



# Filling board of education vacancies

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*Board vacancies occur whenever a member of a board of education either chooses to stop serving or is no longer able to serve on the board. The Ohio Revised Code (RC) provides a mechanism for boards to fill vacancies when they occur for whatever reason.*

*This fact sheet is designed to address the most frequently asked questions about filling vacancies on boards of education under RC 3313.11. The information is of a general nature. Readers should seek the advice of legal counsel with specific legal problems or questions.*

## Reasons for a vacancy

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

RC 3313.11 provides that a vacancy in a board of education may be caused by:

- 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.

Other ways in which a vacancy may be created are:

- A board member forfeits the office if convicted of certain crimes, which include: giving, soliciting or accepting a bribe; receiving improper compensation; and certain election offenses.
- A board member forfeits the office if the member fails to attend at least three-fifths of the regular and special meetings held by the board during any two-year period (RC 3.17; 2011 Ohio Atty.Gen.Ops. No. 2011-043).
- Not enough candidates run for available positions in a November general election, leaving one or more vacancies after the newly elected members are sworn into office in January (*State ex rel. Henry v. Triplett*, 134 Ohio St. 480 (1938)).

Issues concerning compatible or incompatible offices for board members, which could, in some circumstances, create a board vacancy, are beyond the scope of this fact sheet.

## *What constitutes 'nonresidence'?*

Residence is a factual issue to be determined on a case-by-case basis. In deciding where an individual "resides," a court is likely to consider several factors, including where the individual sleeps, receives mail and is registered to vote. An individual's intent regarding his place of residence also may be a consideration (1927 Ohio Atty.Gen.Ops. No. 1057).

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

A person submitting a written resignation may include an effective date in the future or indicate that it is effective immediately. Oral resignations also can be effective immediately or at a date specified in the future. If no effective date is stated in a written or oral resignation, the resignation probably will be deemed effective immediately.

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For more information on this subject, please contact OSBA's Division of Legal Services

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### *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?*

If it is effective immediately, a resignation cannot be withdrawn. 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. 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 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 officeholders, 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 requires preparation of a complaint stating specific charges, which must be signed by a specified number of electors of the school district. The complaint then must be filed with the common pleas court, which conducts a hearing to determine whether the charges are true and whether removal is warranted.

### **Procedural timelines**

#### *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.

### *When may a board act to fill the vacancy?*

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.

A few courts have held that the phrase "at its next regular or special meeting" is directory and not mandatory, and does not require the board of education to appoint a member at the meeting immediately following the resignation. In *Stierwalt v. Hoppe*, 6th Dist. Sandusky No. S-15-017 (Sept. 10, 2015), for example, the appeals court held that an appointment occurring at the second meeting after the vacancy (but still within 30 days) was a valid appointment.

### *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 is filled by the probate court of the county in which the school district is located (RC 3313.85).

#### Filling the vacancy

### *What procedure should our board use to select a person to fill the vacancy?*

There are no procedural requirements other than the time deadlines for board action. Many boards have adopted procedures in board policy that should be followed whenever a vacancy occurs. If the board's policies are silent, the board will need to determine the procedures it will follow in soliciting candidates and selecting the person to fill the vacancy.

### *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.

In its board vacancy toolkit, OSBA has included a sample application for boards to use to assess prospective board members. The board may customize the application for its own needs. The toolkit also includes a list of suggested appropriate interview questions to ask prospective board members. Individual boards of education may use any or all of these questions and add additional areas of inquiry. The Board Vacancy Toolkit is available on OSBA's website at <http://links.ohioschoolboards.org/VacancyToolKit>.

*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 of the remaining members must vote in favor of an appointee. For seven-person boards, at least four of the remaining members must vote in favor of an appointee.

The Ohio attorney general has issued an opinion that if four vacancies occur on a five-member board of education, 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. A board should consult with its attorney if there are multiple vacancies at the same time.

*Can the board interview candidates in executive session?*

OSBA's interpretation of the Sunshine Laws supports the authority of the board to interview prospective board of education candidates in executive session. This activity would appear to fall within RC 121.22(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 board action to name a person to fill the vacancy must be taken in open session of the board (*Kauffman v. Tiffin City Council*, 3rd Dist. Seneca No. 13-84-9, 1985 Ohio App. LEXIS 8627 (Aug. 14, 1985)).

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

No. A board member's term cannot be lengthened by resignation and subsequent appointment by either the board or probate court (RC 3313.11). A former board member may be appointed to the board after his 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 believe the highest vote recipient among 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.

## **Length of appointment**

*How long will an appointed person serve?*

This depends on when the vacancy occurs. The person appointed serves 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 therefore occurs in August.)

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

Such an appointee serves 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 is a special election for the remaining two years of the original board member's term. Individuals wishing to run for this two-year position do so separately from the candidates for the normal four-year board vacancies up for election that year. An individual then is 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 original board member's four-year term.

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

The county board of elections. 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.

*Note: Readers are advised to obtain legal advice regarding the application of the law addressing filling board of education vacancies in specific situations.*