

The Office of Vince Ryan
County Attorney

RQ-0301-KP
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I.D. # 48599

August 20, 2019

Honorable Ken Paxton
Attorney General of Texas
Capital Station
Post Office Box 12548
Austin, Texas 78711-2548

*Via Certified Mail,
Return Receipt Requested*

Re: Request for Opinion concerning applicability of Texas Education Code Section 11.060(d) to Harris County Department of Education and consequences of failing to comply with Section 11.060(d), if applicable

Dear General Paxton:

On behalf of Harris County Department of Education ("HCDE"), a county school district located in Harris County, the Office of the Harris County Attorney is requesting your opinion concerning whether Texas Education Code Section 11.060(d) applies to HCDE.

The issue of the applicability of Section 11.060(d) arises due to a vacancy created on the HCDE Board of Trustees following a trustee's recent resignation from the Board. Specifically, HCDE Trustee Dr. George Moore submitted his resignation on May 15, 2019 "due [to] moving out of the district." *See Exhibit A, Resignation of Dr. George P. Moore.* Dr. Moore holds Position 1, Precinct 2 on HCDE's Board of Trustees, and his term is set to expire in December 2022.

HCDE is the only remaining functioning county school district in Texas and is permitted to operate under Section 11.301(a) of the Texas Education Code, which provides:

A school district or county system operating under former Education Code Chapter 17 [or] Chapter 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.

See TEX. EDUC. CODE § 11.301. In accordance with the requirements of Section 11.301(a), HCDE operates under applicable provisions of former Chapters 17 and 18 of the Texas Education Code as well as "state law generally applicable to school districts that does not conflict with that chapter." *Id.*; *see also Exhibit B, HCDE Board Policy BAA (Local)* (citing Section 11.301(a) and stating, "The County School Trustees may operate not only under

Chapters 17 and 18, but also under state law generally applicable to school districts that does not conflict with Chapters 17 and 18.”).

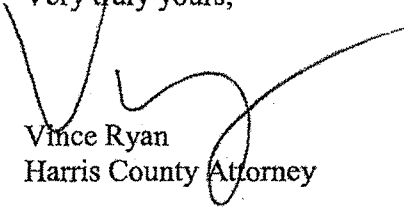
Former Section 17.04 of the Texas Education Code governs vacancies on HCDE’s Board of Trustees, providing, “Any vacancy on a board of county school trustees or a county board of education shall be filled for the unexpired portion of the term by the remaining trustees or board members.” See TEX. EDUC. CODE § 17.04.

Texas Education Code Section 11.060(d) states, “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.” See TEX. EDUC. CODE § 11.060(d).¹ This Office previously recognized, but did not specifically opine, on the issue of whether the 180-day period was mandatory or directory in footnote 2 of Opinion No. KP-0102 in 2016. See Tex. Att’y Gen. Op. No. KP-0102 (2016), at fn. 2.²

If it is determined that Section 11.060(d) does apply to HCDE, HCDE additionally requests your opinion concerning the penalty(ies) that may be imposed in the event the Board of Trustees does not fill the vacancy within the statutorily required 180-day timeframe. The Texas Education Code does not detail the consequences of a board of trustees failing to make an appointment, but only indicates the time frame for the board to fill the vacancy.

For these reasons, HCDE and the Office of the Harris County Attorney, on HCDE’s behalf, respectively request that you issue an opinion regarding the applicability of Texas Education Code Section 11.060(d) to HCDE and in the event that it is determined that Section 11.060(d) does apply to HCDE, respectively request that you issue an opinion regarding the consequences if the Board of Trustees does not fill the vacancy within 180 days.

Very truly yours,


Vince Ryan
Harris County Attorney

Enclosures: Exhibit A: Resignation of Dr. George P. Moore
Exhibit B: HCDE Board Policy BAA (Local)

¹ HCDE posits that the other subsections of Section 11.060 are inapplicable to HCDE because they conflict with Section 17.04, which requires that a vacancy be filled for the unexpired portion of the term – not until the next trustee election as required by Section 11.060(a) – and that the vacancy be filled by the remaining trustees – not by a special election as allowed by Section 11.060(c).

² Footnote 2 of the opinion states: “Subsection 11.060(d) states that the vacancy ‘shall’ be filled within the 180-day period. TEX. EDUC. CODE § 11.060(d). While the word ‘shall’ is generally construed to be mandatory, it is sometimes held to be directory, particularly when a statute sets a time for taking some action but does not restrict or provide consequences for taking the action at a different time. *Lewis v. Jacksonville Bldg. & Loan Ass’n*, 540 S.W.2d 307, 310 (Tex. 1976); see also *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 495 (Tex. 2001) (‘If a provision requires that an act be performed within a certain time without any words restraining the act’s performance after that time, the timing provision is usually directory.’); *Burton v. Ferrill*, 531 S.W.2d 197, 198-99 (Tex. Civ. App.—Eastland 1975, writ dismiss’d) (determining that a statute providing that temporary directors ‘shall’ be appointed on a certain date was directory with respect to the date of appointment).”

Honorable Ken Paxton
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