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REPORT TO THE SENATE COMMITTEE ON ELECTIONS
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Insanity is doing the same thing over and over again and expecting different results

Introduction

My colleagues at the State Board of Elections are understandably reticent to criticize problems at county boards, especially when we are responsible for their oversight. I acknowledge that the coronavirus pandemic combined with new legislation to change the political calendar and to implement early voting, electronic poll books and expanded absentee voting put enormous stress on our voting system.

I fully recognize that the tasks that face the New York City Board of Elections and the county boards are far more challenging than those we face at the State Board—and perhaps have been as difficult as the obstacles we had to overcome after the 9-11 tragedy or Superstorm Sandy. Local election officials rose to those challenges.

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 his exhortation “to get the lessons and make the system better.” 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. In general, I have found that the governor, Mayor de Blasio and our legislative leaders have been responsive when we tell them what we need to get the job done.

I. Issues with the New York City Board of Elections

- **Compliance with the “30 Minute Rule” for waiting to vote for the 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." The Legislature added a similar provision to Election Law § 3-400 for early voting sites. New York City has never come close to meeting the thirty-minute 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 in the presidential primary 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 predictably what worked for the primary was not enough for the general election, where the turnout will be many times greater, and where advocates were recommending early voting as an alternative to the problems of absentee voting in the presidential primary. The New York City Board failed 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 turnout is not necessarily a prediction for success in administering 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 site diagrams must be prepared in advance. 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.

When it became obvious that the City Board had failed to provide sufficient resources for early voting so that there were hours long lines in many

locations, there was no back-up plan. And when I and others proposed alternatives to address the long lines, the commissioners refused to take any action until litigation was imminent.¹

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.)

Abandoning the election district model also allows greater flexibility for training and assignment of poll workers. First-time poll workers do not need to be trained for every poll worker function at the poll site, but can be trained for specific tasks. Training in additional functions can be added as the poll worker gains experience.

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 board should assign additional poll staff for the busiest hours and can reduce the staff for times that are predictably slow. No fast-food restaurant would employ the same staff from 5:30 a.m. to closing at 9:00 p.m. without adjusting for the rush hours. The City Board must abandon its one size fits all staffing model and switch to a more flexible plan that increases staff for busy periods and reduces staff for low-turnout contests and times of the day when fewer voters are expected.

Now is the time for the New York City Board of Elections to plan for compliance with the 30-minute rule for the 2024 presidential election.

- **Compliance with the mandate for vote centers for early voting**

Election Law § 8-600(3) provides that:

Any voter may vote at any polling place for early voting established pursuant to subdivision two of this section in the county where such voter is registered to vote; provided, however, if it is impractical to provide each polling place for early voting all of the election district ballots or if early voting at any such polling place makes ensuring that no voter has not previously voted early during such election, the board of elections may assign election districts to a particular early voting poll site.

¹ Lawsuits filed in Ulster and Rockland counties caused those boards to expand voting hours. Several other counties expanded voting hours without threatened litigation.

While the law makes a clear preference to allow any voter in the county to vote at any early voting poll site, New York City is the only jurisdiction in the state that requires an early voter to go to a particular assigned poll site. The City Board asserts that it cannot comply because its ballot marking devices do not have sufficient capacity to produce every ballot style. Yet, the City Board obstinately refuses to consider alternatives that would address the issue and allow voters to choose the most convenient poll site for early voting, which occurs everywhere else in New York State.

The City Board has not adequately explored alternatives for upgrading the memory capacity for its ballot marking devices. Another option is to provide multiple ballot marking devices assigned to specific election districts at the early voting poll sites. New York City could also consider altering the formatting of its ballots so the election district is not contained in the timing marks, which currently requires a separate ballot style for each election district. Instead the election district could be indicated in a target block on the ballot. Admittedly, these proposals would require modification of the election management system, but if the City started with a plan now, it could be implemented in time for the 2024 presidential election.

The Legislature Should Restructure the New York City Board of Elections

After twelve years as the New York County Democratic Commissioner (1993-2005) and fifteen years as co-chair of the State Board of Elections, I have come to the conclusion that the structure of ten part-time commissioners is part of the problem. I recommend that the Legislature reorganize the New York City Board of Elections so that it is managed by two full-time commissioners who have responsibility and accountability for the City Board's operations.

The current structure of ten commissioners was adopted in 1973 after the Second Circuit Court of Appeals declared unconstitutional the prior structure of four commissioners nominated by the party leaders of Manhattan and Brooklyn.² History reveals a number of dysfunctions that arise from the ten-commissioner structure:

- **Selection of the executive director requires a political deal.** The appointment of the executive director and deputy executive director requires the vote of six commissioners. In order to choose an executive director, someone needs to defect from their party to make a deal with

² *Weiss v. Duberstein*, 445 F.2d 129 (2d Cir. 1971); L. 1973 c. 896. From 1899 to 1973, there were four commissioners of the Board of Elections in the City of New York. The original charter of the consolidated City of New York, merged the four-member Board of Elections of the City of Brooklyn with the four-member Police Board of the City of New York, with elections to be administered by the Bureau of Elections within the New York Police Department (1898 NYC Charter §§ 271, 358 et seq.) The New York City Council promptly amended the Charter to separate elections from the Police Department.

the other side to obtain the sixth vote. For the last forty years, these deals have been the source of many problems.

- **Senior management** positions at NYCBOE are divided among the commissioners so that each senior management position “belongs” to a particular borough and party. Obviously these allocations have nothing to do with merit.
- Allotment of new staff positions and funding is distorted in favor of giving something to each commissioner. Consequently, Staten Island receives disproportionately more staff and funding while Brooklyn receives significantly less.
- NYCBOE employees often regard their political patron as much more important than the supervisor to whom they officially report. This adversely affects discipline and morale. One typical example: the patron overrules the supervisor who declines to authorize time off during a busy period when official policy prohibits vacations and mandates overtime.
- **Diffusion of decision-making and accountability.** Even commissioners and senior staff who are committed to good election administration find it difficult to accomplish major changes.

Bi-Partisan administration should be continued

While it is essential to improve accountability, bi-partisan administration is still the best option to manage the administration of elections. New York chose to rely on the state's two major political parties for the production of election officials in order to insure electoral fairness through bipartisan administration of elections.³ The provision for bi-partisan election administration, although it applies only to the functions of registering voters, distributing ballots and counting votes, was added to the State Constitution in 1894 as a significant reform.

I recommend that there be two full-time commissioners to manage the New York City Board of Elections. The model has worked relatively well in the

³ Election Administration in New York City: Pruning the Political Thicket, 84 *Yale Law Journal* 61-85. During colonial times, the county sheriffs and town clerks administered elections conducted at public meetings. With the introduction of written ballots and multiple poll sites in the early 19th century, inspectors were elected locally. In 1842, the Legislature provided for three inspectors for each election district, but voters could only vote for two. It was intended that the third inspector would come from a different political faction (L. 1842 c. 130, title 3 §21). It was not until 1887 that New York law formally recognized the existence of political parties by giving party leaders a role in the selection of election inspectors. 3 C. Lincoln, *Lincoln's Constitutional History Of New York* 124 (1906).

57 boards outside New York City. The two commissioners would be far more accountable than the current diffusion of responsibility.

I recommend against changing the system for selecting the inspectors. Election administration is substantially better when the local political leaders are invested with responsibility for their neighborhood poll sites. As I indicated above, the City Board should assign four inspectors who are in charge of the poll site, all of the other poll workers should be trained for specific tasks at the poll site, working under the direction of the inspectors. New York City effectively adopted this model for its early voting sites. It is time that they implement the guidance of President Obama's Presidential Commission on Election Administration to operate the election day poll sites with greater efficiency.

II. The 22nd Congressional District

The very close contest between Claudia Tenney and Anthony Brindisi exposed several shortcomings in New York election administration. While we all recognize that Claudia Tenney was “duly elected”—I signed the certification of her election—there were so many errors in the administration of that election that no one can confidently say that the ultimate result reflected the will of a plurality of voters.

The Legislature already addressed one aspect by enacting the provision for manual recounts in close contests (Election Law § 9-208(4)). Unfortunately, that law only went into effect this year and was not available to verify the accuracy of the count in 2020. The Legislature needs to go one step further by amending Election Law § 3-222 to make the electronic copies of ballot images and cast vote records available to the public. The Senate passed such a bill last year and I urge the Assembly to do so as well.

New general elections. Justice DelConte correctly noted that he did not have authority to order a new election, *Tenney v Oswego County Board of Elections*, 71 Misc.3d 421, 425-26 (2021) the Legislature should consider adding this remedy when the court finds there has been such irregularity as to render impossible a determination as to who rightfully was elected. This provision already exists for primary elections (Election Law § 16-102(3)), and should be extended to general elections as well.

Universal voter registration. Justice DelConte's earlier decision at 71 Misc.3d 385 points out how New York's current system of voter registration actually has the effect of disenfranchising eligible voters who fail to register properly. The constitutional amendment and a new law to provide for same day registration will go a long way to address this issue.

Errors by boards disenfranchising voters. Justice DelConte ruled in 71 Misc.3d 400 that a voter's sole remedy after being erroneously purged is to bring a special proceeding pursuant to Election Law § 16-108. The Legislature should review these procedures so that an erroneously purged voter who casts an affidavit ballot can have that ballot counted.

In that same decision Justice DelConte ruled that Election Law § 9-209(2)(a)(iii) prevents counting an affidavit ballot cast at the wrong poll site, even when the inspectors gave erroneous advice to the voters that caused the error. Many of us believed that § 9-209(2)(a)(ii) should have applied. It says that a ballot should be cast and canvassed “if such board finds that ministerial error by the board or any of its employees caused such ballot envelope not to be valid on its face.” The federal courts have consistently applied this rule to prevent violation of due process. *Hirschfield v Board of Elections*, 984 F.2d 35 (1992)(Board failed to advise of need for certificate of acceptance when candidate inquired at time of filing); *Griffin v Burns*, 570 F.2d 1065 (1st Cir. 1978) and *Williams v Sclafani*, 444 F.Supp. 906 (S.D.N.Y.), *aff’d*, 580 F.2d 1046 (2d Cir. 1978); cf. *Briscoe v Kusper*, 435 F.2d 1046 (7th Cir. 1970). We should reexamine this provision to determine whether we need to do more to insure that judges will not disenfranchise voters on account of errors by election officials.

Removal of election officials. The current provision of Election Law § 3-200(7), which gives only the governor authority to remove an election commissioner for cause is so unwieldy that it has never been used. It would be better to give the State Board of Elections authority to remove any election official for cause after notice and a hearing. The State Board should also have authority to suspend an election official pending the hearing. Almost all other states have comparable provisions.