

Testimony of
New York Democratic Lawyers Council
(NYDLC)

Hearing on 2017 Elections and Voting

**Presented to the New York City Council Committee on
Government Operations**

December 13, 2017

Contact:

Jarret Berg, Executive Director, New York Democratic Lawyers Council
Jarret.berg@nydcl.org, 866-NYDLC-01

Thank you Chairman Kallos and members of the Government Operations Committee for holding this important hearing on the 2017 election which provides an opportunity to identify ways to continue improving election administration in New York City. My name is Jarret Berg, Executive Director and 2016-2017 Voter Protection Director of the New York Democratic Lawyers Council (NYDLC). NYDLC has been monitoring elections in New York and battleground states since 2005. In this testimony we will offer insights from our 2017 Voter Protection program and offer solutions for improving the administration of New York City elections.

In 2017, NYDLC recorded data points from monitors at more than 50 poll sites across New York City, with over 200 people in the field on Election Day statewide. Today, we will share our observations and offer solutions to the most prevalent problems that arise before, on, and after Election Day.

Poll Worker Staffing and Training

Ensuring adequate polling place staffing of inspectors and interpreters and reducing Election-Day flake rates is a logistical challenge common across election administration, which requires recruiting, training, and coordinating thousands of people in a concerted manner, on a single Election Day, which begins at 5:00 AM for NYC poll workers.

In 2017, there continued to be several instances of understaffed poll sites, especially during the critical timeframe when polls need to be set up ahead of the opening of polls and morning rush. At many polling places, monitors reported several missing staffers. To prevent late openings, long lines, and other administrative problems that lead to infringed rights and poor civic experience, all poll sites need to be properly staffed for the opening of the polls. This is absolutely necessary *if* we are to continue having only one Election Day.

Inadequate staffing during poll site setup and poll opening has a magnified negative impact, insofar as the “morning rush” (6:00-8:00 AM) is consistently the busiest time of day for voting in most New York localities. This is a “deadline driven” timeframe when strong cooperation and staff camaraderie is needed to get each election district and all machines up and running. This timeframe “sets the tone” and impacts morale for the entire day.

One source of problems is that the early hour (5:00 AM) is not a typical start time for most employees, who may be groggy or delayed due to irregular commuting schedules. Also, the single Election Day means that poll workers are not in a daily routine, so the lack of familiarity (ie, lack of “muscle memory”) makes the likelihood of mistakes or rustiness at that time more common. As with any system reliant upon multiple actors, it is natural that with everything working, it may take fifteen minutes of voters going through the process to “get the kinks out”, and get all staffers up to speed and familiar with the balloting routine.

Notably, the absence of a “soft opening” for voting, which several Early Voting days may help provide, means that all poll sites, many suffering understaffing or tired and irregular staff, must come “on line” at 6AM sharp, right into the heaviest volume of voters for the day.

To address this, each borough should better anticipate and counteract the personnel flake rate. The Board of Elections could supplement existing staff with a layer of part-time setup/opening staff, who could help cover and alleviate the drop off, by serving from 5-8AM.

Missing interpreters is another common shortfall. The BOE should expand its partnership/contracting with local community groups to proactively help ensure that, whether a language is mandated or not, there are staff or volunteers at high ESL-population polling places, to ensure that all eligible voters have access to the language assistance needed to cast a ballot.

Affidavit Ballots

The proper use, distribution, and completion of Affidavit Ballots (known elsewhere as “provisional ballots”) on Election Day is a recurring issue nationwide that continues to serve as a major source of administrative difficulty in New York, resulting in poor civic experience and frustrated voter intent. In theory, the Affidavit Ballot is a rights-preserving mechanism that substitutes for a regular (instantly comingled) ballot, where a registration irregularity exists, so it can be resolved later one way or the other, without prejudicing the voter or the election.

In parts of New York and in years past in New York City, voters who claim they are registered and who turn out to their *correct* (assigned) poll site on Election Day to find their name missing from the poll book are not always proactively offered an affidavit ballot as required by law.

NYDLC’s 2017 incident reporting suggests that New York City’s training on this safeguard has improved. However, there appears to be some resulting confusion over the narrow circumstances when an affidavit ballot will *count* under New York law, which is why, in the first instance, we must all work to ensure that voters are turning out at their *correct* (assigned) polling place:

- In 2017 in Kew Gardens, multiple voters turned out to a polling place other than the one assigned and were aware of or made aware of that fact. At least one did so for convenience purposes. The Coordinator reportedly told the voter it was fine to vote an affidavit ballot, and did not inform the voter of the consequences of casting a ballot in an *incorrect* (unassigned) site—that the entire ballot is discounted without any effort to “save” even citywide races. NYDLC reporting at 8PM indicates that at the same location (PS 99), affidavit ballots were distributed to those who “said it would be easier to vote here all day long.”

Many voters, if given the option, would prefer to vote at a different location than the one assigned by residence, because it better fits their busy schedule. With polling places all over the city, it is understandable that even polling place staff—with modern commercial expectations of everyday convenience—would believe this to be an option. And it should be an option.

Unfortunately, this illustrates the limits of the usefulness of the Affidavit ballot rights-preserving regime, which will never have the intended effect of preserving and saving as many eligible votes as possible, without our modernizing our voting system. New York’s stringent and increasingly arbitrary balloting laws continue to result in the discounting of thousands of cast ballots, while also suppressing turnout among those unable to meet draconian formalities.

A “pro-voter” election system (i.e., designed with fundamental rights prioritized to protect and maximize eligible votes cast), would be one designed to “save” as many votes and contests as possible. Our present system does just the opposite—A vote cast for mayor anywhere in New York City that originates outside a voter’s one assigned poll site is thrown out entirely; Similarly and more absurdly, despite the fact that a U.S. Senator represents the entirety of New York State, a 2018 vote for Senate cast anywhere outside a resident’s assigned poll site will be discounted.

In principle, there is no reason why our voting process cannot be reformed to save as many votes as possible, either by moving to a system of vote centers and ballot printers, where voters could turn out to any of several convenient locations, or by saving as many contests on an “out of residence” voter’s ballot as possible. The most local contest may need to be voided, but all NYC voters are eligible to vote for city- or statewide office, so the rest of the ballot should be saved

Although it was not prevalent in NYC in 2017, another common affidavit ballot issue is poll worker confusion over when to use “Affidavit Ballots” as opposed to “Emergency Ballots”. Because of the importance of this distinction we will continue to highlight it and appreciate the opportunity to do so here. As NYDLC has suggested in the past, poll worker training should emphasize the following “bright line rule” where a voter turns out to their assigned polling place:

- If there is an alleged problem with the voter’s registration (name not in book; refusal to take challenge oath), voter must be proactively offered an *affidavit* ballot;
- If there is a problem with the ballot scanner (hardware or software malfunction or jam), voter must be given an *emergency* ballot.

A voter’s use of an affidavit ballot is typically an indicator of some earlier issue

A) Inadequate Notice of Polling Place Changes

Based on NYDLC Election Day reporting, there is an unacceptable frequency of voters negatively impacted by polling place changes or polling place confusion. The fact is these voters are *receiving* insufficient prior notice of the change, even if the Board is *sending* notice. This may affect frequent voters who “have been voting there for years”, or less frequent voters. The scale of polling-place changes—affecting several hundreds or thousands of voters in each case, warrants prioritization, since each may give rise to a large amount of “lost votes”.

The modern volume of junk mail and marketing material we receive, some of which is intentionally designed to look official, as well as the litany of (mis)information on the internet is a modern challenge. The Board needs to be doing more to raise awareness among the public about polling place changes.

The Board of Elections, civic groups, NYCvotes and others should design digital PSAs and materials that inform voters that polling places change from time to time, even if a voter voted recently. More must be done to encourage voters to confirm their registration and polling place ahead of every election. Where sites are moved due to “last minute” circumstances, additional notice strategies should be implemented commensurate with the scale of the change and the amount of confusion anticipated.

B) Voters Being Misdirected to Other Polling Places

NYDLC reports suggest that hundreds of NYC voters are “misdirected” each Election Day, leading to a multitude of affidavit ballots and/or lost votes. A voter whose address cannot be located in the poll book may be told that they vote at a different polling place. In many cases, it is initially unclear whether a poll worker is just mistaken, the voter’s poll site has changed, or whether the site listed in the digital or paper site lookup resource is inaccurate. Regardless, confused and frustrated voters often wait in line before being sent to a second or third location, which may or may not actually be the correct location for that voter. Exasperated and out of time, too many voters fail to ballot or cast a void affidavit ballot.

As suggested above the Board should find new ways to engage voters ahead of Election Day to confirm their polling place. The Board should continue to integrate smartphone and tablet technology and welcome volunteer support, like our poll watchers, who can assist with basic registration/polling place lookup functions. Before redirecting voters, poll workers must be certain that 1) the voter is presently in the incorrect polling place; and, 2) the voter is being directed to the correct polling place for their address. There must be a system to confirm in real time that the voter’s correct ED table is located at the site they are being directed to. In the longer term, an overhaul of our election system is needed so that it no longer limits participation to a single day, and on that day, to a single physical location.

C) Voter Roll Accuracy and Purges

It is a matter of public record that the City Board of Elections has recently conceded fault and entered into a settlement regarding the wrongful process used to “clean up” the voter rolls ahead of the 2016 Elections. Putting aside the methods and motives behind that practice, 2017 reporting indicates a frequency of incidents, wherein far too many eligible voters are reporting that their name has been omitted from the Election Day poll book.

Many voters claimed to have voted in 2016 or to have registered ahead of the 2017 deadline. Certainly, some may have moved in the interim, and some paper just gets lost in the mail. However, voter-, post office-, or assisting-agency mistake can only explain so much. In one noteworthy case in Queens, all of the last names beginning with the letter "O" were omitted from a paper poll book. The problem was reported by a voter at 8:25 AM and was resolved when replacement poll books arrived hours later. This incident was unusual in its concentrated scale, but the recurring issue of voter file or registration book omissions, typos, printing errors, and missing paper or records is a major contributing factor to the volume of registration-related incidents that arise each Election Day.

Scanner Breakdowns

NYDLC consistently observes poll sites with scanner jams and malfunctions. In some cases, the Ballot Marking Device equipment has not been well maintained. Not surprisingly, many of these incidents are reported during setup and the opening of polls as they are identified. In some cases, it appears that inspectors still lack a working familiarity with the machines, though more basic

errors now occur with less frequency than in the past. In other cases, the proper tools (such as codes and keys) are reportedly missing or misplaced. Scanners that fail later in the day are often due to jams. During peak hours, this can take significant time to resolve.

The impact of a given scanner breakdown on election administration is determined by resource allocation, contingencies and preparedness among BOE technicians, and training of the on-site inspectors. Scanner breakdowns that are not quickly remedied can lead to cascading problems: Lines develop as staff identifies and troubleshoots a malfunction; staff may be reluctant to use other scanners in the poll site; In some cases, staff takes the (erroneous) position that they are not permitted to switch to emergency procedures unless all machines have gone down; Sometimes, voters are less cooperative if they hear that their ballot will be “stored” instead of scanned, leading to abandoned ballots. In the past, affidavit ballots have been (erroneously) distributed or voters at overwhelmed polling places have been told to “come back later”.

To help remedy these issues, pre-Election Day scanner testing should be reviewed so there are fewer surprises at 5:30 AM. The existing DS200 troubleshooting materials should be reviewed for usability by poll workers. One inspector assigned to each site should receive enhanced training and be designated to address the majority of scanner issues. The Board should continue to optimize the pool of technicians. Finally, the Board should improve the rigor of the final pre-election inspection checklist for preparation of scanners, seals verification, and accessories.

Disability Access

NYDLC reports several 2017 disability access incidents. Doors intended to be accessible may be inadvertently locked, blocked, poorly marked, or difficult to get to or through. In a few cases, it appears that BMD machines and accessories need to be better maintained.

As in so many areas of public life, when designing layouts and processes for our elections we must be extremely cognizant of the particular needs of persons with disabilities and the effects that our policy decisions have on these voters. In some cases, the BOE moves polling places to better comply with the ADA. These decisions may improve access for some while reducing access for others. To maximize access, NYDLC recommends the following:

- The evaluation process for poll site fitness and accessibility must include increased emphasis on real-time conditions and facility security, maintenance, equipment, and janitorial practices to reduce unanticipated hindrances. Too often, a location that may seem appropriate on paper may be far less accessible in practice than anticipated.
- The BOE should work closely with disability advocates and advocates for the elderly to better inform their constituents that they may have the option to vote absentee.
- Policymakers should reform the law and state Constitution to provide all eligible voters with the option to vote by mail. This can drastically reduce the volume of voters in need of the most assistance, along with reducing overall in-person volume while increasing capacity. Voting by mail will produce shorter in-person lines. Those least able to wait in lines will be able to avoid them entirely.

Bipartisan Contingencies for Grappling with New Technology

As the Board of Elections has implemented tablets to facilitate Election Day tasks, NYDLC 2017 reporting reveals a host of novel but resolvable administrative issues. For example, poll workers would benefit from having more guidance on how to deal in a consistent, transparent, and bipartisan manner when the WiFi does not work in the polling place itself, but may work nearby. Doing so would set a baseline for appropriate troubleshooting of routine issues and, even if every circumstance could not be provided for, could enunciate a set of values and considerations that would avoid the need for ad hoc solutions.

Improving Poll Worker Recruitment and Quality

Revitalizing the poll worker recruitment process would enable the Board of Election to select from a larger and more diverse pool of applicants, improving poll worker quality and attendance.

- **Attorneys as Poll Workers:** In 2013 the BOE implemented a program to recruit attorneys as poll workers. Participants proved to be excellent poll workers and we recommend that this program be expanded and continued.
- **College and Law Students as Poll Workers:** The Board may explore partnering with CUNY and other colleges, including law schools to establish credit programs for students serving as poll workers. Since *pro bono* hours are now required for New York Bar admission, the BOE should consider ways that Election-related voluntarism can qualify.
- **High School Students as Poll Workers:** Current law allows 16- and 17-year-olds to serve as poll workers. Tapping into this population by working with the Department of Education to develop responsible programming would help foster a culture of youth civic engagement. Students approaching voting age would experience the exercise of civil rights up close. Such a program would help forge community bonds and normalize a sense of shared civic responsibility for the successful administration of our democratic process.
- **Half-Day Shifts:** NYDLC supports the implementation of half-day poll worker shifts that are already permitted by law, because a shift of 17 hours is a major barrier to participation among potential applicants. Moreover, in so many “public trust” contexts, our society has determined that lengthy shifts are undesirable because they lead to fatigue-related mistakes. Working so many hours lead to reduced attention to detail, patience, and overall quality, which is why they are prohibited in public health and safety occupations. Further, we know that with such important civil rights and outcomes at stake, hours of tension and stress can build up among a small group of people leading to hostility, which undermines professionalism, accountability, timely issue-resolution, and team morale.

Comprehensive Modernization and Voter Access Reforms

Many of the cascading problems noted above are exacerbated by squeezing our election into one day for millions of people to vote. By doing so, we continue to invite small issues to have magnified negative impact on the process. Pulling together the aforementioned issues, along with others that have been raised in past years, there is no getting around the urgent need for New

York to comprehensively overhaul our voter registration and election processes. The path forward on improving voter access should include the following proposals:

- To adequately protect fundamental rights, lawmakers must provide reasonable opportunities for voters to access and cast a ballot. By arbitrarily and prematurely cutting off registration 25 days—over three weeks—in advance of Election Day, New York rigidly “freezes” the electorate before many busy and otherwise eligible New Yorkers have an opportunity to get involved. These potential voters are boxed out of participating in our democracy just when they may be most interested in tuning in. New Yorkers who move counties must manually re-register, instead of having their registration transferred by the respective local Boards. Narrow opportunities to ballot at a single location on our single weekday Election Day result in thousands of lost votes.
- The rigid registration rules make it impossible to submit basic clerical changes discovered during the final weeks before an election, like updating addresses or names. To compound this, our registration system is still largely paper-based, so typos and transcription errors cannot be cured. In the aggregate, these rules exacerbate already long lines on Election Day and result in an increased reliance on affidavit ballots.
- There are many steps we can take, like enacting online and automatic voter registration, registration portability, youth pre-registration, and moving away from paper-based registration. For balloting, we should offer all voters the option to vote by mail, and must provide a reasonable election period that includes weekends, so voters have a multi-day window in which to vote. Election Day should be reframed as the last opportunity to vote, and not the first and only day. Early voting should be welcome by every Board because it alleviates systemic pressure while providing voters with convenient options. This would improve nearly every issue discussed above.
- We should ultimately enact one-stop voting (same-day registration and voting), but in the interim, adopting a “Golden Week” model—where the end of the registration period overlaps with early voting—would be a major improvement. In sum, to modernize our laws and adequately protect fundamental civic rights, New York needs to comprehensively overhaul its voter registration and election administration system.

Conclusion

Because fair and credible elections and positive civic engagement are bedrocks of our democracy, we want to thank the City Council for taking a proactive posture toward improving election administration in our city. We urgently need Albany to do the same. NYDLC offers our expertise and assistance to the City Council and Board of Elections to improve our elections.