

THE CITY ATTORNEY

CITY OF SAN DIEGO

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MEMORANDUM OF LAW

DATE: May 7, 2018

TO: Councilmembers Chris Ward and Georgette Gomez

FROM: City Attorney

SUBJECT: Analysis of Laws Governing Amendments to San Diego Charter
Section 66: Board of Education Elections

INTRODUCTION

This Office has been asked numerous legal questions regarding possible amendments to San Diego Charter (Charter) Article VI, Board of Education, and the City of San Diego's authority to govern school board elections. This memorandum attempts to clarify confusion about the City's authority, constitutional limitations, and who is empowered to vote on a Charter amendment affecting school board elections.

The California Constitution authorizes charter cities that include school districts to provide for "the manner in which, the times at which, and the terms for which the members of boards of education shall be elected or appointed, for their qualifications, compensation and removal, and for the number which shall constitute any one of such boards." Cal. Const. art. IX, § 16(a). This is the limit of a charter city's authority over a school board.

Charter section 66 governs the composition and elections of the Board of Education of the San Diego Unified School District (School Board). San Diego Charter § 66. The Charter directs that the School Board be composed of five members, elected at the same time as the City Council, with the top two vote-getters in individual district primary elections advancing to a general election in the entire San Diego Unified School District (School District). The section provides that School Board members serve four-year terms, with no term limits. Candidates must be registered voters and actual residents of the election district of the School District for 30 days prior to filing a nomination petition. The Charter also discusses district boundaries and vacancies. *Id.*¹

¹ Charter section 66 provides for all the California Constitution allows, except for School Board members' "compensation and removal." Cal. Const. art. IX, § 16(a); San Diego Charter § 66. Additionally, Charter section 67, "Powers and Duties," confirms that the Board itself is governed by California law: "The powers and duties of the Board of Education shall be such as are now, or may hereafter be conferred upon such boards by the laws of the State of California." *Id.* § 67. Although section 67 is not necessary to provide such jurisdiction, its inclusion in the Charter is an important reminder of the constitutional limits on the City's authority over the School Board.

Charter section 66 was last amended in 1979, but amendments are often proposed. In February 2017, four Councilmembers proposed a ballot measure to amend Charter section 66 to impose term limits and district-only elections for School Board members, but the proposal did not advance. In January 2018, the City Council's Rules Committee (the Committee) heard proposals by the public to repeal the section, set term limits, establish district-only elections, and increase the number of School Board districts. None of the proposals advanced.

The Committee now awaits a Charter amendment proposal from a School District advisory committee holding public hearings on the subject. The advisory committee faces a June 5 deadline to submit a proposal to the City Clerk and qualify it for a June 13 Committee hearing. If the Committee votes to pursue Charter amendments, it will send a proposal to this Office for legal analysis and drafting before the Council considers placing a measure on the November 2018 ballot.

The legal issues analyzed in this memorandum are critical to discussion of proposed Charter changes. As certain questions posed by your offices are identical, our Office is issuing a single memorandum.²

QUESTIONS PRESENTED

1. What is the extent of the City's legal authority related to the School District and its School Board?
2. Does the California Education Code allow a city charter to govern school district elections only if both (the city and the district) are coterminous (sharing the same boundaries)?
3. Who is qualified to vote on a Charter amendment governing elections of School Board members?
4. If voters amend Charter section 66, would those changes disenfranchise:
(1) voters who live outside of City limits but who send their students to schools in San Diego, and
(2) those residents who live in the City and send their students to school districts outside of the School District?
5. What would be the impact if voters repealed Charter section 66: Board of Education in its entirety?

² Questions No. 1 and No. 3 have been asked by Councilmembers, the public, and the media throughout the process of considering ballot measure proposals and are critical to understanding the statutory scheme of the City's jurisdiction over a School Board election process. Questions No. 2 and No. 5 were asked by Councilmember Ward and Councilmember Gomez. Question No. 4 was asked by Councilmember Gomez. Additional analysis from this Office of the City's complicated role in School Board elections can be found in the legal opinion "*School Board Elections: Candidate Qualifications and Governing Law*," 2008 Op. City Att'y 661 (2008-2; May 13, 2008).

SHORT ANSWERS

1. The California Constitution narrowly limits the City's legal authority over the School Board to providing in its Charter for "the manner in which, the times at which, and the terms for which the members of boards of education shall be elected or appointed, for their qualifications, compensation and removal, and for the number which shall constitute any one of such boards." Cal. Const. art. IX, § 16(a).

2. No. The Charter may legally govern the School Board's composition and elections even though the boundaries of the City and the boundaries of the School District are not coterminous. In fact, a portion of the City is not within the School District, and a portion of the School District extends beyond City boundaries.

3. Only those registered to vote within the geographic boundaries of the School District may vote on a city charter amendment regarding School Board elections. Cal. Const. art. IX, § 16(b). This is an express exception to the constitutional provision that all voters in a Charter city may vote to amend their city's charter. *Id.*, art. XI, §§ 3, 5.

4. No. Voting is defined by residency within the School District. (See No. 3.) A majority of school district, not city, voters must approve charter amendments regarding a district's school board. Cal. Const. art. IX, § 16(b). If voters who *live in the City but outside the School District* were allowed to vote on Charter amendments affecting the School Board, their votes would dilute and disenfranchise those of School District voters. Conversely, if voters who *live outside the City but within the School District* were not allowed to vote, they would be disenfranchised. Both situations would violate the California Constitution.

5. Repealing Charter section 66 would dissolve the School Board. The San Diego County Superintendent of Schools would then set up and appoint a new School Board, with elections to follow. Cal. Educ. Code § 5203. If a ballot measure seeks to repeal section 66, this Office recommends working with the School District on a companion measure to provide a "safety net" for what would occur upon the repeal.

DISCUSSION

I. THE CALIFORNIA CONSTITUTION GRANTS AND DEFINES A CHARTER CITY'S AUTHORITY OVER SCHOOL BOARD ELECTIONS.

A. The City's Authority Over the School Board is Limited.

The California Constitution grants charter cities complete authority over their municipal affairs. Cal. Const. art. XI, §§ 5, 11(a).³ The constitution also grants charter cities specific

³ Article XI, section 5(a) of the California Constitution states: "It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith." *Id.*

authority over the composition and elections for boards of education, if a city chooses to include such provisions in its charter.⁴ Article IX, section 16(a) states:

It shall be competent, in all charters framed under the authority given by Section 5 of Article XI, to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for *the manner in which, the times at which, and the terms for which the members of boards of education shall be elected or appointed, for their qualifications, compensation, and removal, and for the number which shall constitute any one of such boards.*

Cal. Const. art. IX, § 16(a) (emphasis added).

Thus, the California Constitution provides that school board member elections, appointments, terms, qualifications, compensation, removal, and the number of members on the board are all municipal affairs if the voters of a charter city decide to include such provisions in its charter. *Id.*; see generally, *Gerth v. Dominguez*, 1 Cal. 2d 239, 242 (1934). The California Constitution thus provides that a charter provision in these areas will preempt California Education Code sections that regulate those subjects. For example, a charter city may provide for a larger School Board than the limits set by the California Education Code or may set term limits for its members, which are not set under state law.

Beyond the subjects included in article IX, section 16(a) of the California Constitution, however, “the school system is a matter of general concern, and not a municipal affair. Consequently, the School Code [Education Code] governs, and charter provisions must be interpreted in conformity therewith.” *Id.*, citing *Kennedy v. Miller*, 97 Cal. 429 (1893); *Hancock v. Board of Education*, 140 Cal. 554 (1903); *Los Angeles City School District v. Longden*, 148 Cal. 380 (1905); *Board of Education v. Davidson*, 190 Cal. 162 (1922); *Whitmore v. Brown*, 207 Cal. 473 (1929); and *Esberg v. Badaracco*, 202 Cal. 110 (1927). As is true in other areas of law, the tension between what is a municipal affair and a statewide affair adjusts “the political relationship between state and local governments in discrete areas of conflict . . . the result does not necessarily rest on the conclusion that the subject matter of the former is not appropriate for municipal regulation. It means, rather, that under the historical circumstances presented, the state has a more substantial interest in the subject than the charter city.” See *California Federal Savings & Loan Assn. v. City of Los Angeles*, 54 Cal. 3d 1, 18 (1991). Such is true of the schools.

Any proposed Charter amendment affecting the School Board must adhere to the narrow limits of article IX, section 16(a) and not attempt to legislate matters beyond the City’s authority. After Committee review, this Office will analyze all proposed amendments to Charter section 66 to ensure they adhere to constitutional limits.

⁴ The introductory language “it shall be competent” provides a charter city permission to include such provisions, but does not impose a requirement to do so. (See, e.g., California Education Code section 5203, providing that a charter city may repeal such provisions from its charter if it desires.)

B. A Charter City May Provide for a School Board’s Composition and Elections Even Though the Boundaries of the City and the School District Are Not Coterminous.

The boundaries of the School District are not identical to those of the City, prompting questions about the City’s authority to include the district’s School Board elections in its charter.

1. The School District’s Boundaries Do Not Include All of the City, and Also Extend Beyond City Limits.

To answer some of the questions presented, it is necessary to first clarify confusion about the School District’s boundaries. The School District, which serves more than 130,000 students and is the second-largest district in California, serves most, but not all, of the City. It also extends beyond City limits. <https://www.sandiegounified.org/about-san-diego-unified>
Specifically:

- Some portions of the City are outside the School District: The School District “encompasses approximately 208 square miles, running north to the Mira Mesa and Scripps Ranch neighborhoods; east to San Carlos and Lake Murray neighborhoods; south to Bay Terraces, Paradise Hills and Logan Heights neighborhoods; and serving the coastal neighborhoods from Point Loma to La Jolla.” <https://www.sandiegounified.org/do-i-live-within-san-diego-unified-school-district> The School District does *not* include “areas north of Mira Mesa and Scripps Ranch (e.g. ZIP Code 92130, Rancho Bernardo, Carmel Mountain and Rancho Penasquitos except for streets feeding into Mercy Road); “new developments east of Scripps Ranch (accessed via Stonebridge Parkway)” served by Poway Unified; areas “close to the U.S.-Mexico international border (e.g. San Ysidro, Otay Mesa);” and small parts of the City “bordering Lemon Grove (parts of the Jamacha, Lomita and North Encanto neighborhoods).” *Id.*
- Some portions of other cities and unincorporated areas are within the School District: The School District includes “a few addresses in the cities of La Mesa and Lemon Grove . . . San Diego Unified also serves a small unincorporated area between the San Diego city line, Paradise Valley Road, S. Worthington Street and the South Bay Parkway.” *Id.*

These boundaries are noted on the School District’s website, which should be consulted for any future changes to boundary lines. The City does not have authority to change School District boundaries, or to conduct redistricting after the U.S. Census of the five election districts within the School District. *See, e.g.*, Cal. Educ. Code § 5019.5 (the governing board of each school district shall adjust the boundaries after a federal census), among other references.

2. The City is Legally Authorized to Provide for the School Board's Composition and Elections in the City Charter, Even Though the City and School District Have Different Boundaries.

The California Constitution and California Education Code both authorize a charter city to provide for a Board of Education's composition and elections even when the boundaries of a charter city and a school district are not coterminous. Laws contemplate both those districts extending beyond the boundaries of a charter city, and districts that are included within a city.

Article IX, section 16(b) of the California Constitution contemplates the situation in which "the boundaries of a school district . . . extend beyond the limits of a city whose charter provides" for the composition and elections of school board members. It states in relevant part:

(b) Notwithstanding Section 3 of Article XI,⁵ *when the boundaries of a school district or community college district extend beyond the limits of a city whose charter provides for any or all of the foregoing* with respect to the members of its board of education, no charter amendment effecting a change in the manner in which, the times at which, or the terms for which the members of the board of education shall be elected or appointed, for their qualifications, compensation, or removal, or for the number which shall constitute such board, shall be adopted unless it is submitted to and approved by a majority of all the qualified electors of the school district . . .

Id. (Emphasis added.)

This section confirms that the California Constitution authorizes a charter city to include such school board provisions in its charter even when the school district boundaries extend beyond the city's limits and thus are not coterminous. As detailed above, the School District extends beyond the City's boundaries and thus this constitutional provision applies.

Additionally, California Education Code section 5200 contemplates the situation in which a district is "within" a charter city, and provides that it "shall be governed by the board of education provided for in the charter of the city." Cal. Educ. Code § 5200. This law also confirms the California Legislature's intent to interpret the California Constitution to allow a charter city to regulate such matters when a district is included within its boundaries – without any restriction regarding how much of the city must be included within the district's boundaries, whether it must be all of the charter city or a portion:

⁵ Article XI, section 3(a) of the California Constitution states in relevant part: "For its own government, a county or city may adopt a charter by majority vote of its electors voting on the question. . . . A charter may be amended, revised, or repealed in the same manner. . . . The provisions of a charter are the law of the State and have the force and effect of legislative enactments." Cal. Const. art. XI, § 3(a).

§ 5200. Districts governed by boards of education

Any unified school district that is *coterminous with or includes within its boundaries a chartered city* or city and county shall be governed by the board of education provided for in the charter of the city or city and county. . .

Cal. Educ. Code § 5200 (emphasis added).

The use of the word “or” after the phrase “coterminous with” is significant: “Or” is “used to express an alternative or to give a choice of one among two or more things.” *Black’s Law Dictionary* at 756 (6th ed., abridged, 1991). California law thus confirms that school district and chartered city boundaries are not required to be “coterminous” for the charter city to provide the governing law regarding the composition and elections for a district’s board of education. Many California school districts, including the state’s largest in Los Angeles, are not coterminous with the boundaries of the charter cities that regulate their school boards.

California Education Code section 5200 must be read in harmony with article IX, section 16(b) of the California Constitution. Together, the provisions confirm that the City may provide for the School Board’s composition and elections, despite the fact the School District both extends beyond the City’s boundaries and does not include all of the City within its borders.

C. Only Those Who are Registered Voters Within the School District May Vote on a Charter Amendment Regarding the District’s Board of Education and its Election Process.

The California Constitution provides that school district boundaries, not city boundaries, govern who is authorized to vote on a school board’s governance. Article IX, section 16(b) of the California Constitution expressly provides that only voters *within the school district* may vote on a proposed amendment to the city charter provisions dealing with a board of education. As set forth above, but with additional relevant words emphasized here,

(b) Notwithstanding Section 3 of Article XI,⁶ when the boundaries of a school district or community college district extend beyond the limits of a city whose charter provides for any or all of the foregoing with respect to the members of its board of education, *no charter amendment* effecting a change in the manner in which, the times at which, or the terms for which the members of the board of education shall be elected or appointed, for their qualifications, compensation, or removal, or for the number which shall constitute such board, *shall be adopted unless it is submitted to and approved by a majority of all the qualified electors of the school district* . . .

⁶ California Constitution article XI, section 3(a) states in relevant part: “For its own government, a county or city may adopt a charter *by majority vote of its electors* voting on the question. . . . A charter may be amended, revised, or repealed in the same manner. . . . The provisions of a charter are the law of the State and have the force and effect of legislative enactments.” Cal. Const. art. XI, § 3(a). (Emphasis added.)

any portion of a proposed charter or a revised charter which would establish or change any of the foregoing provisions respecting a board of education [i.e., time, place, manner or terms of elections] shall be submitted to the electors of the school district or as one or more separate questions. The failure of any such separate question to be approved shall have the result of continuing in effect the applicable existing law with respect to that board of education.

Cal. Const. art. IX, § 16(b) (emphasis added).

Thus, a voter who is registered to vote within the School District, but who lives outside the City, *can* vote on Charter amendments regarding School Board elections; conversely, those who are registered to vote within the City but outside of School District boundaries *cannot* vote on such Charter amendments. *Id.* (see section 4 below).

The fact that the right to vote in this circumstance is limited to electors registered within district boundaries is confirmed twice in the California Constitution (“a majority of all the qualified electors of the school district” and “submitted to the electors of the school district”). *Id.* This underscores the legislative intent that this is an exception to the provision requiring a majority of *city* voters approve all charter amendments. In so stating, the California Constitution makes clear that it is paramount that a voter be registered within the jurisdiction of the School District, not the City, to vote on the district’s governance. The Legislature has expressly provided for this in the California Education Code, underscoring the point. Cal. Educ. Code § 5201 (question of governance by provisions of a city charter must be “submitted to the voters of the district”).⁷

D. The California Constitution Confirms that Voters Registered Within School District Boundaries May Vote on Charter Amendments Affecting their School Board; Allowing Others to Vote Would Disenfranchise District Voters.

Voting is legally defined by residency within a territorial jurisdiction – in this case, the School District. (See No. 3.) Voting rights are not determined by where a resident or non-resident may choose to send a child to school. Thus, a majority of school district, not city, voters must approve charter amendments regarding a district’s school board. Cal. Const. art. IX, § 16(b). If voters who *live in the City but outside the School District* were allowed to vote on Charter amendments affecting the School Board, their votes would dilute and disenfranchise those of School District voters. Conversely, if voters who *live outside the City but within the School District* were not allowed to vote, they would be disenfranchised. Both situations would

⁷ It is worth noting that a citizens’ initiative that would amend Charter sections regarding the School District, circulated for voter signatures, could be validly signed only by those voters who are registered within the School District. The School District has made this point in past election cycles, noting that persons not eligible to vote on a school district measure may not lawfully sign a petition to place the measure on the ballot. Cal. Elec. Code § 100.

violate the California Constitution. Their participation would disenfranchise School District voters and dilute their votes, violating equal protection laws.

II. REPEALING CHARTER SECTION 66 WOULD DISSOLVE THE SCHOOL BOARD, GIVING THE SAN DIEGO COUNTY SUPERINTENDENT OF SCHOOLS THE DUTY AND AUTHORITY TO APPOINT A NEW BOARD.

Repealing Charter section 66 would dissolve the School Board. The San Diego County Superintendent of Schools would then control the process of setting up and appointing a new School Board until an election is held. As the California Education Code states in relevant part:

§ 5203. Creation of board of education when city charter amended

If the charter of any city provides for . . . a board of education of five members of a unified school district, and such charter has been or is hereafter amended so that it fails to provide for a board of education, a new board of education composed of five members is created under this section immediately upon the effective date of such amendment; the positions thereto shall be filled by appointment of the county superintendent of schools. The terms of the members first so appointed shall expire the first Friday in December of an odd-numbered year next following the effective date of such charter amendment, and an election shall be held for the members of such board at the time fixed by law for the regular election of members of governing boards of school districts, and the members so elected shall assume office on the first Friday in December following.

Cal. Educ. Code § 5203.

If the Charter amendment takes effect on a date that makes it legally impossible to hold an election prior to December 1 of the next odd-numbered year, the county superintendent of schools would again appoint members. State law specifies the staggered terms for new members and when elections would be held. Depending on the timing, School Board elections could be consolidated with general municipal elections. *Id.*

Significantly, if Charter section 66 is repealed, School Board elections would thereafter be held under state law and the City would no longer have a say in the process. California Education Code section 5203, stating that the School Board's dissolution would occur "immediately upon the effective date of such [Charter repeal] amendment," confirms this would occur on the date the Charter amendment is chaptered by the California Secretary of State. This would occur within weeks of the certification of election results.

If a ballot measure proposes to repeal the Charter section, voters may wish to provide a "safety net" and offer a companion measure that considers any related issues that would minimize the chaos of disbanding the School Board so abruptly. The City should work with

counsel for the School District regarding such options, but a companion measure, if approved by voters, could attempt to minimize the disruption that could occur if the School Board dissolves.

Finally, while the focus has been solely on Charter section 66, any proposal to repeal the section must be drafted to repeal all of Article VI - Board of Education from the Charter, including Section 67: Powers and Duties. As set forth above, Charter section 67 confirms that state law provides the School Board's powers and duties. Even if the Charter amendment seeks a complete repeal of these sections of the Charter, the only voters who may participate in that election are those who are registered within School District boundaries.

CONCLUSION

The California Constitution narrowly defines the extent of the City's jurisdiction over the School Board's composition and elections, which are considered to be a municipal affair. Any attempt to regulate the School Board beyond what is specifically authorized would violate the constitution. Any proposed amendment to the Charter provisions governing School Board elections will be carefully analyzed by this Office to ensure that it adheres to legal limitations.

The California Constitution and California Education Code make clear that Charter provisions involving a School Board are an exception to the constitutional provision that allows all voters in a charter city to vote on charter amendments: Only those voters registered within School District boundaries may vote on a Charter amendment regarding their School Board.

If a ballot measure seeks to repeal the School Board provisions from the Charter and is approved by a majority of district voters, the measure would dissolve the School Board. If the City opts to place such a measure on the ballot, this Office recommends working with the San Diego Unified School District to determine if a companion measure will appear on the ballot to minimize any related impact. Upon the repeal, the San Diego County Superintendent of Schools would be empowered and required by state law to appoint a new board, to serve until an election is held. The City would no longer have any authority over School Board elections.

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