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## MEMORANDUM

TO: Commissioners of the Board of Elections in the City of New York

FROM: Douglas A. Kellner, Co-Chair, New York State Board of Elections

DATE: August 4, 2020

*"Success is not final, failure is not fatal. It is the courage to continue that counts."* - Winston Churchill

### Introduction

I appreciate the opportunity to discuss with you several issues that I urge that you consider as priorities for the presidential general election. The coronavirus pandemic has put enormous stress on our voting system. Yet I am confident that we all share the goal of allowing every eligible voter to cast a ballot and have that ballot counted notwithstanding the very significant hurdles that we all have to overcome.

I fully recognize that the tasks that face the New York City Board of Elections are far more challenging than those we face at the State Board—and are perhaps as difficult as the obstacles we had to face after the 9-11 tragedy or Superstorm Sandy. The City Board rose to those occasions, and I believe that it can provide safe, effective voting that will produce a timely, accurate and verifiable result that can assure everyone that our democracy is still viable and functioning.

To those voters who did not have an opportunity to cast their ballots in the primary election, we should apologize for not doing more. Elected officials and others warned that we were not deploying sufficient resources to mail out absentee ballots in a timely manner, and in hindsight we could have done more to address that problem. Indeed, that is why I am reaching out to you now with the hope that we can all learn from the problems faced in the primary to solve them for the general election.

I agree with Governor Cuomo's assessment that "boards of elections had operational issues, some better some worse, and they have to learn from them." We should take to heart our governor's exhortation "to get the lessons and make the system better...for November." Before we say that there is nothing else we can do, we need to take a hard look to reassess the available options to make sure that each and every voter is able to cast a ballot and have that ballot counted. It is especially important that when we need more resources, we make sure that the governor, mayor and our other elected officials know what we need in order to provide this critically essential service to our democracy. So far, I have found that Governor Cuomo, Mayor de Blasio and our legislative leaders have been responsive when we tell them what we need to get the job done.

### **I. Compliance with the "30 Minute Rule" for waiting to vote for the November 2020 presidential general election**

Long lines on election day discourage and disenfranchise voters. To that end, the Voting Systems Regulations include a mandate on the counties that they have adequate staffing at each poll site. 9 NYCRR § 6210.19(c)(1) provides: "County boards shall deploy sufficient voting equipment, election workers and other resources so that voter waiting time at a poll site does not exceed thirty minutes." New York City has never come close to meeting that mandate in presidential general elections, where the turnout is so much greater than any other election events in the four-year cycle.

The City Board took many commendable steps to address poll site voting on June 23 in the face of many challenges locating and sanitizing poll sites and recruiting poll workers. There were only a few sites where voters were required to wait more than thirty minutes. But what worked for the primary is not necessarily enough for the general election, where the turnout will be many times greater. I urge you to take immediate steps to reduce the predictable long lines that will occur on November unless you take dramatic action now to have adequate staff and equipment to serve the voters without excessive waiting.

For example, 2.7 million New York City residents voted in the 2016 presidential election. This is more than three times the 800,000 who voted in the 2020 primary. The lesson from the statistics is that successfully running an election with substantially smaller does not mean that you have enough personnel for the predictable surge in turnout for the presidential election.

New York City has more poll workers than needed for primary and special elections and is understaffed in many locations for the presidential election. It cannot be stressed enough—the turnout in a presidential election is more than three times the turnout in the primary election.

President Obama's Presidential Commission on Election Administration reported detailed recommendations on queuing that I have previously

recommended that the City Board staff review. A key lesson is that once a line becomes long, it takes twice as much effort to recover.

The solution is obvious, albeit not so simple to accomplish. We need more registration check-in tables. That is where the bottlenecks typically occur. Yes, more tables mean that we need more poll-workers to staff these tables, and that means that we need more space. In many poll sites that may mean overflowing into additional rooms, and that means you need to have site diagrams now. In those sites where it is truly impossible to find more space, then we should take the lesson from 9-11 and Superstorm Sandy and move outside. Election Day is already a holiday, and where it is essential to provide voting with proper social distancing, as a last resort, we should ask the mayor to close streets and set up tents for voting outside.

The Legislature has adopted several innovative statutes that can assist New York City in staffing the polls. The most significant in my view is Election Law § 3-500, which authorizes the Board to adopt an alternative poll site staffing plan to more efficiently conduct the election. The City Board should discard the election district model for checking the voter's registration. Now that the City uses electronic poll books, there is no need to divide tables by election districts, where some districts have no lines and others have long lines. Queuing studies have long established that a single line to multiple cashiers moves faster than separate lines for each cashier. (Yes, inspectors need to be trained to give the voter the correct ballot where there are multiple ballot styles at the poll site.)

The Legislature also amended Election Law § 3-400(7) to authorize split shifts. This would allow the Board to recruit additional poll workers for the morning rush, without requiring them to work the entire 17-hour day. There are many, many people who have indicated that they would work at the polls but for the long hours. The Board should take advantage of this provision.

The Legislature has also enacted Election Law § 3-400(8), which authorizes high school students who are seventeen years old to serve as inspectors. This is another potential source of poll workers.

Finally, to the extent that the Board has vacant positions in its poll worker roster, it should publicize the precise vacancies so good government groups and the Mayor's office can assist in finding suitable poll workers. I note that Westchester County Executive George Latimer has asked county employees to volunteer; they will be given time off and will receive poll worker's salary for training and work on the Election Day holiday.

## **II. We need to do better processing absentee ballot applications**

New York City deserves credit for setting up its online absentee ballot application portal. That improved efficiency in processing those applications. I

also recognize that many employees worked long overtime hours trying to deal with the overwhelming tide of applications, and I thank them for those efforts.

We at the State Board also acknowledge that the current deadline for requesting absentee ballots gives voters unrealistic expectations. The State Board has recommended that the Legislature change the deadline for making an application from a postmark seven days before the election to actual delivery of the application to the board fourteen days before the election. Our elected officials have rejected that proposal—and told us to do better. We should accept that message and improve the process for sending out absentee ballots. At the same time we should warn voters that waiting until the deadline puts them at risk of not receiving their ballot in time to meet the statutory deadline for having their ballot count.<sup>1</sup>

So, if the Governor should issue another executive order requiring boards to mail an absentee ballot application to every voter, I recommend that the Board strongly urge voters to use the portal rather than mailing the application, and that the Board warn voters not to wait until the deadline. The Board should also consider whether to highlight the option of early voting. New York City ran a very successful, but underutilized, early voting program.

The lesson from the primary should be obvious—the Board needs more capacity to process absentee applications in a timely manner. This is not a new problem, although the scope has increased by a factor of ten because of the huge volume of absentee applications this year. In 2001, the New York City elections commissioners adopted a policy that the clerks should send applications and ballots *on the same day as they receive the request*, for requests received before 3:00 p.m. or on the next day for requests received after 3:00 p.m. That important guideline was inserted to make it clear that there be no backlog and that staffing overtime would have to be adjusted to keep any backlog from developing.

Please plan now to process double or triple the number of applications for absentee ballots in the general election. Add new capacity to process the applications in a timely manner now. Do not wait for a backlog from which you can never recover.

Also be aware that the Legislature has passed, and the Governor will probably sign, a new law requiring notice and an opportunity to cure when a voter has failed to sign the absentee ballot envelope. I strongly support this

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<sup>1</sup> In 2001, the New York City elections commissioners adopted my proposal to insert in its Absentee Ballot Guidelines the following policy:

The Election Law is ambiguous on how the Board of Elections should handle applications that are mailed to the Board. Election Law 8-400 (2)(c) says that: "All applications must be mailed to the Board of Elections not later than the seventh day before the election for which a ballot is first requested or delivered to such Board not later than the day before such election." It is the policy of the Commissioners that the Board will honor a properly completed application that is actually received until the day before the election even though the application was mailed later than seven days before the election.

legislation even though it makes even more work for the Board. It is necessary to plan now for the staff and procedures to implement the new law.

Voters would have more confidence in the absentee ballot process if they could receive confirmation that their ballot has been sent out and then that the ballot has been received by the Board of Elections. While it may not be possible to implement an online ballot tracking system this year, such a system, already mandated by the City Council, would reassure voters and might further reduce the pressure of voters seeking to vote in person because they are unsure whether their absentee ballots would be counted.

Many have contacted us about providing for dropboxes for voted absentee ballots. In fact, New York already has what effectively amounts to a dropbox program. Anyone can drop off a voted absentee ballot envelope by delivering it to any poll site on Election Day, by delivering it to any early voting site during early voting hours, or to any office of any board of elections. We need to do a better job publicizing these options.

### **III. We need to expand capacity to process the canvass in a timely manner.**

We do not have the luxury to take six weeks to canvass the general election returns. Election Law §§ 9-208(1) and 9-211(1) require the completion of the canvass so that the recanvass and audit can begin no later than November 18, 2020. In any event the Board is required to transmit its canvass to the State Board of Canvassers by November 28, 2020. These deadlines are not arbitrary. The Electoral College meets on December 14, 2020, and New York State must have all of the documentation in place by December 8, 2020 to assure that its 29 electoral votes will be counted in the election for president and vice-president.

We know now that we will have even more absentee ballots to count in November. We have to dramatically scale up the number of tables for reviewing and processing absentee ballots. The Board needs to arrange for space, equipment and personnel now—at a scale many, many times what was used for the primary election.

In the long run, others and I have been explaining to the Governor and the Legislature why the New York process is out of sync with so many other states that have not experienced the same scale of delay in counting absentee ballots. New York law requires that a voter who applied for an absentee ballot because he or she would be absent on election day must vote in person if that excuse should no longer be true on election day; in that case, the absentee ballot would not be processed. Consequently, New York cannot begin to count absentee ballots until the election day and early voting poll records are checked. Ideally, New York should revise its statute to provide that once an absentee ballot is voted, it is logged into the electronic poll book system, and if the voter seeks to vote in person, the voter would vote by affidavit ballot. That would allow the

canvass of absentee ballots to begin on election day, just as early voting counts are now reported with the election night canvass.

Now that there is a cure period, I suggest that the Board consider logging voted absentee ballot envelopes into the poll records as they are received and create a flag when an absentee voter votes in person so the absentee envelope can be located and invalidated. Again, the logistical challenge is enormous and we need to plan now how to meet the challenge.

#### **IV. Let's not forget about ranked choice voting.**

The Board's workload to conduct the general election during the pandemic is overwhelming and comparable to the challenges of 9-11 and Superstorm Sandy. Preparing for the general election has to be the priority. Nevertheless, the date of the first rank choice voting elections is rapidly approaching as we anticipate special elections in March. I hope that the Board will adopt a system like that used by so many other jurisdictions where preliminary, unofficial election RCV returns can be reported on election night.

To the extent that such a system uses software that is part of the voting system, please keep in mind that certification testing and approval is required.