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September 9, 2019

Board President Connie Prado
and Members of the Board of Trustees
South San Antonio Independent School District

LEGAL OPINION LETTER

Filling a Board of Trustee Vacancy

Dear Board President Prado and Members of the Board:

This letter will constitute our Firm's legal opinion regarding the election or appointment process for filling a vacant seat on the South San Antonio ISD Board of Trustees. Specifically, effective September 3, 2019, three (3) South San Antonio ISD Trustees tendered their resignations from their positions as South San Antonio ISD Trustees. In light of these resignations, this Firm has been asked to write an opinion letter to inform the Board of Trustees of its legal options in filling the vacant Trustee seats. In summary, the Board of Trustees has two options. The first option the Board may choose is to hold a special election to fill the vacant seat. In the alternative, the Board may choose to simply appoint a new Trustee by majority vote at a lawfully noticed Board of Trustee meeting. It is important to note that because more than one year remains on term of office of each of the three vacated positions, each of the vacated positions must be filled within 180 days after the vacancy occurs. Both options and the logistical process for proceeding with either option are expanded upon in detail below.

I. WHAT CONSTITUTES A VACANCY

If a board member resigns by delivering written notice to the presiding officer of the Board,¹ the resignation becomes effective and a vacancy exists either (1) on the date the resignation is accepted by the board, or (2) the eighth day after the date of receipt by the board,

¹ The resignation may be delivered to the Board President or the Board Secretary. Tex. Elec. Code § 201.001(a)-(b). Furthermore, as a practical matter a resignation may be delivered to an appropriate district employee, such as the Superintendent, at the district's "usual place for conducting official business." Tex. Elec. Code § 1.007(a).

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whichever is earlier. Each of the three resigning Trustees submitted his or her letter of resignation to the Board on September 3, 2019. The resignations could not be formally accepted at that meeting because the matter was not posted. The Board of Trustees could not formally accept the letters of resignation at a publicly noticed board meeting because they were not on the agenda. Nonetheless, pursuant to Texas Election Code § 201.023, the resignations will be effective the eighth day after their receipt by the Board President. The Board may not refuse to accept the resignations. A board member may withdraw a resignation before the earlier of (1) the Board's acceptance of his or her resignation, or (2) the eighth day, but not after either of those occurrences even if a replacement has not yet been named.²

If more than one year remains in the terms of the positions vacated, the vacancies must be filled not later than the 180th day after the vacancy occurs.³ By implication, if less than one year remains in the term of the position vacated, the Board may leave the position unfilled until the next general election, at which time the term will have expired and voters will elect a replacement to serve a new full term. In the case at hand, each of the three Trustee positions have more than a year left in their term's⁴ general election date, which will be on the Tuesday following the first Monday in November 2020.⁵ As a result, the remaining Board must act to fill the vacant Trustee positions before the next general election date.

**II.
FILLING OF VACANCY BY APPOINTMENT**

The Board of Trustees may choose to fill vacant Trustee positions by appointing an eligible individual to the vacant seat by majority vote⁶. If a vacancy occurs on the Board, the remaining board members may fill the vacancy by appointment only until the next trustee election.⁷ In the situation at hand, assuming that the Board accepts the resignations as is currently posted on September 9, 2019 there are more than 365 days (more than one year) left in each of the three terms. As a result, the Texas Education Code requires that the Board have the seat filled no later than March 7, 2020. If the Board selects the option of appointment, it must complete the process no later than March 7, 2020. While the Texas Education Code authorizes an extended period of time to fill a vacancy, we do not advise that an extended period of time elapse. That is because the District's Board of Trustees must maintain a quorum of members to act. Because there are only four remaining Trustees, all remaining Trustees must attend each meeting

² Tex. Att'y Gen. Op. No. DM-406 (1996).

³ Tex. Educ. Code § 11.060(d).

⁴ The terms for Single Member Districts 2 and 7 expire in November 2020. The term for Single Member District 1 expires in November 2022. *See*, District Policy BBB (Local).

⁵ The next Board General election date. *See*, District Policy BBB (Local).

⁶ In this case a majority vote is defined as a majority of Trustees present and voting on the appointment at a duly called meeting. That is not the same thing as a majority of the full seven Trustees.

⁷ Pursuant to Texas Education Code 11.060. That date would be in November of 2020 on the uniform election date.

in order to maintain a quorum. This leaves no margin of error for Trustee illnesses or other scheduling conflicts. As a result, we feel that appointments should be made quickly in this instance.

i. Appointment Requirements and Application Process.

The Board may name any person in the community for consideration of potential appointment, as long as the individual meets the legal eligibility requirements. For an individual to be eligible for appointment, an individual must be (1) a United States citizen; (2) 18 years of age or older (on the first day of the term to be filled at the election or on the date of appointment); (3) has not been determined (by a final judgment of a court) to be totally mentally incapacitated or partially mentally incapacitated; (4) has not been convicted of a felony; (5) has resided continuously in the State of Texas for twelve months and in the territory from which the office is elected for six months immediately preceding the date the appointment is made; (6) registered to vote in the territory from which the office is elected on the date of appointment; and finally (7) an appointed board member for a single-member school district must be a resident of the district that the appointee is placed to represent.⁸

The Board may, at its discretion, create an application process and solicit interested persons to apply to be considered by the Board for the vacant seat. In the alternative, individual Board Members may nominate qualified individuals to be considered by the entire Board. Whether or not an application process is used, and if so, the metrics, interview, and logistical selection process of the applicants will fall squarely on the Board to decide. The Texas Open Meetings Act allows for the Board to receive legal advice on the entire process in a closed meeting and even allows a school board to conduct a closed meeting to deliberate the appointment of a public officer.⁹ Thus, a board may choose to go into closed session to interview or discuss the merits of individual nominees for a vacant position before returning to open session to publicly call for a vote on the item.

If an individual is appointed, he or she immediately takes office once they have qualified for office and are sworn in. An appointed trustee begins service immediately and serves until the next scheduled trustee election. For example, if the district regularly has trustee elections scheduled in November of even numbered years, the next trustee election is the November 2020 election following the appointment, whether or not the vacant position or district seat was scheduled to be on the ballot in that election. If the appointed trustee's position expires at the 2020 election, (Single Member Districts 2 and 7) the position will be on the ballot for the full term on the 2020 election date. If the appointed trustee's position does not expire at the next regular

⁸ Education Code 11.052(g).

⁹ Texas Government Code § 551.074.

election (Single Member District 1), the position will be placed on the November 2020 ballot for the remaining two-year unexpired term of that district's seat.

III. FILLING OF VACANCY BY SPECIAL ELECTION

As an alternative to appointment, the Board may also call a special election to fill the vacant seat. The Texas Education Code states that a special election to fill a vacancy on the board of trustees of an independent school district is to be conducted in the same manner as the district's general election, unless specific exceptions are listed in the Election Code.¹⁰ Texas Election Code states that a special election to fill a vacancy should be held on the first authorized uniform election date, unless a law outside the election code requires the district hold the election on a date earlier than the 46th day after the date of the order.¹¹ In the situation at hand, the next authorized uniform election date is on November 5, 2019. It is more than 46 days from the date of this opinion letter. As a result, if the Board decides to call a special election to fill the vacancy, it must occur on this November 5, 2019 date. The District must also order the special election no later than 46 days before Election Day, which is September 20, 2019. Although the Board has up to 46 days before Election Day to approve an election order. While a special election called on 46 days' notice would be difficult, it would not be impossible to manage such an election. The sooner a special election is called, the easier the logistics would be to conduct the election. If the Board chooses to fill the positions through special election, the quorum problem would persist through the mid-November election canvass date.

Generally, when a school district has an election, it is required to jointly host the election with another local public entity (*i.e.*, Joint Election requirement). However, the law requiring joint elections does not apply to special elections. Therefore if the only item on the ballot is a special election to fill a vacancy, that election does not have to be held jointly with a city or county. When a Board calls a special election to fill a vacancy the Election code places deadlines on the District regarding how it conducts the election, below is a sample timeline in the event the Board decides to call a special election. These dates are different from the regular deadlines that occur when a regular election is scheduled.

i. NOTICE OF FILING DATES

Generally, notice of a candidate's ability to file for a place on the ballot must be posted not later than the 30th day before the last day to file. [Tex. Elec Code §. 141.040(a)(2)]. However, because this is a special election to fill a vacancy, the order must include the filing deadline. In

¹⁰ Sec. 11.060

¹¹ Section 201.052.

the event that an election is called, we recommend posting the notice of the filing period as soon as practicable after a special election is ordered, preferably the next day. Note that an application for a place on the ballot for a special election may not be filed before the election is ordered.

ii. FIRST DAY TO FILE

The first day to file an application for a place on the ballot would be the day after the special election is ordered.

iii. LAST DAY TO FILE & DEADLINE FOR WRITE IN CANDIDATES TO FILE DECLARATIONS OF WRITE-IN CANDIDACY.

Because the special election would be ordered 70 days before Election Day, the filing deadline and declaration of write in candidacy deadline would be Thursday, September 26, 2019. All applications must be filed by 5 p.m.¹²

iv. DEADLINE TO POST NOTICE OF ELECTION

The District must publish a notice in the newspaper in the territory covered by the election at least once between the 30th day and the 10th day before the election which would be between Sunday October 6, 2019 and Saturday, October 26, 2019.

v. FIRST DAY OF EARLY VOTING

If a special election is ordered, the first day of early voting would be Monday, October 21, 2019 (17th day before election day falls on a Saturday, first day moves to next business day) and the last day of early voting would be Friday, November 1, 2019.

vi. ELECTION DAY

If a special election is ordered, Election Day will fall on November 5, 2019.

**IV.
MISCELLANEOUS INFORMATION**

Its important for the Board to know that after the effective date of the resignation, a trustee continues to serve and have the duties and powers of office until the vacancy created by the resignation is filled. Tex. Const. Art. XVI, § 17. Under this constitutional provision, known as the holdover doctrine, the resigning trustee holds over until a replacement qualifies for office by filing the Statement of Officer and taking the Oath of Office. However, a trustee who is in “Holdover” status may not vote on how the board replaces that trustee. Texas Education Code section 11.060 authorizes the remaining trustees to fill the vacancy by appointment. Generally, a resigning board

¹² Texas Election Code § 201.054(a)(2)

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member is not considered one of the remaining trustees and therefore does not participate in the board's vote to appoint a successor. Tex. Att'y Gen. Op. No. 0-6259 (1945).

It is our hope that this memo has answered all pending questions, if there are still some questions that are left unanswered, please ask us at the meeting, or do not hesitate to contact us.

Sincerely,

Kevin O'Hanlon
For the Firm