FILLING BOARD VACANCIES:
THE PROVISIONAL APPOINTMENT PROCESS

The following information outlines the basic process for dealing with a vacancy on a school or community college district Board of Trustees. This process is separate and distinct from the process used where there is an insufficient number of candidates for a Board seat.

HOW DO VACANCIES OCCUR?

Vacancies usually occur as the result of the resignation of a sitting Board member. The resignation becomes irrevocable when filed with the County Superintendent of Schools.\(^1\) A resignation can state a deferred effective date (up to 60 days from the date the resignation is filed with the County Superintendent), in which case it takes effect on that deferred date.\(^2\) Otherwise, it is effective on the date filed with the County Superintendent.

Vacancies can also occur upon the happening of certain events described in Government Code section 1770 (death, adjudication of physical or mental incapacity, removal from office, ceasing to be an inhabitant of the district, ceasing to discharge the duties of office for three consecutive months, etc.)

When a resignation is received from a Board member, it should be transmitted to the County Superintendent of Schools as soon as possible. The Superintendent’s designee will send out a packet of information and useful forms.

WHAT IS THE SCHOOL BOARD REQUIRED TO DO WHEN A VACANCY OCCURS?

When a vacancy occurs, the Board is called upon to make a provisional appointment or call for a special election (the Code says it “shall” do so), within 60 days of the vacancy, which is the later of the date it is filed with the County Superintendent or a deferred effective date.

The relevant dates need to be carefully considered in calendaring the appropriate action.

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\(^1\) Education Code section 5090.
\(^2\) Education Code section 5091(a).
WHAT HAPPENS IF THE BOARD DOES NOT TAKE ACTION ON EITHER OPTION?

If the Board fails to take action within the 60-day time period, it loses its power to act and the County Superintendent is then legally obligated to call for an election. If it cannot be consolidated with another election during the relevant time frame, the election costs will likely be considerably higher for a “standalone” election. It may be possible to call for an election via mail ballot if the conditions listed in Elections Code section 400 or 4004 can be met.

WHAT ARE THE REQUIRED QUALIFICATIONS FOR A PROVISIONAL APPOINTEE?

Applicants for a provisional appointment must be 18 years of age or older, citizens of the State, residents of the District, and not disqualified by the Constitution or laws of the State from holding a civil office. In districts with trustee areas, applicants should normally be residents of the trustee area corresponding to the departing trustee.

District employees cannot remain employed with the District and serve on the Board of Trustees. The Education Code provides that the employee cannot be appointed unless the employee resigns from employment. If an employee were to be appointed to office without resigning, the law provides that the employment automatically terminates upon being sworn in to office.

Note that the trustee who is leaving office CANNOT be reappointed during the balance of that term. (The person can run for election to the office. He or she could also seek reappointment if a later opportunity arises after the term ends.)

WHAT IS THE PROCESS FOR MAKING A PROVISIONAL APPOINTMENT?

The Board has a great deal of flexibility in this process. While not required to do so, Boards can call for applications or statements of interest, advertise in the newspaper or on the District website, and conduct interviews of interested persons.

While it can be consolidated into a compressed time frame, the process is normally spread across multiple Board meetings. You may want to have an initial Board meeting to announce the vacancy and discuss the Board’s process for filling it; a second meeting could be held to conduct interviews or review applications; and a final meeting could be held for the Board to make the actual appointment. All of this must take place within the 60-day period.

Boards are often uncomfortable making this decision in open session, as they may know one or more of the candidates and no Board member wants to be the one to make the initial motion to appoint a particular person. Nevertheless, the entire process must be conducted in open session, including the interviews and the voting. The Attorney General has opined that a “secret ballot” process is not permissible. Some boards take action by written ballot, identifying their

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3 The County Superintendent of Schools must order the election on the next established election date (per Education Code section 1000) which falls at least 130 days after the order of election (Education Code section 5098(b)).
4 See, 26 Opinions of the Attorney General 12 (1955). There could be an exception with newly established trustee areas where the seat vacated was not previously subject to election by trustee area.
5 Education Code section 35107(b) [for community college districts, see section 72103(b)].
preferred candidate, with ballots read aloud and the vote or abstention of each Board member noted and recorded in the minutes.\(^8\) If a single candidate does not receive the requisite number of votes and thus is not the affirmative act of a majority of the board, multiple rounds may be necessary.

Advertising the vacancy is not required at this stage in the process, although districts sometimes opt to do so.

Our office maintains sample applications, notices of intention to appoint, and interview questions if you would like to see any of those.

Note that CSBA Board Bylaw 9223 addresses provisional appointments. It sets up an optional process calling for advertising in local media, establishing a committee of less than a quorum of Board members to ensure that applicants are eligible for Board membership, and interview of candidates at a public meeting.

**CAN THE OUTGOING BOARD MEMBER VOTE ON THE PROVISIONAL APPOINTMENT?**

Where the vacancy is created by a resignation with a deferred effective date, such that the resigning trustee remains on the Board at the time the action to fill the vacancy is scheduled, that Board member may not vote on the provisional appointment.\(^9\)

**WHAT HAPPENS AFTER A PROVISIONAL APPOINTMENT IS MADE?**

Within ten days of making the appointment, the Board must cause a notice of the vacancy or filing of a deferred resignation and the provisional appointment to be posted in three public places in the district. The Board must also cause the notice to be published once in a newspaper of general circulation published in the District if one exists.\(^10\)

In addition to notifying the public of the vacancy and the identity of the provisional appointee, the notice must include a statement that unless a petition calling for a special election containing a sufficient number of signatures is timely filed with the County Superintendent, the provisional appointment shall become an effective appointment. The petition must be filed within 30 days of the date of the provisional appointment.

**WHAT HAPPENS IF A PETITION FOR SPECIAL ELECTION IS FILED?**

Registered voters of the District have the opportunity to file a petition for special election within 30 days of the provisional appointment. The number of signatures required varies according to the number of registered voters in the District. The Education Code has specific requirements for the form and content of the petition.\(^11\)

If a timely petition is filed, the County Superintendent has 30 days to verify the signatures. If the petition is determined legally sufficient, the appointment is terminated and the County Superintendent must order a special election to be conducted no later than the 130\(^{th}\) day after the

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\(^8\) The California Attorney General has taken the position that “members of a body may cast their ballots either orally or in writing so long as the written ballots are marked and tallied in open session and the ballots are disclosable public records.” See, California Attorney General, “The Brown Act, Open Meetings for Local Legislative Bodies, 2003.”

\(^9\) Education Code section 35178 [for community college districts, see section 72203.5].

\(^10\) Education Code section 5092; see also Government Code section 6061.

\(^11\) Education Code section 5091(f).
determination. In certain circumstances, the special election can be scheduled at a later date to coincide with a regular election.

**HOW LONG DOES THE APPOINTEE SERVE?**

The provisional appointment is effective immediately following the appointment. The appointee serves until the next regularly scheduled governing board election which is at least 130 days after the effective date of the vacancy, at which point an election is held to fill the vacancy for the remainder of the unexpired term.\(^\text{12}\)

**ARE THERE CERTAIN TIMES WHEN A PROVISIONAL APPOINTMENT CANNOT BE MADE?**

There are two situations in which the Board is prohibited from making a provisional appointment or calling for a special election. These are sometimes referred to as “blackout periods.”

- **Vacancies During Last Four Months of Term.** When the vacancy occurs during the last four months of the term for the vacant position, the Board cannot make an appointment or call for a special election (this period generally extends from early August through early December).

- **Vacancies During Same Year as Election But Position Not Scheduled to be Filled at that Election.** When the vacancy occurs during the same year as a governing board election, but the vacant position is not scheduled to be filled at the upcoming election, the Board cannot make a provisional appointment or call for an election where the vacancy occurs (or a resignation is filed with the County Superintendent of Schools) during the period between six months and 130 days prior to the election. In that case, the position is filled at a special election for that position consolidated with the regular election.\(^\text{13}\) A person elected in this specific way takes office at the next regularly scheduled board meeting following the certification of the election and serves only until the expiration of the term he or she was elected to fill.

  If in this scenario (vacancy in an election year but seat not scheduled to be filled at that election), the vacancy occurs less than 130 days before the upcoming election, the Board can proceed to make a provisional appointment or call for a special election. In that case, the appointee serves until the next regularly scheduled election which is at least 130 days after the effective date of the vacancy, meaning they will not be up for election in the same year as the vacancy occurred.

**WHAT IS RECOMMENDED AGENDA LANGUAGE TO GET THE PROCESS STARTED?**

The following is recommended language for your consideration, depending on how you decide to structure the appointment process (*all open session*):

1. Discussion Regarding Vacancy on the Board of Trustees and Possible Action to Call for a Special Election or Pursue a Provisional Appointment (Education Code Section 5091-5095).

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\(^{12}\) Education Code section 5091(e).

\(^{13}\) Education Code section 5093
[This reflects an initial discussion of options and would allow the Board to call for a special election if desired, or indicate a preference for a provisional appointment. If the Board will pursue an appointment, it could establish deadlines for applications, interviews, etc.]

2. Designation of Board Subcommittee to Review Applications for Provisional Appointment to Board of Trustees.

[This is an optional item if the Board chooses to establish a subcommittee for review of applications].

3. Interview Applicants for Provisional Appointment to Board of Trustees.

[This is optional in that interviews are not required]

4. Consideration and Possible Action to Make Provisional Appointment to Fill Vacancy on the Board of Trustees (Education Code section 5091).

REMINDER: Departing trustees will need to file a “Leaving Office” Statement of Economic Interests (Form 700) within 30 days of the effective date of the resignation.

If you have any questions concerning this or related issues, do not hesitate to contact our office.

— Grant Herndon

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Filling Board Vacancies
(Provisional Appointment Process)

Vacancy

This can be the result of a resignation or other cause for vacancy such as death, ceasing to be an inhabitant of the district, etc.

File With County Supt.

When a resignation is filed with the County Superintendent, it becomes effective at that time or at a deferred effective date stated in the resignation, up to 60 days after the filing.

Board Appoints or Calls for Election

With the exception of vacancies which occur in defined "blackout" periods before an upcoming election, the Board must take action to call for an election or make a provisional appointment within the 60-day window. Multiple board meetings should be scheduled to allow for announcing the vacancy, considering candidates and taking action. FAILURE TO ACT BY THE 60TH DAY MEANS THE COUNTY SUPERINTENDENT IS LEGALLY OBLIGATED TO CALL FOR AN ELECTION.

Publish Action Taken

If a provisional appointment is made, the Board must post notice of the vacancy and appointment in at least 3 places in the district and must advertise in a newspaper of general circulation if one exists. The notice must contain specified information.

Petition for Special Election

Registered voters of the district can file a petition for special election within 30 days of the provisional appointment. If the County Superintendent determines the petition has the required number of signatures and is legally sufficient, the provisional appointment is terminated.