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OPINION COMMITTEE

RQ-1144-GA

August 12, 2013

FILE # ML-47359-13  
I.D. # 47359

The Honorable Greg Abbott  
Attorney General of Texas  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

Attention: Jason Boatright, Chairman, Opinion Committee

Re: Request for an Attorney General Opinion to determine whether the Harris County Judge has the authority to deny a petition under a repealed statute to order an election to levy and collect an equalization tax for the Harris County Department of Education, and if not, whether the language of the petition precludes the Judge from placing the petition on the ballot.

- COMMITTEES:
- Chair
  - Education
  - Finance
  - Criminal Justice
  - Higher Education
  - Transportation

Dear General Abbott:

A group of citizens in Harris County is attempting, under Texas Education Code Chapter 18, to require the Harris County Judge to order an election to determine whether to levy and collect an equalization tax for the Harris County Department of Education (HCDE), raising the county property tax rate.

The Texas Education Code Chapters 17 and 18 were repealed by the Texas Legislature; however, under Sec. 11.301 of the Texas Education Code, "A school district or county system operating under former Chapter 17, 18 ... on May 1, 1995, may continue to operate under the applicable chapter as that chapter existed on that date and under state law generally applicable to school districts that does not conflict with that chapter." Therefore, these chapters remain in effect for the HCDE. Nevertheless, the question remains whether the HCDE would be continuing to operate under the chapters "as that chapter existed on that date" if the proposed property tax rate increase was adopted.

Accordingly, I submit to your office the following questions in request of an Attorney General Opinion:

1. Do the citizens of Harris County continue to have a right under Section 11.301(a) of the Texas Education Code to petition the Harris County Judge to order an election permitting the levying and collection of an

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equalization tax for the Harris County Department of Education in light of the repeal of Section 18.07 of the Texas Education Code?

2. Does the proposed language, below, substantially follow the language of Section 18.09 of the Texas Education Code? and if it does not,
3. Does the Harris County Judge have the authority to alter the language proposed to the extent that the alteration causes the language to substantially follow the language of Section 18.09 of the Texas Education Code, or alternatively, does the Harris County Judge have the authority to deny the petition request to order an election for not substantially following the language of Section 18.09?

The proposed language reads as follows:

*Petitioners pray that the County Judge of Harris County, Texas, pursuant to sections 18.07 and 18.09, Texas Education Code, immediately order an election to be held on November 5, 2013, at which election the following ballot shall be submitted to the voters of Harris County, Texas:*

*"For Harris County Department of Education additional tax not exceeding one (1) cent on the \$100 valuation to be used solely and exclusively for early childhood education purposes."*

*"Against Harris County Department of Education additional tax not exceeding one (1) cent on the \$100 valuation to be used solely and exclusively for early childhood education purposes".*

As the citizens have requested the Harris County Judge to place the matter on the November 5, 2013 ballot, and the necessary signatures are expected to be met, I respectfully request an accelerated opinion in view of the August 26 deadline for this ballot.

Thank you for your assistance on this matter and please feel free to contact my office for further information.

Respectfully,



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OPINION COMMITTEE



FILE # ML-47357-13  
I.D. # 47357

The Office of Vince Ryan  
County Attorney

**RQ-1144-GA**

August 9, 2013

The Honorable Greg Abbott  
Attorney General of Texas  
Supreme Court Building  
P.O. Box 12548  
Austin, Texas 78711-2548

Certified Mail Return-Receipt Requested

Attention: Opinion Committee

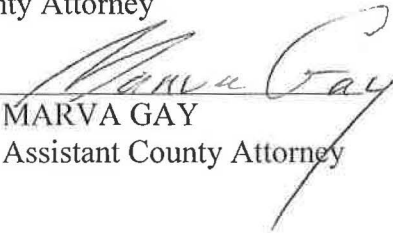
Re: Whether the County Judge is authorized to deny a petition to order an election to levy and collect an equalization tax for the Harris County Department of Education and related questions; C.A. File No. 13GEN1222

Ladies and Gentlemen:

We request your opinion as to whether the Harris County Judge is authorized to deny a petition to order an election to levy and collect an equalization tax for the Harris County Department of Education and related questions. Our Memorandum Brief is attached. As August 26 is the deadline for calling an election to be held on November 5, 2013, we respectfully request your expedited review and opinion on this matter. This request is to replace the request sent by the Harris County Judge on August 6.

Sincerely,

VINCE RYAN  
County Attorney

By:   
MARVA GAY  
Assistant County Attorney

Approved:

  
ROBERT SOARD  
First Assistant County Attorney

## MEMORANDUM BRIEF

This Memorandum Brief is presented in connection with whether the Harris County Judge is authorized to deny a petition to order an election to levy and collect an equalization tax for the Harris County Department of Education (HCDE). A petition drive has been initiated to request that the County Judge place a matter on the November 5, 2013 ballot in Harris County. In anticipation of receiving more than the 78,000 signatures required by the statute, we seek your opinion on the following questions posed by the Harris County Judge.

1. Does section 18.07 of the Texas Education Code, repealed in 1995, allow the citizens of Harris County to petition the County Judge to order an election to levy and collect an equalization tax?, and, if so,
2. Does the County Judge have the authority to deny the request if the language on the petition does not substantially follow the language of the statute set forth in section 18.09 of the Texas Education Code?
3. Does the language proposed by petitioners substantially follow the language of the statute set forth in section 18.09 of the Texas Education Code?, and if it does not,
4. Does the County Judge have the authority to place on the ballot the language of the statute set forth in section 18.09 of the Texas Education Code although the petitioners seek different language?

We ask for your expedited review as August 26, 2013 is the deadline for calling an election to be held on November 5, 2013.

### **Equalization Tax**

In 1995, the Texas Legislature repealed chapter 18 of the Texas Education Code but allowed the Board of School trustees in Harris County and Dallas County to continue operating pursuant to the following: “A school district or county system operating under former Chapter 17, 18, 22, 25, 26, 2, or 28 on May 1<sup>st</sup>, 1995, may continue to operate under the applicable chapter as that chapter existed on that date. . .” Tex. Educ. Code Ann. § 11.301(a). The Harris County Board of School Trustees has existed since before 1900 and in 1937, pursuant to section 18.07 of the Texas Education Code, the voters of Harris County authorized a \$0.01 maximum equalization tax per \$100 valuation. Until 1937, no equalization tax existed in Harris County. The Legislature, through the adoption of section 18.07 of the Texas Education Code, created a mechanism so that every county in the state could collect a countywide equalization tax to be divided among the school districts in that county.

The Harris County Department of Education (HCDE) is the assumed name of the County School Trustees of Harris County. (Harris County Clerk’s File No. 1103873). The Department of Education is a political subdivision of the State of Texas and works independently of the County Government of Harris County. See MGT of America, Inc., *Performance Review of the Harris County Department of Education: Final Report, 2010 at 28.*

HCDE acts as a county unit system of education which is “a method by which the voters of a county may, without affecting the operation of any existing school district within the county, create an additional countywide school district which may exercise in and for the entire territory of the county the taxing power conferred on school districts by article VII, section 3 of the Texas Constitution, for the purpose of adopting a countywide equalization tax for the maintenance of the public schools.” Tex. Educ. Code Ann. § 18.01.

The statutory powers and duties for HCDE can be found in chapters 17 and 18 of the Texas Education Code. HCDE is granted the broad power to “perform any other act consistent with law for the promotion of education in the county.” Tex. Educ. Code Ann. § 17.31(a).

Voters have authorized a maximum tax rate for HCDE to be set at no more than one cent on one hundred dollars valuation for taxable property in Harris County. For the 2012 tax year, the HCDE board approved a tax rate of 0.006617, according to the Truth in Taxation Summary, Mike Sullivan, Tax Assessor-Collector. (<http://www.hctax.net/Property/JurisdictionTaxRates>.)

Chapter 18 of the Texas Education Code authorizes a countywide school district to levy and collect an equalization tax provided a petition for a tax election is prepared and presented to the County Judge. The petition must be signed by “legally qualified taxpaying voters of the county” in a number equal to at least 10 percent of those voting for governor at the last preceding general election. Tex. Educ. Code Ann. § 18.07(b) and § 18.07(b)(2). The petition may pray for authority to levy and collect an equalization tax at any specified rate not in excess of 50 cents on the \$100 property valuation. Tex. Educ. Code Ann. § 18.07(b) and 18.12.

On receipt of a petition legally praying for the authority to levy and collect an equalization tax and fulfilling the requirements of this section, the county judge of any county that has adopted the county-unit system shall immediately order an election to be held throughout the county in compliance with the terms of the petition. *See* Tex. Educ. Code Ann. § 18.07(a).

If the petition specifies a rate, the county judge shall incorporate that rate in his order. Tex. Educ. Code Ann. § 18.08(a). The county judge must give notice of the election by publication of the order at least 20 days prior to the election in a newspaper published in the county. Tex. Educ. Code Ann. § 18.08(b).

According to the Office of the Secretary of State, there were a total of 788,234 votes cast for governor in Harris County for the 2010 general election. *Available at* <http://elections.sos.state.tx.us/elchist.exe>. The number of valid signatures needed for the calling of an election would be ten percent of 788,234 or 78,824.

### **A one-time election**

Chapter 18 of the Texas Education Code authorizes a countywide school district to levy and collect an equalization tax at any specified rate not in excess of 50 cents on the \$100 property valuation. Did the Legislature intend that, at any time after such an election, the voters of the county could have an additional election to add to the tax rate provided the rate is not in excess of 50 cents on the \$100 property valuation? The language of the statute does not specifically allow a petition to authorize an increase in the county equalization tax. However, nothing in the Texas Education Code prohibits multiple elections to authorize raising the tax rate as long as the rate is not in excess of 50 cents on the \$100 property valuation.

Furthermore, although repealed, chapter 18 of the Texas Education Code remains operative for HCDE. "A school district or county system operating under former Chapter 17, 18, 22, 25, 26, 27,, or 18 on May 1<sup>st</sup>, 1995, may continue to operate under the applicable chapter as that chapter existed on that date . . ." Tex. Educ. Code Ann. § 11.301. Since the statute has been repealed, does there continue to exist a right for the voters of Harris County to authorize an increased or additional equalization tax? Under section 11.301(a) of the Texas Education Code, which authorized the Harris County Board of School Trustees to continue to operate, do the voters continue to have a right to petition of the County Judge for such an election?

### **Ballot language**

Does the language in the petition fail to follow the statutory language of section 18.09 of the Texas Education Code and, if the County Judge follows the language of the statute, would the County Judge be diverging from the language of the petition?

Section 18.09(c) reads:

The form of the ballot shall be substantially as follows: If no specific tax rate was set in the petition, the proposition shall read: "For county tax" and "Against county tax." If a specific tax rate was incorporated in the petition, the proposition shall read: "For county tax not exceeding \_\_\_\_\_ cents on the \$100 valuation" and "Against county tax not exceeding \_\_\_\_\_ cents on the \$100 valuation."

Tex. Educ. Code Ann. § 18.09(c).

The petition, as drafted and being circulated, reads as follows:

Petitioners pray that the County Judge of Harris County, Texas, pursuant to sections 18.07 and 18.09, Texas Education Code, immediately order an election to be held on November 5, 2013, at which election the following ballot shall be submitted to the voters of Harris County, Texas:

"For Harris County Department of Education additional tax not exceeding one (1) cent on the \$100 valuation to be used solely and exclusively for early childhood education purposes."

"Against Harris County Department of Education additional tax not exceeding one (1) cent on the \$100 valuation to be used solely and exclusively for early childhood education purposes".

The proposed petition ballot language differs from the statutory language authorized in two potentially significant ways. First, the proposed language in the petition refers to an "additional" tax. There is no specific authority in the statute for an "additional" tax. The language could have said the tax was for two cents on the \$100 valuation, which would have

been more specific. Also, the petition language seeks to limit the Harris County Board of School Trustees' use of this tax as "exclusively for early childhood education purposes." The statutory language set forth in section 18.09 does not appear to allow the County Judge to order an election that would include ballot language that will limit the Board of School Trustees' use of the equalization tax.

Texas Election Code Section 52.072(a) says: "Except as otherwise provided by law, the authority ordering the election shall prescribe the wording of the proposition that is to appear on the ballot." While the Education Code appears to dictate the language to appear on the ballot, some flexibility is permitted because of the use of the word "substantial."

The general rule is that when a statute that authorizes a special election for the imposition of a tax prescribes the form in which the question shall be submitted to popular vote, the statute should be strictly followed. But, if the form is not prescribed, then the language of the proposition submitted is not material so long as it substantially submits the question that the law authorizes with such definiteness and certainty that the voters are not misled. *Turner v. Lewie*, 201 S.W.2d 86, 91 (Tex. Civ. App.—Fort Worth 1947, dismissed); *Reynolds Land & Cattle Co. v. McCabe*, 72 Tex. 57, 12 S.W. 165, 166 (1888). The ballot should contain a description of the proposition submitted in such language as to constitute a fair portrayal of the chief features of the proposition, in words of plain meaning, so that it can be understood by persons entitled to vote. It is not customary to print the full text of the proposition on the ballot, but it is generally sufficient if enough is printed on the ballot to identify the matter and show its character and purpose. *England v. McCoy*, 269 S.W.2d 813, 817 (Tex. Civ. App.—Texarkana 1954, dismissed); *Turner v. Lewie*, 201 S.W.2d 91, supra., *Wright v. Board of Trustees of Tatum Independent School Dist.* 520 S.W.2d 787, 792 (Tex. Civ. App. — Tyler 1975, writ dism'd)

In *Davenport v. Commissioners Court of Denton County*, 557 S.W.2d 530 (Tex. App.—Texarkana 1977), a conflict between statutory language and ballot language dealing with a local option liquor election caused the court to void the election. In relying on an opinion from the El Paso Court of Appeals, the court concluded, "The El Paso court's opinion showed reliance was placed upon the reasoning and conclusions expressed in several prior attorney general opinions and quoted with approval from one of those opinions where it was said ". . . specific statutory wording must be used in the petition, in the election order and on the ballots, in order to have a valid election." *Id.* at 532. .

Section 18.09(c) of the Education Code requires that the ballot language be "substantially" in the statutory form unlike the situation in the *Davenport* case, in which the applicable law mandated "exact language". "[T]he issue to be voted on shall be printed on the ballot in the *exact* language stated in Section 40 of this Act." *Id.*

In order to achieve the purposes of the petitioners, the County Judge would have to liberally construe the statutory language of section 18.09 of the Texas Education Code to allow "additional" in the ballot language or to impose a limitation on the Board of School Trustees. In *Methodist Hospital of Dallas v. Mid-Century Insurance Company of Texas*, 259 S.W.3d 358 (Tex. App.--Dallas 2008), although the court was interpreting the statutory requirements of a lien notice, the court agreed that the plain meaning of the statutory language could not be altered. "Even if we liberally construe a statute to achieve its purposes, we may not enlarge or alter the plain meaning of the statutory language." *Id.* at 360.

Section 18.07 of the Texas Education Code requires the County Judge to “immediately order an election to be held throughout the county *in compliance with the terms of the petition*” provided the County Judge has been presented with “a petition *legally praying* for the authority to levy and collect an equalization tax and *fulfilling the requirements of this section.*” Tex. Educ. Code Ann. § 18.07 (*emphasis added*).

If the County Judge were to alter the proposed ballot language, then he would no longer be ordering an election “in compliance with the terms of the petition.” If the proposed ballot language is in substantially the form required by the statute, then the language proposed by petitioners could be placed on the ballot without injury to the intent of the statute.

To the extent that the wording would be such that it would have changed the result of the election, the language would be considered misleading and, hence, improper. However, if the language chosen to submit the measure to the voters is sufficient enough to identify the matter and show its character and purpose, it will suffice. *Dacus v. Parker*, 383 S.W.3d 557, 565 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2012). “[S]tatutory enactments will be strictly enforced to prevent fraud, but liberally construed in order to ascertain and effectuate the will of the voters.” *Varela v. Percales*, 184 S.W.2d 637, 639 (Tex. Civ. App.—El Paso 1944, no writ). Unless the failure to observe the strict letter of the law affected the result of the election, substantial compliance is sufficient. *Branauum v. Patrick*, 643 S.W.2d 745, 750 (Tex. App.—San Antonio 1982, no writ).

Whether the County Judge has been presented with a petition that legally prays for an election and fulfills the requirements of section 18.07 of the Texas Education Code must be determined by the County Judge. *City of El Paso v. Tuck*, 282 S.W.2d 764, 766 (Tex. Civ. App.—El Paso 1955, writ ref’d n.r.e.). (holding that county judge’s refusal to call an election in response to a petition because he determined that the inhabitants of a territory had abandoned their effort to incorporate was not subject to review by an appellate court in the absence of fraud or arbitrary action). See also *Hoffman v. Elliott*, 473 S.W.2d 675 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref. n. r. e.) (holding that when county judge was presented with a statutory petition and satisfactory proof that the territory sought to be incorporated contained the requisite number of resident qualified electors, then the judge had no discretion as to whether to call an election—he must do so).

### **Validity of the underlying proposition**

The official receiving the petition may not inquire as to the validity of the underlying proposition and when all procedural requirements for submission of a proposed ordinance have been met mandamus will issue to order an election. *Glass v. Smith*, 244 S.W.2d 645, 653 (Tex. 1951). The determination as to the validity of a proposal prior to the matter becoming law would “interfere with the exercise by the people of their political right to hold elections” *Id.* As the *Glass* court explained:

If the courts into whose province the duty is committed by the Constitution to adjudge the validity or invalidity of municipal legislation will not themselves interfere with the legislative process how could they justify their inaction while ministerial officers, usually without judicial training, interrupted that process? The same cogent and persuasive reasons which prompt judicial non-interference with the legislative process should compel the courts in proper cases to prevent interference by others with that process. *Id.* at 644-45.



In *Coalson v. City Council of Victoria*, the Supreme Court rejected the City of Victoria's attempt to have a proposed charter amendment declared invalid because the ordinance, were it to become law, would be unconstitutional. The court said, "The declaratory judgment suit, at this stage of the proceedings, seeks an advisory opinion. The election may result in the disapproval of the proposed amendment. ... The election will determine whether there is a justiciable issue, at which time the respondents' complaints ... may be determined by the trial court. *Coalson v. City Council of Victoria*, 610 S.W.2d 744, 747 (Tex. 1980)

Similarly, in *Dacus v. Parker*, 2012 WL 2783181 (Tex. App. Houston—14th Dist. 2012), the court held that the voters' opposition to a pay-as-you-go fund for drainage systems and streets and the manner in which city was to implement the measure was a challenge against the measure itself rather than the ballot proposition, and such a challenge was not cognizable in an election contest.

Long standing Texas public policy favors the right of the people to petition their government as enunciated in article I, section 27 of the Texas Bill of Rights of the Texas Constitution:

The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance.

The Amarillo Court of Appeals declared the right to petition the government as constitutionally equivalent to the right of free speech:

The right to petition in the Texas Constitution is inseparable from the right of free speech, and, as a general rule, the rights are subject to the same constitutional analysis; although the rights are distinct guarantees, they were cut from the same constitutional cloth, inspired by the same principles and ideals. *Clark v. Jenkins* 248 S.W.3d 418 (Tex. App.—Amarillo 2008, pet. denied)

This principle underpins the holding in *Arenas v. Board of Com'rs of City of McAllen*, 841 S.W.2d 957, 959 (Tex. App.—Corpus Christi 1992), in which the court ordered the City of McAllen to submit a proposition to the voters even though the petition included matters that were not within the applicable statute. The city commissioners found the petition was legally insufficient because the petition went beyond the statutory requirements of proposing minimum salaries for existing police officers and attempted to provide minimum salaries for non-existent classifications of police officers. The court disagreed and said:

The power of initiative and referendum is the exercise by the people of a power reserved to them, and not the exercise of a right granted. *Arenas* at 959 quoting *Coalson v. City Council of Victoria*, 610 S.W.2d 744 (Tex. 1980).

The legislature has declared the public policy of the state of Texas is to give effect to the expressed intent of the people:

Any question arising under provision of the Election Code should be decided with due consideration to the statutory objective that the will of the people shall prevail. Election Code, art. 1.01.

This policy is reflected in various cases dealing with claimed irregularities in the election process in which courts have declared that failures and irregularities in the observance of provisions of the statutes concerning such matters will not invalidate an election unless they have affected or changed the result. *Waters v. Gunn*, 218 S.W.2d 235, 237 (Tex. Civ. App.—Amarillo 1949, writ ref'd n.r.e.) (citing *Hill v. Smithville Independent School Dist.*, Tex. Com. App., 251 S.W. 209; *Lightner v. McCord*, Tex. Civ. App., 151 S.W.2d 362).

### **Summary**

We would appreciate your guidance on whether the voters of Harris County, pursuant to section 18.07 of the Texas Education Code have the right to petition the County Judge to put this matter on the November 5, 2013 ballot and, if so, may the County Judge deny the request based upon the failure of the petition to track the statutory language. If the proposed ballot language does not substantially comply with that of the statute, may the County Judge place on the ballot language that more closely follows that set forth in section 18.09 of the Texas Education Code?

As August 26, 2013 is the deadline for calling an election to be held on November 5, 2013, we respectfully request your expedited opinion on this matter.