



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 18, 2020

The Honorable Vince Ryan/
Harris County Attorney
1019 Congress, 15th Floor
Houston, Texas 77002

Opinion No. KP-0288

Re: Whether subsection 11.060(d) of the Education Code, regarding filling a vacancy on the board of trustees of an independent school district, applies to the Harris County Department of Education (RQ-0301-KP)

Dear Mr. Ryan:

On behalf of the Harris County Department of Education (the “Department”), you ask whether subsection 11.060(d) of the Education Code, regarding filling a vacancy on the board of trustees of an independent school district, applies to the Department.¹ You inform us that a Department trustee recently resigned from a board position with a term expiring in December 2022. Request Letter at 1. Your question arises because prior law that has continuing application for some school districts also addresses filling board vacancies—former section 17.04 of the Education Code. TEX. EDUC. CODE § 17.04—App. (Title 2 Appendix). Although the Legislature repealed the prior law in 1995,² subsection 11.301(a) of the Education Code continues to apply to certain school districts:

A school district or county system operating under former Chapter 17, 18, [or other specified chapters] 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.

Id. § 11.301(a). You tell us the Department is the last remaining county school district in Texas authorized to operate under former chapters 17 and 18 of the Education Code. Request Letter at 1. Former chapters 17 and 18 authorize a “countywide school district” managed by its own elected board of trustees, independent of county government. TEX. EDUC. CODE §§ 17.01(a)-App., .02(b)-App. 18.01—App. (Title 2 Appendix). Thus, we consider provisions that address filling a vacancy

¹See Letter from Honorable Vince Ryan, Harris Cty. Att'y, to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (Aug. 20, 2019), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> (“Request Letter”).

²Act of May 27, 1995, 74th Leg., R.S., ch. 260, § 58(a)(1), 1995 Tex. Gen. Laws 2207, 2498.

on the board of trustees found in these former chapters and in the current law generally applicable to school districts.

The one provision in the former law addressing vacancies provides:

Any vacancy on a board of county school trustees or a county board of education *shall* be filled for the unexpired portion of the term by the remaining trustees or board members.

Id. § 17.04-App. (emphasis added). Section 11.060 of the current Education Code governs vacancies, providing in pertinent part:

- (a) If a vacancy occurs on the board of trustees of an independent school district, the remaining trustees may fill the vacancy by appointment until the next trustee election.
- (b) If the board is appointed by the governing body of a municipality, a trustee appointed by the governing body to fill a vacancy shall serve for the unexpired term.
- (c) Instead of filling a vacancy by appointment under Subsection (a) or (b), the board or municipal governing body may order a special election to fill the vacancy. A special election is conducted in the same manner as the district's general election except as provided by the Election Code.
- (d) If more than one year remains in the term of the position vacated, the vacancy *shall* be filled under this section not later than the 180th day after the date the vacancy occurs.

Id. § 11.060 (emphasis added). You wish to know whether the 180-day deadline in subsection 11.060(d) applies to the Department, whether the deadline is mandatory or directory, and what penalties or consequences may occur should the board of trustees not fill the vacancy within 180 days. Request Letter at 2.

Subsection 11.301(a) of the Education Code does not authorize a school district to choose which laws it will operate under. *See TEX. EDUC. CODE § 11.301(a).* Rather, it authorizes certain districts to choose to continue operating under former law, and if a district so chooses, its operations are subject to the former law and to the current law generally applicable to school districts that does not conflict with the former law. *See id.* Thus, current section 11.060 applies to the district only to the extent it does not conflict with former section 17.04. *Id.* § 11.301(a); compare *id.* § 11.060, with *id.* § 17.04-App.

Former section 17.04 states that the board of trustees "shall" fill a vacancy on the board for the unexpired portion of the term. *Id.* § 17.04-App. Current subsection 11.060(d) provides that the board "shall" fill a vacancy not later than 180 days after it occurs if more than one year remains in the term. *Id.* § 11.060(d). The board can comply with both statutes simultaneously by filling

the vacancy within 180 days of its occurrence. Thus, current subsection 11.060(d) does not conflict with former section 17.04. *See Tex. Att'y Gen. Op. No. GA-0470* (2006) at 3 (stating that “[i]rreconcilable conflict involves a direct conflict such that a person cannot comply with both provisions at the same time”).

The word “shall” as used in both statutes imposes a duty unless the context necessarily requires a different construction, or the statute expressly says otherwise. TEX. GOV'T CODE § 311.016(2). “Shall” is generally understood as a mandatory term that creates a duty or condition, but in some contexts, it may be construed as directory. *See AC Interests, L.P. v. Tex. Comm'n on Env'l. Quality*, 543 S.W.3d 703, 708–09 (Tex. 2018).³ Although “no absolute test” exists to determine whether a statutory provision is mandatory or directory, “[t]he fundamental rule is to ascertain and give effect to the legislative intent.” *Chisholm v. Bewley Mills*, 287 S.W.2d 943, 945 (Tex. 1956). When a statute provides a deadline for an action, “the absence of words restraining the doing thereof afterwards or stating the consequences of failure to act within the time specified, may be considered as a circumstance tending to support a directory construction.” *Id.* Subsection 11.060(d) does not expressly prohibit the board from filling a vacancy after 180 days, nor does it provide any other consequences of failing to meet the deadline. *See TEX. EDUC. CODE § 11.060(d).* But the statute’s silence about consequences cannot be used to undermine its purpose. *AC Interests, L.P.*, 543 S.W.3d at 709, 713. Subsection 11.060(d)’s plain purpose is to fill a board vacancy expeditiously when more than a year remains in the position’s term. *See TEX. EDUC. CODE § 11.060(d).* If subsection 11.060(d) means merely that the board should but is not required to fill the vacancy within 180 days, then the board could leave the vacancy unfilled until the position’s term has nearly expired. Whether mandatory or directory, it is not “a mere suggestion that can be disregarded at will.” *AC Interests, L.P.*, 543 S.W.3d at 714. By setting a deadline, subsection 11.060(d) provides the basis for a court order requiring the board to act if it fails to fill the vacancy within the 180-day period. *See State v. \$435,000.00*, 842 S.W.2d 642, 644 (Tex. 1992) (holding that a statute providing that a court “shall” set a hearing within a 30-day period is mandatory in the sense that the duty may be enforced by mandamus). Thus, former section 17.04 requires the Department’s board of trustees to fill a vacancy on the board for the unexpired portion of the term, and current subsection 11.060(d) requires the board to fill the vacancy not later than 180 days after it occurs if more than one year remains in the term. TEX. EDUC. CODE § 17.04-App. (Title 2 Appendix). Failure of the board to fill a vacancy within the statutory period provides a basis for a court order compelling the board to comply with its duty.

³*See Tex. Att'y Gen. Op. No. KP-0102* (2016) at 2, n.2. Without deciding whether subsection 11.060(d) of the Education Code was mandatory or directory, the opinion determined that subsection 11.060(c) and the Election Code authorized a special election after the expiration of the 180-day period to fill a school trustee vacancy. *See id.* at 3.

S U M M A R Y

Former section 17.04 of the Education Code requires the Harris County Department of Education's board of trustees to fill a vacancy on the board for the unexpired portion of the term, and current subsection 11.060(d) requires the board to fill the vacancy not later than 180 days after it occurs if more than one year remains in the term. Failure of the board to fill a vacancy within the statutory period provides a basis for a court order compelling the board to comply with its duty.

Very truly yours,



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