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5350 Skylane Boulevard
Santa Rosa, CA 95403

Tel: (707) 524-2690
Fax: (707) 578-0517
santarosa@sclscal.org
www.sclscal.org

General Counsel
Carl D. Corbin

Attorneys
Monica D. Batanero
Nancy L. Klein
Damara L. Moore
Jennifer E. Nix
Steven P. Reiner
Mia N. Robertshaw
Loren W. Soukup
Patrick C. Wilson
Frank Zotter, Jr.

Of Counsel
Robert J. Henry
Margaret M. Merchat
Virginia A. Riegel

LEGAL UPDATE

September 20, 2016

To: Superintendents, Member School Districts (K-12)

From: Frank Zotter, Jr. FZ
Senior Associate General Counsel

**Subject: 2016 Governing Board Elections and Organizational Meetings and
Frequently Asked Questions**
Memo No. 34-2016

ORGANIZATIONAL MEETINGS **(Education Code Section 35143)**

Each school district, community college district, and county office of education is required to hold an annual organizational meeting. In an election year, a school district or community college organizational meeting is held on a day within the fifteen (15) day period that commences with the date upon which a governing board member elected at that election takes office (the first Friday in December). In years in which no regular election for governing board members is conducted, the organizational meeting is held during that same fifteen day period. Exceptions to this rule are discussed below. This year the date on which elected trustees will take office is December 2, 2016. Organizational meetings should be held as follows:

1. Governing Boards of School Districts and Community College Districts.

The organizational meeting must be held within 15 days of the first Friday in December. Unless otherwise provided by a rule of the Governing Board, the *date* of the organizational meeting must be selected by the Board at its regular meeting held immediately *prior* to December 2nd.

2. Governing Boards of School Districts Governed by A City Charter.

These Boards have the option of holding their organizational meetings as described under Paragraph 1, above, or may hold their organizational meeting between December 15th and January 14th, if so provided by the Governing Board rules.



3. County Boards of Education.

The organizational meeting is the first meeting after the last Friday in November or the first meeting on or after the first day in July depending on whether the terms of office of the Board members commence on the last Friday in November or July 1.

ELECTION ISSUES

Districts with the governing board elections scheduled for 2016 should be aware of the following information:

1. Number of Candidates Less Than or Equal to the Number of Board Seats.

No election is held. The existing Board members continue to serve until the organizational meeting of the Board, at which time the candidate(s) are seated and become Board members.

2. No Candidates or Insufficient Candidates for Number of Seats Vacant.

Seats for which there are sufficient candidates are discussed above. For those seat(s) for which there are no candidates, the Board must appoint. It is important to note that, except for seats which have been specifically designated two-year seats, an appointment to a governing board seat due to lack of a candidate or candidates is a four-year appointment.

The appointment must be made prior to the election. Prior to making the appointment, “. . . the governing board shall cause to be published a notice once in a newspaper of general circulation published in the district or, if no such newspaper is published in the district, in a newspaper having general circulation in the district, stating that the board intends to make an appointment and informing persons of the procedure available for applying for the office.” (Education Code section 5328.5).

3. Changing the Election Cycle from Odd-Year to Even-Year (New for 2016).

Under the Elections Code, the “default” for school districts and community college districts is to hold elections in odd-numbered years. See Elections Code section 1302, subdivision (a) (“the regular election to select governing board members in any school district, community college district, or county board of education shall be held on the first Tuesday after the first Monday in November of each odd-numbered year).

Over the years, however, many school and college districts have switched their election cycles to even-numbered years. By doing so, these elections appear on the same ballot as statewide elections, and the districts can split ballot printing costs with the other public entities sharing the same ballot. In addition, because these elections coincide with gubernatorial or presidential elections, voter turnout is usually much higher. School district races are often the only matters on the ballot in odd-numbered years, and voter turnout accordingly is usually low.



Nevertheless, districts should recognize that just because more voters *participate* in even-numbered years, that does not necessarily translate into greater interest in school and college elections. Indeed, the onslaught of national or statewide candidates and issues on the statewide ballot can “drown out” such local elections, about which voters are typically not well-informed to begin with.

School districts and community colleges should also take note of AB 415, which Gov. Brown signed into law last year. It adds a new chapter to the Elections Code, beginning with section 14050, known as the California Voter Participation Rights Act. Under this Act, commencing January 1, 2018, school and college districts must hold their elections on statewide election dates (i.e., even-numbered years) if voter turnout for a regularly-scheduled election in that district has been at least 25% less than the average voter turnout for the previous four statewide general elections.

This bill authorizes a voter in a district that fails to make the switch to file a lawsuit to enforce this requirement. A prevailing plaintiff can collect reasonable attorney’s fees and court costs if court intervention is necessary. Districts that still hold their elections in odd-numbered years, therefore, may want to consider switching to even-numbered years, especially if their election turnout has been low, or for the other reasons set forth above, or both.

Procedure

The process for switching elections to an even-numbered cycle is set forth in Elections Code section 1302, as well as Elections Code section 10404.5 (for K-12 districts) or Elections Code section 10404.7 (for community colleges). At least 240 days before the district’s next scheduled election date, it must first adopt a resolution requesting the change, addressed to the county board of supervisors in each county where the district has territory. Thereafter, each board of supervisors, following various required notices, and in consultation with its elections official, must decide whether to approve the consolidation. Following approval, the board or boards must notify all registered voters, at the district’s expense, of the change of election date.

If the change is approved, it moves the existing odd-numbered election no more than one year to the next even-numbered year’s election cycle. The terms of office of all incumbent members of that board are automatically extended. Thus, for districts that act in time for the pending 2017 election, their incumbents would serve until 2018; if the change is made in time for the 2019 election, those incumbents would serve until 2020.

Any districts interested in making this change, whether because of AB 415 or for any other reason, should contact our office for assistance. We have sample resolutions both for K-12 and community college districts. We can also provide a more detailed overview of the process to switch from the odd-numbered year election cycle to even-numbered years.



FREQUENTLY ASKED QUESTIONS

Eligibility to Hold Office

1. What are the qualifications to be elected/appointed to a school board?

Education Code section 35107, subdivision (a) provides as follows:

(a) Any person, regardless of sex, who is 18 years of age or older, a citizen of the state, a resident of the school district, a registered voter, and who is not disqualified by the Constitution or laws of the state from holding a civil office, is eligible to be elected or appointed a member of a governing board of a school district without further qualifications.

2. Can employees of the school district serve on the governing board?

No. Education Code section 35107, subdivision (b)(1) provides as follows:

An employee of a school district may not be sworn into office as an elected or appointed member of that school district's governing board unless and until he or she resigns as an employee. If the employee does not resign, the employment will automatically terminate upon being sworn into office.

3. Are there limitations on the employment of a spouse or other relatives of a board member?

Yes. Under Government Code section 1090, a long-term school district or community college district employee whose spouse is appointed to or elected to the district's governing board may not be promoted by the board. "Long-term" means that the employee has served for one year or more. See Government Code section 1091.5, subd. (a)(6). The spouse of a new employee, i.e., someone with less than one year of employment at the district in question, may not be elected or appointed to the board unless the other spouse resigns his or her employment first.

If a spouse has been an employee of the district for at least one year before the other spouse joins the governing board, then the other spouse may be elected or appointed to serve on the governing board. Even in that circumstance, however, the board would thereafter be limited in its ability to affect the employment status of the employee spouse. For example, the employee-spouse could not be promoted, changed from a temporary to a regular employee, or have his or her position selectively reclassified while the other spouse is a board member. Furthermore, under the Political Reform Act (Government Code section 87100 et seq.), the board-member spouse would have to abstain from any discussion or participation in any decision that would uniquely affect the employee-spouse.



4. Are there term limits for school board members?

There can be, but only if the voters choose to impose them. Education Code section 35107, subdivision (c) provides as follows (emphasis added):

Notwithstanding any other provision of law, the governing board of a school district may adopt or the residents of the school district may propose, by initiative, a proposal to limit or repeal a limit on the number of terms a member of the governing board of the school district may serve on the governing board of the school district. Any proposal to limit the number of terms a member of the governing board of the school district may serve on the governing board of the school district shall apply prospectively only and shall not become operative unless it is submitted to the electors of the school district at a regularly scheduled election and a majority of the votes cast on the question favor the adoption of the proposal.

Therefore, unless action is taken as set forth in section 35107, subdivision (c), term limits do not apply to school district governing boards.

5. May a school board member hold another political office?

The answer depends on whether the other public office has “potentially overlapping public duties” with the school board position. Where there is potential for overlapping duties the common law doctrine of “incompatible” offices prevents one person from holding both offices. By way of example, board members of a “feeder” elementary school district cannot at the same time also serve as a board member of the high school district. (See 68 Ops.Cal.Atty.Gen. 171 (1985)).

Term of Office

Note: The responses set forth below may not apply to school district elections that are subject to the provisions of a city charter. Districts that are governed by a city charter should always review the charter to determine whether it governs the district’s elections.

6. When does the term of office begin?

For K-12 board members elected in odd-numbered years, Education Code section 5000 provides as follows:

After the initial election of governing board members in any school district or community college district, a governing board member election shall be held biennially on the first Tuesday after the first Monday in November of each succeeding odd-numbered year to fill the offices of members whose terms expire on the first Friday in December next



succeeding the election. Except as provided in this chapter, or in Chapter 2 (commencing with Section 5200), the elections shall be held and conducted in accordance with Chapter 3 (commencing with Section 5300). (Emphasis added.)

Similarly, for board members elected in even-numbered years, Education Code section 5017 provides as follows:

Each person elected at a regular biennial governing board member election shall hold office for a term of four years commencing on the first Friday in December next succeeding his or her election. Any member of the governing board of a school district or community college district whose term has expired shall continue to discharge the duties of the office until his or her successor has qualified. The term of the successor shall begin upon the expiration of the term of his or her predecessor. (Emphasis added.)

Finally, Elections Code section 10554 provides as follows:

Elective officers, elected or appointed pursuant to this part, take office at noon on the first Friday in December next following the general district election. Prior to taking office, each elective officer shall take the official oath and execute any bond required by the principal act. (Emphasis added.)

Because Education Code section 5300 provides that provisions of the Elections Code apply to school district elections “except as otherwise provided in the code” it appears that the references to “noon” in Elections Code section 10554 applies to school elections as well.

7. Is there a different rule for when the term of office begins for County Boards of Education?

Yes. Education Code section 1007, subdivision (a) provides: “Members [of county boards of education] elected at the time of the direct primary shall take office on the first day of July, and members elected at the date on which members of school district governing boards are elected shall take office on the last Friday in November subsequent to their election..” Thus, the first day of the term of incoming board members who were elected in June is July 1, and for those elected in November, their first day is the last Friday of November.

It is common for new members who are succeeding outgoing members to be sworn in at the first organizational meeting, which as noted above is different from the date upon which the terms of office for these board members actually begin and end. The organizational meeting for County Board trustees is either the first meeting on or after the first day in July (for those elected at the June primary) or the first meeting *after* the last



Friday in November (for those elected in November). Awaiting the organizational meeting is done purely for ceremonial reasons, however, and has no legal effect on the true first day in office of the incoming member (or the last day of office of the outgoing member). Some board members choose to be sworn in privately (e.g., by a notary public) before the organizational meeting.

Oath of Office

8. Is it necessary for a board member to take an “oath of office?”

Yes. Government Code section 1360 provides as follows:

Unless otherwise provided, before any officer enters on the duties of his office, he shall take and subscribe the oath or affirmation set forth in Section 3 of Article XX¹ of the Constitution of California.

Failure to take the oath of office and file a bond as required by law is one way in which a public office becomes vacant, as provided in Government Code Section 1770, subdivision (i).

9. Who can administer the oath of office to a newly elected/appointed board member?

Any person listed in Education Code section 60 or Government Code section 1362 may administer the oath to a newly elected/appointed board member.

Education Code section 60 provides as follows:

The Superintendent of Public Instruction, Deputy and Assistant Superintendents of Public Instruction, secretary of the Superintendent of Public Instruction, members of the Board of Governors of the California Community Colleges, the Chancellor of the California Community Colleges, county superintendents of schools, school trustees, members of boards of education, secretaries and assistant secretaries of boards of education, city superintendents of schools, district superintendents of schools, assistant superintendents of schools, deputy superintendents of schools, principals of schools, and every other officer charged with the performance of duties under the provisions of this code may administer and certify oaths relating to officers or official matters concerning public schools.

Government Code section 1362 provides as follows:

Unless otherwise provided, the oath may be taken before any officer authorized to administer oaths.

¹ That is, “Article 20.”



This is a very broad provision — “any officer authorized to administer oaths” includes judges, virtually all elected officials, notaries public, and numerous county and state officers.

10. What happens if the elected/appointed officer fails or refuses to take the oath of office?

Education Code section 5017 provides, in pertinent part, as follows:

. . . Any member of the governing board of a school district or community college district whose term has expired shall continue to discharge the duties of the office until his or her successor has qualified. The term of the successor shall begin upon the expiration of the term of his or her predecessor.

In addition, Government Code section 1302 provides as follows:

Every officer whose term has expired shall continue to discharge the duties of his office until his successor has qualified.

If the office was vacant then the position remains vacant until filled by a qualified candidate.

11. When may the oath be taken by a newly elected/appointed school board member?

Elections Code section 10554 provides as follows:

Elective officers, elected or appointed pursuant to this part, take office at noon on the first Friday in December next following the general district election. Prior to taking office, each elective officer shall take the official oath and execute any bond required by the principal act. (Emphasis added.)

Thus, the oath of office may be administered at any time after the election results are certified by the county clerk. This is typically done at the district’s organizational meeting.

12. How long does the county clerk have to certify the election results?

Elections Code section 15372 provides as follows:

The elections official shall prepare a certified statement of the results of the election and submit it to the governing body within 28 days of the election or, in the case of school district, community college district, county board of education, or special district elections conducted on the first Tuesday after the first Monday in November of odd-numbered years,



no later than the last Monday before the last Friday of that month.

Elections Code sections 15400 and 15401 provides as follows:

The governing body shall declare elected or nominated to each office voted on at each election under its jurisdiction the person having the highest number of votes for that office, or who was elected or nominated under the exceptions noted in Section 15452. The governing board shall also declare the results of each election under its jurisdiction as to each measure voted on at the election.

The elections official shall make out and deliver to each person elected or nominated, as declared by the governing body, a certificate of election or nomination, signed and authenticated by the elections official.

13. What are the rules with respect to the annual organizational meeting?

Education Code section 35143 provides as follows:

The governing board of each school district shall hold an annual organizational meeting. In a year in which a regular election for governing board members is conducted, the meeting shall be held on a day within a 15-day period that commences with the date upon which a governing board member elected at that election takes office. Organizational meetings in years in which no such regular election for governing board members is conducted shall be held during the same 15-day period on the calendar. Unless otherwise provided by rule of the governing board, the day and time of the annual meeting shall be selected by the board at its regular meeting held immediately prior to the first day of such 15-day period, and the board shall notify the county superintendent of schools of the day and time selected. The clerk of the board shall, within 15 days prior to the date of the annual meeting, notify in writing all members and members-elect of the date and time selected for the meeting.

If the board fails to select a day and time for the meeting, the county superintendent of schools having jurisdiction over the district shall, prior to the first day of such 15-day period and after the regular meeting of the board held immediately prior to the first day of such 15-day period, designate the day and time of the annual meeting. The day designated shall be within the 15-day period. He shall notify in writing all members and members-elect of the date and time.

At the annual meeting the governing board of each high school district, union high school district, and joint union high school district shall organize by electing a president from its members and a clerk.



At the annual meeting each city board of education shall organize by electing a president from its members.

At the annual meeting the governing board of each other type of school district, except a community college district, shall elect one of its members clerk of the district.

As an alternative to the procedures set forth in this section, a city board of education whose members are elected in accordance with a city charter for terms of office commencing in December, may hold its annual organizational meeting required in this section between December 15 and January 14, inclusive, as provided in rules and regulations which shall be adopted by such board. At the annual meeting the city board of education shall organize by electing a president and vice president from its members who shall serve in such office during the period January 15 next to the following January 14, unless removed from such office by majority vote of all members of the city board of education.

14. At the organizational meeting which board members (e.g., outgoing or incoming) convene the meeting?

Where the oath of office is administered at the organizational meeting the board with the outgoing board members may convene the meeting, the oath may be administered, and then the board with new members would complete that part of the agenda that follows the administration of the oath of office. If the new member takes the oath of office prior to the organizational meeting the meeting would then need to be convened with the new member sitting with the board.

Brown Act

15. Does the Brown Act apply to newly elected members before they take office?

Yes. Government Code section 54952.1 provides as follows:

Any person elected to serve as a member of a legislative body who has not yet assumed the duties of office shall conform his or her conduct to the requirements of this chapter and shall be treated for purposes of enforcement of this chapter as if he or she has already assumed office.

We believe the reference to “elected to serve” applies once the county clerk has certified the election results (See Elections Code sections 15372, 15400 and 15401 as set forth above.)



Board Member Resignation

16. May a school board member resign from his/her office?

Yes. Government Code section 1770, subdivision (c) provides that “[a]n office becomes vacant . . . [upon the incumbent’s] resignation.”

17. How does a school board member resign?

Education Code section 5090 provides that “a vacancy resulting from resignation occurs when the written resignation is filed with the county superintendent of schools . . .”

18. Is it necessary for the school board to take action to accept a member’s resignation?

No. As noted above the resignation is effective upon the county superintendent of schools’ receipt of the written resignation.

Some governing board meetings do have public agenda items to “accept” a member’s resignation. This is usually done for purposes of creating an occasion to honor a departing board member and is purely ceremonial with no legal significance.

19. May a board member rescind a written resignation once it is filed with the county superintendent of schools?

No. Education Code section 5090 provides that a “written resignation . . . shall, upon being filed with the county superintendent of schools be irrevocable.”

20. What constitutes “filing” a resignation with the county superintendent?

A resignation is filed with the county superintendent upon physical receipt by the county superintendent’s office of a writing indicating a resignation.

21. May a board member defer the effective date of a resignation?

Yes. Education Code section 5090 provides that a board member’s written resignation may indicate a “deferred effective date.” Section 5091 provides further that the resignation may not be deferred “for more than 60 days after he or she files the resignation with the county superintendent of schools.”

22. Would an e-mail or facsimile transmission constitute a written resignation?

Probably not. The law applicable to resignations has not been amended to provide for electronic or facsimile substitution for written resignations.

23. What is the effective date of a resignation?

Unless the resignation contains a “deferral” date, the effective date of a written resignation is the date it is actually received by the county superintendent’s office.

24. Are there any limits on the role of a board member who files with the county superintendent a written resignation with a deferred effective date?

Yes. Education Code section 35178 provides as follows:

A member of the governing board of a school district who has tendered a resignation with a deferred effective date pursuant to Section 5090 shall, until the effective date of the resignation, continue to have the right to exercise all powers of a member of the governing board, except that such member shall not have the right to vote for his or her successor in an action taken by the board to make a provisional appointment pursuant to Section 5091.

Please note: This prohibition applies only to the actual vote and does not appear to preclude the member whose resignation is pending from participating in the selection process or board discussion of who to appoint.

25. What does a school board need to do after learning of a resignation from one of its members?

Education Code section 5091 provides that the governing board “shall, within 60 days of the vacancy or the filing of the deferred resignation, either order an election or make a provisional appointment to fill the vacancy.”

Please Note: The 60 days starts to run when the resignation is received by the county superintendent even if the resignation contains a deferred effective date.

The governing board must also make sure that the person provisionally appointed to the position is “qualified” under Education Code section 35107 as discussed in more detail above.

26. May the board meet in closed session to develop questions or interview candidates?

No. Under the Brown Act, all aspects of making a provisional appointment must be done in public session, except where the board appoints an advisory ad hoc committee of less than a quorum of board members and no other members. If an advisory ad hoc committee is appointed it may assist in screening or evaluating applications and preparing interview questions, but may not make any final decisions for the board. (See Government Code section 54952, subdivision (b).)

The provisional appointment must be put on the public session agenda and the Board



must take action to approve the appointment.

27. After the board makes a provisional appointment what happens next?

Education Code section 5092 provides as follows:

Whenever a provisional appointment is made to the governing board of a school district pursuant to Section 5091, the board shall, within 10 days of the provisional appointment of a person to fill a vacancy which occurs or will occur, post notices of both the actual vacancy or the filing of a deferred resignation and also the provisional appointment in three public places in the district and shall publish a notice pursuant to Section 6061 of the Government Code. If there is no newspaper of general circulation published in the district, notice need not be published.

The notice shall state the fact of the vacancy or resignation and the date of the occurrence of the vacancy or the date of the filing of, and the effective date of, the resignation. The notice shall also contain the full name of the provisional appointee to the board and the date of his appointment, and a statement that unless a petition calling for a special election, containing a sufficient number of signatures, is filed in the office of county superintendent of schools within 30 days of the date of the provisional appointment, it shall become an effective appointment.

Thus, the residents of the district whose board has appointed a provisional board member can petition to force a special election—although in practical terms, this rarely happens.

28. What happens if vacancies occur in a majority or more of the board seats at the same time?

Education Code section 5094 provides as follows:

If for any reason vacancies should occur in a majority of the offices on any school district or community college district governing board, the president of the county board of education having jurisdiction may appoint members of the county board of education to the district governing board until new members of the governing board are elected or appointed.

Note: At the discretion of the county board of education president, appointments may be made in one or more of the vacant positions. In other words, the county board president is not limited to making appointments only sufficient to create a quorum on the district board. Thus, on a five person board with 3 vacancies, the county board president may designate up to 3 members of the county board of education to serve as district board members. Once appointed, the county board members continue to serve as district board members until new members “are elected or appointed.”



29. May a district board reappoint the same person who resigned from the seat that is vacant?

No. Government Code section 1752, subdivision (a) provides, in pertinent part, as follows:

. . . no person elected or appointed to the governing body of any city, county, or district having an elected governing body, shall be appointed to fill any vacancy on that governing body *during the term for which he or she was elected or appointed* (emphasis added).

Please note: This provision also prohibits a board member with a “short” term from resigning and being appointed to a vacant “long” term.

30. If the district chooses to call for written applications from candidates who wish to be considered for appointment, are the submitted applications public records?

Yes. Under California Public Records Act copies of any applications that are received by the district must be made available for public inspection and copies provided upon request.

Note: Because the applications are public records we recommend that prospective candidates be so-informed before they submit an application.

31. If the board chooses to interview candidates one at a time before making an appointment do all candidates have a right to be present?

Under the Brown Act all persons—including candidates for a board appointment—have a right to attend all public sessions of the board.

At the same time the board may request (but not require) the other candidates to remain outside the meeting room until after they are interviewed.

Our experience has been that most candidates honor the request, as they understand the essential fairness of the request, and that the refusal to do so may have an impact on the remaining board members’ willingness to appoint such a candidate.

32. If everything must be done in public session, how does the board develop questions that will not be known in advance by the candidates?

Good question! The Brown Act simply does not provide a ready response to this question.

We have recommended against using email (or other private communications) among board members to reach a board decision on what questions to ask the candidates.



School & College Legal Services of California
Tel: (707) 524-2690 Fax: (707) 578-0517
www.sclscal.org

It is recommended that individual board members submit proposed questions to the board president, who will compile a composite question list. The board can also have such questions referred to an executive officer, such as the superintendent, who can undertake the task of compiling such questions, perhaps in concert with a single board member or an ad hoc committee of the board.

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

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

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