

The logo for LUCE FORWARD, featuring the words "LUCE FORWARD" in a white serif font. To the left of the text is a graphic consisting of three overlapping squares: a blue one on the left, a grey one in the middle, and an orange one on the right.

LUCE FORWARD

## Proposition 39 Opportunities and Challenges

March 8, 2011

California Charter Schools Association Conference

**John C. Lemmo, Esq.**

Procopio, Cory, Hargreaves & Savitch LLP  
John.lemmo@procopio.com

**Kenneth J. Stipanov, Esq.**

Luce, Forward, Hamilton & Scripps LLP  
kstipanov@luce.com

# What we'll cover

- Prop 39 basics
- What is the process?
- When/how do problems arise under Prop 39?
- Negotiating Facilities Use Agreements
- How does a charter enforce its rights?
- **Questions**

© 2011, Procopio, Cory, Hargreaves & Savitch LLP and Luce, Forward, Hamilton & Scripps LLP

# California's Charter School Law

1. District, County Office of Education, or State Board must authorize
2. Exempt from significant State rules that inhibit flexibility
3. Created by developer or converted from existing school
4. Nonsectarian, nondiscriminatory, complies with IDEA
5. Free
6. School of choice
7. Admits students by lottery, if needed
8. Has a written performance contract describes how student performance will be measured

© 2011, Procopio, Cory, Hargreaves & Savitch LLP and Luce, Forward, Hamilton & Scripps LLP

## What makes California's law "strong"?

- Any district, county office of education or State Board of Education can "authorize"
- Can be operated by nonprofit corporation
- Free from union contracts
- Free of most Education Code rules ("megawaiver")
- Directly funded at statewide average "per student" for operations
- Revocation requires an evidentiary hearing and can be appealed

© 2011, Procopio, Cory, Hargreaves & Savitch LLP and Luce, Forward, Hamilton & Scripps LLP

## What makes California's law "weak"?

- **No direct access to facilities or funding for facilities**, despite Proposition 39 and state bond approvals
- Dependent on districts for special education funding and services
- Charters good for only 5 years at a time
- Not treated as governmental for sovereign immunity and other purposes

© 2011, Procopio, Cory, Hargreaves & Savitch LLP and Luce, Forward, Hamilton & Scripps LLP

## Proposition 39 -- the Basics

- District **must** provide facilities to charter schools serving 80+ in-district students, if requested
- Conditions must be “reasonably equivalent” to those found in district-operated schools
- Facilities must be contiguous, furnished, and equipped
- The district “shall make reasonable efforts to provide” facilities “near to where the charter school wishes to locate”
- Charter Schools are “entitled to receive facilities”

© 2011, Procopio, Cory, Hargreaves & Savitch LLP and Luce, Forward, Hamilton & Scripps LLP

## Proposition 39 – the Basics

- District **must** share existing space ... it need not be vacant or unused space
- The district need not construct new space, nor pay for lease of new space
- District must make room for the charter school, ***even if*** that causes some disruption of district classroom use or other operations
- It's an annual process

© 2011, Procopio, Cory, Hargreaves & Savitch LLP and Luce, Forward, Hamilton & Scripps LLP

## Proposition 39 – the basics

- Regulations were revised for 2009-2010 school year
- Charter school must submit request for facilities by November 1 of the prior school year. Request must include
  - “reasonable projections of in-district and total ADA”
  - the methodology used for that projection
  - If school not yet open, documentation of number of “meaningfully interested” students
  - The school’s operational calendar
  - Info describing school’s general area and/or where it wishes to locate
  - Any other info about school’s program relevant to facilities

© 2011, Procopio, Cory, Hargreaves & Savitch LLP and Luce, Forward, Hamilton & Scripps LLP

## Proposition 39 – the basics

- Request is evaluated by District
- District must explain objections to methodology or projections by December 1, or they are waived
- District must make a “preliminary proposal” by February 1, identifying the specific location, conditions, and projected “pro rata” share amount
- Charter school must express concerns by March 1
- District must make final proposal by April 1

© 2011, Procopio, Cory, Hargreaves & Savitch LLP and Luce, Forward, Hamilton & Scripps LLP

# Negotiating the Facilities Use Agreement (“FUA”)

What kind of agreement is an FUA? Is it a

- Lease?
- License?
- Operating Contract?

➤ Has lease-like features, but usually does not create real property rights or true exclusive use rights like a commercial space.

© 2011, Procopio, Cory, Hargreaves & Savitch LLP and Luce, Forward, Hamilton & Scripps LLP

## FUAs *Continued*

- Term
  - Should be for the life of the charter itself, including periods of re-application, appeal, etc.
    - FUA cannot be the “back door” to charter termination
  - Should be tailored to actual school operations or fiscal year (e.g., July-June)
  - Termination by Charter School? (Ability to control future obligations.)
  - Should not include periods before or after actual possession or use (cost, liability and insurance risks)

© 2011, Procopio, Cory, Hargreaves & Savitch LLP and Luce, Forward, Hamilton & Scripps LLP

## FUAs *Continued*

- Space sharing – “Co-Location”
  - Scheduling
  - Maintenance and improvement
  - Common equipment (e.g., lunch area furniture)
  - Expense sharing
  - Non-student areas (office, maintenance closets, computer rooms, utilities, locker rooms)

© 2011, Procopio, Cory, Hargreaves & Savitch LLP and Luce, Forward, Hamilton & Scripps LLP

**Case Study of “co-location” gone bad**  
*New West would have been excluded from these spaces:*



© 2011, Procopio, Cory, Hargreaves & Savitch LLP and Luce, Forward, Hamilton & Scripps LLP

## Case Study of “co-location” gone bad

....but New West could have had these “lovely” spaces instead:



© 2011, Procopio, Cory, Hargreaves & Savitch LLP and Luce, Forward, Hamilton & Scripps LLP

## FUAs *Continued*

- Maintenance, Repair Retrofitting – Who is responsible?
  - Compliance with law
  - Handicap Access
  - Building Codes
  - Fire Sprinklers
  - Earthquake
  - Changes in laws

© 2011, Procopio, Cory, Hargreaves & Savitch LLP and Luce, Forward, Hamilton & Scripps LLP

## FUAs – cont.

- Maintenance, Repair Retrofitting *Continued*
  - District Policies and Procedures
    - Compatible with operation of CS?
    - Use of district personnel (pay scale)
    - Personnel training requirements
    - Requirement to comply with future changes to district policies (dangerous)
  - District facilities vs. Charter School-installed improvements

© 2011, Procopio, Cory, Hargreaves & Savitch LLP and Luce, Forward, Hamilton & Scripps LLP

## FUAs *Continued*

- Maintenance, Repair Retrofitting *Continued*
  - Big Ticket expenses
    - Structural
    - Parking Lots
    - Roofs
    - Handicap Access
  - Alterations
    - Approval Process
    - Control of funds during construction

© 2011, Procopio, Cory, Hargreaves & Savitch LLP and Luce, Forward, Hamilton & Scripps LLP

## FUAs *Continued*

- Casualty Damage (Fire Insurance)
  - District may require Charter School to contribute “pro rata share” of district’s costs
  - District may “self insure” (a.k.a. no insurance)
  - Watch interaction with indemnity provisions
  - Participation in district insurance program may entail deductible that is excessive for a single Charter School
  - Waiver of subrogation in district insurance program cases
  - Who is responsible to re-build?

© 2011, Procopio, Cory, Hargreaves & Savitch LLP and Luce, Forward, Hamilton & Scripps LLP

## FUAs *Continued*

- Default and Remedies
  - Maintenance and and Repair Obligations
    - Who decides if Charter School has breached?
    - District ability to do Charter School work and charge Charter School (plus overhead and admin fees)
    - Charter School ability to fix district breach and offset against amounts owed to District (good luck!)
  - Financial Breach
    - Late charges (notice and grace periods)
    - Default interest (notice and grace periods)
    - Future liability
    - Separate assets
    - District right to offset against amounts owed Charter School
  - Security Deposit - Charter School should resist

© 2011, Procopio, Cory, Hargreaves & Savitch LLP and Luce, Forward, Hamilton & Scripps LLP

## FUAs *Continued*

- Premises Liability
  - FUA will attempt to impose all liability on Charter School
  - Charter School must resist
    - for issues and defects not created by Charter School (i.e. dangerous conditions left over from district)
    - common area responsibility
  - Indemnity clauses must contain appropriate carve-outs
  - Insurance, Insurance, Insurance

© 2011, Procopio, Cory, Hargreaves & Savitch LLP and Luce, Forward, Hamilton & Scripps LLP

# Proposition 39 provides rights to charter schools

- So how can a Charter School enforce its rights under Proposition 39?
  - E.g. District says “no” to request, provides insufficient offer, “withdraws” offer, ignores the charter school’s request, etc.

© 2011, Procopio, Cory, Hargreaves & Savitch LLP and Luce, Forward, Hamilton & Scripps LLP

# Proposition 39 litigation

- Charter schools have used the courts to enforce their legal rights....
  - *Aurora CS* case: non-authorizing district must provide space
  - *Ridgecrest CS*: asking 230-student elementary school to use 5 different sites is **not** OK
  - *New West CS*: school district cannot withdraw an offer, and is subject to money damages for failure to comply

© 2011, Procopio, Cory, Hargreaves & Savitch LLP and Luce, Forward, Hamilton & Scripps LLP

# Questions...or your own experiences...

- Questions and discussion.

LF 101462184

© 2011, Procopio, Cory, Hargreaves & Savitch LLP and Luce, Forward, Hamilton & Scripps LLP