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OPINION COMMITTEE

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September 27, 2006

FILE # HL-45023-06
I.D. # 045023

**VIA CERTIFIED MAIL,
RETURN RECEIPT REQUESTED**

The Honorable Greg Abbott
Office of the Attorney General
Opinion Committee
P.O. Box 12548
Austin, Texas 78711

RQ-0538-GA

Re: **OPINION REQUEST**

- (1) Whether the Board of Trustees of United Independent School District may change the terms of office of current and/or future Board members under Section 11.059 of the Texas Education Code from three to four-year terms;
- (2) Whether the Board of Trustees of United Independent School District will be required to change the terms of office of current and/or future board members under Section 11.059 of the Texas Education Code from three to four-year terms; and
- (3) Whether the school district is required to hold joint elections under Section 11.0581 of the Education Code in every election under all circumstances.

Dear Attorney General Abbott:

Please accept this letter as a request pursuant to Texas Government Code Section 402.042 for an opinion from your office for clarification on the interpretation of Sections 11.059 and 11.0581 of the Texas Education Code. Education Code Section 11.059 establishes the terms of office for trustees of independent school districts, and Section 11.0581 establishes a requirement that trustee elections be held jointly with the election of either city or state and county officials. All references to "Education Code," "Election Code," "Local Government Code" and "Government Code" are Texas Codes.

Question Number 1:

Can the trustees of the United Independent School District ("UISD"), who are currently elected for three-year terms of office, vote to change their terms of office and /or the terms of office of future trustees from three-year terms to four-year terms?

Trustees for the UISD are elected pursuant to Education Code Section 11.059. Section 11.059 presently reads as follows:

- (a) A trustee of an independent school district serves a term of three or four years.*
- (b) Elections for trustees with three-year terms shall be held annually. The terms of one-third of the trustees, or as near to one-third as possible, expire each year.*
- (c) Elections for trustees with four-year terms shall be held biennially. The terms of one-half of the trustees, or as near to one-half as possible, expire every two years.*
- (d) A board policy must state the schedule on which specific terms expire.*
- (e) Expired.*

The language of this statute does not appear to limit a board of trustees from requiring which of the two options a school district may take, i.e., requiring members of its board to have either a three-year or a four-year term of office. It also does not expressly prohibit a school district's board from changing the terms of office for the future. An issue is presented, however, because the previous law did prohibit a board of trustees from changing the terms of office, once it decided on one of the two alternatives.

When the Education Code was revised in 1995, Chapter 23 was rescinded, and Chapter 11 took its place. The following is a synopsis of what former Chapter 23 provided:

- Section 23.13 dealt with 3-year terms for other than countywide ISD boards that did not include within an ISD's boundary a city or town with a population in excess of 75,000 people. The statute allowed for a reduction in terms of office from 4 to 3 years and from 6 to 3 years, although it did not mention anything about increasing the terms.
- Section 23.14 dealt with 6-year terms for other than a countywide ISD that included within its boundaries a city with a population of at least 75,000 people or where the district had a student population of at least 30,220 students. This statute did not mention anything about reducing the terms, but Section 23.13 did allow for a reduction, as mentioned above.

- Section 23.15 dealt with 4-year terms for ISDs that already had 4-year terms, but it also provided for a reduction of terms from 6 to 4 years. It did not mention anything about reducing the terms to 3 years, but Section 23.13 did.
- Section 23.16 dealt with countywide ISDs and called for 2-year terms for their trustees.

With the enactment of current Chapter 11, particularly Section 11.059 (a), all school trustees have to serve either a 3- or 4-year term of office. Furthermore, former subsection (e) prohibited a board from changing that term once chosen. However, the prohibition expressed in subsection (e) expired on August 31, 2001. Until its expiration in 2001, subsection (e) read as follows:

(e) A district in which trustees serve three-year or four-year terms as of January 1, 1995, continues to elect trustees under that system. The board of trustees of a district in which trustees are elected to two-year or six-year terms shall adopt a resolution providing for three-year or four-year terms. After adoption of the resolution, the board may not alter the length of the terms served by district trustees. This subsection expires August 31, 2001. (Emphasis added).

What is the effect of expired subsection (e) in conjunction with the remaining subsections (a) through (d) of Section 11.059, the latter still being in full force and effect?

The Government Code provides courts with guidance in interpreting legislative enactments. Chapter 311, entitled "Code Construction Act," sets out various methods that may be relied upon by the courts when interpreting the construction and meaning of statutes. Three statutes from Chapter 311 of the Government Code appear to be particularly helpful, namely, Section 311.002, "Meaning of Words;" Section 311.021, "Intention in Enactment of Statutes;" and Section 311.023, "Statute Construction Aids."¹

¹ **TEX. GOV'T CODE § 311.002 states:**

- (a) Except as provided by Subsection (b), words shall be given their ordinary meaning.
- (b) If a word is connected with and used with reference to a particular trade or subject matter or is used as a word of art, the word shall have the meaning given by experts in the particular trade, subject matter, or art.

TEX. GOV'T CODE § 311.021 states:

In enacting a statute, it is presumed that:

- (1) compliance with the constitutions of this state and the United States is intended;
- (2) the entire statute is intended to be effective;
- (3) a just and reasonable result is intended;
- (4) a result feasible of execution is intended; and public interest is favored over any private interest

TEX. GOV'T CODE § 311.023 states:

In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the:

- (1) object sought to be attained;
- (2) circumstances under which the statute was enacted;
- (3) legislative history;
- (4) common law or former statutory provisions, including laws on the same or similar subjects;
- (5) consequences of a particular construction;
- (6) administrative construction of the statute; and
- (7) title (caption), preamble, and emergency provision.

Under Government Code Section 311.023(1)–(3), a court may consider (i) the object sought to be attained; (ii) the circumstances under which the statute was enacted; and (iii) the legislative history in construing a statute, whether or not the statute is considered ambiguous on its face. Oftentimes, the legislative history of the statute will reveal the object sought to be attained and the circumstances under which the statute was enacted. However, after researching Education Code Section 11.059, there does not appear to be any legislative history for former subsection (e), nor, for that matter, any other portion of the statute.

Under Government Code Section 311.023 (5), a court may also consider the consequences of a particular construction. One apparent consequence to the expiration of subsection (e) is that school boards will regain local control for deciding the terms of office for electing their members. In another helpful provision, Government Code Section 312.002 states that words shall be given their ordinary meaning.

Black's Law Dictionary, 8th Edition, defines "repeal" as follows:

repeal, *n.* *RESCIND* (3); *esp.*, *abrogation of an existing law by legislative act.* [Citing authority] – ***repeal***, *vb.*

Express repeal. *Repeal by specific declarations in a new statute or main motion.* [Citing authority.]

Implied repeal. *Repeal by irreconcilable conflict between an old law and a new law or main motion and a more recent law or motion. – also termed repeal by implication.* [Citing authority.]

This is distinguished from an "amendment" to a statute, which normally means an alteration in the law already existing, leaving some part of the original still standing.

Black's Law Dictionary, 8th Edition, defines "expire" as a verb for the noun, "expiration," as follows:

expiration, *n.* *A coming to an end; esp., a formal termination on a closing date* <*expiration of the insurance policy*>. – ***expire***, *vb.*

Absent any specific contrary provision in the law, the ordinary meaning of the word "expire," then, appears to be our best guide for interpreting the result of an expired statutory provision. The statute must be read without any consideration to the expired language. Related to this is the Savings Provision for statutes found in Government Code Section 311.031, which reads, in pertinent part, as follows:

(a) . . . *repeal of a statute does not affect:*

(1) *the prior operation of the statute or any prior action taken under it;*

- (2) *any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred under it;*
- (3) *any violation of the statute or any penalty, forfeiture, or punishment incurred under the statute before its amendment or repeal; * * **

These Government Code provisions imply that repealing a statute does not affect those matters the statute addressed and affected prior to its being repealed. By inference, the repealed statute has no effect on matters after the date of its amendment or repeal.

It appears that a reasonable interpretation of the language of former subsection (e) to Section 11.059 is that it is no longer effective, and the remainder of the statute should be read without consideration to it. Absent legislative history to guide us, what could be a just and reasonable intention of the legislature?

Perhaps the legislature intended in 1995 to abolish six-year terms and make uniform trustee elections, but not take local control away from school trustees indefinitely. By imposing an expiration clause, the legislature may have intended an interim period of stability before returning local control to school boards, after a district has had time to experience the pros and cons of either a 3- or 4-year term of office for its trustees. Yearly elections required by 3-year terms are expensive, and voter turnout is increasingly difficult to attain. Does the school board have the power to change terms of office under current Section 11.059 of the Education Code?

The power to set terms for school boards is given to the legislature by Article VII, Section 16-a, of the Texas Constitution. That provision states as follows:

The legislature shall fix by law the terms of all offices of the public school system and of the state institutions of higher education, inclusive, and the terms of members of the respective boards, not to exceed six years.

The power to establish, support and maintain the public free schools is given to the legislature as well, by Article VII, Section 1. That provision states as follows:

A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the legislature of the state to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

The legislature, in turn, granted certain specific powers to the school trustees. Education Code Section 11.151 (b) reads as follows:

The trustees as body corporate have the exclusive power and duty to govern and oversee the management of the public schools of the district. All powers and duties not specifically delegated by statute to the agency or to the State Board of Education

Education are reserved for the trustees, and the agency may not substitute its judgment for the lawful exercise of those powers and duties by the trustees.

In conjunction with the legislative powers granted in Section 11.151 (b), boards of trustees also have express authority to establish for their school districts a three- or four-year term of office [*Education Code § 11.059 (a)*] and establish a policy that contains the schedule on which specific terms of office will expire [*Education Code § 11.059 (d)*]. If school boards have not been granted express authority by subsections (a) and (d), it seems reasonable to conclude that they have implied authority under law. It has long been held that boards of trustees of independent school districts possess not only the powers expressly conferred on them by law; they also have authority necessarily implied from the powers so conferred in order to execute their express powers. *Harlingen ISD v. C.H. Page & Bros.*, 48 S.W. 983 (Tex. Comm'n App. 1932, judgm't adopted; *Texas Roofing Co. v. Whiteside*, 385 S.W.2d 699 (Tex. Civ. App. – Amarillo 1964, writ ref'd n.r.e.). If a school board does not have the authority to set the terms of office of trustees, it would be theoretically possible for trustees of a newly-formed school district not to have a term of office, and there could be no board policy that provides a schedule of expiration of their terms.

Newly-enacted Education Code Section 11.0581 (d) expressly provides authority to boards of trustees of independent school districts to “adjust the terms of office of [their] members” to conform to a new election date as required by subsection (a). This, in turn, may cause a necessary change in terms of office from three to four years in some cases, thus providing some indication that boards of trustees have implied power to change terms of office under Section 11.059. The Commissioner of Education has, apparently, come to a similar conclusion. On the official web page for that state agency over which the Commissioner of Education is in charge, the Commissioner has provided answers to Frequently Asked Questions dealing with HB 1, the legislation that added Section 11.0581 (d) to the Education Code. Under Questions 64 and 65 on page 16, dealing with a potential change in term limits for school trustees, the Commissioner posed the following questions and answers:

64. *If a city does not hold an election in a given year, when may local board of trustee elections be held?*

A school district must select an election option that actually coincides with a municipal election or a state and county election. However, a district may select an option that does not coincide each year. For example, a district with three-year terms may elect to hold elections on the state and county election date despite the fact that some district elections in odd-numbered years may not coincide with a state or county election.

65. *In regard to the election law changes, for a district that must change their election date, when will board members whose term is expiring run for office? Will the election simply be postponed and their terms extended until the next called election?*

Under Section 11.0581 (d) of the Education Code as added by HB 1, a board of trustees may lengthen or shorten terms to coincide with a new election date.

The interpretation provided by the Texas Education Agency should be given serious consideration over other interpretations that might be given by other state agencies. *Dodd v. Meno*, 870 S.W.2d 4 (Tex. 1994); *Government Code § 311.023 (6)*.

If Section 11.059 of the Education Code can reasonably be interpreted not to prohibit a school board from implementing a new policy that establishes either a three- or four-year term of office for trustees that is different from its current policy for terms of office, it appears that the legislative grant of reserved authority, together with its implied authority to carry out the requirements of the statute, leaves the decision to determine terms of office up to local boards (within statutory parameters of three or four years), as determined by a majority of each district's duly elected school board members in the best interest of that school district. It is, perhaps, questionable whether a local board may increase its members' own terms of office while in office; however, Section 11.0581 of the Education Code does appear to permit boards to at least change terms that would apply to future trustees. This would result in compliance with the state's constitution and would be a just and reasonable result intended by the legislature, and would certainly be feasible of execution. It would, furthermore, promote the public interest because boards of trustees are elected by their communities and, presumably, attempt to respond favorably to the desire of the majority, all of which supports the presumption in the legislature's enactment of Education Code Section 11.059. *See: Government Code § 311.021*.

Question Number 2:

United Independent School District ("UISD") is located in Webb County, Texas. It is composed of a seven (7)-member board of trustees, each member of which represents one of seven (7) single-member districts ("SMD"). UISD trustees currently serve 3-year terms. The District presently conducts its regular trustee elections on the 2nd Saturday in May every year. The last election of trustees was in SMDs 3 and 5, which took place on May 13, 2006. Under the District's current schedule of elections, SMDs 1, 2 and 4 would conduct their trustee elections on the 2nd Saturday in May 2007; SMDs 6 and 7 would conduct their elections in May 2008; and SMDs 3 and 5 would again conduct their elections in May 2009.

UISD wishes to conduct its elections of trustees on the same election date as the regular elections for state and county officers – (i.e., the 1st Tuesday after the 1st Monday in even-numbered years) – and on the same election date as the City of El Cenizo, which is a municipality within a portion of UISD in SMD 1 and which conducts its elections jointly with the state and Webb County in November. As you know, the regular elections for state and county officers are required to be held on the 1st Tuesday after the 1st Monday in even-numbered years; while the Uniform Election Date for municipalities in November is merely the 1st Tuesday after the 1st Monday of that month. *See: Election Code §§ 41.002, 41.001*.

By converting to November elections, UISD would not be able to conduct a joint election with the state or with Webb County until 2008, in SMDs 6 and 7. Following that election year, the next time the District would be able to conduct joint elections would be 2010, in SMDs 1, 2 and 4. The District would be able to conduct joint elections in SMDs 3 and 5 in 2012. This would mean that in election year 2007 for SMDs 1, 2 and 4, and in election year 2009 for SMDs 3 and 5, and in election year 2011 for SMDs 6 and 7, the District would not be able to conduct joint elections.

If UISD changes its election date to the November Uniform Election Date to track elections of state and county officers and the municipality of El Cenizo in SMD 1, would the District be required to change the terms of office of its trustees from 3 to 4 years in order to ensure that a joint election is conducted in every election? If not required, would the District have the choice of either maintaining the current three (3)-year term schedule or changing to a four (4)-year term schedule? For your convenience, I am providing you with a matrix of current SMD election years in UISD through 2016, a ten-year period following the District's general election of trustees in May 2006. The highlighted check marks show when the District would be able to conduct joint elections in each of the SMDs during that timeframe under its current schedule. [See enclosure.]

Question Number 3:

What is the proper interpretation to give to the recently-enacted Section 11.0581 of the Texas Education Code, wherein subsection (a) states that an independent school district is required to hold its trustee elections on the same date as elections for members of the governmental body of a municipality located in the school district or the general election for state and county offices; and what is the proper interpretation to give to subsection (b), wherein elections held on the same date as provided by subsection (a) shall be held as a joint election under Chapter 271 of the Texas Election Code?

The 79th Legislature's enactment of Section 11.0581 becomes effective at the start of the 2006-2007 school year. The statute reads as follows:

Sec. 11.0581. JOINT ELECTIONS REQUIRED.

- (a) *An election for trustees of an independent school district shall be held on the same date as:*
 - (1) *the election for the members of the governing body of a municipality located in the school district; or*
 - (2) *the general election for state and county officers.*
- (b) *Elections held on the same date as provided by Subsection (a) shall be held as a joint election under Chapter 271, Election Code.*

- (c) *The voters of a joint election under this section shall be served by common polling places consistent with Section 271.003 (b), Election Code.*
- (d) *The board of trustees of an independent school district changing an election date to comply with this section shall adjust the terms of office of its members to conform to the new election date.*

One interpretation of law that has gained momentum is that school boards must now be in a joint election with either a city, county or state every time there is a school board election of trustees. The problem with that is at least fourfold: (1) Section 11.0581 does not explicitly state that; (2) the same city, county and state elections of their officers may not occur every year there is a school board election; (3) following this interpretation may require having more than one standard election date, alternating with a city one year and a county or state the next; and (4) there may be some election years for a school district without any corresponding elections of any city, county or state officers that year.

A reasonable interpretation of Section 11.0581, subsections (a) and (b), does not necessarily require a joint election every time there is a school board election. The statute merely states in subsection (a) that a school district election for its trustees shall be held on the same date as, for example, a city council election of its officers. A plain reading of the subsection would only require that a school board, desiring to use the same election date as, for example, a city located in the school district, use the same election date as that city. Thus, in this example, if the city's election date is the second Saturday of May, as is the case with many Texas cities, a school district of that city may choose to have the same date for its trustee elections – i.e., the second Saturday in May. Subsection (b) of Section 11.0581, requiring joint elections, would only apply when both elections take place at the same time. This is normally referred to as an election on the “same day.” *Election Code § 271.002*. In that event, the school district would be required to participate in a joint election with the city under Chapter 271 of the Election Code. In off years, as would be the case for UISD (because it currently holds yearly elections and the city does not), the school district would still be required to use the same election date (i.e., the second Saturday in May), but it would not participate in a joint election.

Unfortunately, as reasonable an interpretation of Section 11.0581 as the foregoing may be, there are many different interpretations to the contrary. One reason for this may be because the heading for Section 11.0581 is, “JOINT ELECTION REQUIRED.” However, a maxim of statutory construction is that the heading of a title, subtitle, chapter, subchapter or section of a statute does not limit or expand the meaning of a statute. *Government Code § 311.024*.

If my interpretation of Section 11.0581 is not correct, what is the correct interpretation, and under what circumstances must trustees hold joint elections in order to comply with this new law? Does this new provision effectively abolish three-year terms of office for school trustees where a municipality is located in the school district and the municipality (or county) has elections every other year? Or does this mean that the elections between the municipality (or county) and the school district shall be held jointly only when the municipality (or county) and the school district elections

elections coincide; but when they do not coincide, the school district continues to hold elections on the municipality's (or county's) non-election years? Or does this mean that a school district may be faced with holding an election on an election date in one year and hold its next election on a different election date in order to hold joint elections in every election? But if the latter is the case, what does a school district do when there are no other elections in the same year as a school district's election?

Local Government Code Section 26.042 establishes the date for the election of municipal officers. It states:

The governing body of the municipality may set the date of election for municipal officers in accordance with applicable provisions of the Election Code. Chapter 41, Election Code, provides uniform election dates for each general or special election in this state. The revised law reflects the fact that an election must be held on one of the dates specified by that Code.

Election Code Section 41.001 sets the uniform election dates as follows:

Section 41.001. Uniform election dates.

- (a) *Except as otherwise provided by this subchapter, each general or special election in this state shall be held on one of the following dates:*
- (1) *the second Saturday in May; or*
 - (2) *the first Tuesday after the first Monday in November. * * **

Election Code Section 41.002 establishes the date for the election of state and county officials. It states:

Section 41.002. General election for state and county officers.

The general election for state and county officers shall be held on the first Tuesday after the first Monday in November in even-numbered years.

The city of Laredo holds municipal elections every two years on the second Saturday in May in even-numbered years. Currently, UISD board policies establish three-year terms for its board members. The elections for trustees are held every year on the second Saturday of May, as are the city's elections. The trustees run in single-member districts in accordance with Section 11.052, Texas Education Code. See: *UISD Board Policies BBB (Legal and Local)*, enclosed. Thus, the School District appears to be in compliance with subsection (a) of Section 11.0581. That is, the District holds its trustee elections on ". . . the same date as the election for the governing body of (the city)" – the second Saturday in May. Subsection (b) of the statute, requiring the holding of joint elections when elections are held on the same date, would, reasonably, only apply when elections for both units of government are held simultaneously. Thus, the phrase, "same date," as used in subsection

Thus, the phrase, "same date," as used in subsection (b), would require two things: (1) that the elections for both entities are held on the same date; and (2) that the elections are held simultaneously on the same day. It is noteworthy that Chapter 271 of the Election Code permits joint elections to take place "on the same day." It does not use the phrase, "the same date."

Applying the rules for interpreting statutory language may also be helpful. The legislature did not mention Section 11.0581 in its legislative history. Thus, we are left with applying other rules of statutory interpretation to this new Section.

Applying the rule requiring us to give words their ordinary meaning, Government Code Section 312.002 should provide some guidance. Section 11.0581 begins with the words, "*An election for trustees of an independent school district shall be held on the same date as: . . .*" "An" election can be distinguished from "the" election of trustees in that "an" may mean one of many other elections, while "the" election may mean every election. If the legislature meant to require that there can be no election of a trustee unless it is held jointly with the election of municipal, state or county officers, it would have reasonably used the word "the," not "an." The American Heritage Dictionary of the English Language, Fourth Edition, defines the word "an" as follows: "Of or relating to, or resembling. One relating to, belonging to, or resembling." What may be helpful here is the word, "resembling," i.e., one of many or one as distinguished from others. American Heritage defines "the" as follows: "Used before singular or plural nouns and noun phrases that denote particular, specific persons or things." Thus, "the election" of trustees could be interpreted to mean all elections. "An election" could be interpreted to mean one of several elections. In this case, "an" election could refer to the election of municipal or county or state officers on the election date chosen by a school district and that actually takes place on the same day as trustee elections.

The legislature could have easily stated that no election of trustees may be held except jointly with the election of municipal or state and county officers. Clearly, this would have meant the abolishment of three-year terms where municipal officers are elected every other year.

Without legislative history to guide us, and considering other rules of interpretation, such as the "object sought to be attained" [*Government Code § 311.031 (a) (1)*], we are left to speculate on the meaning and purpose of Section 11.0581. If the legislature was attempting to increase voter turnout, limit voter confusion, address voter apathy in school board elections and economize on the cost for running elections, it would be better served if no trustee election was held unless it was held jointly. This means that, in most situations, three-year terms would no longer be a viable alternative for school districts. Can we say that a just and reasonable result was presumed to be intended by the legislature by interpreting the Section in this manner? *Government Code § 311.021 (3)*.

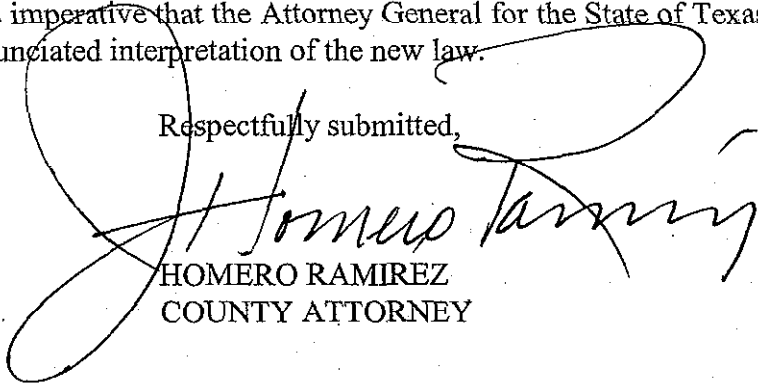
Since most legislative enactments are a result of compromise, it is possible that either interpretation is theoretically possible; therefore, guidance from the Attorney General is necessary.

JUSTICE DEPARTMENT PRECLEARANCE

I presume that the Texas Secretary of State will be asking the Justice Department to pre-clear recently-enacted Texas Education Code Section 11.0581 if that has not already occurred. I also presume that once pre-cleared by the Justice Department, each school district will have to request pre-clearance once it changes its trustee terms to conform to the joint election requirement, if it is not already in compliance and pre-cleared.

42 USCA § 1973c gives the United States Attorney General the authority to review a submission of a request by the chief legal officer or other appropriate official of a state or subdivision and, within 60 days of the submission, object to any change to a standard practice or procedure with respect to voting. Therefore, I believe it is imperative that the Attorney General for the State of Texas provide school districts with a clearly enunciated interpretation of the new law.

Respectfully submitted,



HOMERO RAMIREZ
COUNTY ATTORNEY

Enclosures: TEA Web Page – “House Bill 1 – FAQ,” page 16 (August 24, 2006 - Updated)
Matrix showing current election years for UISD Single Member Districts
UISD Board Policies BBB (Legal) and (Local)

cc: Mr. Juan J. Cruz, Esq.
Escamilla & Poneck, Inc.