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LEGAL UPDATE

October 31, 2017

To: Superintendents, Member School Districts (K-12)
**From: Jennifer E. Nix *JEN*
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**Subject: Authorizer’s Role in Ensuring Charter School Admissions
and Enrollment Processes and Procedures are Legally Compliant
Memo No. 37-2017**

Our office frequently receives questions regarding charter school admissions and enrollment processes and procedures. This Legal Update reviews the law governing charter school admissions and details the responsibilities of the authorizing entity to ensure compliance with relevant laws.

Are charter schools required to enroll all students who request enrollment?

Yes, subject to capacity considerations.

All charter schools in California are public schools, regardless of governance model or funding model. Like other public schools, charter schools cannot select which students to enroll and must enroll all students who seek admission to the charter school. The California Charter Schools Act states that: “**A charter school shall admit all pupils who wish to attend the charter school.**”¹ Accordingly, unless a charter school is at capacity, it must admit all students who apply, just as a traditional public school cannot deny admission to a student within its residence area.

Charter schools risk potential liability when they refuse to admit a student for any reason other than capacity, and authorizers risk potential liability if they knowingly permit charter schools to violate federal and state laws.

Can a charter school deny enrollment based on capacity considerations?

Yes.

¹ Education Code § 47605(d)(2)(A) (as amended Oct. 13, 2017).



Unlike a traditional public school, a charter school does not have to admit additional students if the grade or school in which admission is desired is at capacity.² If applications for admission exceed the targeted enrollment for the school or grade, the law requires the charter school to initiate a “public random drawing,” also known as a lottery.³ Preference must be provided in any lottery to:

- Students currently attending the charter school;
- Students whose parents reside in the district in which the school is authorized; and
- If the charter school is converted from an existing public school, students who reside within the former attendance area of the charter school.⁴

In some situations, charter schools also are permitted or required to provide preference to students receiving free or reduced price meals.⁵ Finally, individual charter schools may provide other preferences in a lottery “including, but not limited to, siblings of pupils admitted or attending the charter school and children of the charter school’s teachers, staff, and founders identified in the initial charter.”⁶

Effective October 13, 2017, charter schools should include in their petitions the priority order for any preference in admissions. The priority orders must be determined in accordance with the following:

- Each type of preference shall be approved by the chartering authority at a public hearing.
- Preferences shall be consistent with federal law, the California Constitution, and Education Code section 200.
- Preferences shall not result in limiting enrollment access for pupils with disabilities, academically low-achieving pupils, English learners, neglected or delinquent pupils, homeless pupils, or pupils who are economically disadvantaged, as determined by eligibility for any free or reduced-price meal program, foster youth, or pupils based on nationality, race, ethnicity, or sexual orientation.⁷

Additionally, “preferences shall not require mandatory parental volunteer hours as a criterion for admission or continued enrollment.”⁸

² A charter school should determine enrollment capacity prior to accepting applications for the school year at issue.

³ Education Code § 47605(d)(2)(B) (as amended Oct. 13, 2017).

⁴ Education Code § 47605(d). The law does not define what is meant by “preference,” and leaves definition of that term to each charter school. Legislative history indicates that students provided a “preference” are exempted from inclusion in the lottery system. Information on lottery preferences should be contained in the charter school’s petition.

⁵ Education Code § 47605.3; 47614.5.

⁶ Education Code § 47605(d)(2)(B) (as amended Oct. 13, 2017). It is recommended that an authorizer that is reviewing a petition in which the charter school has relied on any admission preference not specifically authorized by law have legal counsel review the petition, as many preferences could have the effect of illegally discriminating against a protected class.

⁷ Education Code § 47605(d)(2)(B).

⁸ *Id.*



Must a charter school’s admission procedures and policies be in the charter school’s petition?

Yes.

Pursuant to changes made by Assembly Bill 1360, effective October 13, 2017, a charter school’s petition must include admissions policies and procedures.⁹ Additionally, any priority order for preferences in admission must be in a charter school’s petition and have been approved by the authorizer at a public hearing.¹⁰

Authorizers should expect current charter schools to seek amendment of their current approved charter to cover admissions policies and procedures and/or priority order prior to the application cycle for the 2018-2019 school year if the charter school’s current petition does not already cover those items. These amendments would be considered “material,” and must be approved by the authorizer’s governing board, subject to the standards and criteria contained in section 47607 of the Education Code.

Can a charter school refuse to admit a student with a disability or an English Learner based on an inability to meet the student’s needs?

No.

Charter schools are required to admit all students who wish to enroll, regardless of individual need, cost to educate, or assumed suitability of the charter school’s program. Various federal and state laws prohibit discrimination based on protected classes of students. All students in California, including those seeking admission to a charter school, are protected from discrimination on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the California Penal Code, including immigration status.¹¹ Accordingly, a charter school cannot create an admissions requirement or impose another barrier to enrollment that effectively denies admission to any protected class of student.

The U.S. Department of Education, Office for Civil Rights (“OCR”), addressed recruitment, admission, and enrollment of students with disabilities in charter schools in its December 28, 2016, guidance document titled *Frequently Asked Questions About the Rights of Students with Disabilities in Public Charter Schools under Section 504 of the Rehabilitation Act of 1973*.

In its *FAQ*, the OCR states that Section 504 prevents public charter schools from discriminating on the basis of disability in recruitment of prospective students. Charter schools “must ensure that recruitment materials include a notice that the recipient does not discriminate on the basis of disability in violation of Section 504 in, among other things, the admission and treatment of

⁹ Education Code § 47605(b)(5)(H).

¹⁰ Education Code § 47605(d)(2)(B).

¹¹ Education Code § 220.

students.”¹² The OCR explained that a charter school’s materials “must not indicate or signal that a charter school refuses admission to any applicant with a disability, or applicants with a particular type of disability, or that it otherwise discriminates against persons with disabilities.”¹³ Some examples of such discriminatory statements would be:

- “Students with an intellectual disability will not be accepted.” (Discrimination based directly on disability.)
- “All students are required to be present at school at least 170 out of the 180 school days per year without exception.” (Discrimination based indirectly on disability.)
- “Students with a current or previous IEP or Section 504 plan will not be admitted.” Or “Students who require a sign language interpreter will not be admitted.” (Discrimination based on noncompliance with an obligation that is required of the recipient under federal law.)¹⁴

Applications for enrollment must be accessible and usable by applicants with disabilities.¹⁵ In so stating, the OCR mentioned that Title VI of the Civil Rights Act of 1964 also would require charter schools to provide the language assistance necessary to ensure meaningful communication with limited English proficient parents (such as translation and interpretation) and to communicate information provided to other parents in a language that limited English proficient parents can understand.¹⁶

Regarding admission decisions, the OCR made clear that a charter school cannot have a policy or practice of excluding students with disabilities, and that a charter school cannot have a policy or practice that excludes a student because the student needs special education or related aids and services to ensure a free appropriate public education (“FAPE”).¹⁷ This is the case even if the charter school does not otherwise offer the program or related service that the student needs, regardless of whether the charter school does not want to incur the cost of providing the program or related service.¹⁸ A charter school cannot admit a non-disabled student over a disabled student because of the costs of administering the disabled student’s educational program.

The OCR has not addressed the rights of other classes of protected students in charter school admissions and enrollment, but it is likely that the OCR would reach similar conclusions for other protected classes based on the other laws it administers, including race, color, and national

¹² U.S. Department of Education, Office for Civil Rights, *Frequently Asked Questions About the Rights of Students with Disabilities in Public Charter Schools under Section 504 of the Rehabilitation Act of 1973* at 10.

¹³ *Id.* at 11.

¹⁴ *Id.*

¹⁵ *Id.* at 12.

¹⁶ *Id.*

¹⁷ *Id.* at 13-14.

¹⁸ *Id.* This is true even if the student requires a program not offered by the charter school. Sometimes, a charter school will have to accept a student for admission and then place the student in a program operated by another local educational agency or a nonpublic school in order to ensure that the student receives a FAPE. See, e.g., *Kern Cnty. Superintendent of Schs.*, OAH Case No. 2016040211 (Aug. 8, 2016) (finding that the charter school, which operated only an independent study program, was required to fund a residential treatment center program for an enrolled student who required such a placement for FAPE).

origin (Title VI of the Civil Rights Act of 1964)¹⁹, sex and sexual orientation (Title IX of the Education Amendments Act of 1972), and handicap (Title II of the Americans with Disabilities Act).

Can a charter school refuse to admit a student based on other concerns.

No.

The law requires charter schools to accept all students who wish to enroll until such time as the grade or school is at capacity. This means that a charter school cannot deny enrollment based upon a student's past attendance, behavior, academic performance, and/or athletic performance.

Charter schools should be clear on their admissions paperwork that they will accept and serve all students, and should avoid using admission paperwork that asks for such information.

Can a charter school ask if a prospective student has a disability and/or request a copy of the prospective student's IEP or Section 504 plan?

Generally, no.

The OCR has stated: "During the application and admission process and before enrollment in the charter school, it is generally not permissible under Section 504 to ask a prospective student whether the student has a disability."²⁰ The OCR was clear that "there is generally no legitimate reason to ask about or consider a student's disability in the process of initially accepting or rejecting applications or in admitting students to a charter school."²¹ Impermissible pre-enrollment inquiries include:

- A question about disability on an application;
- A question about whether the student has an IEP or a 504 plan;
- A question about whether the student requires related services; and/or
- Informal pre-enrollment inquiries, such as an inquiry about disability, IEPs, or Section 504 plans by charter school staff in formal interviews or informal conversations with prospective students or their parents.²²

The exceptions to this rule are if: (1) the information is used to increase the chances that the student gains admission to the charter school, usually as part of a remedial plan required by the OCR; or (2) the charter school is chartered to serve the educational needs of students with a specific disability and the questions establish whether the student has that specific disability.²³

¹⁹ The OCR interprets Title VI to protect against discrimination against English Learners. Accordingly, it is important to ensure that admissions and enrollment materials are accessible to students and families whose native language is not English.

²⁰ U.S. Department of Education, Office for Civil Rights, *Frequently Asked Questions About the Rights of Students with Disabilities in Public Charter Schools under Section 504 of the Rehabilitation Act of 1973* at 16.

²¹ *Id.* at 21.

²² *Id.*

²³ *Id.* at 21-22.



Upon enrollment, a charter school can ask a student whether he/she has a disability in order to ensure that it provides the student with a FAPE.²⁴

Can a charter school “counsel out” a prospective or enrolled student based on his or her disability or related needs?

No.

A charter school cannot try to influence a prospective or enrolled student with a disability to not apply to, not enroll in, or to disenroll from a charter school on the basis of disability.²⁵

Can a charter school have admissions requirements?

In some instances, neutral admissions requirements could be acceptable.

A charter school is permitted, with approval from its authorizer, to establish policies and practices that enable the school to carry out its unique educational mission, which could include outreach and marketing strategies, an application process, admissions requirements, and lottery preferences. Any admissions requirements must be contained in the charter school’s initial petition, and an authorizer can deny a charter school’s petition if it determines that any admissions requirements are illegal.²⁶

The OCR has stated that it could be a required reasonable modification to waive particular admissions criteria in order to avoid disability discrimination.²⁷

However, charter schools cannot use a student’s performance on entrance essays or interviews to determine which students to enroll. Admission requirements would be for informational purposes only, not to influence admission status.

Authorizers should be aware that admission requirements such as essays or interviews could potentially discourage applications from students in protected classes, which could violate anti-discrimination laws.

What can a charter school require of families upon enrollment?

Only the same basic information required of students in all public schools. Charter schools cannot require familial involvement, donations, and/or family contracts as a condition of enrollment.

Students in California are guaranteed a free public education, and no pupil fees may be charged to a student enrolled in a public school, including charter schools.²⁸ Charter schools cannot

²⁴ *Id.* at 21.

²⁵ *Id.* at 23.

²⁶ Education Code § 47605(b)(5)(H).

²⁷ U.S. Department of Education, Office for Civil Rights, *Frequently Asked Questions About the Rights of Students with Disabilities in Public Charter Schools under Section 504 of the Rehabilitation Act of 1973* at 19.



condition enrollment on requiring parents to make donations or to do work, or “volunteer” at the school site.²⁹ Effective October 12, 2017, the law reflects that that charter schools may not require parental involvement as a condition of acceptance or enrollment at the charter school, and that charter schools must affirmatively notify parents of that fact:

A charter school may encourage parental involvement, but shall notify the parents and guardians of applicant pupils and currently enrolled pupils that parental involvement is not a requirement for acceptance to, or continued enrollment at, the charter school.³⁰

Some charter schools require parents to ensure that their children eat specific meals, limit screentime, and/or wear specific types of clothing (not uniforms). It is likely that a court would consider such restrictions to be an impermissible fee. Moreover, it is likely that a charter school with enrollment requirements that required families to behave in certain ways in the home setting would discourage enrollment of students who are foster youth, English Learners, and/or low-income.

A charter school can solicit *voluntary* donations of funds or property, and may request *voluntary* participation in fundraising activities.³¹

Charter schools, like all public schools, cannot require a student to provide a social security number or a birth certificate in order to enroll.³² Charter schools should inform parents that they can provide alternative forms of documentation to establish date of birth.

Finally, charter schools cannot require students and/or parents/guardians to sign a “contract” in order to enroll.

What are the responsibilities of a charter school authorizer in ensuring that the charter school complies with the law related to admissions and enrollment?

The governing board of an authorizing entity is required to monitor, *inter alia*, that a charter school is implementing the provisions of its charter, is obeying all applicable federal, state, and local laws, and is not engaging in any violations that would subject the charter school to possible revocation under section 47607(b) of the Education Code.

Accordingly, an authorizing entity should be reviewing practices and policies of its charter schools in a manner that effectively monitors for access and equity, which would include a review of admissions and enrollment policy and procedures and the forms used by the charter

²⁸ Cal. Const. Art. IX, § 5; Cal. Educ. Code § 49011(b)(4).

²⁹ Education Code § 49011(b)(4); California Department of Education, Fiscal Management Advisory 15-01 (Jan. 20, 2015).

³⁰ Education Code § 47605(n) (as amended Oct. 13, 2017).

³¹ Education Code § 49011(c).

³² U.S. Department of Justice, U.S. Department of Education, *Fact Sheet: Information on the Rights of All Children to Enroll in Schools*. Additionally, Assembly Bill 699, signed into law by Governor Brown on October 5, 2017, prohibits school officials and employees of a local educational agency from collecting information or documents regarding citizenship or immigration status of pupils or their family members, except as required by state or federal law or as required to administer a state or federally supported educational program. Education Code § 234.7.



school. Authorizing boards can request student enrollment spreadsheets at the beginning, middle, and end of the school year. This data allows authorizers to evaluate whether each of their charter schools serves a student population that is comparable to that of district schools, county office of education schools, or the community in which each charter is located. Reviewing data throughout the school year ensures that charter schools maintain consistent attendance and do not “counsel out” specific subgroups of students during the course of the school year. Periodic reviews of the charter school’s website can help uncover potentially illegal practices that may be easy to correct.

Additionally, an authorizing board should review admissions and enrollment policies and forms when reviewing initial and renewal petitions. Each charter school petition is required to have a reasonably comprehensive description of admission policies and procedures; the means by which the school will achieve a racial and ethnic balance among its students that is reflective of the general population residing within the territorial jurisdiction of the school district to which the charter petition is submitted; description of any specific admissions requirements; method used to conduct a lottery, if necessary; description of how the admissions requirements are consistent with nondiscrimination laws; and assurances that students requiring special education will be admitted. When reviewing petitions, authorizing boards should ensure that the charter schools are making clear commitments to nondiscriminatory recruitment practices and admission requirements.

Finally, authorizers should take seriously and fully investigate any complaints against a charter school. Complaints about a charter school should first be addressed at the school site.³³ If the problem is not resolved, the charter school’s governing board and authorizing entity should be contacted.³⁴ If the charter school receives federal funds, it is subject to the provisions of the Uniform Complaint Procedure.³⁵ Complaints can also be filed directly with the county office of education where the charter school is located, and the county superintendent may monitor or conduct an investigation into the operations of the charter school.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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³³ California Department of Education, *Charter Schools FAQ Section 1* (May 8, 2017) <https://www.cde.ca.gov/sp/cs/re/qandasec1mar04.asp>.

³⁴ *Id.*

³⁵ *Id.*