



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 1, 2020

To: County Judges and County Election Officials

Re: Ballot by Mail Based on Disability

Due to misreporting and public confusion, the Texas Attorney General provides this guidance addressing whether a qualified voter, who wishes to avoid voting in-person because the voter fears contracting COVID-19, may claim a disability entitling the voter to receive a ballot by mail regardless of whether the voter would need personal assistance to vote in-person or risk injuring their health because of a sickness or physical condition. Based on the plain language of the relevant statutory text, fear of contracting COVID-19 unaccompanied by a qualifying sickness or physical condition does not constitute a disability under the Texas Election Code for purposes of receiving a ballot by mail. Accordingly, public officials shall not advise voters who lack a qualifying sickness or physical condition to vote by mail in response to COVID-19.

The Election Code establishes specific eligibility requirements to obtain a ballot by mail for early voting. TEX. ELEC. CODE §§ 82.001–.004. While any qualified voter is eligible to early vote by personal appearance, the Legislature has limited access to early voting by mail for individuals who meet specific qualifications. Section 82.002 of the Election Code, titled “Disability,” allows a qualified voter to early vote by mail “if the voter has a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter’s health.” *See id.* § 82.002(a). Thus, a voter has a disability under this section and, therefore, is eligible to receive a ballot by mail if:

- (1) the voter has a sickness or physical condition; *and*
- (2) the sickness or physical condition prevents the voter from appearing in-person without:
 - (a) needing personal assistance; *or*
 - (b) injuring the voter’s health.

Only a qualifying sickness or physical condition satisfies the requirements of section 82.002. The Election Code does not define “sickness” or “physical condition.”¹ The

¹ Our objective in construing a statute is to give effect to the Legislature’s intent, which requires us to examine the statute’s plain language. *Leland v. Brandal*, 257 S.W.3d 204, 206 (Tex. 2008). We presume the Legislature included each word in the statute for a purpose and that words not included were purposefully omitted. *In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008). In determining the plain meaning of undefined words in a statute, we consult dictionary definitions. *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018); *see* Tex. Att’y Gen. Op. KP-

common understanding of the term “sickness” is “the state of being ill” or “having a particular type of illness or disease.” NEW OXFORD AM. DICTIONARY 1623 (3d ed. 2010).² A person ill with COVID-19 would certainly qualify as having a sickness. However, a reasonable fear of contracting the virus is a normal emotional reaction to the current pandemic and does not, by itself, amount to a “sickness,” much less the type of sickness that qualifies a voter to receive a ballot by mail under Election Code section 82.002.

In addition to “sickness,” the Election Code allows voters to vote by mail if they have a “physical condition” that prevents them from appearing at the polling place without assistance or without injury to their health. TEX. ELEC. CODE § 82.002(a). “Physical” is defined as “of or relating to the body as opposed to the mind.” NEW OXFORD AM. DICTIONARY 1341 (3d ed. 2010). “Condition” is defined as “an illness or other medical problem.” *Id.* at 362. Combining the two words, a physical condition is an illness or medical problem relating to the body as opposed to the mind. To the extent that a fear of contracting COVID-19, without more, could be described as a condition, it would at most amount to an emotional condition and not a physical condition as required by the Election Code to vote by mail. Thus, under the specifications established by the Legislature in section 82.002 of the Election Code, an individual’s fear of contracting COVID-19 is not, by itself, sufficient to meet the definition of disability for purposes of eligibility to receive a ballot by mail.

To the extent third parties advise voters to apply for a ballot by mail for reasons not authorized by the Election Code, including fear of contracting COVID-19 without an accompanying qualifying disability, such activity could subject those third parties to criminal sanctions imposed by Election Code section 84.0041. TEX. ELEC. CODE § 84.0041 (providing that a person commits an offense if the person “intentionally causes false information to be provided on an application for ballot by mail”); *see also id.* § 276.013 (a person commits election fraud if the person knowingly or intentionally causes a ballot to be obtained under false pretenses, or a misleading statement to be provided on an application for ballot by mail). However, whether specific activity constitutes an offense under these provisions will depend upon the facts and circumstances of each individual case.

A lawsuit recently filed in Travis County District Court does not change or suspend these requirements. In that case, the District Court ordered the Travis County Clerk to accept mail ballot applications from voters who claim disability based on the COVID-19 pandemic, and to tabulate mail ballots received from those voters. The Texas Attorney General immediately appealed that order. Accordingly, pursuant to Texas law, the District Court’s order is stayed and has no effect during the appeal. Moreover, even if the order were effective, it would not apply to any county

0009 (2015) (concluding that to be able to vote by mail, a voter must satisfy the standard of disability established under section 82.002, and that standards of disability set in other unrelated statutes are not determinative).

² *See also* Tex. Att’y Gen. Op. KP-0149 (2017) (noting that a behavioral abnormality of a sexually violent predator sufficient to result in civil commitment qualifies as a sickness, understood as an “unsound condition” or disease of the mind, under section 82.002(a)).

clerk or election official outside of Travis County. Those officials must continue to follow Texas law, as described in this letter, concerning eligibility for voting by mail ballot.

Sincerely,

A handwritten signature in black ink that reads "Ken Paxton". The signature is fluid and cursive, with the first name "Ken" and last name "Paxton" clearly distinguishable.

KEN PAXTON
Attorney General of Texas