



# Filling board of education vacancies

Ohio School Boards  
Association  
8050 N High St  
Suite 100  
Columbus  
OH 43235-6481  
(614) 540-4000  
fax (614) 540-4100  
www.osba-ohio.org

*This factsheet is designed to address the most frequently asked questions about filling vacancies on boards of education. The information is of a general nature. Readers should seek the advice of legal counsel with specific legal problems or questions.*

What happens when a vacancy occurs on a board of education? The law dealing with this situation is found at Ohio Revised Code Section (RC) 3313.11. This factsheet attempts to answer some of the common questions concerning the issue of a vacancy in the office of board of education member.

## What can cause a vacancy on a board of education?

There are seven specific events that can create a board vacancy. They are:

- death,
- nonresidence,
- resignation,
- removal from office,
- failure of a person elected or appointed to qualify,
- removal from the district,
- absence from board meetings for a period of 90 days if for reasons declared insufficient by a two-thirds vote of the remaining board members.

A board member may also forfeit his or her office if he or she is convicted of certain crimes, which include: giving, soliciting or accepting a bribe; receiving improper compensation; and certain election offenses. (*Note: issues concerning compatible/incompatible offices for board members, which could, in some circumstances, create a board vacancy, are beyond the scope of this factsheet.*)

## When does a vacancy occur?

The vacancy occurs on the date of any of the events indicated in the first question. In the case of a resignation, the vacancy occurs on the effective date of the resignation.

## If a vacancy occurs, how do we fill it?

The statute requires the board to act to fill the vacancy at its next regular or special meeting, which is held at least 10 days after the vacancy occurs. The board must act to fill the vacancy within 30 days.

The Ohio attorney general has issued an opinion that if four vacancies occur on a five-member board of education, that the remaining board member does not have authority to fill the vacancies (2004 Ohio Atty. Gen. Ops. No. 027). The same reasoning may apply if only two members of a five-person board attempt to fill three vacancies.

## What procedure can/should our board use in the process of selecting a person to fill the vacancy?

There are no procedural requirements other than the time deadlines for board action. Probably the board's first consideration upon learning of a vacancy or expected vacancy is to determine the procedure it wishes to follow in soliciting candidates and in selecting the person to be named to fill the vacancy. A board could have a procedure established in board policy that would be followed whenever a vacancy occurs.

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### **Can the board accept applications?**

Yes. Oral or written applications can be suggested or required by the board. Written applications are recommended to avoid later misunderstandings. Written applications also serve to document all information submitted for consideration by each candidate.

### **Is a special majority required to appoint a board member?**

Yes. A majority vote of the remaining members is required. For five-person boards, this means at least three affirmative votes of the remaining members. For seven-person boards, this requires at least four affirmative votes of the remaining members.

### **What happens if the board is unable or unwilling to name a replacement?**

If the board fails to act within 30 days after a vacancy occurs, the vacancy will be filled by the probate court of the county in which the school district is located (RC 3313.85).

### **How long will an appointed person serve?**

This depends on when the vacancy occurs. The person appointed will serve the shorter of either the completion of the term of the original board member or until Jan. 1 following the next regular board of education election, if the election occurs at least 90 days after the person is appointed. (*Regular board of education elections are held at the November general elections in each odd-numbered year. The 90 day cut-off will therefore occur in August.*)

### **What happens if a person appointed serves less than the full remaining term of the original board member?**

Such an appointee will serve until Jan. 1 following the completion of the first two years of the original board member's four-year term. At the November general election that occurs prior to that Jan. 1, there will be a special election for the remaining two years of the original board member's term. Individuals wishing to run for this two-year position will do so separately from the candidates for the normal four-year board vacancies up for election that year. An individual will then be elected to serve for only the two remaining years of the original board member's term.

### **When can special elections be held?**

Only at the November general elections in odd-numbered years. This is when regular board of education elections are scheduled. The election is "special" in that there is an election for a two-year term to complete the four-year term of the original board member.

### **Who is responsible for conducting such a special election?**

The county board of elections. However, the board of education is required to give written notice to the board of elections immediately upon becoming aware of the need for a special election.

### **After losing an election for the board, could a current board member resign and be reappointed to an additional term on the board?**

No. The term of a board member cannot be lengthened by his or her resignation and subsequent appointment by either the board, county board or probate court. A former board member may be appointed to the board after his or her term of office has expired.

### **Does the last board of education election have any influence on the person to be appointed?**

No, unless the remaining board members want it to. Some persons believe the highest vote recipient among the unsuccessful board candidates at the last election should or must be appointed to fill a vacancy. Although the remaining board members may appoint this person, they are under no obligation to do so.

### **Can the board interview candidates in executive session?**

OSBA's interpretation of the Sunshine Law supports the authority of the board to review prospective candidates for the board of education in executive session. This activity would appear to fall within RC 121.22 (Ohio's Sunshine Law) subsection (G)(1). That section permits, among other things, executive sessions to be held to consider "... the appointment ... of a public ... official." This is precisely what a board is doing in appointing a person to fill a board vacancy. The formal action of the board to name a person to fill the vacancy must be taken in open session of the board (*Kauffman v. Tiffin City Council* (Aug. 14, 1985), Seneca App. No. 13-84-9, unreported).

### **What constitutes nonresidence?**

Residence or nonresidence is a factual issue to be determined in each case. Although precedents regarding how to determine residence or nonresidence in this context are few, it is likely that a court will consider a number of factors, including: where the individual sleeps, receives mail and is registered to vote. The intent of the individual regarding his or her place of residence also may be a consideration (1927 Ohio Atty. Gen. Ops. No. 1057).

### **What is the effective date of a resignation?**

The person resigning will determine the effective date of the resignation. If the resignation is in writing, it may state an effective date in the future or indicate

that it is to take effect immediately. An oral resignation also is possible and can also be effective either immediately or at a date specified in the future. If no effective date is stated, the resignation probably will be deemed effective immediately.

**To whom must the resignation be delivered?**

There are no statutory guidelines regarding to whom a resignation should or must be delivered. Some communication of the resignation is required, presumably to the board itself or to a board member, the superintendent or treasurer as a representative of the board.

**Can a resignation be withdrawn?**

No, if it is effective immediately. If it has an effective date in the future, it may be withdrawn prior to that date. However, if the board of education accepts the resignation, even before the effective date, the resignation may not be withdrawn thereafter.

**Must a resignation be acted upon by the board of education?**

No. However, a board may act to accept a resignation and the acceptance can be important if the individual later attempts to withdraw the resignation as indicated in the question above.

**What constitutes “insufficient reasons for missing board meetings for 90 days?”**

This determination is left to the discretion of each board of education. The statute sets forth no standards.

**How does an individual fail to qualify for the board position?**

RC 3313.11 requires an individual to qualify within 10 days after organization of the board or within 10 days of his or her election or appointment. Qualification after an election requires an individual to (a) file his or her campaign finance report as required by RC 3517.10; (b) receive his or her

certificate of election from the county board of elections; and (c) be properly sworn in. All three tasks must be completed not later than 10 days after the board’s organizational meeting. Qualification after being appointed to fill a vacancy requires only that the appointee take the oath of office within 10 days of his or her appointment.

**How can an individual be removed from his or her position as a board member?**

The Ohio Constitution authorizes laws to be passed to provide for removal from office for misconduct. Pursuant to this authorization, the General Assembly has enacted RC 3.07 through 3.10 These statutes provide a process for removing public office-holders, including school board members. An official can be removed if he or she willfully and flagrantly exercises authority or power not authorized by law, refuses or willfully neglects to enforce the law or to perform any official duty imposed upon him or her by law, or is guilty of gross neglect of duty, gross immorality, drunkenness, misfeasance, malfeasance or nonfeasance. The procedure that must be followed is that a complaint stating specific charges must be prepared and signed by a specified number of electors of the school district. The complaint must then be filed with the common pleas court, which will conduct a hearing to determine whether the charges are true and whether removal is warranted.

OSBA has a sample application boards may use to assess prospective board members. The board may customize the application for its own needs. OSBA also has a list of appropriate interview questions to ask of prospective board members. Individual boards of education may wish to delete some questions and/or add additional areas of inquiry. Copies are available from OSBA upon request.

**Note:** *The reader is advised to obtain competent legal advice regarding the application of the law regarding appointments to fill board of education vacancies in specific situations.*