

Notes

California Charter School Teachers: Flexibility in the Classroom, Vulnerability as an Employee

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Since the passage of the Charter Schools Act of 1992, charter schools have been hailed for achieving better results for students compared to traditional public schools in California. In particular, charter schools are touted for their ability to serve the needs of low-income students in urban areas. Proponents also assert that charter schools present teachers with the opportunity to work in a more flexible environment, where they allegedly enjoy greater flexibility and control over their instructional and curricular decisions, giving them the ability to innovate and experiment with new teaching pedagogy to meet the unique needs of their students. However, there is little discussion on the drawbacks that teachers face while teaching in this “increased flexibility” employment regime. Specifically, charter school teachers are deprived of statutory protections against arbitrary disciplinary decisions.

This Note explores various legal routes that charter school teachers may navigate to protect themselves from arbitrary disciplinary and termination decisions. In particular, this Note examines various statutory and constitutional sources of protection, at both the state and federal level, and concludes that California due process provides the most promising opportunity for attaining protection from arbitrary disciplinary decisions. However, several unresolved ambiguities within California due process jurisprudence undermine the prospect of its ability to effectively shield teachers from uninformed or erroneous disciplinary decisions.

This Note’s conclusion provides for an alternative legal framework that would better balance charter school teachers’ need to be respected and free from completely arbitrary disciplinary actions, with the charter schools’ need to flexibly and efficiently make staffing decisions. Indeed, charter schools must be able to swiftly remove teachers who cannot meet the needs of their students due to their incompetence, unprofessionalism, or other faults. But at the same time, as professional educators and individuals as invested in their students as their own careers, charter school teachers should not be subject to the unfettered whim of their administrators.

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INTRODUCTION

Since the passage of the Charter Schools Act of 1992, charter schools have been hailed for achieving better results for students compared to traditional public schools in California.¹ In particular, charter schools are touted for their ability to serve the needs of low-

1. CAL. EDUC. CODE §§ 47600–04.5 (West 2016); *Why Charters Get Results*, CAL. CHARTER SCHS. ASS'N, <http://www.calcharters.org/understanding/results/> (last visited Aug. 5, 2016).

income students in urban areas.² Proponents claim that the success enjoyed by charter schools is attributable to a variety of factors, including: (1) greater flexibility in curriculum, budget, and staffing; (2) greater ability to implement change to better meet students' needs; (3) increased accountability as they are subject to review and renewal every five years; (4) engaged teachers who are empowered to make important decisions and experiment with new educational tactics; and (5) parents who are invested in working with teachers to advance their children's progress.³

In addition to being educators, charter school teachers are also employees. When the discussion focuses on charter school teachers as employees rather than educators, the conversation then hones in on how teachers are attracted to charter schools because they “want[] the freedom to make their own instructional and curricular decisions, and an environment that foster[s] professional opportunities for collaboration with like-minded colleagues.”⁴ Though some drawbacks of teaching at charter schools are acknowledged, such as longer hours, “less job security,” and high teacher burnout and turnover rates, these discussions largely focus on teachers as educators, as opposed to teachers as employees.⁵ Discussions related to the employment practices in charter schools are centered around how charter school administrators are not bound by the same bureaucratic red tape as school district administrators, allowing them greater control and flexibility in hiring practices and professional development in order to ensure the best outcomes for students.⁶ However, little attention is given to the other side of the coin: the tradeoffs that charter school teachers must bear as a result of this “increased flexibility” employment regime.

This Note explores the various legal routes that charter school teachers may navigate to protect themselves from arbitrary disciplinary and termination decisions. Part I provides a general overview of the legal framework shaping the charter school system in California, and discusses

2. *What Should Parents Know About Charter Schools?*, NPR (Sept. 15, 2006, 9:00 AM), <http://www.npr.org/templates/story/story.php?storyId=6081152> (last visited Aug. 5, 2016).

3. *Why Charters Get Results*, *supra* note 1; see CTR. FOR RESEARCH ON EDUC. OUTCOMES, CHARTER SCHOOL PERFORMANCE IN CALIFORNIA 40 (2014).

4. Courtney L. Malloy & Priscilla Wohlstetter, *Working Conditions in Charter Schools: What's the Appeal for Teachers?*, 35 EDUC. & URB. SOC'Y 219, 227–29 (2003); see *In Their Own Words: Teachers on Working at a Charter*, CAL. CHARTER SCHOOLS ASS'N, <http://www.calcharters.org/understanding/working/> (last visited Aug. 5, 2016).

5. Malloy & Wohlstetter, *supra* note 4, at 225–26; Brian Childs, *Charter Schools v. Public Schools: The Right Choice for Teachers*, CERTIFICATION MAP (Oct. 23, 2012), <http://certificationmap.com/charter-schools-vs-public-schools/>; Adolpho Buzman-Lopez, *Study: Teacher Turnover Much Higher at LA Charters Than Public Schools*, 89,3 KPCC (July 19, 2011), <http://www.scpr.org/news/2011/07/19/27792/new-study-finds-teacher-turnover-much-higher-chart/> (last visited Aug. 5, 2016).

6. Ron Zimmer & Richard Buddin, Occasional Paper, *Making Sense of Charter Schools: Evidence from California*, RAND EDUC. (Rand Corp.) 2006, at 4.

the California statutory protections that charter school teachers may utilize to challenge arbitrary disciplinary decisions. Part II discusses federal statutory and due process protections that charter school teachers may utilize as public employees. Part III questions whether California's due process protections may offer charter school teachers any safeguards from arbitrary disciplinary decisions. Finally, Part IV recommends an alternative legal framework that better balances the dignity of charter school teachers and their needs, with the goals that the charter school movement aims to accomplish for the students and families in California.

I. CALIFORNIA STATUTORY PROTECTIONS

A. OVERVIEW OF CHARTER SCHOOL REGIME IN CALIFORNIA

The California Charter Schools Act of 1992 created California's charter school system in order to "provide opportunities for teachers, parents, pupils, and community members to establish and maintain schools that operate independently from the existing school structure," in order to accomplish a variety of student and family-oriented goals.⁷ Namely, the California Legislature established charter schools as an alternative, autonomous regime of public schools designed to accomplish seven goals: (1) improve student learning; (2) increase student learning opportunities for low-achieving students; (3) encourage the use and development of different, innovative teaching methods; (4) create new professional opportunities for teachers with increased responsibility over learning programs; (5) provide parents and students with more choice as to the educational opportunities available in the public school system; (6) hold the schools accountable for meeting "measurable pupil outcomes"; and (7) provide "vigorous competition in the public school system to stimulate continual improvements in all public schools."⁸

To give charter schools the broad flexibility necessary to accomplish their goals, the legislature granted charter schools a "mega-waiver" from nearly all of the statutes in the California Education Code ("Education Code") governing district schools.⁹ Section 47610 of the Education Code provides, "[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 . . . [a]s specified in Section 47611 [and] . . . Section 41365[,] [as well as] [a]ll laws establishing minimum age for public school attendance.*"¹⁰ This single sentence in the Education

7. CAL. EDUC. CODE §§ 47600-01 (West 2016).

8. *Id.* § 47601.

9. *See id.* § 47610; *see also* *Human Resources and Employment*, CAL. CHARTER SCH. ASS'N, <http://www.calcharters.org/operating/human-resources/> (last visited Aug. 5, 2016).

10. EDUC. §§ 47610-11 (outlining a charter school's obligations should it choose to offer its teachers a retirement plan under the State Teacher's Retirement system. Section 41635 establishes the

Code releases charter schools from the “red tape” allegedly burdening normal school districts, giving charter schools the requisite autonomy and flexibility to achieve their goals in exchange for direct accountability for measured academic results.¹¹ However, charter schools are still required to comply with several other laws that apply to district schools, such as provisions in the federal and state constitution, as well as federal laws governing equal rights, access, and discrimination.¹² These other bodies of law will be discussed later in Parts II and III of this Note.

Though the “mega-waiver” provides charter schools with a wealth of freedom and autonomy, this provision also renders these schools ineligible for the statutory protections that district teachers receive. Namely, charter school teachers are not subject to the teacher tenure laws that protect district teachers’ job security.¹³ California public school teachers are initially hired on a probationary basis and are eligible to become “permanent” employees if they are employed consecutively for three years.¹⁴ Permanent employees cannot be dismissed except for the specific, relatively extreme causes enumerated by section 44932 of the Education Code.¹⁵

Charter School Revolving Loan Fund and its administration by the California School Finance Authority).

11. See Zimmer & Buddin, *supra* note 6, at 1.

12. *Frequently Asked Questions*, NAT’L CHARTER SCHOOL RES. CTR., <http://www.charterschoolcenter.org/page/frequently-asked-questions> (last visited Aug. 5, 2016).

13. See *id.*

14. EDUC. § 44929.23.

15. *Id.* § 44932. That section of the Education Code provides:

A permanent employee *shall not* be dismissed except for one or more of the following causes:

- (1) Immoral conduct including, but not limited to, egregious misconduct. For the purposes of this chapter, “egregious misconduct” is defined exclusively as immoral conduct that is the basis for an offense described in Section 44010 or 44011 of this code, or in Sections 11165.2 to 11165.6, inclusive, of the Penal Code.
- (2) Unprofessional conduct.
- (3) Commission, aiding, or advocating the commission of acts of criminal syndicalism, as prohibited by Chapter 188 of the Statutes of 1919, or in any amendment to that chapter.
- (4) Dishonesty.
- (5) Unsatisfactory performance.
- (6) Evident unfitness for service.
- (7) Physical or mental condition unfitting him or her to instruct or associate with children.
- (8) Persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the state board or by the governing board of the school district employing him or her.
- (9) Conviction of a felony or of any crime involving moral turpitude.
- (10) Violation of Section 51530 or conduct specified in Section 1028 of the Government Code, added by Chapter 1418 of the Statutes of 1947.
- (11) Alcoholism or other drug abuse that makes the employee unfit to instruct or associate with children.

In addition to enumerating the substantive grounds upon which a tenured teacher may be dismissed, the Education Code also establishes a complicated set of procedural requirements that must be satisfied in order to dismiss or discipline a teacher.¹⁶ For example, to initiate the dismissal or suspension process, formal written charges that specify the “behavior and the acts or omissions constituting the charge[,] . . . the statutes and rules that the employee is alleged to have violated, and . . . set forth the facts relevant to each charge” must be filed with the governing board of the school district.¹⁷ Based on the written charges, the school board may, upon a majority vote, give the teacher notice that it intends to dismiss or suspend him or her at the expiration of thirty days from the date of service of the notice, unless the teacher demands a hearing to dispute the charges.¹⁸ However, the school board may only initiate dismissal or suspension proceedings in this manner if a collective bargaining agreement has not been adopted pursuant to section 3543.2(b) of the Government Code.¹⁹ Taken together, these rules make the process of suspending or dismissing a teacher cumbersome, costly, and difficult, thus giving tenured teachers a significant degree of protection from not only arbitrary disciplinary decisions, but possibly meritorious ones as well.²⁰

While there is debate about whether the protections offered to district teachers are excessive and possibly detrimental to the profession and students,²¹ none of these statutory provisions apply to charter school teachers.²² As discussed earlier, charter school teachers have been intentionally and explicitly carved out of these statutory protections in order to give charter schools more flexibility to make staff-related decisions.²³ However, as a result, charter school teachers are deprived of the statutory protections that district teachers enjoy, and are therefore

16. *See id.* § 44934.

17. *Id.* § 44934(b)–(c).

18. *Id.* § 44934(b).

19. *Id.*

20. A challenge to the constitutionality of the teacher tenure laws in California is being litigated by a group of nine California students in *Vergara v. California*, No. BC484642, 2014 WL 6478415 (Cal. Super. 2014). A California superior court judge has held that laws governing the hiring and firing of district school teachers served no compelling purpose, and have led to an unfair, nonsensical system which drives new, effective teachers from the classroom prematurely while allowing incompetent senior teachers to remain in the classroom. California’s teachers unions filed an appeal on September 3, 2014. The California Court of Appeals reversed the trial court’s decision in April 2016. Jennifer Medina & Motoko Rich, *California Appeals Court Reverses Decision to Overturn Teacher Tenure Rules*, HUFFINGTON POST (Apr. 14, 2016), <http://www.nytimes.com/2016/04/15/us/californiaappealscourt-reverses-decision-to-overturn-teacher-tenure-rules.html>.

21. *See Teacher Tenure Pros and Cons*, PROCON.ORG, http://teachertenure.procon.org/#pro_con (last visited Aug. 5, 2016).

22. *See* EDUC. § 47610.

23. *See Human Resources and Employment*, *supra* note 9.

highly vulnerable to a mass of adverse employment decisions that district teachers do not experience by virtue of sections 44934 and 44932 of the Education Code. The question then remains as to whether charter school teachers have any protections at all under California statutes—or instead, under this framework, are merely subject to the whim of their administrators, left to constantly question their job security and their ability to make a stable living in a challenging profession.

B. THE EDUCATIONAL EMPLOYMENT RELATIONS ACT

Although the “mega-waiver” carves charter schools out of the vast majority of California laws governing school districts,²⁴ some hope still remains for charter school teachers in California’s statutory framework. Charter schools still fall under the purview of the Educational Employment Relations Act, also known as the “Rodda Act,” as established by section 47611.5(a) of the Education Code.²⁵ The Rodda Act recognizes that all public school employees have a right to unionize and engage in collective bargaining.²⁶ Specifically, the Rodda Act acknowledges the right of all public school employees to join organizations of their choice, to be represented by such organizations in their professional and employment relationships with their public school employers, and to have a voice in the formulation of educational policy.²⁷

In accordance with the Rodda Act, the California Charter Schools Act requires that the charters of such schools contain a declaration asserting whether “the charter school shall be deemed the exclusive public school employer of the employees at the charter school for the purposes of section 3540.1 of the Government Code.”²⁸ However, regardless of whether the charter elects the charter school or the district to be the exclusive public employer, the charter school is still subject to the obligations of a “Public School Employer” under the Rodda Act.²⁹ For example, charter schools have a duty to meet and negotiate with representatives of employee organizations regarding matters within the scope of the representation.³⁰ They also have an obligation not to interfere with employee selection or formation of an exclusive representative,³¹ as well as a duty not to retaliate against employees for exercising their rights under the Educational Employment Relations

24. See EDUC. § 47610.

25. *Id.* § 47611.5(a).

26. See CAL. GOV’T CODE § 3540 (West 2016).

27. See *id.* §§ 3540, 3543.

28. John R. Yeh, *Charter Schools and Collective Bargaining: The Unholy Alliance*, CAL. PUB. EMP. REL. J. ONLINE, <http://cper.berkeley.edu/journal/online/?p=915> (last visited Aug. 5, 2016).

29. *Id.*; GOV’T § 3543.3.

30. Yeh, *supra* note 28; GOV’T § 3543.1.

31. Yeh, *supra* note 28; GOV’T § 3543.5.

Act.³² California courts and the Public Employment Relations Board have held charter schools to these obligations, regardless of whether their employees have recognized an exclusive representative or not.³³ Thus, although charter school teachers are exempt from the statutory protections that district teachers receive, they still possess the right to unionize and collectively bargain to improve their conditions of employment. Such negotiations could develop substantive and procedural requirements with which employers must comply in order to dismiss or discipline a charter school teacher.

While unionization is available to charter school teachers as a tool to establish protections from arbitrary disciplinary measures, it is unlikely to provide effective or immediate relief. Unions have attempted to organize in charter schools in the past but failed.³⁴ As of 2011, only twelve percent of California's charter schools were unionized,³⁵ and today unions still struggle to affirmatively implant themselves in charter schools.³⁶

One challenge unions face is that charter school teachers simply may not want to join or form unions.³⁷ Teachers at charter schools are typically younger than district teachers, and often choose to work specifically at charter schools, where they enjoy greater freedom and flexibility in the classroom, and as a staff member generally.³⁸ Thus, they are unlikely to want to join a union, which many believe only serves to create complicated collective bargaining agreements, wrought with red tape and restrictive rules.³⁹ To many of these teachers, unions embody the bureaucratized, limited work environment that they wanted to avoid by joining the charter movement in the first place.⁴⁰ Another reason that unions have struggled to successfully implant themselves in charter schools is the difficult nature of organizing the teachers who are spread

32. Yeh, *supra* note 28; Gov't § 3543.5.

33. Yeh, *supra* note 28. The Court of Appeal's decision in *California Teachers Ass'n v. Public Employment Relations Board*, 169 Cal. App. 4th 1076 (2009), is an example of a court imposing the provisions of the Rodda Act, such as the duty not to retaliate, on charter schools. *Id.*

34. Larry Sand, *Teachers Unions Target Charter Schools in California*, UNION WATCH (Sept. 30, 2014), <http://unionwatch.org/teachers-unions-target-charter-schools-in-california/> (last visited Aug. 5, 2016).

35. Arianna Prothero, *Calif. Teachers' Union is Getting "Serious About Charter School Organizing"*, EDUC. WEEK (Aug. 22, 2014, 8:20 PM), http://blogs.edweek.org/edweek/charterschoice/2014/08/calif_teachers_union_is_getting_serious_about_charter_school_organizing.html (last visited Aug. 5, 2016).

36. See Arianna Prothero, *Calif. Teachers' Union Sets Sights on Charters*, EDUC. WEEK (Sept. 10, 2014), <http://www.edweek.org/ew/articles/2014/09/05/03charterunions.h34.html> (last visited Aug. 5, 2016); Sand, *supra* note 34; see also Martin H. Malin & Charles Taylor Kerchner, *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship?*, 30 HARV. J.L. & PUB. POL'Y 886, 902 (2006).

37. Prothero, *supra* note 35; Sand, *supra* note 34.

38. Childs, *supra* note 5; Malloy & Wohlstetter, *supra* note 4, at 225–26.

39. See Sand, *supra* note 34; see also Malloy & Wohlstetter, *supra* note 4, at 227.

40. Sand, *supra* note 34; Malloy & Wohlstetter, *supra* note 4, at 227.

out amongst a network of different campuses within the same system.⁴¹ These campuses are often geographically scattered and have different workplace cultures, administrators, policies, schedules, modes of operation, and student populations.⁴²

Despite the challenges unions face in organizing charter school teachers and staff, the unionization movement among California's charter schools has recently become more active and prominent.⁴³ In 2013, forty out of the 183 charter schools in Los Angeles were unionized.⁴⁴ Additionally, in the same year, the National Education Association ("NEA") launched a campaign to unionize charter schools.⁴⁵ Moreover, in January 2015, the California Teachers Association ("CTA"), the NEA's largest state affiliate, officially listed "charter school organizing" as a focus area in its long-term strategic plan, after making only slight progress over the last few years.⁴⁶

In sum, charter school unionization in California is in its early stages. Whether unionization will pick up in the charter sector is still unclear.⁴⁷ Though proponents are optimistic, unions still face the challenge of unionizing a population of young teachers who favor flexibility over bureaucracy, and are scattered across separate local campuses within large networks. Considerable debate remains as to whether unions will stabilize or weaken the charter movement, garnering mixed opinions in the educational community.⁴⁸ Specifically, "the

41. For example, Rocketship Education currently has ten schools located across the southern part of San Francisco Bay Area in California, with more schools opening in these various areas in the years to come. *Communities We Serve*, ROCKETSHIP, <http://www.rsed.org/locations.cfm> (last visited Aug. 5, 2016). Another network, Aspire, has numerous schools located throughout both California and Tennessee. *California Schools*, ASPIRE PUB. SCHS., <http://aspirepublicschools.org/schools/regions/california-schools/> (last visited Aug. 5, 2016); *Tennessee Schools*, ASPIRE PUB. SCHS., <http://aspirepublicschools.org/schools/regions/tennessee-schools/> (last visited Aug. 5, 2016).

42. See Sand, *supra* note 34; see also Richard D. Kahlenberg & Halley Potter, *The Original Charter School Vision*, N.Y. TIMES (Aug. 30, 2014), <http://www.nytimes.com/2014/08/31/opinion/sunday/albert-shanker-the-original-charter-school-visionary.html> (last visited Aug. 5, 2016) (discussing how charter schools sometimes form "'thin' collective bargaining agreements that are tailored to the special needs of individual charter schools" but suggesting that charter schools are reacting largely on an individualized basis to the changing educational landscape); see also Michelle Ellson, *Charter Schools' Union Gaining National Attention*, ALAMEDAN (Aug. 20, 2014, 12:05 AM), <http://thealamedan.org/news/charter-schools-union-gaining-national-attention> (last visited Aug. 5, 2016).

43. See Sam Dillon, *As Charter Schools Organize, Many Debate Effect*, N.Y. TIMES (July 26, 2009), <http://www.nytimes.com/2009/07/27/education/27charter.html> (last visited Aug. 5, 2016); see also Samantha Winslow, *Charter School Teachers Join the Union*, LABOR NOTES (Apr. 22, 2013), <http://www.labornotes.org/2013/04/charter-school-teachers-join-union> (last visited Aug. 5, 2016).

44. Tim Walker, *NEA Steps Up Organizing Efforts in Non-Union Charter Schools*, NEATODAY (July 8, 2013, 10:25 AM), <http://neatoday.org/2013/07/08/nea-steps-up-organizing-efforts-in-non-union-charter-schools/> (last visited Aug. 5, 2016).

45. *Id.*

46. Prothero, *supra* note 35.

47. *Id.*

48. Dillon, *supra* note 43.

unionization effort raises questions about whether unions will strengthen the charter movement by stabilizing its young, often transient teaching force, or weaken it by preventing administrators from firing ineffective teachers and imposing changes they say help raise achievement, like an extended school year.”⁴⁹

Consequently, the road to unionization is an uncertain, long, and indirect path to providing charter school teachers with protection and relief from arbitrary disciplinary decisions. As a result, unions currently are not available as an effective or immediate means of protecting charter school teachers. Therefore, consideration must be given to alternative avenues for relief.

II. FEDERAL SOURCES OF PROTECTION

A. FEDERAL STATUTORY PROTECTIONS FROM ARBITRARY DISCIPLINARY DECISIONS

As discussed in Part I, the “mega-waiver” does not exempt charter schools from their obligations to comply with federal laws pertaining to equal rights, access, and discrimination, as well as a variety of other federal statutes that cover both public and private employers.⁵⁰ For example, charter schools must still comply with the American Disabilities Act, the Family Medical Leave Act, the Fair Labor Standards Act, Title IV and Title VII of the Civil Rights Act, and other similar statutes.⁵¹ These federal statutes offer charter school teachers limited protection from arbitrary termination decisions, by precluding administrators from basing disciplinary actions on race, gender, age, disability, or medical condition.⁵² However, charter school teachers are still vulnerable to a wide swath of other discipline and dismissal decisions, such as those based on mistaken facts, or administrator arbitrariness.

For example, consider two teachers, Teacher A and Teacher B, who are both pregnant and take twelve weeks of unpaid medical leave under the Family Medical Leave Act (“FMLA”). Teacher A is fired because she spoke out at a staff meeting against the network’s aggressive expansion plans because she’s concerned that resources will be spread

49. *Id.*

50. *Frequently Asked Questions*, *supra* note 12; see *United States Issues Guidance on Obligations of Charter Schools to Comply with Federal Civil Rights Laws*, U.S. DEPT. OF EDUC. (May 14, 2014), <http://www.ed.gov/news/press-releases/us-department-education-issues-guidance-obligations-charter-schools-comply-federal-civil-rights-laws> (last visited Aug. 5, 2016); Letter from Catherine E. Lhamon, Assistant Sec’y for Civil Rights, to Colleague (May 14, 2014) (on file with U.S. Dept. of Educ.).

51. Letter from Catherine E. Lhamon, Assistant Sec’y for Civil Rights, *supra* note 50; *Handy Reference Guide to the Fair Labor Standards Act*, U.S. DEPT. OF LABOR, <http://www.dol.gov/whd/regs/compliance/hrg.htm> (last visited Aug. 5, 2016); *Leave Benefits*, U.S. DEP’T OF LABOR, <http://www.dol.gov/dol/topic/benefits-leave/fmla.htm> (last visited Aug. 5, 2016).

52. *See id.*

too thin to ensure each school's proper operation. On the other hand, Teacher B is fired for taking leave under the FMLA because the principal was annoyed with having to find and pay for a substitute teacher for twelve weeks. The FMLA protects Teacher B from dismissal,⁵³ but provides no relief to Teacher A who was subject to the arbitrary termination decision. Therefore, although these federal statutes serve to protect charter school teachers from a limited number of termination decisions, such as those based on race, gender, and disability, charter school teachers are still vulnerable to a wealth of other arbitrary disciplinary decisions.

B. FEDERAL DUE PROCESS AS A MODE OF PROTECTION

I. *Overview of Federal Due Process and Its Application to Charter School Teachers*

California charter schools have been recognized as public school employers.⁵⁴ In the Charter Schools Act of 1992, the legislature specifically established charter schools as part of California's public school system.⁵⁵ In *Options for Youth-Victor Valley, Inc.*, a charter school argued that it was subject to the National Labor Relations Board ("NLRB") and not to the Public Employment Relations Board ("PERB") because it was a private, non-profit corporation and independent charter school.⁵⁶ The PERB regional director held that because charter schools are accountable to, and dependent upon, whichever public body granted them the charter, and because the school declared itself the public employer of the school's employees for the purposes of collective bargaining, that the school was a public employer, subject to all of the statutory obligations.⁵⁷

As public employers, charter schools also fall under the purview of the U.S. Constitution, and can be found liable if their actions violate an employee's constitutional rights.⁵⁸ The First and Fourth Amendments, among others, may offer limited relief to charter school teachers that are fired for exercising their rights under those particular amendments. However, charter school teachers remain vulnerable to a wide range of other disciplinary decisions that do *not* relate directly to those amendments, such as those based on administrative error or odious administrator motives. Thus, the Fourteenth Amendment is most

53. 29 U.S.C. § 2615(a) (West 2016).

54. See Malin & Kerchner, *supra* note 36, at 929.

55. See *Wilson v. State Bd. of Educ.*, 75 Cal.App.4th 1125, 1136 (Ct. App. 1999).

56. *Options for Youth-Victor Valley, Inc.*, 27 Pub. Emp. Rep. Cal. 104 (2003).

57. *Id.*; see Malin & Kerchner, *supra* note 36, at 929.

58. James F. Allmendinger, et al., *The First, Fourth and Fifth Amendment Constitutional Rights of Public Employees—Free Speech, Due Process and Other Issues*, AM. BAR ASS'N 1 (2009), http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2009/ac2009/151.authcheckdam.pdf.

relevant for the present discussion, because the Due Process Clause may provide a path that charter school teachers could use to protect themselves from a broader range of disciplinary decisions.

The Fourteenth Amendment provides that no person shall be “deprived of life, liberty, or property, without due process of law.”⁵⁹ Due process is triggered by a governmental deprivation of property.⁶⁰ “Property” has been defined broadly to include not only physical property, but also entitlements provided by state law or custom.⁶¹ Once federal due process is triggered, an individual is entitled to some degree of procedure before being effectively deprived of his or her property or liberty.⁶²

In *Cleveland Board of Education v. Loudermill*, the Supreme Court clarified the nature of the process due to a public employee upon his termination, when that employee had a constitutionally recognized property interest in his or her job.⁶³ In *Loudermill*, the petitioner worked as a security guard for the Cleveland Board of Education. On his job application, he stated that he had never been convicted of a felony.⁶⁴ Later, as part of a routine examination of Loudermill’s employment records, the Board discovered that he had previously been convicted of grand larceny.⁶⁵ The Board provided Loudermill with written notice that he was going to be dismissed because of his dishonesty in filling out his employment application.⁶⁶ Loudermill did not have the opportunity to respond to these charges or otherwise challenge his dismissal.⁶⁷ He was ultimately fired, and challenged the Board’s termination procedures on the grounds that they violated his right to procedural due process.⁶⁸

In evaluating whether the government’s expeditious termination violated the employee’s right to due process, the Court weighed the employee’s private interests in maintaining employment, having notice of

59. U.S. CONST. amend. V.

60. Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. REV. 1067, 1084–85 (1991–1992).

61. *Id.* at 1085.

62. *See* *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties in the pendency of the action and afford them an opportunity to present their objections.” (emphasis added)); *see also* *Louisville & N. R. Co. v. Schmidt*, 177 U.S. 230, 236 (1900) (“[The requirements of] the due process clause of the Fourteenth Amendment . . . are complied with, provided that in the proceedings which are claimed not to have been due process of law, the person condemned has had sufficient notice, and adequate opportunity has been afforded him to defend.”).

63. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542–46 (1985).

64. *Id.* at 535.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 536.

his charges, and having an opportunity to present his side of his case, against the government's interest in immediate termination in order to ensure smooth bureaucratic operations.⁶⁹ The Court concluded that the government's interest did not outweigh the employee's interests, and that "affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays."⁷⁰

The Court held that due process in the employment context requires the government to provide the public employee with both "notice [of the charges against him] and an opportunity to respond."⁷¹ The opportunity to respond allows employees to state their side of the case and provide reasons, either in-person or in writing, as to why they should not be subjected to the proposed act of discipline or dismissal.⁷² The Court highlighted that these procedures "need not be elaborate[d]."⁷³ According to the Court, requiring more than notice and an opportunity to respond would constitute an unfair intrusion upon the government's interest in efficient removal of a dissatisfactory employee.⁷⁴ These basic procedures serve as an "initial check against mistaken decisions," to ensure that there is a reasonable basis to believe that the charges against the employee are true, and to justify the proposed disciplinary action or termination.⁷⁵

In *Loudermill*, the Court established procedures that defined the baseline fundamental due process requirements that public employers must comply with in terminating employees.⁷⁶ With this precedent in mind, the federal Due Process Clause may provide charter school teachers with a means of protecting themselves from arbitrary disciplinary decisions. If charter school teachers could trigger the federal Due Process Clause by establishing that they have a property interest in their continued employment, administrators would be required to provide them notice and an opportunity to be heard before disciplining or terminating them.

This procedural requirement may consequently serve to protect some charter school teachers from arbitrary termination decisions by requiring administrators and teachers to engage in a dialogue before reaching a decision. The process may clear up mistaken termination decisions. Such a dialogue and potential paper trail may also force administrators to carefully reason through a decision to dismiss or

69. *Id.* at. 543-44.

70. *Id.* at 544.

71. *Id.* at 546.

72. *Id.*

73. *Id.* at 545-46.

74. *Id.*

75. *Id.*

76. *Id.*

discipline a teacher, because administrators would be precluded from flatly terminating teachers without an explanation.

For example, consider the following hypothetical: Ms. Apple is a charter school teacher with stellar test results. Assuming the Due Process Clause applies, the administration would be required to give her reasonable notice of her termination and an opportunity to be heard, before terminating her from her position.⁷⁷ In compliance with the requirements of due process, her principal calls her into his office for a meeting. After he informs her that she is being fired, Ms. Apple asks why. The principal explains that her test scores were below standard, and that the school has decided it would be better if they hired another, more experienced teacher. Ms. Apple looks at the test scores that the principal has referred to, and notices a mistake—the principal has confused her test scores with Ms. Applebaum's. She points out the mistake, the principal realizes that he almost fired the wrong teacher, and reassures Ms. Apple that she is not being terminated. This is an example of a situation where a teacher who is provided notice and an opportunity to be heard may be able to utilize this forum to avoid being subjected to an arbitrary, or in this case mistaken, disciplinary action.

It is important to note, however, that due process will not *always* protect teachers from arbitrary termination decisions, as is discussed in Subpart II.B. The foregoing example is simply meant to illustrate that it is *possible* for federal and state due process to protect at least *some* teachers from arbitrary or mistaken termination decisions. Regardless, the efficacy of the federal Due Process Clause first hinges on whether federal due process can be triggered in the first place.

2. *Would Federal Due Process Be Triggered If a Charter School Teacher Is Fired or Disciplined?*

The Supreme Court has recognized that public school teachers may have an “entitlement” or “property interest” within the meaning of the Fourteenth Amendment to retain their positions via statute or contract.⁷⁸ In *Board of Regents v. Roth*, the Supreme Court established that “[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.”⁷⁹ The Court qualified that property interests stem not from the federal Constitution, but from independent sources, such as

77. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

78. *Bd. of Regents v. Roth*, 408 U.S. 564, 576–78 (1972); *Perry v. Sindermann*, 408 U.S. 593, 599–603 (1972).

79. *Roth*, 408 U.S. at 577.

state law.⁸⁰ In applying these principles, the Court highlighted the fact that the petitioner, Professor Roth, had signed an employment contract that only guaranteed his employment up to a certain date; the contract did not provide any promises or guarantees of continued employment after the expiration of his one-year employment term.⁸¹ Because no state statute or university rule secured Roth's interest in re-employment, the Court held that Professor Roth therefore had "no possible claim of entitlement to re-employment."⁸² Thus, due to the nature of Professor Roth's employment contract, he did not have a right to due process, as he had not shown he had been deprived of a *property* interest.⁸³

Similarly, in *Perry v. Sindermann*, the Court acknowledged that "[a] person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."⁸⁴ However, unlike the *Roth* case, the Court concluded that Professor Sindermann established that a *de facto* tenure program existed at his school, sufficient to give him a legitimate expectation of job security, and to in turn create an "entitlement" to his continued employment.⁸⁵ Specifically, Professor Sindermann cited a provision in his college's faculty guide, as well as guidelines promulgated by the Coordinating Board of the Texas College and University System, which suggested that a teacher employed for more than seven years had some form of job tenure.⁸⁶ Ultimately, the Court concluded that Professor Sindermann had "alleged the existence of rules and understandings, promulgated and fostered by state officials . . . [to] justify his legitimate claim of entitlement to continued employment absent 'sufficient cause.'"⁸⁷

In accordance with *Roth* and *Sindermann*, California charter school teachers must demonstrate that they have a property interest or entitlement to their continued employment under California's statutory framework or contract law in order to trigger federal due process protections. The Charter Schools Act of 1992 does not provide charter school teachers with any guarantees of employment, or impose any obligations with regard to their hiring, dismissal, or disciplinary practices.⁸⁸ In fact, through the "mega-waiver," the California statutory

80. *Id.*

81. *Id.* at 578.

82. *Id.*

83. *Id.*

84. *Perry v. Sindermann*, 408 U.S. 593, 601 (1972).

85. *Id.* at 600-02.

86. *Id.*

87. *Id.* at 602-03.

88. See CAL. EDUC. CODE §§ 47600-64 (West 2016).

scheme purposefully exempts charter school teachers from the statutes that would likely provide district teachers an “entitlement” to their employment within the meaning of the Fifth Amendment.⁸⁹

Because charter school teachers cannot establish entitlement by pointing at the California charter school statutory framework, contract law is the only other alternative. Whether a teacher has a property interest in his or her continued employment depends on the terms of each teacher’s individual contract.⁹⁰ Generally, charter school teachers’ terms and conditions of employment are established either through individual employee contracts, employee policies, or handbooks. Charter school teachers in California are commonly hired at will.⁹¹ As such, they can be fired at any time for good reason, bad reason, or no reason at all, provided that they are not fired for *illegal* reasons, such as race, gender, religion, etc.⁹² This makes sense in light of the purpose of charter schools: to establish an independent network of public schools that have increased flexibility to make decisions as necessary to best serve their students.⁹³ The ability to terminate a teacher without any red-tape certainly serves that interest.

Because California charter schools expressly hire teachers on an at will basis, a substantial percentage of charter school teachers are unable to establish a property interest in their continued employment for the purposes of triggering the federal Due Process Clause. Most charter school teachers face a situation similar to Professor Roth’s. As previously discussed, Professor Roth’s employment contract did not provide any guarantee of employment beyond a certain date.⁹⁴ Consequently, although he had a property interest in his employment during the duration of his contract, after it expired he did not have any property interest in his future employment sufficient to trigger federal due

89. *See id.* § 47610.

90. *Bd. of Regents v. Roth*, 408 U.S. 564, 576–78 (1972).

91. *See* John R. Yeh, *Perspective: Charter Schools and Collective Bargaining: Implications for Authorizing Agencies*, CAL. SCH. BDS. ASS’N (Nov. 15, 2011), http://www.csba.org/Newsroom/CA_SchoolsMagazine/2011/Winter/Departments/Perspective_Winter2011.aspx; *see, e.g., Employee Handbook 2012*, ASPIRE PUB. SCHOOLS, NAT’L COUNCIL ON TECH. QUALITY, http://www.nctq.org/docs/revised_final_copy_10_3_2012.pdf (“All employment at Aspire is ‘At-Will’.[sic]”); *Human Resources*, LIVERMORE VALLEY CHARTER SCHOOL, <http://lvcs.org/about/human-resources> (“All LVCS staff are hired on an ‘at-will’ annual basis, including teachers, aides, custodians, office staff, and administration.”); SHERMAN THOMAS CHARTER SCH., *EMPLOYEE HANDBOOK 3* (2007–2008); (“The School is an at-will employer.”); *Trillium Charter School: A California Public Charter School*, 9 TRILLIUM CHARTER SCHOOL, <http://trilliumcharter.weebly.com/uploads/1/1/3/2/11327995/trillium-mission.pdf> (Trillium Charter School Employees are employed at will).

92. *See* CAL. LAB. CODE § 2922 (West 2016); *Guz v. Bechtel Nat’l Inc.*, 8 P.3d 1089, 1100 (Cal. 2000) (“An at-will employment may be ended by either party ‘at any time without cause,’ for any or no reason, and subject to no procedure except the statutory requirement of notice.”).

93. *See* Zimmer & Buddin, *supra* note 6, at 1.

94. *Bd. of Regents v. Roth*, 408 U.S. 564, 578 (1972).

process.⁹⁵ Charter school teachers are even worse off than Professor Roth. Unlike him, they have absolutely no guarantee of job security, because their employment is terminable at any time, and need not be justified by a good reason. Therefore, charter school teachers, expressly hired at will, are unlikely to have a property interest in their continued employment. Therefore, they are unable to invoke the federal Due Process Clause when they are subjected to arbitrary discipline unless they can characterize their employment relationship as something other than at will.

Once a charter school teacher signs an employment contract with an express at will provision, it is difficult for them to later argue that their employee-employer relationship ought to be characterized differently. For example, in accordance with the parol evidence rule, a written, fully integrated employment contract, with an unambiguous, express, at will provision cannot be contradicted by extrinsic evidence of an earlier implied agreement to terminate only for cause.⁹⁶

The consequences of the parol evidence rule's negative impact is best illustrated through the following hypothetical: A prospective charter school teacher is meeting with her soon-to-be principal, who has just orally offered her a position at his school. The teacher asks about job security. The principal responds, "We hope all of our teachers will stick around long-term and develop professions here; we don't want our school to just be another rung on a ladder that they are climbing. You will probably only get fired if your test scores are not up to standard, or some other good reason." The teacher is later given an employment contract during her prep period and is told that she needs to sign it by the end of the day. The contract contains an express, unambiguous, at will clause. Being a young, inexperienced professional, overwhelmed with the rigors of working at a charter school, she glosses over the clause and signs the document. She is later fired because she critiqued the charter school network's expansion plan at a staff meeting. This teacher is not able to establish she had a property interest in her future employment despite the principal's oral assurances, and would be precluded from arguing that the principal's statements contradict the explicit at will provision in her contract.⁹⁷

An alternative method through which charter school teachers may attempt to establish that their employment relationship is not at will is by arguing that the contract has been modified since its execution, such that the at will provision no longer governs.⁹⁸ An express at will employment

95. *Id.*

96. *See Dore v. Arnold Worldwide, Inc.*, 139 P.3d 56, 60–61 (Cal. 2006).

97. *See id.*

98. *See CAL. CIV. CODE* § 1698 (West 2016).

agreement can be modified by a subsequent express agreement to re-define the employment relationship as something other than at will.⁹⁹ However, vague promises are insufficient to alter the at will nature of the employment relationship,¹⁰⁰ and the modification must be supported by new consideration.¹⁰¹ Thus, in order to effect a modification, a charter school teacher must be told clearly and unambiguously that the terms of his/her employment are being modified such that the relationship is no longer at will, and that in return, the charter school teacher must give extra consideration. The likelihood of this scenario occurring is low, given that administrators have an incentive to preserve the at will nature of the relationship in order to possess the flexibility necessary to accomplish the charter school's goals.¹⁰²

In sum, because charter school teachers are generally hired at will in California, it is unlikely they will be able to establish that they have a property interest in their continued employment. While some charter school teachers may have other types of employment contracts¹⁰³ that provide a legitimate expectation of job security sufficient to create an entitlement under due process, this is largely a deviation from California general practice.¹⁰⁴ The result is that the federal Due Process Clause is unlikely to be an accessible route for charter school teachers to challenge or protect themselves from arbitrary disciplinary decisions, as they are usually unable to trigger the federal Due Process Clause in the first place. However, despite generally being precluded from using the federal Due Process Clause, charter school teachers may still be able to turn to the California Due Process Clause as an alternative path to relief.

99. See *Dore*, 139 P.3d at 60–61.

100. See *Wagner v. Glendale Adventist Med. Ctr.*, 265 Cal. Rptr. 412, 418 (1989).

101. See *id.*

102. See *Zimmer & Buddin*, *supra* note 6, at 1.

103. For example, charter school teachers at Green Dot Public Schools, a public charter network in Los Angeles, are currently represented by a union. Their employment contract as of 2006 provided that Green Dot teachers are not hired at will. Rather, under this employment contract, “No unit member shall be disciplined, non-renewed, dismissed, reduced in rank or compensation without just cause.” Agreement Between Green Dot Schools, A California Not-For-Profit Corporation and the Association De Maestros Unidos/CTA/NEA 16, EDUWONK (effective through June 30, 2006, <http://www.eduwonk.com/AMUContractFinalFY20061.pdf>); see *FAQs: General Questions About Green Dot Public Schools*, GREEN DOT PUB. SCHOOLS, <http://www.greendot.org/page.cfm?p=1751> (last visited Aug. 5, 2016).

104. See *Yeh*, *supra* note 28.

III. CALIFORNIA DUE PROCESS

A. OVERVIEW OF CALIFORNIA'S DUE PROCESS FRAMEWORK AND ITS APPLICATION TO CHARTER SCHOOL TEACHERS

The California Constitution parallels the U.S. Constitution, providing that a “person may not be deprived of life, liberty, or property without due process of law.”¹⁰⁵ However, procedural due process under the California Constitution is more inclusive compared to federal due process.¹⁰⁶ As discussed earlier, “property” under the federal constitution includes both traditional forms of property, and an entitlement granted by statute or some other legal source.¹⁰⁷ California has expressly rejected this narrow approach to due process triggers, and adopted its own unique due process framework.¹⁰⁸

The California Supreme Court criticized the federal due process framework in *People v. Ramirez*.¹⁰⁹ Justice Mosk, writing for the majority, agreed that the purpose of procedural due process was to minimize abuses of governmental discretion.¹¹⁰ However, the Court rejected the notion that only property interests stemming from state law could trigger the procedures that protect individuals from arbitrary administrative decisions.¹¹¹ Where administration possesses complete discretion to grant or deny an interest, due process is not triggered.¹¹² Because of this narrower definition of “property,” Mosk noted that the government could essentially carve itself out of the Due Process Clause altogether.¹¹³ Specifically, Mosk was concerned that the government could severely limit the scope of the Due Process Clause by providing that the property interest at stake is subject to the “unconditional discretion of the person in charge of its administration.”¹¹⁴

The court concluded its critique by stating, “the federal approach for determining whether a due process liberty interest is at stake masks fundamental values that underlie the clause.”¹¹⁵ Specifically, the framework did not promote accuracy and reasonable predictability in government decisions, nor did it minimize abuses of governmental

105. CAL. CONST. art I, § 7(a).

106. Asimow, *supra* note 60, at 1085.

107. *Id.* at 1085–86.

108. Sara B. Tosdal, Note, *Preserving Dignity in Due Process*, 62 HASTINGS L.J., 1003, 1014 (2011).

109. *People v. Ramirez*, 599 P.2d 622, 626 (1979).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

discretion.¹¹⁶ Rather, this framework permitted state legislatures to provide administrative agencies with unfettered discretion, and ultimately increase the risk that citizens would be subjected to, and harmed by, arbitrary decisions.¹¹⁷

Expressly rejecting the federal due process framework for the reasons discussed above, the California Supreme Court established a due process framework of its own.¹¹⁸ In doing so, the court attempted not only to address the policies underlying the federal due process framework, but also to incorporate another unique value: Respect for the dignity and worth of each citizen as a human being, each of whom possesses the right to be free from arbitrary government decisions.¹¹⁹ The court established that even where the governmental decision is discretionary, procedural protections may nonetheless be required to protect an individual's

dignitary values, or, in other words, to ensure that the method of interaction itself is fair in terms of what are perceived as minimum standards of political accountability—of modes of interaction which express a collective judgment that human beings are important in their own right, and that they must be treated with understanding, respect, and even compassion.¹²⁰

Accordingly, the court explained that whenever an individual is subject to a deprivatory governmental action, that individual possesses a due process liberty interest in receiving a fair, unprejudiced decision, and must be treated with respect and dignity throughout the process.¹²¹ The court held that “the due process safeguards required for protection of an individual’s statutory interests must be analyzed in the context of the principle that freedom from arbitrary adjudicative procedures is a substantive element of one’s liberty.”¹²² The court established a four-part balancing test to determine whether due process is triggered under certain circumstances, and what process is due.¹²³ The test requires the court to consider: (1) the private interest affected; (2) the risk of an erroneous deprivation of that interest if those procedures are used, as well as the probable value of additional substitute procedural safeguards; (3) the dignitary interest in informing individuals of the nature, grounds, and consequences of the action and giving them a chance to present their

116. *Id.*

117. *Id.*; see Tosdal, *supra* note 108, at 1016 (“In other words, if one of the purposes of due process is to protect individuals from arbitrary government action, then relying on the legislature to create a protectable liberty or property interest defeats that very purpose. Indeed, the more discretion an agency has, the greater the risk that an agency action will arbitrarily harm an individual.”).

118. *Ramirez*, 599 P.2d at 626–27.

119. *Id.*

120. *Id.*

121. *Id.* at 627.

122. *Id.*

123. *Id.*

side of the story before a responsible official; and (4) the government's interest, including the fiscal and administrative burdens additional procedures would require.¹²⁴

The court's holding in *Ramirez* is extremely beneficial to charter school teachers if interpreted the following way: Even where the government has not statutorily conferred to a citizen a right or entitlement, and has complete discretion in making a final decision, due process may still be required *whenever* the government takes a deprivatory action, if deemed necessary to guarantee respect for that citizen's dignity and their right to be free from arbitrary government actions.¹²⁵

The hypothetical introduced earlier, in Part II, where Ms. Apple was mistakenly terminated because she was confused with another teacher who had poor test scores, clearly illustrates how this different due process framework may work to the advantage of charter school teachers attempting to challenge an arbitrary or mistaken termination decision. Ms. Apple would not have been able to trigger federal due process, as she did not possess a property interest or entitlement in her continued employment.¹²⁶ By contrast, under California due process, the fact that Ms. Apple has a property interest or entitlement stemming from state law is not wholly dispositive of whether due process would be triggered if the school chose to discipline or dismiss her. Even if her administrators had full discretion to discipline or terminate at any time for any reason, as they do under the at will provision in her contract,¹²⁷ Ms. Apple nonetheless possesses the right to be free from *arbitrary* government decisions, according to *Ramirez*.¹²⁸ Under this framework, a procedural interaction with the decisionmaker would *still* be necessary to protect her *dignity* as a citizen and human being.¹²⁹

Accordingly, if administration did choose to fire Ms. Apple, California due process would be triggered.¹³⁰ Although the government would have

124. *Id.* at 627–28.

125. See Tosdal, *supra* note 108, at 1017 (“On the other hand, *Ramirez* also appears to state that the appropriate inquiry for *triggering* due process is whether procedural protections are constitutionally required based on a balance of the private and governmental interests, rather than on the statutory creation of a benefit or interest. In other words, the balance of the interests is ‘separate and independent’ from the terms of a statute—not based simply on the interests identified in the Fifth and Fourteenth Amendments.”). As will be discussed in greater depth *infra*, this interpretation has not been adopted universally by lower courts, and thus undermines whether this doctrine will indeed provide charter school teachers with relief from arbitrary disciplinary decisions. *Id.*

126. See *infra* Part II analysis.

127. See CAL. LABOR CODE § 2922.

128. *Ramirez*, 599 P.2d at 627.

129. See Asimow, *supra* note 60, at 1086.

130. Again, this hinges upon whether the courts interpret *Ramirez* to apply to circumstances in which an individual is not deprived of a *statutorily conferred* benefit, as will be discussed later. This hypothetical is intended only to illustrate that under the California due process regime, charter school

taken a deprivatory action within its discretion, it is still required to respect her dignity and right to be free from arbitrary administrative decisions.¹³¹ Subsequently, to properly affect the termination, the administrator would be required to provide her with notice of the charges and an opportunity to respond.¹³² And, as discussed earlier, the administrator's mistake would be uncovered during his back-and-forth with Ms. Apple, and the decision would ultimately be withdrawn and corrected. Thus, due process would have successfully served its purpose in protecting a citizen from being subjected to an arbitrary, or in this case mistaken, government action. But, as explained in the following Subpart, there are a few unresolved challenges that muddle this path to reducing arbitrary disciplinary decisions.

B. UNRESOLVED ISSUES UNDERMINING THE EFFICACY OF CALIFORNIA DUE PROCESS

I. *Will Due Process Be Triggered Under the Four-Part Test Put Forth in Ramirez?*

Thus far, California due process appears to be the most promising route for charter school teachers to utilize for protection from arbitrary disciplinary decisions. However, there are three hurdles that cast doubt on whether this regime will effectively reduce the vulnerability of charter school teachers to arbitrary disciplinary decisions. The first is the unclear probability that a lower court will interpret *Ramirez* favorably to find that due process has been triggered in the first place. The second issue is procedural sufficiency, and what processes precisely ought to be "due" to ensure that each teacher's dignitary interest is respected. Finally, assuming that due process was triggered and charter school teachers received at least notice and an opportunity to respond, there remains the question as to whether procedural protections alone will sufficiently protect teachers from arbitrary administrative decisions. Each issue will be discussed in turn below.

Whether the termination of an at will charter school teacher will trigger due process depends on two variables. First, of importance, is how a court will interpret the California Supreme Court's ambiguous holding in *Ramirez*. There, the court held that "due process safeguards required for protection of an individual's statutory interests must be analyzed in the context of the principle that freedom from arbitrary adjudicative procedures is a substantive element of one's liberty."¹³³ On the one hand,

teachers still have a *chance* of benefitting from this legal framework by reducing the likelihood of being subjected to an arbitrary disciplinary decision.

131. *Ramirez*, 599 P.2d at 626–27.

132. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

133. *See Ramirez*, 599 P.2d at 627.

some courts interpret *Ramirez* broadly, such that due process is triggered based on the court's balancing of private and governmental interests, and consideration of the arbitrariness inherent in the existing procedures.¹³⁴ On the other hand, other courts have interpreted *Ramirez* very narrowly, requiring that the government deprive an individual of a statutorily conferred benefit or interest to trigger due process.¹³⁵

Under the broad interpretation, due process is not limited to deprivations of statutorily conferred benefits.¹³⁶ California due process would still be available to charter school teachers as an avenue to protect themselves from arbitrary decisions. Contrastingly, under the narrow interpretation, the discipline or dismissal of a charter school teacher will always fail to trigger due process, since charter school teachers' employment does not stem from a statutorily conferred benefit. Thus, charter school teachers currently stand at an unresolved crossroads as to whether California due process may be triggered when a charter school deprives a teacher of his or her employment. The resolution of this issue lies in the hands of the lower courts now charged with the responsibility of interpreting the *Ramirez* court's puzzling holding.¹³⁷ Regardless, charter school teachers may still be able to use this framework, because they are not completely blocked from this avenue of relief, compared to the federal due process framework.¹³⁸

Assuming *arguendo*, that a court will interpret *Ramirez* favorably to charter school teachers, the second variable that effects the triggering of due process under the California framework is whether a court, in applying the four-part test laid out in *Ramirez*, will conclude that the balancing of private and government interests, as well as the risks of arbitrariness and resulting harm, weigh in favor of imposing due process protections.¹³⁹ The outcome of this test will also resolve the second issue: what procedures will be sufficient to respect charter school teachers' dignitary interests.¹⁴⁰ Given the circumstances of charter school teachers' employment, it is likely that due process will be required, and that charter school teachers will, at a minimum, be given notice of the charges

134. See Tosdal, *supra* note 108, at 1020; see also Saleeby v. State Bar, 702 P.2d 525, 535–36 (Cal. 1985) (holding that when procedural due process was triggered, partly because the petitioner did not have the opportunity to respond, and because he was not provided with the reasons for the determination, the determination was ultimately arbitrary, and due process protections were required).

135. See Tosdal, *supra* note 108, at 1021; see also Schultz v. Regents of the Univ. of Cal., 206 Cal. Rptr. 910, 918 (1984) (holding that the language of the *Ramirez* court suggests that due process is only triggered when a statutorily conferred benefit is deprived).

136. See Tosdal, *supra* note 108, at 1020.

137. The issue of whether the discipline or dismissal of a charter school teacher triggers California due process has not been addressed by any California courts.

138. See *infra* Part II analysis.

139. See *People v. Ramirez*, 599 P.2d 622, 627–28 (1979).

140. *Id.*

supporting their termination and an opportunity to respond. The following application of the four-part test supports the likelihood of this conclusion.

With regard to the first factor, the interests of the private party, it has been recognized that public employees have a great interest in maintaining their employment. If dismissed, teachers are not only deprived of an opportunity to build their career and make a living during the uncertain period in which they are searching for a new job, but they also may face difficulties in obtaining subsequent employment, having to explain the circumstances of their last dismissal.¹⁴¹

The second factor concerns the risk of an erroneous deprivation of that interest if those procedures are used, and the probable value of additional, substitute procedural safeguards. Charter school teachers are at high risk of an erroneous deprivation of their employment. Because charter school teachers are generally hired at will, there are *no* procedures preventing an administrator from following through with a mistaken or completely arbitrary dismissal decision. As the regime currently exists, an administrator can dismiss a charter school teacher because he mistakenly believed her test scores were poor, because he misinterpreted her comments at a staff meeting to be horribly offensive, or because he simply does not like her.¹⁴² The imposition of even minimal procedure would be extremely beneficial in reducing the likelihood that principals would choose to follow through with arbitrary decisions that harm charter school teachers in the process.¹⁴³

The third factor, the dignitary interest in informing individuals of the nature, grounds, and consequences of the action and enabling them to present their side of the story, is not recognized at all in the current charter school employment regime. Given the nature of at will employment, administrators are not required to inform charter school teachers of the charges supporting their dismissal, or give them an opportunity to present their side of the case in order to avoid potentially erroneous dismissal decision.¹⁴⁴

For example, consider the following hypothetical: A teacher named Ms. Orange is a four-year veteran at a charter school. Her performance

141. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985) (“We have frequently recognized the severity of depriving a person of the means of livelihood. While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job.”) (citations omitted).

142. See *At-Will Employment and Wrongful Termination*, GOVERNOR’S OFFICE OF BUS. & ECON. DEV., <http://www.business.ca.gov/StartaBusiness/AdministeringEmployees/EqualEmploymentOpportunityLaws/AtWillEmployment.aspx> (last visited Aug. 5, 2016) (explaining that at-will employment means, “at least in theory, that the employer or employee may terminate the employment relationship at any time, with or without cause.”).

143. See *Bd. of Regents v. Roth*, 408 U.S. 564, 591 (1972) (Marshall, J., dissenting).

144. See *At-Will Employment and Wrongful Termination*, *supra*, note 142.

has never been questioned, and she is well liked by the other staff members, and all of her students. At the end of the school year, Ms. Orange is called into the principal's office. Without warning, the principal informs her that her employment contract will not be renewed in the following year, because he and the other administrators did not believe she was truly invested in the charter school's mission.

Here, although the administrators have provided her with a reason for her dismissal, there is no way for her to verify that the provided reason is not pretextual. There is a possibility that she may have been subjected to a completely arbitrary or erroneous decision. This hypothetical highlights the lack of respect for teachers' dignitary interests in the charter regime as it current exists. As there is no required process and therefore no recognition of charter school teachers' dignitary interests, this factor heavily weighs in favor of requiring at least *some minimal* procedural protections.

The fourth and final factor concerns the government's interest, which includes the fiscal and administrative burdens that additional procedural requirements would entail. Administrators could argue that imposing extra procedures on the teacher discipline/dismissal process contradicts the central purpose of charter schools. Namely, that charter schools were intentionally created to have extra flexibility and to be free of the administrative burdens that district schools are subject to, including the arduous statutes restricting teacher dismissal and discipline.¹⁴⁵ Thus, to require administrators to give notice and an opportunity for the teacher to respond would impose the bureaucratic restrictions that charter schools were designed to avoid, and impede administrators' ability to make staffing decisions immediately, efficiently, and flexibly, to best meet their schools' needs.¹⁴⁶

Though charter schools have an interest in being able to immediately discipline and dismiss unsatisfactory teachers, this interest does not sufficiently outweigh the other three factors to preclude due process from triggering in these circumstances. Requiring administrators to comply with only the essential requirements of due process—such as notice and opportunity to respond—does not limit the *substantive circumstances* under which a teacher may be terminated. That is, a charter administrator may still dismiss or discipline a teacher for a wide range of reasons, compared to a district school administrator who is bound by the Education Code. Thus, charter administrators still retain great flexibility to make decisions as necessary to serve the school's needs. Furthermore, the fiscal and administrative costs inherent in

145. See CAL. EDUC. CODE §§ 44932, 44934 (West 2016); see also *Human Resources and Employment*, *supra* note 9.

146. See Zimmer & Buddin, *supra* note 6, at 1.

requiring an administrator to provide a teacher with notice of the charges supporting her dismissal and providing her an opportunity to respond are relatively low. These minimal procedural requirements could be met efficiently in a variety of ways, such as through a written letter giving the teacher notice of the charges and an opportunity to write back within a limited number of days, or through a meeting between the teacher and administrator.¹⁴⁷

To summarize, assuming that a court interprets *Ramirez* favorably, to apply even when individuals are not deprived of a statutorily conferred benefit, the discipline or dismissal of a charter school teacher will still trigger the requirements of California due process. Subsequently, to effect dismissal or discipline, administrators would be required to give teachers notice of the charges supporting their dismissal, and an opportunity to respond. Even minimal due process procedures, such as the requirement of a written or oral conversation, sufficiently balance the teachers' right to be free from erroneous or arbitrary discipline or dismissal, with the charter schools' interest in maintaining flexible and efficient dismissal procedures. The final question that remains is whether requiring administrators to comply with these procedural requirements will in fact protect charter school teachers from arbitrary disciplinary decisions.

2. *Assuming That Due Process Is Triggered and Minimal Due Process Procedures Are Implicated, Will These Procedural Requirements Actually Protect Teachers from Arbitrary Decisions?*

Under the California Constitution's Due Process Clause, administrators are required to jump through certain procedural hoops to properly dismiss a teacher. However, given that charter school teachers are hired at will, would requiring administrators to comply with those procedures actually reduce the likelihood that charter school teachers will be subject to erroneous or arbitrary disciplinary decisions? To better illustrate this issue, again consider the Ms. Apple hypothetical discussed earlier in Part II of this Note.

Suppose that in compliance with due process, Ms. Apple's principal provides her with a letter informing her that she is being terminated because her test scores are subpar, and that he thinks it is in the best interest of the school that a more experienced teacher is hired in her

¹⁴⁷ Procedural sufficiency is yet another variable that would depend on the outcome of the court's application of this four-part test. For the sake of this Note, it can be assumed that minimal procedures, similar to those required in the *Loudermill* case, will be sufficient to serve the purposes of due process. It is possible that a court may require higher or lower protections based on a variety of other factors.

place. Ms. Apple responds in writing, detailing that the test scores cited in the principal's letter actually belonged to another teacher, Ms. Applebaum, who also worked at the same school. Upon receiving the letter, the principal realizes that he has made a mistake. However, being a new administrator who does not want his credibility questioned by other school leaders and the rest of his staff, the principal terminates Ms. Apple anyway to avoid tarnishing his reputation. Despite the fact that the principal has complied with the requirements of due process, Ms. Apple is still fired for an arbitrary reason.

The above hypothetical reveals a gap between the purposes underlying procedural due process and the ability of these procedures to accomplish their intended goals in the charter school employment context. Namely, it calls into question whether the imposition of procedural requirements will actually be useful in protecting charter school teachers from arbitrary decisions, primarily because of their at will employment status. The imposition of procedural requirements still imposes no direct restrictions on the reasons, or lack thereof, for which a principal can dismiss a teacher. Thus, so long as the administrator first complies with the procedures required by California due process, he can still discipline or dismiss a charter school teacher for an arbitrary reason, or even a mistaken reason, if he so wishes. Fortunately, Justice Marshall provides helpful guidance in his dissent in *Board of Regents of State Colleges v. Roth*, where he addresses a similar critique of the effectiveness of procedural due process in reducing the likelihood of arbitrariness in administrative decisions.¹⁴⁸

In his dissent, Justice Marshall acknowledges that purely procedural requirements could be viewed as “useless act[s]” because a state entity “bent on denying employment . . . will do so regardless of the procedural hurdles that are placed in its path.”¹⁴⁹ He concedes the validity of this perspective to an extent. However, he also emphasizes that procedural protections ultimately stem from a substantive right of all citizens to have a government that acts reasonably and fairly; a government that makes decisions based on merit.¹⁵⁰ Justice Marshall points out that in vindicating this substantive right, “a requirement of procedural regularity at least renders arbitrary action *more difficult*. Moreover, proper procedures will surely eliminate some of the arbitrariness that results, not from malice, but from innocent error.”¹⁵¹

Ultimately, Justice Marshall counters the argument that procedural requirements are completely “useless” by articulating that when the

148. *Roth*, 408 U.S. at 591 (Marshall, J., dissenting).

149. *Id.*

150. *Id.*

151. *Id.* (emphasis added).

government is aware that it may have to justify its decisions with sound reasons, it is more likely to be cautious, careful, and correct in its decisionmaking, even if it possesses discretion throughout the process.¹⁵² He voices that procedural requirements do at least two things: (1) protect citizens by reducing the likelihood that the government will act in a truly arbitrary fashion; and (2) benefit the government by ensuring that its reputation is not tainted by improper or erroneous decisions that otherwise go unchecked.¹⁵³

Justice Marshall's analysis in his *Roth* dissent addresses the concern raised by the Ms. Apple hypothetical, to an extent. Indeed, charter administrators still possess the discretion to dismiss a teacher for completely arbitrary or erroneous reasons, so long as they provide notice and give the teacher an opportunity to respond. However, given that they are obligated to explain their reasoning to the teacher and/or provide a paper trail tracking their dismissal decision, they will be less inclined to exercise their discretion so expansively. For example, the administrator in the Ms. Apple hypothetical could still fire her after discovering his mistake if he is too embarrassed to admit his gaffe to the rest of his staff; she is hired at will, after all. However, because the administrator is aware of his obligation to inform Ms. Apple that the reason for her dismissal is his embarrassment, he may be less likely to follow through with that decision. He may decide he would rather not deal with the social or reputational consequences of the decision—that his staff and the community would lose respect for him as a school leader—or he may not want to put in the effort to find a different, legitimate reason for dismissing her. Consequently, while it is possible for an administrator to dismiss a teacher erroneously or arbitrarily despite being subject to due process requirements and having an opportunity to self-correct, the chance of this actually happening is unlikely.¹⁵⁴

In light of the foregoing analysis, California due process appears to be the most promising legal doctrine to protect charter school teachers from arbitrary disciplinary decisions for several reasons. First, unlike the federal framework, charter school teachers are not automatically

152. *Id.*

153. *Id.* (where Justice Marshall also argues, in essence, that all individuals have a substantive right to be employed by the government, and that procedural due process stems from the existence of those substantive rights). This Note is not adopting Justice Marshall's argument in full; rather, only to the extent that procedure alone may have a substantial impact on a government's decisionmaking process, and nonetheless protect citizens from arbitrary decisions.

154. See *Characteristics of Public School Districts in the United States: Results from 2007-08 Schools and Staffing Survey*, NAT'L. CTR. FOR EDUC. STATISTICS, http://nces.ed.gov/pubs2009/2009320/tables/sasso708_2009320_dtn_08.asp (last visited Aug. 5, 2016); see also Noreen S. Ahmed-Ullah, *Principals Given Flexibility in Firing Teachers Showed They Could Evaluate Well, Study Indicates*, CHICAGO TRIBUNE (July 19, 2011), http://articles.chicagotribune.com/2011-07-19/news/ct-met-cps-study-principals-20110719_1_fire-teachers-probationary-teachers-principals.

precluded from triggering due process, given California's more expansive due process trigger structure. Second, once triggered, due process would better protect teachers from erroneous or mistaken dismissal decisions, by guaranteeing an opportunity to understand the charges underlying their dismissal and to clarify any misunderstandings or mistakes. Subsequently, administrators would have an opportunity to self-correct and avoid the improper dismissal altogether. Third, although procedural requirements would not substantively preclude administrators from making arbitrary disciplinary decisions, they will reduce their likelihood of occurrence. Administrators may be more hesitant to act upon arbitrary tendencies when they are required to create a paper trail and provide the teacher with notice of the reasons underlying termination, as schools have an interest in maintaining a positive, fair reputation as a public employer.

However, two issues cast a shadow upon whether California due process will effectively protect charter school teachers from arbitrary disciplinary decisions. The first problem is that the initial application of this framework to charter school teachers depends on the way *Ramirez* is interpreted in each particular case. Some courts have interpreted *Ramirez* to establish a separate right to be free from arbitrary administrative decisions, regardless of whether a statutory right has been conferred. But, other courts have not, and have required the existence of a statutory right to trigger California due process. The second substantive flaw in this system is that its effectiveness relies primarily on the administrators' good faith. That is, the system operates on the assumption that administrators self-correct when mistakes underlying dismissal surface, and that administrators are deterred from making truly arbitrary decisions as a result of having to comply with the requisite due process procedures. While it is reasonable and practical to assume that administrators generally will act in good faith, the California due process system nonetheless lacks "teeth" in the sense that it is still entirely possible that an administrator "bent on denying employment will do so regardless of the procedural hurdles that are placed in [his or her path]."¹⁵⁵

In short, California due process is the most promising bridge for charter school teachers to cross in attaining protection from arbitrary disciplinary decisions. This framework makes significant headway in creating an employment regime that balances not only the charter schools' need to flexibly and efficiently make staffing-related decisions to serve its students, but also addresses the teachers' need to be safe and secure from arbitrary and odious dismissal decisions. But, because it is wrought by two noteworthy, substantive shortcomings, its effectiveness

155. *Bd. of Regents v. Roth*, 408 U.S. 564, 591 (1972) (Marshall, J., dissenting).

in shielding teachers from the whim of their administrators remains in question.

With the lessons of Parts I, II, and III in mind, Part IV now proposes and evaluates steps that the California Legislature may take to more affirmatively protect charter school teachers from arbitrary disciplinary decisions, while still balancing the needs of charter schools and the objectives of the charter movement.

IV. RECOMMENDATIONS FOR REFORM

The law currently provides charter school teachers with two possible routes to protect themselves from arbitrary disciplinary decisions: unionization and California due process. But, it is uncertain whether either route effectively accomplishes the goal of safeguarding charter school teachers from arbitrary or erroneous determinations for the reasons discussed in Parts II and III respectively. Thus, although charter schools largely retain the flexibility to efficiently make staff-related decisions to best serve the needs of its students, charter school teachers pay the price, as they are still fairly vulnerable to being dismissed for arbitrary, odious, or erroneous reasons.

Meanwhile, district teachers receive significant protection from dismissal and discipline via the California Education Code. These statutory protections make it nearly impossible for administrators to dismiss an ineffective or dissatisfactory teacher absent the most extreme circumstances. Consequently, while district teachers enjoy phenomenal job security, district schools may be crippled in their ability to best serve the needs of their students, given the difficulty inherent in dismissing an ineffective, tenured teacher.

These two employment regimes represent two opposite ends of a spectrum, where the competing needs of teachers and schools are not being met in a balanced fashion. In each framework, one party benefits to the other's severe detriment. The statutory protections for district teachers have recently been challenged through litigation. In 2012, nine California public school children challenged the constitutionality of the California statutes that govern teacher tenure, teacher dismissal, and teacher layoffs, in *Vergara v. California*.¹⁵⁶ Though the challenge failed, and statutes still remain in place, this attempted reform, by way of litigation, has brought the debate regarding their propriety to the forefront of public attention.¹⁵⁷ By contrast, however, little advocacy is being done on behalf of reform for charter school teachers.

This Note proposes two suggestions that would better balance the charter school teachers' need to be respected and free from completely

¹⁵⁶. See Medina & Rich, *supra* note 20.

¹⁵⁷. *Id.*

arbitrary decisions, with the charter schools' need to flexibly and efficiently make staffing decisions. The first is that California due process should be made firmly available to charter school teachers, with protections akin to those required in *Loudermill*. But, a regime of administrative review should be layered over these minimal procedural protections to ensure that charter school teachers' substantive right to have a government employer that acts reasonably and fairly is properly enforced, with requisite procedure playing an integral role. The second suggestion is that charter schools should be required to provide teachers with full disclosure and training as to its employment policies, and inform them of their legal rights as public employees hired at will, or otherwise. The details of each proposed reform, the underlying rationale behind each proposal, and the anticipated resulting outcomes of said policy changes will be discussed in the following Subparts.

A. CODIFICATION OF *LOUDERMILL*-LIKE DUE PROCESS PROCEDURES WITH ADMINISTRATIVE OVERSIGHT

Statutory codification of due process protections similar to those provided in *Loudermill*, combined with an additional layer of administrative oversight, would serve three key purposes. First, this reform would remove one of the barriers that charter school teachers currently face in invoking California due process: the uncertainty as to whether *Ramirez* will be interpreted favorably, to afford charter school teachers the relief provided by this framework in the first place. Second, this reform would provide charter school teachers with reasonable means of protecting themselves from erroneous and severely arbitrary disciplinary decisions, while still balancing the charter schools' need for flexibility and administrative freedom. Third, requiring administrative oversight would address one of the fundamental substantive gaps in the California due process framework: the questionable effectiveness of procedure *alone*, when no substantive restrictions are imposed upon the administrators' discretion.

Statutorily conferring charter school teachers with due process protections analogous to those in *Loudermill* would address one of the barriers that they currently face in invoking California due process. As discussed earlier, whether the framework applies in the first place is dependent upon whether a court interprets *Ramirez* to require a statutorily conferred right. However, should the legislature simply provide that charter school teachers may invoke California due process even when they are hired at will, this barrier is lifted, because further inquiry into courts' mixed interpretations of *Ramirez* is no longer necessary. Such a reform would be consistent with the fact that California uniquely values an individual's right to be free from arbitrary governmental decisions, as illustrated by the court's rationale in *Ramirez*.

As charter schools are public employers, this right is *always* at stake when a charter school teacher is hired at will in accordance with common practice. Moreover, the legislature has provided charter school teachers with similar, narrow statutory protections in the past, such as when it passed the Rodda Act. In short, this statutory reform would allow charter school teachers to invoke due process protections without having to rely upon the courts' mixed jurisprudence on what is required to trigger due process under *Ramirez*.

Under this proposed framework, school administrators would be required to provide their teachers with written notice of the charges underlying a disciplinary decision, and teachers would be afforded an opportunity to respond. But, the process would not stop there. To ensure that the principal is not acting erroneously, or making a completely arbitrary decision that does not respect the teacher's dignitary interest, an impartial party would review the written record created between the principal and teacher. This administrative review would ideally be an impartial panel of individuals, such as a Review Board comprised of three to five members of the school board, who could review the paper trail to spot-check for arbitrariness or error. Truly arbitrary reasons include reasons utterly unrelated to the teacher's employment. Put differently, a reviewing board may find that a teacher might have been subjected to an arbitrary disciplinary decision if the underlying reason bore *no connection whatsoever* to his or her role as a teacher.¹⁵⁸

These *Loudermill*-esque protections, combined with a basic framework of administrative oversight, would provide charter school teachers with a reasonable means of protecting themselves from erroneous or arbitrary disciplinary decisions, while balancing the needs and objectives of charter schools. On the one hand, these procedural requirements, with additional administrative review, amply respect teachers' dignitary interest and right to be free from erroneous and arbitrary decisions. By receiving notice and being provided an opportunity to respond, charter school teachers could prevent erroneous disciplinary determinations, as factual misunderstandings may come to light during the back-and-forth. Moreover, if administrators are aware that they must create a written record of their disciplinary decision, they may be more hesitant to act arbitrarily, thus reducing the likelihood that a charter school teacher will be dismissed for improper reasons.

158. Assigning a few members of the school board the responsibility of reviewing disciplinary and dismissal decisions is ideal for several reasons. First, charter schools are already held accountable to the school board, who provides them with the charter that authorizes their existence in the first place. Second, school board members are in the best position to review the decisions with an impartial lens, compared to actual charter administrators, teachers, or even parents. Finally, allocating this responsibility to school board members would be cost-effective; it would be financially and administratively reasonable to appoint several school board members to review the paper file of a few decisions each month.

More importantly, the additional administrative review would fill the remaining gap in the California due process framework: the risk that an administrator may still choose to follow through with an arbitrary disciplinary decision, regardless of having to comply with procedural requirements. If a charter school teacher believes her administrator is acting in bad faith, such as by claiming that her dismissal is due to a non-arbitrary reason when she has reason to believe it is actually motivated by an arbitrary reason, she could make these claims in her response to the notice of charges. Under California due process as it currently exists, her response would only be seen by her administrator, and would have little impact on his decision if he is truly bent on ending her employment for an arbitrary reason. However, under this new framework, the paper trail would be reviewed by a separate, impartial administrative authority, who may be more inclined to believe the teacher's side of the story and preclude her termination. Therefore, this framework provides charter school teachers protection by imposing procedural requirements and providing an opportunity for substantive review.

These procedural requirements are favorable to both charter school teachers, as well as the schools themselves. First, they respect the interests of charter schools and the charter movement. Second, they do not impose a high fiscal or administrative burden, compared to the procedures that district administrators must comply with to discipline or dismiss a district teacher. For example, a school board majority vote is not required to give the teacher notice of a decision that the administrators intend to dismiss or discipline her, and administrators need to provide each teacher a full, formal hearing upon request.

In this framework, a paper trail is established and reviewed; there is no need for a hearing, or any other long, drawn-out process that would impede the ability of charter administrators to dismiss a teacher efficiently. Furthermore, these procedures do not impose a great *substantive* limit upon the reasons that an administrator may dismiss a teacher. This reform does not propose that charter school teachers only be dismissed for "just cause" or another ambiguous, performance-related term, such as "professional misconduct." Rather, if the Review Board is limited to checking for error and true arbitrariness, which may entail requiring that the determination rest on something remotely related to the teacher's role as an employee, then charter school teachers can still be dismissed for a wide variety of reasons. For instance, under this framework, a charter school teacher may be fired if the administration is not persuaded she believes in the school's mission, if she has a poor impact on staff culture because she does not get along with the other staff, or if her test scores were poor. Therefore, under this framework, charter school administrators still retain substantial discretion in their

ability to dismiss or discipline unsatisfactory or ineffective teachers at a low cost.

In sum, the codification of *Loudermill*-like protections with an additional level of administrative review would address all of the shortcomings inherent in the California due process framework as it currently exists. These recommendations also fairly balance charter school teachers' dignitary interest with charter schools' need for flexible and efficient decisionmaking authority. But, these reforms would be irrelevant if charter school teachers themselves were not aware of the paths of legal relief available to them. The following Subpart proposes a solution to this potential issue.

B. CHARTER SCHOOL TEACHERS SHOULD BE GIVEN NOTICE OF THEIR RIGHTS RELATED TO THEIR EMPLOYMENT STATUS

Charter schools should be required to inform teachers of their legal rights under this framework for two primary reasons. First, charter school teachers themselves are unlikely to be aware of their rights as public school teachers, as a high percentage of those teachers are young, inexperienced, and unfamiliar with the profession.¹⁵⁹ If charter school schools are not required to inform incoming teachers of their rights, charter schools may be tempted to take advantage of these unseasoned teachers and fire them without complying with requisite procedures. Charter schools may also misinform teachers of the law by telling them that they have no rights to organize or unionize, when in fact, they are afforded this right under the Rodda Act. The teachers would never seek redress for their injuries stemming from the charter schools' misdeeds, as they were not aware of their basic rights. To prevent this circumventing of the legal system, charter schools thus should provide teachers with literature on their rights as public employees and public school teachers.

Second, as previously discussed, charter school teachers generally seek employment at charter schools because they are eager to be free of the bureaucratic limitations that burden district schools.¹⁶⁰ However, their enthusiasm for flexibility and innovation in the classroom often causes them to overlook the vulnerabilities that they expose themselves to as at will employees. Charter schools thus have a responsibility to be transparent with these teachers early on as to the costs and benefits of

159. See Michelle Exstrom, *Teaching in Charter Schools*, NAT'L CONFERENCE OF STATE LEGISLATURES I (2012) (stating that as of 2012, "[t]hirty percent [of charter school teachers] were in their first three years of teaching, and 75 percent had taught for less than 10 years."); see also Sara Rimer, *Study Finds Charter Schools Lack Experienced Teachers*, N.Y. TIMES (Apr. 8, 2003), <http://www.nytimes.com/2003/04/08/education/o8CHAR.html> ("Charter schools, regarded by hundreds of thousands of families as an alternative to low-performing public schools, rely heavily on young, inexperienced, uncredentialed teachers . . .").

160. Malloy & Wohlstetter, *supra* note 4, at 225–26.

being employed in this unique workplace—essentially, increased flexibility in exchange for less job security. Such transparency would actually work to the benefit of charter schools. If teachers are made fully aware of their vulnerabilities and legal status as an at will employee early on, then they will be less likely to challenge a determination that is valid. Consequently, administrators who properly exercise their authority will not be burdened by meritless challenges.

In short, requiring charter schools to provide their teachers with notice of their rights and vulnerabilities serves to prevent further mistreatment of charter school teachers, and benefits the charter schools themselves by lessening the likelihood of complicated dismissals when they are, in fact, supported by law.

CONCLUSION

This Note's survey of the law protecting charter school teachers from arbitrary disciplinary decisions has brought several conclusions to light. Charter school teachers occupy an odd middle ground between public and private employment. Charter school teachers have explicitly been carved out of the protections that district teachers receive from the California Education Code, as part of the "mega-waiver" designed to give charter schools increased flexibility and independence. Consequently, charter school teachers are generally hired at will. While they still have the right to unionize and eventually pursue better protections through collective bargaining, the unionization movement is too young and underdeveloped to predict whether it will be effective in improving the working conditions for charter school teachers.

Turning to constitutional protections, charter school teachers, though completely precluded from invoking federal due process, may be able to invoke California due process to require administrators to comply with certain procedural requirements in effecting a termination, which may reduce the likelihood that erroneous and completely arbitrary reasons will serve as the basis for dismissal. But, because the applicability of this framework hinges upon a specific outcome in the wake of muddled jurisprudence, it is still uncertain whether charter school teachers will be able to turn to this framework for relief.

The reforms proposed in this Note aim to strike an appropriate balance between the interests of charter school teachers on the one hand, and the objectives and goals of charter schools and the charter movement generally on the other. Statutory codification of *Loudermill*-like due process protections, with an extra level of administrative review, may provide charter school teachers with reasonable means of protecting themselves from arbitrary disciplinary decisions, while ensuring that administrators still retain great flexibility to efficiently dismiss a dissatisfactory teacher to best serve student needs.
