

Answers to FAQs

Vacancies on the Board of Education

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ICSA publishes this guidance as part of its continuing effort to provide assistance to school leaders. The responses to the FAQs represent the combined thinking of committee members. **This guidance is published for informational purposes only and is not a substitute for legal advice. For legal advice or a legal opinion on a specific question, you should consult a lawyer.**

Please note that this FAQ does not specifically address vacancies related to incompatibility of public offices or conflicts of interest. (See the ICSA's *Answers to FAQs Regarding Conflict of Interest and Incompatible Offices*, June 2014, for more information on those topics.) This FAQ also does not address any special requirements which may apply to Article 34 schools (Chicago Public Schools); however, different requirements applying to boards of school directors and to special charter districts governed by Articles 32 and 33 are addressed in footnotes as appropriate.

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1. How does a school board member's seat become vacant?

A. Pursuant to provisions of School Code Section 10-11 (105 ILCS 5/10-11).²

Section 10-11 of the *School Code* provides that the office of a school board member becomes vacant before his or her term expires, upon the happening of any of the following events:

1. Death of the board member.
2. His or her resignation in writing, when filed with the Board Secretary.
3. His or her becoming a person under legal disability.
4. His or her ceasing to reside in the district.

5. His or her conviction of an infamous crime, of any offense involving a violation of official oath, or of a violent crime against a child.
6. His or her removal from office.³
7. Decision of a competent tribunal declaring his or her election void.
8. His or her ceasing to be an inhabitant (resident) of a particular area from which he or she was elected, if residential requirements of School Code Section 10-10.5, 11E-35, or 12-2 are violated.

Regarding item 2 above, the *School Code* states that a vacancy occurs when a board member files a written resignation with the Board Secretary. Therefore, it is not advisable (or legally effective) for a board member to tender his or her resignation to the Secretary specifying that it is to take effect on a specified future date. Nor is school board action to accept the resignation required, in order for the resignation to become effective. The statutory 45-day period for the board's appointment of a person to fill the vacancy, see Question 2, begins to run from the date the Board Secretary receives the board member's written resignation.

Regarding item 4 above, an Illinois Supreme Court decision provides guidance on when a board member ceases "to reside in the district." The Court summarized this analysis as follows:

In assessing whether the candidate has established residency, the two required elements are: (1) physical presence, and (2) an intent to remain in that place as a permanent home. Once residency is established, the test is no longer physical presence but rather abandonment; the presumption is that residency continues, and the burden of proof is on the contesting party to show that residency has been abandoned. Both the establishment and abandonment of a residence is largely a question of intent, and while intent is shown primarily from a candidate's acts, a candidate is absolutely competent to testify as to his intention, though such testimony is not necessarily conclusive.

Maksym v. Board of Election Commissioners, 950 N.E.2d 1051 (Ill. 2011).

Regarding item 5 above, Section 25-2 of the *Election Code* indicates that a felony, bribery, and perjury fall within the category of infamous crimes. 10 ILCS 5/25-2.

Regarding item 6 above, the *School Code* authorizes a regional superintendent to remove a school board member from office for "willful failure to perform ... official duties." 105 ILCS 5/3-15.5. State law does not include provisions for recall, impeachment, or removal of a board member by direct public action during his or her term of office.

B. If no candidate stands for election to a school board position, the term of which is expiring and would otherwise be filled at the election.

After enumerating the events that trigger a vacancy before "the expiration of the term ... of office" of a school board member discussed above, Section 10-11 of the *School Code* discussed above goes on to state (in language also found in Section 25-2 of the *Election Code*, 10 ILCS 5/25-2) that:

No elective office except as herein otherwise provided becomes vacant until the successor of the incumbent of such office has been appointed or elected, as the case may be, and qualified.

The Illinois Supreme Court has recognized the common law rule that a vacancy occurs when the term of office expires, but that statutes may provide for an officer to hold over after expiration of the term until his successor is elected. *People ex rel Sergel v. Brundage*, 296 Ill. 197 (1921). Under the *School Code* and *Election Code* "holdover" provision quoted above, the incumbent whose term has expired would serve until a successor is appointed by the board of education or regional superintendent of schools. See Question 2.

C. By reason of election or appointment to another public office which is incompatible with school board membership.

At common law, a public official who accepts a second office which is “incompatible” with the first is regarded as having resigned, vacated, or abandoned the first office.

Incompatibility of offices exists when a statute expressly prohibits the occupant of either office from holding the other office. *See, e.g.*, 50 ILCS 105/1 and *People ex rel. Smith v. Wilson*, 828 N.E.2d 1214 (3d Dist. 2005) (provision of Public Officer Prohibited Activities Act expressly precludes county board member from serving as school board member). Incompatibility also arises if the duties of one office are such that its holder cannot in each instance faithfully perform all the duties of the other, as for example when the offices entail responsibilities which conflict with each other, or when performing the duties of one would interfere with performance of the other. *Barsanti v. Scarpelli*, 862 N.E.2d 245 (2d Dist.), *appeal denied* 224 Ill.2d 593 (2007), citing cases including *People ex rel. Fitzsimmons v. Swailes*, 463 N.E.2d 431 (1984) (defendant township assessor could not also be county board member: offices were incompatible because as county board member, he would vote on who would be supervisor of assessments overseeing his work as assessor).

In another decision, an appellate court held that the offices of alderman, school board member, and park district commissioner were incompatible. The court found that offices can be incompatible absent an actual conflict; the eventuality of a conflict is enough. Offices are incompatible when the functions or duties of the offices are inherently inconsistent and repugnant so that one person would be unable to faithfully, impartially, and efficiently discharge the duties of both offices. *People ex rel. Alvarez v. Price*, 948 N.E.2d 174 (Ill.App.1 Dist. 2011).

The Illinois Attorney General has also opined on the compatibility of the office of school board member and other government offices. Formal opinions issued include the following:

- Formal Opinion No. S-1367 (June 29, 1978) – membership on Champaign County Zoning Board of Appeals is incompatible with positions of drainage district commissioner, school board member, or township supervisor.
- Formal Opinion No. S-1494 (June 30, 1980) – offices of village mayor and school board member are incompatible.
- Formal Opinion No. 85-019 (November 19, 1985) – offices of school board member and city council member are incompatible.
- Formal Opinion No. 91-031 (July 26, 1991) – offices of school board member and township park board member are incompatible.
- Formal Opinion No. 93-011 (May 25, 1993) – membership on Woodford County Board and Metamora Township School Board are incompatible.
- Formal Opinion No. 93-012 (May 25, 1993) – serving as library district trustee and school board member is not incompatible.

In addition, the Illinois Attorney General has informally opined that the offices of high school board member and elementary school board member are incompatible, therefore one person cannot be members of both simultaneously. *See Informal Opinion No. I-11-003* (March 31, 2011). *See also* the ICESA's *Answers to FAQs Regarding Conflict of Interest and Incompatible Offices* (June 2014).

D. By reason of the board member's conviction of certain crimes.

A school board office becomes vacant whenever a school board member is convicted of an infamous crime, or of any offense involving a violation of official oath, or of a violent crime against a child pursuant (105 ILCS 5/10-11(5)); of having a prohibited interest in a district contract (105 ILCS 5/10-9); of official misconduct (720 ILCS 5/33 3); and of engaging in prohibited activities involving the bidding process, e.g., bid rigging (720 ILCS 5/33E-3).

An Illinois appellate court twice found that a felony forgery conviction in another state constituted an infamous crime rendering the individual ineligible to hold the office of school board member. *Alvarez v. Williams*, 23 N.E.3d 544 (Ill.App.1 2014); *Williams v. Cook County Officers Electoral Board*, 35 N.E.3d 82 (Ill.App.1 2015). And, as noted above, Section 25-2 of the *Election Code* indicates that a felony, bribery, and perjury fall within the category of infamous crimes. 10 ILCS 5/25-2.

2. How is a vacancy determination made?

Depending on the event which caused the vacancy, the determination of vacancy may be made by a court, the regional superintendent, or the board of education. Boards should consult with legal counsel as to their authority in specific situations.

3. How is a board member vacancy filled?

A. What are the timelines for filling a school board member vacancy?⁴

Section 10-10 of the *School Code* provides the general timelines and process for filling a vacancy. The remaining board members must notify the regional superintendent within five calendar days after the vacancy occurs.

The board fills the vacancy until the next regular school election, at which time a successor is elected to serve the remainder of the unexpired term⁵, *unless the vacancy occurs with:*

- less than 868 days remaining in the term; OR
- less than 88 days before the next regularly scheduled election.

If one of these two exceptions applies, then no election to fill the vacancy is held, and the appointed member serves the remainder of the unexpired term.

If the board fails to fill the vacancy within 45 days, the regional superintendent fills the vacancy within the next 30 days.

If the regional superintendent fails to fill the vacancy, it is filled at the next regular election.

B. How does a board select someone to fill a vacancy?

The process of how an individual is selected to fill a board position is not detailed by statute and may be addressed by board policy.

Note: The individual appointed must still meet the legal qualifications to be elected as a board member, including any applicable residency requirements. 105 ILCS 5/10-11. A board *may* discuss selection of a person to fill a school board vacancy in closed session pursuant to Section 2(c)(3) of the *Open Meetings Act* (5 ILCS 120/2(c)(3)).

4. What are the qualifications for appointment to the board?

There are no general eligibility requirements for appointment to a board that are expressly addressed in the *School Code*; however, Sections 10-3 and 10-10 (105 ILCS 5/10-3 and 5/10-10) set forth qualifications for elected board members. Please note that board members of some community unit school districts may be subject to additional, historical residential qualifications, based on the distribution of population among congressional townships in the district, or as between the district's incorporated and unincorporated areas. See 105 ILCS 5/11A-8. ⁶

5. Under what circumstances may a student serve on a school board?

A board may opt to appoint a student to the board to serve in an advisory capacity only. The student may not have any voting privileges or attend any executive sessions of the board. 105 ILCS 5/10-10.

The process of how a student is selected to serve on a board and the term for a student member is addressed by board policy.

6. How are school board officer vacancies filled?

A. President. ⁷

The School Code has two provisions governing vacancy in the office of the Board President. Section 10-13.1 states that the "vice-president shall perform the duties of the president if there is a vacancy in the office of president or in case of the president's absence or inability to act" An earlier enacted statute calls for the appointment of a *president pro tempore* if the president is absent from any meeting or refuses to perform his or her duties, and specifies that the "vice-president, if the board elects such officer, shall be appointed to the *president pro tempore* role, presumably for the remainder of the president's term (which is either 2 years or 1 year, if the board has adopted a one-year term policy). See 105 ILCS 5/10-13. Many boards resolve any confusion by stating expressly in policy that the vice president fills a vacancy in the presidency.

B. Vice President.

The *School Code* does not specifically address vacancies in the office of vice president. Board policy may address the manner in which such a vacancy is filled.

C. Treasurer.

In the case of a vacancy in the office of treasurer, the board may appoint a school treasurer for the unexpired term. The board is authorized to determine the temporary incapacity of its treasurer due to illness, absence, or other cause that prevents the prompt performance of the treasurer's duties, and may appoint an acting treasurer until such time that the board determines the temporary incapacity no longer exists. 105 ILCS 5/8-1(b-c).

Class I county school units and Class II county (Cook County) school units which have withdrawn from the jurisdiction of a township treasurer and trustees of schools: treasurers serve one-year terms and may or may not be board members (if the treasurer is a board member, then no compensation is allowed). A treasurer may not be a member of the county board of school trustees. 105 ILCS 5/8-1(b).

Class II county school units that were under the jurisdiction of a township treasurer and trustees of schools at the time those offices were abolished by vote: treasurers are appointed by the board to serve two-year terms and may not be the superintendent of the district. 105 ILCS 5/8-1(c), amended by P.A. 96-538.

Class I county school units: first term treasurers must have a financial background, related experience, or 12 semester hours of college-level accounting. 105 ILCS 5/8-1(d).

Class II county school units: first term treasurers must be certified public accountants or certified chief school business officials or have experience as a township treasurer prior to July 1, 1989. 105 ILCS 5/8-1(e).

School treasurers are prohibited by law from having any interest, direct or indirect, in any investments in which the board is authorized to invest. 30 ILCS 235/2(d).

D. Secretary.

The *School Code* provides that, in the event the secretary is absent from a meeting or refuses to perform his or her duties, a secretary pro tempore may be appointed. The appointee to the secretary position need not be a member of the board. 105 ILCS 5/10-14.

E. How does a board select someone to fill an officer vacancy?

The process of how an individual is selected is addressed by board policy.

In contrast to selection of board members, the *Open Meetings Act* prohibits discussion of selection of school board officers in closed session because no specific exception to the open meeting requirement exists for the discussion of officer appointments. 5 ILCS 120/2.

¹ The following attorneys are members of this committee: Heather K. Brickman, Hodges, Loizzi, Eisenhammer, Rodick & Kohn LLP; Debra H. Jacobson, Hodges, Loizzi, Eisenhammer, Rodick & Kohn LLP Heidi A. Katz, Robbins Schwartz Nicholas Lifton & Taylor, Ltd.; Kimberly Small and Maryam Brotine, Illinois Association of School Boards.

² Section 25-2 of the Election Code [10 ILCS 25/2] provides a similar list of situations creating a vacancy in office, with the addition of refusal or neglect to take an oath of office as an event creating a vacancy. School boards should consult with legal counsel as to the interplay of the various statutes governing vacancies in office as may be applied to school boards.

³ A now obsolete *School Code* provision allows the State Board of Education to authorize the State Superintendent to direct regional superintendents to remove school board members if a school district remains on academic watch status three years after being placed on that status. It is obsolete now because the *School Code* no longer provides for academic watch status. 105 ILCS 5/2-3.25f(b)(1), amended by P.A. 99-203.

⁴ Different procedures apply in school districts governed by a board of directors. In such districts, when a vacancy occurs the remaining directors fill the vacancy by appointment within 30 days. If the board fails to fill the vacancy within 30 days, regional superintendent fills the vacancy within the next 30 days. If the regional superintendent fails to do so, then the vacancy is filled at the next regular school election. 105 ILCS 5/10-4(e).

⁵ In special charter districts with members that are still appointed by a mayor, in the case of a vacancy, the mayor nominates a replacement and the city council votes to confirm. That person holds office for the remainder of his or her predecessor's term.

⁶ Section 11A-8 was repealed along with the rest of *School Code* Article 11A "Unit District Formation" by Public Act 94-1019, effective July 10, 2006. In P.A. 94-1019, the General Assembly comprehensively updated school reorganization mechanisms to further encourage and remove perceived barriers to school consolidations. As P.A. 94-1019 did not repeal *School Code* § 9-12, the ballot formats prescribed in that section and incorporating residential qualifications remain in use, as applicable in particular unit districts.

⁷ Under Article 32, in special charter districts where board members are appointed by the mayor of a city, the person appointed from the city-at-large for one year is the president, but has no vote except in the case of a tie. 105 ILCS 5/32-3.1. In cities having a population of 45,000 or more, constituting school districts to which Article 32 applies, the president is designated by the mayor and serves a two-year term. 105 ILCS 5/32-4. In school districts governed by Article 33, officers are subject to removal by a majority of the board and, when a vacancy occurs, the board appoints a successor. 105 ILCS 5/33-3. The treasurer and secretary of an Article 33 board need not be members of the board. Id.

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