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Legal Alert: Early Mail Voting

1 message

NYSSBA Legal Alerts <legalalert@nyssba.org>

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Early Mail Voting

On September 20, 2023, Governor Hochul signed into law Chapter 481 enacting the New York Early Mail Voter Act. Unlike with absentee voting, voters requesting an early mail ballot need not supply a reason why they cannot appear in person at the polls on election day.

Under the law, school districts with personal registration must use an application form approved by the State Board of Elections. NYSSBA drafted a form and submitted it to the State Board of Elections. That form was approved at the Board's meeting on February 6, 2024 (archived recording of the meeting may be found here: <https://elections.ny.gov/event/february-06-2024-commissioners-meeting>). A link to the approved form is included with the general questions and answers about the law that follow. The State Education Department plans to post the application to its website as well.

A lawsuit challenging the validity of the New York Early Mail Voter Act, *Stefanik v. Hochul*, was dismissed by Albany County State Supreme Court Justice, Christina L. Ryba, on February 5, 2024 (https://nycourts.gov/reporter/3dseries/2024/2024_24034.htm). It is unknown if the plaintiffs will file an appeal.

In General

Must school districts make available early mail ballots?

Yes. All school districts are required by law to make early mail ballots available to qualified voters for the election of school board members, district public library trustees, the adoption of the annual school budget, and district public library budgets and referenda (Educ. Law §§ 2018-e, 2018-f, 2613).

Are boards of cooperative educational services (BOCES) subject to the early mail voting requirements?

BOCES are required to supply early mail ballots, but only when submitting a proposition to the voters for purchase or sale of real property, building construction or additions thereto. The commissioner of education is authorized to adopt regulations to implement early mail voting for

such BOCES referenda (Educ. Law § 1951(2)(t)).

Who is entitled to an early mail ballot?

Early mail ballots must be provided upon proper application to any qualified voter of the school district (Educ. Law §§ 2018-e(2)(e), (f), 2018-f(3), (4)).

Issuance of Early Mail Ballots

How do voters obtain an early mail ballot?

Voters must submit an early mail ballot application to their school district (Educ. Law §§ 2018-e(2)(b), 2018-f(2)(a)).

However, voters in school districts without personal registration also have the option to request an early mail ballot by letter (Educ. Law § 2018-f(4)). A voter who makes a request by letter is sent both an application and a ballot to complete and return, as discussed in a question below.

The ballot application used in districts with personal registration must be in a form prescribed by the state board of elections (Educ. Law § 2018-e(2)(b)), which can be found at:

https://www.nyssba.org/clientuploads/nyssba_pdf/PrintOnDemand/proposed-resolution-24-04-evbm-school-application-with-form.pdf.

When must early mail ballot applications be made available?

With the exception of early mail ballots issued upon receipt of a request by letter as permitted in districts without personal registration, nothing in the law specifies how far in advance of an election school districts must begin making applications for early mail ballots available (see Educ. Law § 2018-f(4)).

However, since the notice of the district meeting must include a statement that qualified voters may apply for early mail ballots at the clerk's office (Educ. Law § 2004(7)), as a practical matter, ballot applications should be made available at the time of the first publication of the notice of the district meeting and must be made available far enough in advance of the meeting date to permit voters to apply for and return completed ballots as required by law.

May a school district issue an early mail ballot to a voter who has not submitted an application?

Yes, but only in school districts without personal registration. In such districts, any qualified voter may request a ballot by signed letter, rather than by application. The letter must be received by the district clerk or designee no earlier than 30 days before the election and no later than seven days before the election. Upon receipt of the letter request, the clerk must send both an application and a ballot to the voter at the same time. The voter then completes both the application and the ballot and returns them together to the district. In fact, the law specifically provides that the ballot will not be counted unless the completed application is returned with it (Educ. Law § 2018-f(4)).

Is there a deadline by which school districts must receive a request for an early mail ballot?

Yes. In school districts with personal registration, the early mail ballot application must be received by the district no earlier than the thirtieth day before the election (Educ. Law § 2018-e(2)(e)). If the early mail ballot is to be mailed to the applicant, the application must be received no later than seven days before the election. If it is to be delivered in person to the voter or his/her agent, the application must be received no later than the day before the election (*Id.*).

In districts without personal registration, the early mail ballot application must be received at least seven days before the election if the ballot is to be mailed to the voter, or the day before the election if the ballot is to be issued in person to the voter (Educ. Law § 2018-f(2)(a)).

Nonetheless, voters in districts without personal registration may request an early mail ballot by signed letter rather than application, subject to certain specified conditions (Educ. Law § 2018-f(4)).

Are there any procedures that school districts must follow when issuing early mail ballots?

Yes. Before actually sending an early mail ballot to individuals requesting one, districts must review all such applications and determine whether the applicant is a qualified voter (Educ. Law §§ 2018-e(2)(f), (3), 2018-f(3)).

In addition, in districts with personal registration, early mail ballots must be mailed to the

address set forth in the application no later than six days before the election. However, if the applicant or his/her agent delivered the application in person after the seventh day before the election and not later than the day before the election, the early mail ballot must be delivered to the applicant, or the agent named in the application, when the applicant or the agent appear in the district clerk's office (Educ. Law § 2018-e(2)(f)).

In districts without personal registration, early mail ballots may be mailed or issued in person only directly to the applicant (Educ. Law § 2018-f(3)).

Must a school district maintain a list of individuals who have been issued early mail ballots?

Yes. The school district's board of registration in districts with personal registration must make a list of all persons to whom early mail ballots have been issued and file the list in the office of the district clerk, where it must be available for public inspection during regular office hours until the day of the election (§ 2018-e(6)). In addition, the board of registration must place those names in the district's register indicating that those persons applied for and were issued such a ballot (Educ. Law § 2018-e(3)).

Similarly, in districts without personal registration, the district clerk or other designee of the school board must make a list of all persons to whom early mail ballots were issued and make it available for public inspection during regular office hours until the day of the election (Educ. Law § 2018-f(7); but see § 2004(7)). An appropriate entry must be made on the poll list (Educ. Law § 2018-f(3)).

What is the deadline for the submission of early mail ballots?

To be counted, an early mail ballot must have been received in the office of the district clerk (clerk or designee of the school board in districts without personal registration) by 5:00 p.m. on the day of the election (Educ. Law §§ 2018-e(8), 2018-f(9)).

Counting Early Mail Ballots

Note: The statutes governing early mail ballots (Educ. Law §§ 2018-e, 2018-f) largely mirror the language of the statutes governing absentee ballots (Educ. Law §§ 2018-a, 2018-b). As such, if questions arise regarding the counting of early mail ballots, a school district should consult with its attorney, who may refer to prior decisions of the commissioner of education addressing the counting of absentee ballots.

Can an early mail ballot be challenged?

Yes. Any qualified voter may file a written challenge to the qualifications of any person whose name appears on the list of individuals issued an early mail ballot, stating the reason for such challenge (Educ. Law §§ 2018-e(6), 2018-f(7)). Early mail ballot challenges may not be made on the basis that the voter should have voted by absentee ballot. The written challenge must be transmitted by the clerk or designee to the election inspectors on the day of the election (*Id.*).

In school districts with personal registration, a qualified voter may also challenge an early mail ballot during the public canvassing of such ballots after the polls close (Educ. Law § 2018-e(10), (11)).

Must early mail ballots be counted in public?

It depends. In school districts with personal registration early mail ballots must be examined and opened in public to permit a qualified voter to make a challenge (Educ. Law § 2018-e(11)).

The language of section 2018-f of the Education Law governing early mail ballots in districts without personal registration lacks any requirement to open such ballots in public view.

Are there certain steps that election inspectors must follow before counting early mail ballots?

Yes. Immediately after the closing of the polls, the election inspectors must examine the early mail ballots. If a person's name on an envelope as a voter has already voted in person, or if there is no signature on the envelope, it will be set aside unopened and returned to the clerk (Educ. Law §§ 2018-e(10), 2018-f(11)). In districts with personal registration, the election inspectors will also compare the signature on each envelope with the signature on the register of the person of the same name registered at the same address. If the signatures correspond, the inspectors certify thereto by signing their initials opposite the name of the voter in the register (Educ. Law § 2018-e(10)). In addition, the election inspectors must determine each challenge in accordance with the statutory procedures. If a challenge is sustained the envelope will not be opened and

the ballot will not be counted (Educ. Law §§ 2018-e(11), 2018-f(11)).

How are early mail ballots counted?

After the closing of the polls, the election inspectors examine early mail voters' ballots received by the district in the manner required by law.

Absent any grounds for rejecting such ballots, the election inspectors will open the envelope containing the early mail ballot, withdraw the ballot and deposit it in the proper ballot box without unfolding it. These ballots must remain folded until they are actually counted (Educ. Law §§ 2018-e(10), 2018-f(11); see also §§ 2018-e(6), 2018-f(7)). The election inspectors will then count or canvass the early mail ballots along with the other ballots cast or the votes recorded on voting machines (Educ. Law §§ 2018-e(12), 2018-f(12)).

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