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OPINION COMMITTEE

January 20, 2016

FILE # ML-47939-16

I.D. # 47939

RQ-0091-KP

Honorable Ken Paxton
Office of the Attorney General
PO Box 12548
Austin, TX 78711-2548

Re: Whether a board of trustees of an independent school district may lawfully fill a school board trustee vacancy through special election on a uniform election date beyond 180 days from the onset of the vacancy.

Dear Attorney General Paxton:

I am the County Attorney for Val Verde County, Texas that includes the City of Del Rio, Texas and the San Felipe Del Rio Consolidated Independent School District (SFDRCISD) within its jurisdiction. I am submitting this request on behalf of SFDRCISD to request your guidance as to whether an independent school district that is unable to fill a vacant trustee position by appointment, as required by Texas Education Code Section 11.060(d), may instead submit the vacant position to the public to fill the vacant position for the remaining unexpired term through a special election held on the next uniform election date. In this instance, the next uniform election date (May 7, 2016) occurs approximately one month beyond the Education Code's 180-day statutory period for filling the vacancy which elapses on or about April 11, 2016.

After having reviewed and analyzed controlling statutes I believe such opinion to be necessary in order to address uncertainty in the statute created by the following circumstances:

On October 14, 2015, the resignation of a longtime member of the SFDRCISD Board became effective, creating a vacancy for the unexpired term that would not expire until May 2018, and with more than one year remaining this triggered Tex. Educ. Code. 11.060. Relevant sections of the Education Code and the Election Code permit the vacancy to be filled either by appointment or by election, but also require the vacancy to be filled within 180 days. After numerous attempts, the Board has been unable to agree on an appointment to fill the vacancy. The next uniform election date is on May 7, 2016,

which, as stated above, is just beyond the180-day period. Your guidance is needed as the board's ability to meet the 180-day requirement through appointment is in serious doubt and a special election also cannot be accomplished within this statutory window.

Relevant excerpts of the Education Code and Elections Code and analysis follows for your benefit:

Education Code: Section 11.060 of Texas Education Code:

> Sec. 11.060. VACANCIES. (a) If a vacancy occurs on the board of trustees of an independent school district, the remaining trustees may fill the vacancy by appointment until the next trustee election.
> (b) If the board is appointed by the governing body of a municipality, a trustee appointed by the governing body to fill a vacancy shall serve for the unexpired term.
> (c) Instead of filling a vacancy by appointment under Subsection (a) or (b), the board or municipal governing body may order a special election to fill the vacancy. A special election is conducted in the same manner as the district's general election except as provided by the Election Code.
> **(d) If more than one year remains in the term of the position vacated, the vacancy shall be filled under this section not later than the 180th day after the date the vacancy occurs.**

The statute above offers alternatives for filling the vacancy: either through (1) a special election or, (2) though appointment by the remaining board. An appointee serves only though the unexpired term and the post is then filled by a general election at the end of that term (in this instance May 2018). However, Section 11.060 requires that a vacant position with an unexpired term of more than one year, be filled within 180 days of the vacancy.

Election Code: Section 41.001 of the Texas Election Code states in relevant part:

> Sec. 41.001. (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.

Section 41.004 of the Texas Election Code states in relevant part:

> Sec. 41.004. SPECIAL ELECTION WITHIN PARTICULAR PERIOD. (a) If a law outside this code other than the constitution requires a special

election subject to Section 41.001(a) to be held within a particular period after the occurrence of a certain event, the election shall be held on an authorized uniform election date occurring within the period unless no uniform election date within the period affords enough time to hold the election in the manner required by law. In that case, the election shall be held on the first authorized uniform election date occurring after the expiration of the period.

(b)   If the constitution requires a special election to be held within a particular period after the occurrence of a certain event, Section 41.001(a) does not apply.

Uniform election dates are the first Saturday in May and the first Tuesday after the first Monday in November.[1] According to the Election Code, a special election to fill a vacancy must be held on a uniform election date, either May 7th or November 3rd and be ordered at least 46 days prior to the relevant election date.[2]

Analysis:

The SFDRCISD trustee's resignation was effective October 14, 2015, before the uniform election date occurring on November 3, 2015, but less than 46 days before that date. Thus, the Board could not have ordered a special election to have been held this past November 3, 2015.

The Education Code provisions requires that the vacant post be filled within 180 days of the trustee's effective date of resignation or on or before April 11, 2016. Thus, were the vacant post to be filled by special election, "a law outside" the Election Code, namely the Education Code Section 11.060, requires that a special election be held within 180 days of the "occurrence" of the vacancy.

The exceptions found in Election Code 41.004 quoted above, appears to permit holding the special election on May 7, 2016, notwithstanding that this date is beyond the Education Code's 180-day period that expires on April 11, 2016, as May 7th is "the first authorized uniform election date occurring after the expiration of that period."

Per statute, the Election Code is applicable to all general, special, and primary elections held in this state. *See* Tex. Elec. Code Ann. § 1.002(a). Moreover, the Election Code supersedes any conflicting statute outside the Election Code unless either the Election Code or the outside statute *expressly* provides otherwise. *Id.* § 1.002(b). While on first reading there appears to be no conflict between Section 11.060 of the Education Code and section 41.001(a) of the Election Code, I am requesting your guidance as to

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[1] *See* Tex. Elec. Code § 41.001.
[2] *See* Tex. Elec. Code § 201.052.

whether Section 41.001(a) of the Election Code prevails, because neither the Election Code nor section Education Code provides otherwise.

As such, my constituents and the SFDRCISD Board seeks your guidance regarding whether under such circumstances, the Board fulfills its obligations under Section 11.060 of the Education Code, assuming it is unable to fill the vacancy by appointment, by instead interpreting Election Code Section 41.004 to enable the Board to call and hold a special election to fill the unexpired term of the vacant seat on the May 7, 2016 uniform election date.

Aware that neither statute nor rule requires expedited service from the Attorney General in rendering this opinion, we nonetheless point out that a special election to be held on the May 7th uniform election date must be ordered by February 19, 2016 (the 78th day before the election pursuant to the Secretary of State published election dates).

Very truly yours,

Ana Markowski Smith
Val Verde County Attorney