



August 2022

## FILLING BOARD “VACANCIES” APPOINTMENTS IN LIEU OF ELECTION (NO CANDIDATES OR INSUFFICIENT NUMBER OF CANDIDATES)

The following information outlines the basic process for dealing with a lack of candidates or insufficient number of candidates for board seats in a school or community college board or county board of education election. This process is separate and distinct from the process used to fill vacancies on the board which occur as a result of a resignation or other event causing a mid-term vacancy.

### What Triggers the Duty to Appoint?

- ▶ When no one has been nominated for elective office by the deadline.<sup>1</sup>
- ▶ For districts that elect trustees at large when there are fewer candidates than board seats up for election.
- ▶ For districts that elect by trustee area (or elect at large using “from-trustee” areas) when there are fewer candidates than board seats required to be elected from a particular trustee area.
- ▶ When no timely petition requesting an election has been presented to the officer conducting the election, signed by the lesser of 50 voters or 10 percent of the voters of the district (or of the trustee area for districts electing by trustee area).

### What is the School Board Required to Do?

When there are no candidates or an insufficient number of candidates for the seats available, the typical steps followed appear below. The relevant dates should be carefully considered in calendaring the appropriate action.

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<sup>1</sup> The deadline for nominations is normally 5 p.m. on the 88<sup>th</sup> day before election day. However, if there is an incumbent and the incumbent does not file by that time, the deadline is extended for any other person until 5 p.m. on the 83<sup>rd</sup> day before the election. (Elections Code sections 10603, 10604.) The duty to make the appointment is triggered where there are no candidates or an insufficient number of candidates on the 83<sup>rd</sup> day before the election. (Education Code section 5326.)

- ▶ Meet to consider process and set schedule for newspaper publication,<sup>2</sup> optional submission of applications, board/committee review of applications, and board interviews.
- ▶ Publish in newspaper (required).
- ▶ Board interviews (optional).
- ▶ Board appointment (***\*THE APPOINTMENT MUST BE MADE AT A MEETING HELD PRIOR TO ELECTION DAY.***)

### Publication of Notice of Intent to Appoint

For this type of appointment, the board must publish notice of intent to make an appointment before taking action. The notice must be published once in a newspaper of general circulation published in the district. If there is no such newspaper, the publication must be made in a newspaper having general circulation in the district. The notice must advise interested persons of the procedure available for applying for the office.<sup>3</sup> Our office can provide you with a sample notice for publication.

The statute does not specify a deadline for the publication, other than it must occur before the board takes action to appoint. If the board will be interviewing candidates before the meeting at which the appointment is made, ideally the notice will have appeared before that date as well. Many districts now also opt to post the notice on their websites.

### What Are the Required Qualifications for an 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.<sup>4</sup>

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 he or she 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 into office.<sup>5</sup>

For county boards of education, the county superintendent of schools, any member of his or her staff, or an employee of a school district within the county board's jurisdiction are not eligible for appointment to that office.<sup>6</sup>

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<sup>2</sup> In contrast to provisional appointments, appointments due to lack of sufficient candidates require a district to advertise the vacancy **prior** to taking action to fill it.

<sup>3</sup> Education Code section 5328.5.

<sup>4</sup> See 26 Opinions of the California 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. Consult counsel on this issue.

<sup>5</sup> Education Code section 35107(b) [for community college districts, see section 72103(b)].

<sup>6</sup> Education Code section 1006(a).

## What Is the Process for Making an Appointment in Lieu of Election?

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 on the district's website, and conduct interviews of interested persons.

While it can be consolidated into a compressed timeframe, the process may normally be spread across multiple board meetings and can include special meetings. You may want to have an initial board meeting to announce the need for the appointment, discuss the board's process, and establish timelines; 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. Remember, however, that board action must occur before election day. Our office can provide sample applications (English and Spanish) and interview questions.

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 voting. The Attorney General has opined that a "secret ballot" process is not permissible.<sup>7</sup> Some boards take action by written ballot, on which they identify their preferred candidate, with ballots read aloud and the vote or abstention of each board member noted and recorded in the minutes. If a single candidate does not receive the affirmative vote of a majority of the board, multiple rounds of voting may be necessary.

For K-12 districts, note that CSBA Board Bylaw 9223 addresses both provisional appointments and appointments in lieu of election. It recommends the same basic process as for provisional appointments (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). This process may not be appropriate for all districts. If a board has adopted the policy but wishes to waive some of the elements or modify it, the best practice would be to do so formally before the process is implemented in a particular case.

## Can the Board Appoint a Current Board Member Whose Term is Expiring?

The statutes do not address or prohibit a board from appointing a current member whose term is expiring. However, that trustee must not participate in the discussion or voting on the question, and arguably should not participate in interviewing other candidates. The board member must publicly announce the fact of the potential conflict of interest and should leave the room during any discussion or votes on that matter.<sup>8</sup>

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<sup>7</sup> 59 Opinions of the California Attorney General 619 (1976); Government Code section 54953.

<sup>8</sup> Government Code section 87105.

## What if We Have By-Trustee Areas or At-Large Trustee Areas?

In nearly all cases, the appointee will need to be a resident of the by-trustee or at-large “from trustee area” for which there were no candidates or an insufficient number of candidates.<sup>9</sup> Please consult our office if you have questions or concerns in this area.

## What Happens After an Appointment Is Made?

Once the appointment is made, the appointee or appointees are to be seated at the organizational meeting of the board *AS IF ELECTED AT A DISTRICT ELECTION*.

In a year when a regular governing board election is held, the organizational meeting of a school or community college board must be held within a 15-day period that begins with the date upon which an elected governing board member takes office.<sup>10</sup> For school and community college districts, board member terms begin on the second Friday of December.<sup>11</sup> *Note that Education Code section 5328 provides that if the organizational meeting is held after the date on which elected trustees’ terms normally begin, a trustee appointed in lieu of election should not be sworn in until the organizational meeting.*

Districts should notify the county elections official of the name of the appointee so the County can issue the appropriate forms (typically referred to as a Certificate of Appointment or Certificate of Election) and Oath of Office.

## What Happens If a Petition for Election Is Filed?

If a petition is filed by 5 p.m. on the 83<sup>rd</sup> day prior to the date fixed for a governing board election, signed by the lesser of 50 voters or 10 percent of the voters in the district (or trustee area), the seat will be filled by election.

## How Long Does the Appointee Serve?

As noted above, the appointment is effective at the board’s organizational meeting following the election. The appointee is seated as if elected and serves the entire term for the seat filled.

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<sup>9</sup> See 26 Opinions of the California Attorney General 12 (1955). A question may arise if the district has newly implemented a by-trustee area system or has redistricted the trustee area in question. While the result may be different for a provisional appointment, for an appointment in lieu of election due to insufficient candidates the appointee should reside in the new or newly configured trustee area.

<sup>10</sup> See Education Code section 35143 (for community college districts, section 72000). For county boards of education, the organizational meeting is the first meeting held after the second Friday in December. (Education Code section 1009 for those boards whose members’ terms begin on the last Friday in November.)

<sup>11</sup> Education Code sections 5000, 5017, 35105, 72027. County board members’ terms begin on the second Friday in December (Education Code section 1007) or the first day of July for those that elect at the time of the direct primary.

## What Happens if we Have Only One Candidate for an Open Seat?

If only one candidate filed for an open seat, no election is held and the person is seated at the board's organizational meeting in December.<sup>12</sup>

## 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 Lack of Candidates (or, if applicable, Insufficient Number of Candidates) for Board Seat at Upcoming Governing Board Election and Procedure for Appointment (Education Code sections 5326 - 5328.5).
2. (OPTIONAL - BUT MAY BE ADDRESSED IN BOARD POLICY) Designation of Board Subcommittee to Review Applications for Provisional Appointment to Board of Trustees
3. (OPTIONAL - BUT MAY BE ADDRESSED IN BOARD POLICY) Interview Applicants for Appointment to Board of Trustees in Lieu of Election.
4. Consideration and Possible Action to Make Appointment(s) to the Board of Trustees in Lieu of Election (Education Code section 5328).

A summary sheet that may be helpful for your boards is attached.

- Grant Herndon

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*Education Law Updates are intended to alert clients to developments in legislation, opinions of courts and administrative bodies and related matters. They are not intended as legal advice in any specific situation. Please consult legal counsel as to how the issue presented may affect your particular circumstances.*

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<sup>12</sup> Education Code section 5328.

# Appointments In Lieu Of Election (No Candidates or Insufficient Number of Candidates)

