter schools fulfill a function that public agencies are authorized to perform, traditionally have performed, and indeed continue to perform.

(4) *Whether the corporation is treated as a public entity by other statutory provisions.*

A charter school is deemed to be a “school district” for purposes of applying certain sections of the California Constitution. (Education Code Section 47612, subd. (c).) Charter Schools must meet statewide performance standards and conduct pupil assessments pursuant to the provisions of the Education Code. (Education Code Section 47605, subd. (c).) These two sections are sufficient to conclude that all charter schools are treated as public entities by other statutory provisions, and therefore should appropriately be subject to the Act. Additionally, SOUL’s charter petition states that as to its governing Board, EOC: “All meetings are conducted in accordance with and pursuant to the Ralph M. Brown Act and other applicable open meeting laws.”⁵

Your facts describe those laws courts have found do not apply to charter schools generally. The fact that courts have found that the Charter Schools Act “assigns no similar sovereign significance to charter schools” as it does to public schools, is inapposite here. (*Wells v. One2One Learning Foundation* (2006), 39 Cal.4th 1164, 1241.) A local government agency, for purposes of the Act, could be “a 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.” (Section 87300.) The Act does not require the same degree of “sovereign significance” as do, for example, the Tort Claims Act or the False Claims Act. As such, we find this factor is also met.

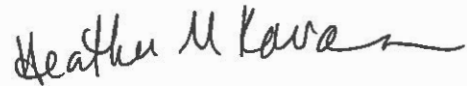
Additionally, we cannot agree that the Governor did not support AB 709 for the reasons you presume, especially considering his commitment to transparency. Additionally, a veto letter does not set or overturn current law, and we are bound to apply the law as currently stated.

⁵ See SOUL’s Charter Petition, at p. 59 (Footnote 3, *supra*.)

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Hyla P. Wagner
General Counsel

A handwritten signature in cursive script that reads "Heather M. Rowan".

By: Heather M. Rowan
Counsel, Legal Division

HMR:jgl