

GUIDANCE ON UPCOMING BUDGET VOTE AND BOARD MEMBER ELECTION

Hodgson Russ Education Alert
June 5, 2020

Our school attorneys have received numerous questions from Superintendents, district clerks, and other school officials seeking clarification about the election process amid complications due to COVID-19. This alert will provide you with our guidance to the most frequently asked questions we have received recently. We understand and recognize that there are myriad of real world issues and different variations of every scenario noted below. To that end, certain issues will need to be evaluated on a on a case-by-case basis. We encourage you to call or contact any member of our team for assistance with specific questions.

- **What if the absentee voter ballot envelope is not signed?**

The vote may not be opened and should not be counted.

- **What is the deadline for submission of absentee ballots?**

Absentee ballots must be received by the Office of the District Clerk by 5:00 p.m. on the day of the election (June 9). Please note that even ballots which are post-marked June 9 but are received after 5:00 p.m. may not be counted. There has been information circulated this may change and that an announcement by the Governor could occur Sunday. We will keep you apprised of any developments.

- **Should we allow for voters to drop off their ballots in person?**

Yes. We recommend providing voters with as much opportunity as possible to ensure that their votes are duly submitted and counted in accordance with relevant deadlines. We recommend that Districts have office hours during the week of the election, but particularly on the day of the election, so as to permit voters to drop their ballots off in-person until 5:00 p.m. on June 9. Districts may use locked drop boxes or other means by which social distancing and other infection control measures may be observed while maintaining the integrity of the electoral process. If a school district chooses to use drop boxes as a convenient means by which voters can deposit their ballots prior to the 5:00 p.m. deadline, it must ensure that the drop box is locked and/or secured and monitored by school staff (e.g. the District Clerk) or by surveillance cameras to ensure that ballots are not tampered with or stolen. The drop boxes

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should be emptied at the close of business every day or whenever the surveillance of the drop boxes will end each day in order to maintain a clear chain of custody of the ballots. District clerks and school officials are strongly encouraged to take all measures which ensure that a clear chain of custody is maintained. In this regard, a log should be maintained which includes the name of the individual who has emptied the ballot box, how many ballots were removed from the drop box, and where the unopened ballots are then maintained, etc.

- **May we open up the outside or transmittal envelope which contains the absentee ballot voter envelope and ballot prior to 5:00 p.m. on June 9?**

While there is no specific prohibition relative to opening the “outside” envelope, which contains the absentee voter envelope and enclosed ballot, doing so may raise a host of issues. Our recommendation is that the envelopes not be opened or otherwise altered in any way from the way in which they were received by the District Clerk until 5:00 p.m. on election day in order to instill in voters the greatest level of confidence and integrity in the electoral process during these extraordinary times.

- **What if the ballot has been incorrectly marked by a voter? For example, if there are only two vacant school board seats but a voter indicates that they are voting for three nominees (i.e. “over votes”), what should we do with the ballot?**

The State Education Law provides that, if it is for any reason impossible to determine a voter’s choice of candidate for an office, the vote shall not be counted for such office and should be treated as a blank vote. Where a school district receives an absentee ballot where a voter has voted for more than the eligible candidates, then it would be impossible for the school district to determine the voter’s choice of candidates and thus, the ballot should be treated as a blank vote for purposes of the election. Assuming the ballot is otherwise valid, the vote toward the budget and any other propositions should still be counted.

- **What do I do, if anything, with a ballot if a voter has submitted their ballot with written comments on it or enclosed other material with their ballot?**

According to New York State Education Law Section 2034(3), **the whole ballot is void if the voter:**

- a. does any act extrinsic to the ballot such as enclosing any paper or other article in the folded ballot, or
- b. defaces or tears the ballot, or
- c. makes an erasure thereon, or
- d. in a union free school district meeting or election, makes any mark thereon other than a single cross X mark in pen or pencil, or a single check mark, in pen or pencil, in a voting square, or other than the writing in a name for the purpose of voting; provided, however, that an erasure or a mark other than a single cross X mark in pen or pencil, or a single check mark, in pen or pencil, made in a voting square shall not make the ballot void, but shall render it blank as to the office in connection with which it is made. No ballot shall be declared void or partially blank because a cross X mark or check mark thereon is irregular in form.

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- **How can I address voter concerns that their votes will not be kept confidential?**

We encourage you to educate your voters as to the absentee ballot process, which itself has not been altered by Governor Cuomo's Executive Orders. In this regard, voters should be aware that their ballots will be separated from the oath envelope that bears their name, return address or other personally identifiable information. The purpose of the voter's signature and other relevant information on the oath envelope is so that the District may assure that the ballot has been submitted by a qualified voter. After the oath envelope is opened, the ballot will be placed unfolded into the ballot box. The individual ballots are not unfolded and canvassed until after 5:00 p.m. on the day of the election.

- **Are we required to livestream the canvassing of the ballots?**

While there is nothing in the Governor's Executive Orders or Education Law itself that would expressly require districts to livestream the opening and counting of the ballots, the general mandate that the annual district meeting and election "shall be conducted remotely" could potentially be interpreted to include the opening and counting of the ballots. We generally recommend, if you have the capability to do so, that you livestream – with video and audio – the canvassing of the ballots, in an effort to instill confidence in District residents by demonstrating that a formal, validly conducted election is taking place. In other words, we believe that livestreaming the opening and counting of the ballots may preserve the integrity of the election to the greatest extent possible under the circumstances while providing the school district with a measure of comfort should it receive a voter challenge relative to its handling of the electoral process. We further recommend that any livestreaming of the vote be recorded and maintained.

- **May a voter challenge an absentee ballot?**

School districts are required to make a list of all individuals to whom absentee ballots have been issued and make it available for public inspection until the day of the election. Any qualified voter may, prior to the election, file a written challenge to the qualifications of any person whose name appears on the list of absentee voters prepared for transmittal to the election inspectors on the day of the election, stating the specific reason(s) for such challenge. If the voter being challenged has signed the required attestation and appears on the registration rolls, the District can take those facts as evidence of the voter's qualifications. The burden should then shift to the challenger to present facts and evidence to support their position as to why the challenged voter should be disqualified. The Election Chairperson should consider and weigh all of the relevant evidence and come to a conclusion as to whether the voter is qualified and entitled to vote. The election Chairperson would then make the decision on whether to count the ballot. This decision will only be overturned if it is "arbitrary, capricious or contrary to law"—which can be a difficult burden to satisfy.

In school districts with personal registration and small city schools, Section 2018-a of the Education Law provides that a qualified voter may challenge an absentee ballot during the canvassing or public examination of such ballots. However, in light of Governor Cuomo's Executive Order mandating that the annual district meeting and election "be conducted remotely" this year, there does not appear to be a meaningful way for voters to interpose a challenge during the examination of ballots. We strongly encourage you to act reasonably in light of the many unique challenges you

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are faced with this election season and in a way which would instill confidence in a process that is largely hidden from voters this year.

- **If the Board of Elections is counting your absentee ballots, how are the absentee ballots transported to the board of elections? Who should transport them?**

We recommend that *at least* two (2) school officials, but preferably three (3), securely transport the ballots to the Board of Elections. In the event of a voter challenge, there will be at least two or more individuals that can attest to the safe and secure transportation of, or otherwise proper handling of, the ballots. If you are utilizing your local board of elections for assistance in scanning the ballots, it will also be critical to maintain and establish a clear chain of custody from the school to the board of elections whereby each movement and as much detail as possible should be memorialized in terms of who comes into contact with the ballots at any given time, the names of those board of election officials who assist, how long the ballots take to be scanned and where, who receives the ballots back from the board of elections, how and when the ballots are securely transported back the school, etc. Despite the fact that the board of elections will be scanning the ballots, election inspectors still have a duty to monitor the ballots at all times and ensure that they are being handled and canvassed properly and with integrity. If you do not believe that the board of elections will be able to scan and process all ballots on the evening of the election (or they have advised you that they are unable to do so given the volume of districts they are assisting), or you/your colleagues are unable to stay all night to await their counting and scanning of all ballots, school officials should maintain and/or secure the ballots until they can be transported to the board of elections first thing the next morning (6/10). District personnel and/or election inspectors should be present the entire time the ballots are handled off-site. This is critical in order to maintain integrity of the electoral process.

- **Who should maintain the ballots after they are scanned? Where should the ballots be stored?**

Once the ballots are scanned at the Board of Elections, they should be securely transported back to the District Office (in accordance with certain procedures as noted above) where they must be secured and maintained like any other District records in accordance with Schedule ED-1.

The "Records Retention and Disposition Schedule ED-1" (8 N.Y.C.R.R. § 185.12 "Appendix I"), which all school districts must follow, sets forth specific periods of time that various types of school elections records must be maintained. For example, "final election results, including election inspectors' return and statement of canvass (where information is not duplicated in report of final election results) and election results report" must be permanently maintained. Those "intermediate records used to compile final election results, including tally sheets and voting machine tabulations" must be maintained for one year after the election, or, if the election is contested, until any investigation and/or litigation is complete. You can view or access the Schedule ED-1 electronically at: http://www.archives.nysed.gov/a/records/mr_pub_ed1.shtml. In districts that use paper ballots and ballot boxes, the Education Law further requires that after the election is over and the results have been announced, the election inspectors must lock and seal the ballot boxes, and the chief election inspector must deliver them to the district clerk. Thereafter, the ballot boxes cannot be opened, except: (1) upon order of the commissioner; or (2) after the elapse of a period of six months without challenge to the election, the board may pass a resolution ordering the opening of the ballot boxes

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and the destruction of the ballots therein (See N.Y. Educ. Law § 2034(6)).

- **Who announces election results?**

The Election Chairperson declares the results provided by the election inspectors.

- **How are the election results announced?**

Social media platforms, live streaming, etc. are all acceptable methodologies by which the election chairperson may widely disseminate this information to voters.

For school districts that have been divided into election districts, the election inspectors must make a written report of the results, signed by all election inspectors, to the chief election inspector of each election district. The chief election inspector of each election district then must, within 24-hours, file a written report with the District Clerk. Upon receiving the results, the board of education then must tabulate and declare the results within 24-hours.

- **Do we have to provide written notice to the board candidates?**

The District Clerk must immediately provide written notice to every person elected, either personally or by mail, of his or her election.

- **Can election results be set aside or otherwise be invalidated?**

Yes. However, a high standard must be met by a challenger in order for election results to be overturned. The Commissioner of Education has held that there is a presumption of regularity in the conduct of an election and she will not set aside the results of an election in the absence of evidence that the alleged irregularities actually affected the outcome of the election. See *Appeal of Casey-Tomasi*, Dec. No. 17,301 (2018); *Appeal of Roberts*, Dec. No. 13,162 (1994). Moreover, such irregularities must be so pervasive that they “vitiating the electoral process...or demonstrate a clear and convincing picture of informality to the point of laxity in adherence to the election provisions of the Education Law.” *Appeal of Roberts*, *supra*. The Commissioner has previously acknowledged that it is a “rare case” where errors become so pervasive that they “vitiating the fundamental fairness of the election.” *Id.* Please note that mere speculation that certain irregularities possibly exist is similarly insufficient to overturn election results.

If you have any questions about the Upcoming Budget Vote and Board Member Election described in this alert or please contact Jeffrey Swiatek (716.848.1449), Andrew Freedman, (716.848.1332), or Lindsay Menasco (716.848.1214).

Please check our Coronavirus Resource Center and our CARES Act page to access information related to both of these rapidly evolving topics.

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