



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION
2018-4

The Honorable Joy Hofmeister
State Superintendent of Public Education
Oklahoma State Department of Education
2500 North Lincoln Boulevard
Oklahoma City, OK 73105

June 26, 2018

Dear Superintendent Hofmeister:

This office has received your request for an official Attorney General Opinion in which you, in effect, ask the following questions:

1. **What effect, if any, does the enactment in 2016 of House Bill 3103 (2016 Okla. Sess. Laws ch. 356) have on the conclusions reached in Attorney General Opinion 2001-33?**
2. **If, based on the enactment of House Bill 3103 (2016 Okla. Sess. Laws ch. 356), Attorney General Opinion 2001-33 is no longer valid, can an otherwise ineligible member of a school district board now continue to hold a seat on the board?**
3. **If the answer to Question #2 is no:**
 - (a) **When does the seat of the ineligible board member become vacant?**
 - (b) **Does the ineligible board member continue to serve until a replacement is appointed?**
 - (c) **If the ineligible board member does not resign, must the school district board take action to remove the ineligible member?**
 - (d) **What are the time frames and mechanisms available to remove the ineligible board member?**
4. **If a school district board member is ineligible to hold a seat on the board, does the member's participation in board activities violate the Oklahoma Open Meeting Act?**

I. BACKGROUND

Public school education in Oklahoma is governed by the Oklahoma School Code, 70 O.S.2011 & Supp.2017, §§ 5-101—5-161. Local school district boards of education (“School Boards”) are the governing bodies for each school district in Oklahoma. 70 O.S.2011, § 5-106. In general, School Board members are elected, *see id.* § 5-107A, and are required to, among other things, complete courses of instruction on education issues both as new members and on a continuing basis. *See* 70 O.S.Supp.2017, §§ 5-110, 5-110.1. In 2001, this office issued an official opinion relating to the consequences of a School Board member not meeting these educational requirements. *See* A.G. Opin. 2001-33 (hereinafter, the “2001 Opinion”).

In 2016, House Bill 3103 (hereinafter, “HB 3103”) amended Sections 5-110 and 5-110.1 of Title 70, the statutes largely at issue in the 2001 Opinion. *See* 2016 Okla. Sess. Laws ch. 356. Because your questions involve the effect of HB 3103 on the analysis and conclusions set forth in the 2001 Opinion, it is helpful to begin with a brief summary of the previous version of Sections 5-110 and 5-110.1, the questions addressed and conclusions reached in the 2001 Opinion, and the subsequent statutory changes effected by HB 3103.

A. The Educational Instruction Requirements of Title 70, Sections 5-110 & 5-110.1.

At the time of the 2001 Opinion, Section 5-110 required a person filing “a notification and declaration of candidacy” for a School Board seat to agree in writing to complete, within 15 months of election or appointment, at least twelve hours of instruction covering certain education-related topics. 70 O.S.Supp.2000, § 5-110(A).¹ Incumbents seeking reelection were subject to a lesser commitment of six hours of instruction within fifteen months of being elected, with an emphasis on changes in school law. *Id.* § 5-110(B). If a School Board member did not meet these requirements, the School Board was required to “declare the seat of such member vacant and fill the vacancy according to law.” *Id.* § 5-110(C).

In addition to the requirements of Section 5-110, Section 5-110.1 set forth the following continuing education requirements for School Board members to meet over the course of their term: fifteen hours if elected for a five-year term, twelve hours if elected for a four-year term, and nine hours if elected for a three-year term. 70 O.S.Supp.2000, § 5-110.1(A). Failure to meet the continuing education requirements of Section 5-110.1 would “result in the ineligibility of the member to run for reelection to the [School Board.]” *Id.* § 5-110.1(C).

B. The 2001 Opinion.

The 2001 Opinion addressed four questions related to the requirements of Section 5-110.1. The first question was whether a School Board member who failed to meet the continuing education requirements of Section 5-110.1 could be elected to an additional term of office. The answer consisted of two parts. First, the opinion concluded that, based on the straightforward terms of the statute, a School Board member who does not comply with Section 5-110.1 “cannot run for

¹ The State Board of Education was required to promulgate rules for approving courses to fulfill this requirement. 70 O.S.Supp.2000, § 5-110(A).

reelection[.]” A.G. Opin. 2001-33 at 144. Second, the opinion addressed a scenario in which an ineligible incumbent nevertheless runs for, and is elected to, another term on the School Board and such election is not successfully challenged by the deadline for protests set forth in the Oklahoma Election Code. *Id.* at 144-47. Because Section 5-110.1 provided that non-compliance would result only in the “ineligibility of the member *to run* for reelection”—in contrast to being ineligible to hold office—the opinion concluded that the reelected incumbent in this scenario may serve another term. *Id.* (emphasis added).

The second question asked whether, in the above scenario, the School Board would be required by law to seat the reelected incumbent once the election results were certified by the county election official. A.G. Opin. 2001-33 at 147. Here, the opinion again focused on the fact that noncompliance with Section 5-110.1 rendered the incumbent ineligible to *run for reelection*, but not ineligible to *hold title to the office*, if elected. *Id.* at 148-49. The opinion concluded that once reelected and in possession of “a due and proper certificate of election to an office,” the incumbent “is prima facie entitled to qualify and assume the duties of such office, and the [School Board] cannot refuse to seat him or her as a board member.” *Id.* at 151.

The third question addressed in the 2001 Opinion asked whether, in this scenario, the School Board would be required to declare the incumbent member’s seat vacant under Title 51, Section 8, which provides that “[e]very office *shall* become vacant on the happening” of, among other things, the officer’s “[c]onviction in a state or federal court of competent jurisdiction of any felony or any offense involving a violation of his official oath[.]” A.G. Opin. 2001-33 at 151 (quoting 51 O.S.1991, § 8 (emphasis in original)). Noting the requirement that School Board candidates swear to or affirm their eligibility to run for office, the opinion found that an incumbent who was ineligible to run for office based on noncompliance with Section 5-110.1—but swore or affirmed to the contrary—could be guilty of perjury. *Id.* at 152. It is the School Board itself that, under Title 51, Section 8, must determine whether facts exist that would render the office vacant. *Id.* at 152-53. If the School Board refused to do so, the remedy would be a writ of mandamus to compel its action. *Id.* at 153. However, before the School Board could declare the seat vacant, the opinion concluded, the purportedly ineligible seat holder must be provided with due process which, at a minimum, would include notice and an opportunity to be heard. *Id.* at 155 (citing *Patel v. OMH Med. Ctr., Inc.*, 1999 OK 33, ¶ 41, 987 P.2d 1185, 1201).

The fourth and final question addressed in the 2001 Opinion is whether, if an incumbent is reelected to a School Board despite being ineligible to run under Section 5-110.1, subsequent action taken by that School Board is legitimate. A.G. Opin. 2001-33 at 155. In analyzing this question, the opinion again emphasized the difference between eligibility to run for office and eligibility to hold that office once elected. *Id.* at 156. Based on this distinction, the opinion concluded that an incumbent who is elected notwithstanding the failure to comply with Section 5-110.1, and whose election is not challenged by the statutory deadline, is eligible to hold a seat on the School Board. *Id.* As such, subsequent actions of the School Board would be valid. *Id.*

C. House Bill 3103.

HB 3103 amended Sections 5-110, 5-110.1, and 5-110.2 of Title 70. First, HB 3103 made the following changes to subsections D and E of Section 5-110,² which requires candidates to agree in writing to “complete at least twelve (12) hours of instruction on education issues” covering certain listed topics within fifteen months of election or appointment to the School Board:

D. If a school board member, including an incumbent member, has not satisfied the instructional requirements as set forth in this section within fifteen (15) months of election, reelection or appointment, the district board of education shall declare the seat of the member vacant within thirty (30) days of the date of receipt of notice that the member has not completed the requirements as provided for pursuant to Section 5-110.2 of this title and shall fill the vacancy according to law. A school board member who is required to vacate a school board seat pursuant to this subsection shall be ineligible to be reappointed ~~or to~~ to run for reelection to or to hold that respective board seat on the school district board of education or to run for election to or to hold any other board seat on the board of education for a three-year period for three-member boards, for a four-year period for seven-member boards or for a five-year period for five-member boards.

E. All government departments, agencies and institutions of this state are directed to lend assistance as may be required by the State Department of Education for the proper conduct and administration of the workshops as authorized in subsection A of this section. The State Department of Education shall maintain a permanent record of the instructional hours and continuing education hours earned for each district board of education member who successfully completes a workshop and shall issue a certificate of completion to the member.

2016 Okla. Sess. Laws ch. 356, § 2. HB 3103 also amended Subsection D of Section 5-110.1³—the provision imposing continuing education requirements for School Board members—in the following way:

D. If a school board member has not satisfied the continuing education requirements of this section, the school district board of education shall declare the

² Section 5-110 of Title 70 was amended on several occasions between the issuance of the 2001 Opinion and the passage of HB 3103. Subsections D and E of Section 5-110, as amended by HB 3103, were included in Subsection C of the version of Section 5-110 that was considered in the 2001 Opinion.

³ The version of Title 70, Section 5-110.1(D) analyzed in the 2001 Opinion remained unchanged until 2012, when the following amendment was enacted:

D. Failure by a board member to satisfy the continuing education requirements of this section shall result in the ineligibility of the member to be reappointed or run for reelection to that respective board seat on the school district board of education or to run for election to any other board seat on the board of education for a three-year period for three-member boards, for a four-year period for seven-member boards or for a five-year period for five-member boards.

seat of the member vacant within thirty (30) days of the date of receipt of notice that the member has not completed the requirements as provided for pursuant to Section 5-110.2 of this title and shall fill the vacancy according to law. Failure by a board member to satisfy the continuing education requirements of this section shall result in the ineligibility of the member to be reappointed ~~or to~~ run for reelection to or to hold that respective board seat on the school district board of education or to run for election to or to hold any other board seat on the board of education for a three-year period for three-member boards, for a four-year period for seven-member boards or for a five-year period for five-member boards.

2016 Okla. Sess. Laws ch. 356, § 3. Finally, Section 5-110.2, which requires the State Board of Education to maintain records of School Board members' continuing education attendance, was amended as follows:

The State Board of Education shall maintain records of attendance by school board members at continuing education events required pursuant to Sections 5-110 and 5-110.1 of this title and prior to the final opportunity for each school board member who has not completed the continuing education requirements to complete the same, shall notify the school board member by mail before March 1 of each year of any final opportunity to complete these requirements. Upon determining that a school board member did not complete the continuing education requirements of Sections 5-110 or 5-110.1 within the respective period of time, the Board shall immediately notify by certified mail the school district board of education and the school district superintendent that the school board member did not complete the requirements and that the school district board of education is required to declare the seat of that member vacant.

2016 Okla. Sess. Laws ch. 356, § 4.

Together, these amendments require a School Board to declare a member's seat vacant for failure to satisfy the education requirements of Sections 5-110 or 5-110.1 within 30 days of receiving notice of noncompliance from the State Board of Education pursuant to Section 5-110.2, *see* 2016 Okla. Sess. Laws ch. 356, §§ 2–3, and, correspondingly, set forth more explicit notice procedures to be followed by the State Board. *See id.* § 4. Further, the amendments clarify that a member whose seat is vacated for noncompliance with either Section 5-110 or 5-110.1 is now ineligible to “be reappointed to, run for reelection to or to hold” the vacated seat *or* “to run for election to or to hold any other board seat” for between three and five years depending on the size of the School Board. *Id.* §§ 2–3.⁴

⁴ HB 3103 also amended Section 13A-110 of Title 26, a provision of the Election Code related to the filling of vacancies on School Boards and technology center school district boards. *See* 2016 Okla. Sess. Laws ch. 356, § 1. However, the modifications to that provision are not relevant to this discussion.

II. DISCUSSION

A. Validity of the 2001 Opinion after HB 3103.

In your first question, you ask broadly about the effect of HB 3103 on the conclusions reached in the 2001 Opinion. As discussed above, the 2001 Opinion focused on the consequences of a School Board member's noncompliance with the continuing education requirements of Title 70, Section 5-110.1, and reached four official conclusions. We address the effect of HB 3103 on these conclusions in order.

Conclusion 1: A School Board member who does not satisfy the continuing education requirements of Section 5-110.1 is ineligible to run for reelection, but if the member nevertheless successfully ran for reelection and the election result was not challenged, the member would be eligible to hold the seat.

The 2001 Opinion reached this conclusion based on the statutory language of Section 5-110.1, which rendered a noncompliant School Board member ineligible to “run for reelection.” *See* A.G. Opin. 2001-33 at 143-44. Contrasting this language with other statutes setting forth certain qualifications to **hold office**, the opinion found that if the noncompliant member was nevertheless reelected and the election result went unchallenged, the member would be eligible to hold the seat.

This distinction is no longer relevant. As amended by HB 3103, Section 5-110.1 now requires a School Board, within 30 days of receiving notice of a member's noncompliance with the section's continuing education requirements, to declare the seat vacant and to fill the vacancy according to law. *See* 70 O.S.Supp.2017, § 5-110.1(D). Moreover, a member who does not satisfy the continuing education requirements of Section 5-110.1 is now ineligible “to be reappointed to, run for reelection to **or to hold**” his or her seat on the School Board, or to run for another seat for certain time periods depending on the size of the School Board. *Id.* (emphasis added). Accordingly, this conclusion is no longer valid and is hereby withdrawn.

Conclusion 2: Once reelected and in possession of “a due and proper certificate of election to an office,” a School Board member “is prima facie entitled to qualify and assume the duties of such office, and the [School Board] cannot refuse to seat him or her as a board member” even if the member has not satisfied the continuing education requirements of Section 5-110.1.

As noted in the 2001 Opinion, “[w]hen any person shall usurp, intrude into, or unlawfully hold or exercise any public office,” a civil action in the nature of *quo warranto* may be filed to remove that person from the office. A.G. Opin. 2001-33 at 147-48 (citing 12 O.S.1991, § 1532). The opinion concluded, however, that this remedy was unavailable where a School Board member who failed to satisfy the requirements of Section 5-110.1 was nonetheless reelected. *Id.* at 148. This conclusion was again based on the distinction between being ineligible to “run for reelection” and being ineligible to hold office. Because this distinction was rendered irrelevant by the passage of HB 3103, the conclusion is no longer valid and is hereby withdrawn.

Conclusion 3: A School Board is required to determine whether a board seat becomes vacant under Title 51, Section 8 based on a conviction for a felony or any offense involving a violation of a member's official oath. If the School Board fails to do so, its action may be compelled through a writ of mandamus, but in either event, no vacancy may be declared without providing the member notice and an opportunity to be heard.

The third question addressed in the 2001 Opinion shifted focus from the Oklahoma School Code to Title 51, Section 8, the statute by which a State office becomes vacant upon the occurrence of certain events. One such event is the officeholder's final conviction of a felony or other offense involving the oath of office. *See* 51 O.S.2011, § 8. Because a candidate for election to a School Board is required to "swear or affirm that he or she is eligible to run for the office or serve in the office if elected," the opinion found that a candidate who does so without having met the requirements of Section 5-110.1 may be guilty of perjury, a felony. *See* A.G. Opin. 2001-33 at 152. The School Board would be the entity responsible for determining "whether there are facts showing a member has a criminal conviction" that would create a vacancy under Title 51, Section 8. *Id.* at 152-53. While such an inquiry likely requires only a routine check of public records, the opinion concluded that, in the event of a factual dispute, the School Board would be required to provide the School Board member with certain due process protections before declaring the seat vacant. *Id.* at 153-55.

HB 3103 did not amend the provisions of the Election Code requiring School Board candidates to swear or affirm to their eligibility to run for office, nor did it modify Title 51, Section 8. Accordingly, this conclusion remains valid.

Conclusion 4: If a School Board member is ineligible to run for reelection for noncompliance with the education requirements of Section 5-110.1, but is nevertheless reelected, subsequent actions of the School Board would be valid.

In answering the final question, the 2001 Opinion returned to the distinction between ineligibility to run for reelection and ineligibility to hold office. Having found that an incumbent School Board member who is ineligible to run for reelection due to noncompliance with Section 5-110.1 is nevertheless eligible to hold office if reelected, the opinion concluded that actions taken by the School Board subsequent to such reelection would be valid. *See* A.G. Opin. 2001-33 at 155-56. But the opinion also went further, suggesting that even if a noncompliant member were ineligible to hold office, the member would be a *de facto* member⁵ if he or she remained on the School Board after becoming ineligible. *Id.* The law views the actions of *de facto* officers as "valid so far as they involve the interest of the public and third persons." *Hatfield v. Jimerson*, 1961 OK 250, ¶ 9, 365 P.2d 980, 982 (quoting *State ex rel. Tayrien v. Doggett*, 1956 OK CR 45, ¶ 6, 296 P.2d 185, 186). However, because a full discussion of the *de facto* officer doctrine was unnecessary to the 2001 Opinion's conclusion, its implications were not fully developed.

⁵ By contrast to a *de jure* officer, who lawfully holds office "by right and just title," *see Price v. Bd. of Cty. Com'rs of Pawnee Cty.*, 2016 OK 16, ¶ 13 n.11, 371 P. 3d 1089, 1092 n.11 (quoting BLACK'S LAW DICTIONARY (Rev. 4th ed. 1968)), a *de facto* officer is one who lacks some qualification necessary to hold office, but nevertheless is in actual possession of the office under color of title. *Ajax Contractors, Inc. v. Myatt*, 1967 OK 19, ¶¶ 15-17, 424 P.2d 30, 33.

As discussed above, the passage of HB 3103 rendered irrelevant the distinction between a School Board member's eligibility *to run* for office and *to hold* office. A School Board member who fails to meet the education requirements of Section 5-110.1 is now ineligible to run for *and* to hold office. 70 O.S.Supp.2017, § 5-110.1(D). With this change, the validity of actions taken by a School Board on which an ineligible member sits may depend on whether the member could be considered a *de facto* officer.⁶ However, such a determination will depend on facts specific to each situation. See A.G. Opin. 2011-6 at 40 ("In order to constitute a *de facto* officer, 'there must be some facts, circumstances, or conditions which would reasonably lead persons who have relations or business with the office to recognize him as the lawful incumbent, and submit to or invoke his official action, without inquiry as to his title.'" (quoting *Stearns v. Sims*, 1909 OK 235, ¶ 5, 104 P. 44, 46)). To the extent the conclusion reached in the 2001 Opinion found otherwise, it is no longer valid and is hereby withdrawn.

B. Based on the enactment of HB 3103, a School Board member who has not complied with the educational requirements of Title 70, Sections 5-110 & 5-110.1 may not hold his or her School Board seat, even if reelected.

As set forth above, the result of HB 3103 is that a School Board member who fails to meet the educational requirements of Sections 5-110 and 5-110.1 must vacate his or her seat and is ineligible to "be reappointed to, run for reelection to *or to hold*" the vacated seat or "to run for election to or to hold any other board seat" for between three and five years depending on the size of the School Board. 70 O.S.Supp.2017, §§ 5-110(D), 5-110.1(D) (emphasis added). Accordingly, the answer to your second question is that a noncompliant School Board member may not hold his or her seat, even if reelected, and may not be elected to a different School Board seat for a certain period of time after his or her seat is declared vacant.⁷ We now turn to your subsidiary questions regarding when the ineligible member's seat becomes vacant, how and when a replacement is seated, and the role of the School Board in this process.

1. If a School Board member does not comply with the education requirements of Title 70, Sections 5-110 & 5-110.1, the Board must declare his or her seat vacant within 30 days of receiving notice of noncompliance from the State Board of Education.

As to when an ineligible member's seat becomes vacant, this is also answered by the amendments enacted by HB 3103. As amended, Title 70, Section 5-110.2 requires the State Board of Education to maintain records of School Board members' attendance at continuing education programs and,

⁶ It should be noted that where a School Board member is ineligible to hold a seat due to noncompliance with Sections 5-110 or 5-110.1, he or she remains a *de jure* member of the School Board until the earlier of (i) 30 days from the School Board's receipt of notice of the member's noncompliance from the State Board of Education pursuant to Title 70, Section 5-110.2, or (ii) such time as the School Board officially declares the member's seat to be vacant. See 70 O.S.Supp.2017, § 5-110.1(D); see also *Price*, 2016 OK 16, ¶ 13, 371 P. 3d at 1092 (holding that "[u]ntil [the office is declared vacant], the *de jure* officer still holds the designated office with all of the benefits and emoluments which are attached to it").

⁷ As noted in the 2001 Opinion, in the event that such a member were reelected or reappointed, the appropriate remedy would be an action in the nature of *quo warranto* to determine title to the office. See A.G. Opin. 2001-33 at 147 (citing *State ex rel. Stuart v. Rapp*, 1981 OK 87, ¶ 3, 632 P.2d 388, 389).

before March 1 of each year, notify members who have yet to complete their continuing education requirements of any final opportunity to do so. 70 O.S.Supp.2017, § 5-110.2. If a School Board member does not meet these requirements by the deadline, the State Board must immediately send notice by certified mail to the School Board and district superintendent stating that (i) the School Board member did not meet the statutory requirements and (ii) the School Board is required to declare the member's seat vacant. *Id.*

Upon receiving such notice, the School Board "shall declare the seat of the member vacant within thirty (30) days of the date of receipt of the notice...and shall fill the vacancy according to law." 70 O.S.Supp.2017, §§ 5-110(D), 5-110.1(D). Accordingly, the ineligible member's seat becomes vacant upon declaration of the School Board. The School Board may declare the seat vacant at any time after receiving notice of the member's noncompliance with Section 5-110 or 5-110.1, but it must do so no later than 30 days following receipt. However, these provisions notwithstanding, the Oklahoma Supreme Court has articulated the general proposition "that due process is implicated in decisions to find a vacancy or forfeiture in a public office." *Nesbitt v. Apple*, 1995 OK 20, ¶ 14, 891 P.2d 1235, 1241. As noted in the 2001 Opinion's discussion of vacancies arising under Title 51, Section 8, this would require that the School Board member receive notice of his or her noncompliance and "a full and fair opportunity to be heard." A.G. Opin. 2001-33 at 155 (citing *Patel v. OMH Med. Ctr., Inc.*, 1999 OK 33, ¶ 41, 987 P. 2d 1185, 1201).⁸

2. Under Title 70, Sections 5-110 & 5-110.1, a vacated School Board seat is filled according to the procedures set forth in Title 26, Section 13A-110.

You also ask about the duties of the School Board in removing and replacing a member who has failed to satisfy the requirements of Title 70, Sections 5-110 or 5-110.1. As discussed above, failure to comply with the statute automatically results in the member's ineligibility to serve on the School Board and, upon receiving notice of ineligibility and having afforded the member due process, the School Board is required to declare the member's seat vacant. 70 O.S.Supp.2017, §§ 5-110(D), 5-110.1(D). By doing so, the School Board has taken all actions required of it to unseat the ineligible member.

Once the ineligible member's seat is vacated, the School Board is also vested with the duty to fill the vacancy by appointment. 26 O.S.Supp.2017, § 13A-110(A). The Board may not reappoint the member who it unseated, nor may it appoint any other person who would otherwise be ineligible to be a School Board candidate. *Id.* § 13A-110(C). If the School Board has not made the appointment within 60 days of declaring the vacancy, the School Board "shall call a special election to fill the vacancy for the unexpired term." *Id.* § 13A-110(E).

⁸ On a related point, you ask whether a School Board member who fails to satisfy the education requirements in Sections 5-110 or 5-110.1 may continue to serve until a replacement is appointed. Under the plain language of the statute, such failure "shall result in the ineligibility of the member...to hold that respective board seat" and the School Board "shall declare the seat of the member vacant within thirty (30) days" of receiving notice from the State Board of Education. 70 O.S.Supp.2017, §§ 5-110(D), 5-110.1(D). There is nothing in the statute that would permit an ineligible member to continue to serve until a replacement is appointed, and we decline to read such a provision into the statute. *See, e.g., Cities Serv. Gas Co. v. Peerless Oil & Gas Co.*, 1950 OK 4, ¶ 7, 220 P.2d 279, 293 ("When the language is plain, we have no right to insert words or phrases so as to incorporate in the statute a new and distinct provision.") (quoting *United States v. Temple*, 105 U.S. 97, 99 (1881)) (Halley, J., dissenting).

C. Effect of School Board action involving an ineligible member under the Oklahoma Open Meeting Act.

The Oklahoma Open Meeting Act (the “Act”) imposes certain requirements for the conduct of meetings of public bodies, which include “boards of public and higher education in this state.” 25 O.S.2011, § 304. For instance, the Act requires public bodies to, among other things, hold meetings at specified times and places that are convenient to the public and are preceded by advance public notice, cast their votes publicly and have such votes recorded, and keep minutes of their proceedings. *See id.* §§ 303, 305, 312.

Generally speaking, nothing in the Act would prohibit an ineligible member from participating in a meeting of a School Board. However, where the Act requires a quorum or majority of the School Board’s members in order to take some action, the involvement of an ineligible member may affect the School Board’s ability to act. For instance, the Act permits a public body to go into executive session only when “authorized by a majority vote of a quorum of the members present[.]” 25 O.S.2011, § 307(E). Additionally, public bodies may hold meetings by videoconference only if a quorum of members is present in person at the meeting site posted on the agenda. *Id.* § 307.1(A). If the School Board has received notice of the member’s noncompliance with Sections 5-110 or 5-110.1 of Title 70 and has declared the member’s seat vacant, and the member thereafter participates in a meeting and is counted for quorum or majority purposes, certain actions of the School Board could violate the Act. Absent these circumstances, however, the participation of an ineligible member in a meeting of a School Board would not violate the Oklahoma Open Meeting Act.⁹

It is, therefore, the official Opinion of the Attorney General that:

- 1. The enactment in 2016 of House Bill 3103 (2016 Okla. Sess. Laws ch. 356) renders a member of a local school district board of education ineligible to run for, be reappointed to, or hold his or her office if the member fails to satisfy the requirements of 70 O.S.Supp.2017, §§ 5-110 & 5-110.1. To the extent A.G. Opin. 2001-33 concludes otherwise, such conclusions are no longer valid and are hereby withdrawn.**
- 2. If a member of a local school district board of education fails to satisfy the requirements of 70 O.S.Supp.2017, §§ 5-110 & 5-110.1, that member may not continue to hold his or her seat, even if reelected, and may not be elected to a different Board seat for between three and five years after his or her seat is declared vacant. *Id.* §§ 5-110(D), 5-110.1(D).**
- 3. If a member of a local school district board of education becomes ineligible to hold office for failure to satisfy the requirements of 70 O.S.Supp.2017, §§ 5-110 & 5-110.1, the board must declare the member’s seat vacant within 30 days of receiving notice of such failure from the State Board of Education pursuant to 70 O.S.Supp.2017, § 5-**

⁹ It should be noted, however, that a School Board that allows a non-member to participate in executive session may waive the confidentiality or privilege attached to the Board’s discussions or materials presented in executive session. Similarly, allowing a non-member to have access to confidential materials considered in executive session may violate other statutes or administrative rules not addressed herein. *See, e.g.*, 70 O.S.Supp.2017, § 6-101.11 (limiting access to teacher evaluation materials).

110.2. However, the member must receive notice of his or her noncompliance and “a full and fair opportunity to be heard.” A.G. Opin. 2001-33. See also Nesbitt v. Apple, 1995 OK 20, ¶ 14, 891 P.2d 1235, 1241.

- 4. Unless the participation of an ineligible member in a meeting of a local school district board of education leaves the board without a quorum for the purposes of 25 O.S.2011, §§ 307(E) & 307.1(A), the member’s participation would not violate the Oklahoma Open Meeting Act, 25 O.S.2011 & Supp.2017, §§ 301–314.**



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