SCHOOLS LEGAL SERVICE

Education LAW UPDATE

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NOVEMBER 2026

– FILLING BOARD VACANCIES –
REQUIRED PUBLIC NOTICE OF APPOINTMENTS MUST BE POSTED ON THE DISTRICT'S WEBSITE

When a vacancy occurs on a school district governing board, community college board, or county board of education, the application law requires the governing board to either make a provisional appointment to fill the vacancy until the next governing board election or call for a special election. Public notice is required when a provisional appointment is made.

Within 10 days of a provisional appointment, notice of the vacancy (or deferred resignation) and the provisional appointment must be provided by all of the following methods:

- Posting the notice in three public places within the jurisdiction;
- Publishing the notice pursuant to Government Code section 6061, if applicable; and
- Posting the notice on the district's internet website.

The notice must also specify:

- The fact of the vacancy or resignation;
- The date of the vacancy, or the date of filing and effective date of the resignation;
- The full name of the provisional appointee and the date of appointment; and
- That the appointment will become effective unless a petition calling for a special election, containing a sufficient number of signatures, is filed with the county superintendent of schools within 30 days of the provisional appointment.

These notice requirements promote transparency and provide voters with an opportunity to petition for a special election following a provisional appointment.

Our bulletin on filling board vacancies pursuant to the requirements of Education Code section 5092 is attached hereto for your use.

When publication in a newspaper of general circulation is required, districts may wish to consider using https://legal.ognsc.com/, an online filing service for legal notices through *The Bakersfield News Observer*. The service allows users to upload notices, submit payment, and obtain proofs of publication electronically. *The Bakersfield News Observer* is an adjudicated newspaper of general circulation in Kern County. (Districts should confirm that any publication selected satisfies the legal requirements applicable to their jurisdiction.)

Please contact us if you have questions on this topic.

- Abigale Auffant
Mark Pafford

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– FILLING BOARD VACANCIES –
THE PROVISIONAL APPOINTMENT PROCESS

The following outlines the basic process for dealing with a vacancy on a school or community college district governing board or county board of trustees.[1] 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.[2] 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.[3] Otherwise, it is effective on the date filed with the County Superintendent.

Vacancies can also occur upon 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.

[1] The process for filling board vacancies is spelled out in Education Code (EC) section 5090 and following; the same process applies to county boards of education as prescribed in EC section 1008.

[2] EC section 5090.

[3] EC section 5091(a).

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.

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.[4] 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.[5]

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.[6]

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.)[7]

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[4] The County Superintendent of Schools must order the election on the next established election date (pursuant to EC section 1000) which falls at least 130 days after the order of election (EC section 5098(b)).

[5] 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.

[6] EC section 35107(b) [for community college districts, see section 72103(b)].

[7] Government Code section 1752.

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 board members may know one or more of the candidates and might be reluctant 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.[8] Some boards take action by written ballot, identifying their preferred candidate, with ballots read aloud and the vote or abstention of each board member noted and recorded in the minutes.[9] If a single candidate does not receive the affirmative vote of a majority of the board, multiple rounds of voting may be necessary.

Advertising the vacancy is not required at this stage in the process, although districts sometimes opt to do so (and your board policy may call for it).

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

For K-12 districts, CSBA Board Bylaw 9223 addresses both provisional appointments and appointments in lieu of election. It recommends the same basic process for both (establishing a committee of less than a quorum of board members to ensure that applicants are eligible for board membership and interviewing 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.

[8] 59 Opinions of the California Attorney General 619 (1976); Government Code section 54953.

[9] 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."

CAN THE OUTGOING BOARD MEMBER VOTE ON THE PROVISIONAL APPOINTMENT?

Where the vacancy is created by a resignation with a deferred effective date, so the resigning trustee remains on the board at the time the action to fill the vacancy is scheduled, the resigning board member may not vote on the provisional appointment.[10]

WHAT HAPPENS AFTER A PROVISIONAL APPOINTMENT IS MADE?

Within 10 days of making the appointment, the board must cause a notice of the vacancy, or filling 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.[11] Within 10 days of making the appointment, the board must cause a notice of the vacancy, or filling 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. The notice must also be posted on the district's internet website (Education Code § 5092.)[12]

When publication in a newspaper of general circulation is required, districts may wish to consider using https://legal.ognsc.com/, an online filing service for legal notices through *The Bakersfield News Observer*. The service allows users to upload notices, submit payment, and obtain proofs of publication electronically. *The Bakersfield News Observer* is an adjudicated newspaper of general circulation in Kern County. (Districts should confirm that any publication selected satisfies the legal requirements applicable to their jurisdiction.)

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.[13]

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[10] EC section 35178 [for community college districts, see section 72203.5].

[11] EC section 5092; see also Government Code section 6061.

[12] The statute does not specify the duration of the posting. Because the posting includes information about the 30-day deadline for posting a petition for special election, we recommend posting for 30 days.

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 130th day after the 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.[14]

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.[15] A person elected in this specific way takes office at the next regularly scheduled board meeting following 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.

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[13] EC section 5091(f).

[14] EC section 5091(e).

[15] EC section 5093.

WHAT AGENDA LANGUAGE IS RECOMMENDED 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 sections 5091-5095).

[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.

Please do not hesitate to contact our office if you have questions concerning this or related issues.

- Abigale Auffant
Mark Pafford

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