

**To:** Jasmine Georges-Yilla, Executive Director, Board of Correction; Lynelle Maginley-Liddie, Commissioner, NYC Department of Correction; Rodney L. Pepe-Souvenir, President, NYC Board of Elections; Michael Ryan, Executive Director, NYC Board of Elections

**From:** Vote in NYC Jails Coalition

**Date:** June 25, 2024

**Re: Memorandum Detailing Repeated Failures of New York City Board of Elections and New York City Department of Corrections to Provide Meaningful Ballot Access to Individuals Detained in New York City Jails**

## **I. Introduction and Background**

This letter highlights the repeated failures of the New York City Board of Elections (“BOE”) and New York City Department of Correction (“DOC”) to provide meaningful voting access to individuals detained in New York City jails. In contravention of the spirit of the John R. Lewis Voting Rights Act of New York,<sup>1</sup> the BOE and DOC continue to deprive detained individuals their fundamental right to vote. While the BOE has continued to take the position that it is meeting the needs of these community members, a closer view shows that it in fact is not.

The Vote in Jails NYC Coalition (“VJC” or the “Coalition”) has worked closely with the DOC for the past two years to increase voter registration and absentee ballot distribution at Rikers. We have sent multiple letters<sup>2</sup> detailing the shortcomings of both agencies in meeting the needs of the vulnerable populations in New York City jails, most of whom are Black, Latinx, and people of color being held pre-trial, not yet convicted of any offense and otherwise eligible to vote. We most recently sent a letter detailing concerns by our coalition on February 13, 2024, which the BOE responded to on April 16, 2024.

## **II. History of Our Efforts and Persistent Issues**

In 2023, thanks to the efforts of the VJC, DOC received 227 ballots from the BOE, which involved a single DOC employee making multiple trips to the five borough board of elections offices. More than 100 voters who submitted ballot request forms through the DOC employee were rejected. One-hundred six ballots were completed and returned by the employee to the appropriate board of elections office. Fifty-three voters were released from DOC custody, rendering them ineligible to vote absentee, and sixty-eight ballots were not counted for other

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<sup>1</sup> N.Y. Elec. Law § 17-212(1)(b)(iii) (Emphasizing the legislature’s commitment to eliminating policies that “obstruct [], impede[], or otherwise interfere[] with any voter in any manner that causes or will reasonably have the effect of causing any delay in voting or the voting process, including the canvassing and tabulation of ballots.”)

<sup>2</sup> We previously sent letters to the BOE on various issues implicated by individuals in detention. *See* Letter from Vote in NYC Jails Coalition to Bill DeBlasio, Mayor of the City of N.Y., Margaret Egan, Exec. Dir. Of the Bd. of Corr., Cynthia Brann, Comm’r of Dep’t of Corr., and BOE (Mar. 30, 2021); Letter from the Vote in NYC Jails Coalition to the BOE (June 7, 2022); Letter from the Vote in NYC Jails Coalition to the BOE (Nov. 1, 2022); Letter from the Vote in NYC Jails Coalition to the BOE (Apr. 2, 2024).

unknown reasons. Voters were not given the opportunity to cure their ballot or ballot request form.

In 2024, similar patterns have persisted. Through the efforts of the Coalition, 582 individuals have been registered and 534 absentee ballot requests have been submitted so far in 2024. For the April 2, 2024 primary, 296 absentee ballots were requested by individuals detained at Rikers Island. One-hundred seventy-one of those absentee ballots were returned to the DOC, reflecting a loss of 125 applications. The reasons for the decline in the number of absentee ballots collected by the DOC raises serious concerns because of the high volume and lack of sufficient justification. Ultimately, the DOC only returned 119 ballots to the BOE and the BOE has not disclosed how many votes were counted.

### **III. New York State Law Mandates that the New York City Board of Elections and New York City Department of Correction Enable People Detained Pre-Trial to Cure Their Absentee Ballots and Absentee Ballot Request Forms**

New York Election Law provides “A qualified voter may vote as an absentee voter under this chapter if . . . he or she expects to be absent from his or her voting residence because he or she is **detained in jail awaiting action by a grand jury or awaiting trial, or confined in jail or prison after a conviction for an offense other than a felony**, provided that he or she is qualified to vote in the election district of his or her residence.” N.Y. Elec. Law § 8-400(1)(d) (emphasis added).

An **absentee voter qualified to vote at any election must apply** pursuant to section 8-400(2) of the Election Law. Application **forms for absentee ballots must be furnished by local boards of election** “until the day before such election.” Elec. Law § 8-400(2)(a), *see also* § 8-400(2)(c) (requiring that applications be received no later than one day before an election if delivered by hand, or ten days prior to an election if delivered via mail or the electronic absentee ballot application transmittal system). The BOE is required under Election Law to facilitate the application process in a manner that **enables the voter to cast their absentee ballot in the next election for which the voter is eligible** and will be absent from their county of residence for whatever period they are lawfully absent under the provision. *See* Elec. Law § 8-402(4) (requiring that the BOE ensures the voter has “one secular day” to mark their absentee ballot and has “time for the return of such ballot to the board of elections by the deadline for its receipt”); *see also* § 8-400(2)(a), (d) (describing requirements for when absentee ballot applications must be received and how and when the BOE must deliver absentee ballots to voters). “Upon receipt of an application for an absentee ballot” the board of elections **must determine whether the applicant is qualified to vote** and entitled to receive an absentee ballot, if the board of elections finds that the applicant is not qualified it must reject the application after an investigation. Elec. Law § 8-402(1). Notably, if the Board of Elections determines the applicant is not eligible “it **shall immediately notify the applicant**, giving him the reason for such rejection.” Elec. Law § 8-402(5) (emphasis added).

The Board of Elections has failed to consistently abide by the mandates of state Election Law by failing to create a process which enables individuals in detention, without freedom of movement, the ability to rectify mistakes on absentee ballots and thus has deprived countless individuals of their fundamental right to vote. Based on information available to us, it is not clear that the BOE has issued any formal notices of ineligibility to individuals as required under Election Law § 8-402(1). It also is not clear whether, consistent with § 8-402(1), any investigations have been conducted to determine whether individuals in detention are in fact eligible under § 8-400(1)(d) for an absentee ballot all of which must occur “not later than the day before the election for which a ballot is first requested, or if such ballot is to be sent by mail, such determination shall be made at a time which will afford sufficient time for the transmission of the ballot to the voter, one secular day for the voter to mark such ballot and execute the statement of absentee voter, and time for the return of such ballot to the board of elections by the deadline for its receipt.” Elec. Law § 8-402(4). These failures fall on the BOE and not DOC as New York Election Law clearly delegates that responsibility to the BOE and no one else.<sup>3</sup> See Elect. Law § 1-104 (defining “boards of elections” to mean the boards of elections of any county in the state and the Board of Elections of New York City); see also § 8-402 (delineating the BOE’s responsibility to make absentee ballot application determinations, to perform investigations on the bases of eligibility or ineligibility on a particular absentee ballot application, and to notify the applicant of ineligibility and the underlying basis for denial of eligibility).

The BOE, in compliance with New York Election Law, must reconsider its current systems and practices to ensure that individuals in detention, pursuant to N.Y. Election Law § 8-400(1)(d), are provided with the same level of access and ability to correct their absentee ballot applications. When the BOE determines that an applicant is ineligible for an absentee ballot the BOE must immediately notify the individual, not DOC, of the ground of ineligibility; This will allow the voter to determine next steps to cure or correct the application or to pursue relief as is so appropriate based on their individual circumstances.

#### **IV. The BOE Must Create a Process That Enables Individuals in Detention the Ability to Cure Defects that May Exist in Their Absentee Ballots**

New York Election Law § 9-209(3) requires BOE to “review absentee ballots as they arrive; identify minor, curable defects (such as missing signatures); and immediately inform voters of their right to correct those [defects].” *Tenney v. Oswego Cnty. Bd. of Elections*, 70 Misc. 3d 680, 683, 136 N.Y.S.3d 853, 856 (N.Y. Sup. Ct. 2020).

Under New York State Election law, a curable defect includes instances where the ballot envelope:

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<sup>3</sup> While the BOE has consistently taken the position that it is the responsibility of the DOC to facilitate the “enfranchisement of [i]/detainees” pursuant to New York City Charter § 1057a(9) and (10), with § 1057-a(10) referenced in the BOE’s 4/16/2024 reply, New York state election law is clear in its delegation of absentee ballot application eligibility determination to the BOE and no other body. See Elec. Law § 8-402.

(i) is unsigned; (ii) has a signature that does not correspond to the registration signature; (iii) has no required witness to a mark; (iv) is returned without a ballot affirmation envelope in the return envelope; (v) has a ballot affirmation envelope that is signed by the person that has provided assistance to the voter but is not signed or marked by the voter; (vi) contains the signature of someone other than the voter and not of the voter; or (vii) is returned by mail between two and seven days after the election without a postmark.

Elec. Law § 9-209(3)(b).

The BOE **must** “indicate the issue that has to be cured on the ballot envelope and, **within one day of such determination**, send to the voter's address indicated in the registration records and, if different, the mailing address indicated on the ballot application, **a notice explaining the reason for such rejection** and the procedure to cure the rejection.” Elec. Law § 9-209(3)(c) (emphasis added). The BOE is obligated to “**contact the voter by either electronic mail or telephone**, if such information is available to the board in the voter's registration information, to notify the voter of the deficiency and the opportunity and the process to cure the deficiency. *Id.* (emphasis added).

If the BOE determines that the defect is not curable, the BOE “**shall notify the voter by mail, sent within three business days of such rejection**, and by either electronic mail or telephone, if such information is available to the board in the voter's registration information, **and notify the voter of other options for voting, and, if time permits, provide the voter with a new ballot.**” Elec. Law § 9-209(3)(h) (emphasis added). Ultimately, if the ballot envelope contains one or more curable defects that have not been timely cured, the ballot envelope shall be set aside for review pursuant to section 9-209(8) of the Election Law. Elec. Law § 9-209(3)(f).

Absentee ballots are not invalid and do not require curing if: “(i) a ballot envelope is undated or has the wrong date, provided it is postmarked on or prior to election day or is otherwise received timely by the board of elections; (ii) the voter signed or marked the ballot affirmation envelope at a place on the envelope other than the designated signature line; (iii) a voter used a combination of ink (of any color) or pencil to complete the ballot envelope; (iv) papers found in the ballot envelope with the ballot are materials from the board of elections, such as instructions or an application sent by the board of elections; (v) an extrinsic mark or tear on the ballot envelope appears to be there as a result of the ordinary course of mailing or transmittal; (vi) the ballot envelope is sealed using tape, paste or any other binding agent or device and there is no indication of tampering; or (vii) the ballot envelope is partially unsealed but there is no ability to access the ballot.” Elec. Law § 9-209(3)(g)

Again, while the BOE may take the position that, pursuant to New York City Charter § 1057-a subdivisions (9) and (10), the DOC is solely responsible for facilitating this process, **that is a misreading of controlling state law which definitively delegates the ballot curing responsibility to the BOE and not the DOC.** Elec. Law § 9-209. Understanding that the DOC plays a critical role in facilitating that process, however, we want to endeavor to clarify the lines of responsibility and work collaboratively to ensure that no voter is disenfranchised. **We request a meeting with BOE officials and DOC officials**

**promptly to discuss, formalize, and implement an appropriate and lawful plan to facilitate the cure process for individuals currently in detention and eligible to vote by absentee ballot as outlined in New York Election Law § 9-209.**

## **V. Conclusion**

We await the BOE's formal response to our requests and appreciate the BOE's cooperation in this matter. We hope our shared goal of enfranchising all New Yorkers regardless of detention status unifies our groups to ensure that no eligible voter is left behind.

Sincerely,

The Vote in NYC Jails Coalition

Member organizations include: The Legal Aid Society, LatinoJustice PRLDEF, The Community Services Society of New York (CSS), Freedom Agenda, The Bronx Defenders, National Action Network, VOCAL-NY, League of Women Voters NYC, Sorensen Center for International Peace and Justice, New York City Public Advocate's Office, PROP (Police Reform Organizing Project), NAACP Legal Defense Fund, Five Boro Defenders, NYU Center on Race, Inequality, and the Law (CRIL).

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