



State of New Jersey
DEPARTMENT OF THE PUBLIC ADVOCATE
240 WEST STATE ST.
P.O. BOX 851
TRENTON, NJ 08625-0851
PHONE: (609) 826-5090 FAX: (609) 984-4747

JON S. CORZINE
Governor

RONALD K. CHEN
Public Advocate

May 30, 2008

**VIA FACSIMILE AND
ELECTRONIC MAIL**

Donna Kelly, Esq.
Assistant Attorney General
Department of Law and Public Safety
Hughes Justice Complex
2nd Fl., P.O. Box 112
Trenton, NJ 08625

Re: Credentialing Rules for Exit Polling, 40 N.J.R. 1772(a) (Apr. 7, 2008)

Dear Ms. Kelly:

The following constitute the comments of the New Jersey Department of the Public Advocate ("Department") on the pre-proposal entitled "Credentialing Rules for Exit Polling," 40 N.J.R. 1772(a) (Apr. 7, 2008).

Initially, we refer you to two prior documents prepared by the Department about the subject of exit polling: (1) our December 28, 2006 letter to then-Attorney General Rabner (hereinafter, the "Comment Letter"); and (2) our amicus curiae brief and appendix in In re Attorney General's "Directive on Exit Polling: Media and Nonpartisan Public Interest Groups" issued July 18, 2007, Dkt. No. A-543-07T1 (N.J. App. Div.) (hereinafter, "Amicus Brief"). We designate those documents and any and all sources referenced in those documents as part of the

record of these proceedings. To the extent not inconsistent with our statements herein, we rely on those documents.

As a general matter, we reiterate our view that under applicable provisions of Title 19, exit polling and election-protection activities are permissible outside of polling places, and within 100 feet from the entrance to the “polling place or room,” i.e., the actual room or location within the building where voting occurs, and provided that the poll entrance is not thereby obstructed. See generally Comment Letter at pp. 1, 5-8. As you know, we do not share your view of the most relevant statute in this case, N.J.S.A. 19:34-6, as generally “proscribing expressive . . . activities” (but see 40 N.J.R. at 1772). Rather, we interpret the statute as proscribing only one specific type of arguably expressive activity – electioneering – with its other provisions directed at conduct such as obstructing, defacing, tampering or interfering with a polling place or voter attempting to vote.

As the statute itself does not define “electioneering,” we should rely on the commonly understood dictionary definition of the word: to promote or work actively for or against a particular candidate, political party, or ballot question. A broader interpretation of N.J.S.A. 19:34-6 would be constitutionally suspect. The statute should be narrowly construed to avoid potential conflict with the free expression guarantees of the federal and state constitutions. Due respect for the doctrine of constitutional avoidance is especially important here because N.J.S.A. 19:34-6 defines a criminal offense that can result in lengthy imprisonment.

We therefore do not interpret “electioneering” as that term is used in N.J.S.A. 19:34-6 et seq. as anything more than advocating that the voter cast his or her vote for or against a particular candidate for office, party, or public question. We believe that regulations that proscribe conduct beyond that narrow definition are not authorized by statute and may well result in constitutional infirmity. As a result, we do not think that any regulations, directives, or other constraints on exit pollsters or election-protection workers are appropriate. We acknowledge, of course, that your client may have a different view of this, and that it will ultimately be up to the judiciary to decide which of these views is correct. Subject to the final outcome of that litigation, therefore, we offer the following comments on the pre-proposal:

Rulemaking authority

As even the pre-proposal was published when the Attorney General was no longer chief election official, and the final regulations will issue long past the transfer of that position to the Secretary of State, the authority of the Department of Law and Public Safety to issue the proposed regulations is in serious question. We do not view N.J.S.A. 19:34-6, -7, and -15, or N.J.S.A. 52:17B-98 – either individually or collectively – as providing the necessary authority to regulate the conduct and speech of persons assisting voters and not engaged in electioneering (as defined above) outside polling places, or to authorize regulation by the issuance of permits to such persons.

N.J.S.A. 52:17B-98 is merely a declaration of legislative policy conferring no substantive authority, stating simply that:

It is hereby declared to be the public policy of this State to encourage cooperation among law enforcement officers and to provide for the general supervision of criminal justice by the Attorney General as chief law enforcement officer of the State, in order to secure the benefits of a uniform and efficient enforcement of the criminal law and the administration of criminal justice.

It is implausible to claim that a prefatory and precatory declaration of general legislative intent, which, according to our research, has never been used to claim rulemaking authority by the Attorney General, can support rulemaking authority here. This is especially so when the subject matter of the regulation, elections and voting, was already under the primary jurisdiction of another member of the Cabinet. Construing N.J.S.A. 52:17B-98 to grant rule-making authority to the Attorney General would create a rule without any limiting principle. While this statute may authorize the Attorney General to issue personnel and procedural directives, internal to state law enforcement, we do not believe it authorizes the Attorney General to issue rules regulating the primary conduct of citizens, and certainly cannot authorize the Attorney General to augment or revise the statutory definition of criminal conduct.

A more apt source of regulatory authority would be N.J.S.A. 52:16A-98(b) and the doctrine of incidental regulatory powers as described in N.J. State League of Municipalities v. Dep't of Cmty. Affairs, 158 N.J. 211, 223 (1999).¹ By its terms, that statute is an express grant of power to the Secretary of State to serve as chief election officer. If there is any authority to make rules regulating free speech designed to inform voters of their legal rights (which we deny), it comes from that statute and the incidental powers doctrine, and not from N.J.S.A. 52:17B-98; and that power devolves to the Secretary of State, not the Attorney General. As noted above, however, we do not read even this statute as authorizing the Secretary to promulgate rules that proscribe expressive activity beyond the narrow definition of "electioneering."

Text of proposal

The definition of "protected zone" is subject to misinterpretation as currently written in proposed section 13:17-7.2.² As we noted above, N.J.S.A. 19:34-6, -7 and -15 are primarily directed toward conduct, rather than "constrain[ing] expressive activity," so the reference to

¹ The "grant of authority to an administrative agency is to be liberally construed in order to enable the agency to accomplish its statutory responsibilities and . . . courts should readily imply such incidental powers as are necessary to effectuate fully the legislative intent."

² "'Protected zone' means any of the 100-foot zones surrounding a polling place as prescribed in N.J.S.A. 19:34-6, 7, or 15, within which expressive activity is constrained on election days while an election is in progress."

expressive activity only muddles the definition. By its constitutionally provocative wording it also unnecessarily triggers an adverse inference against government regulation (since under the First Amendment all government regulation of expressive activity is inherently disfavored). Moreover, the existing cross-reference to other statutes that create varying 100-foot zones fails to create the clarity that regulations are supposed to provide. Therefore, we suggest that, to promote clarity and to avoid triggering a controversy about whether the qualifying clause in the draft impermissibly enlarges the statutory purpose, the proposal should instead follow precisely the words of the cited statutes, and should read: “‘Protected zone’ means an area that is (a) inside a polling place or room; (b) one hundred feet or less from a polling place or room; and (c) one hundred feet or less from the outside entrance of the building that houses a polling place or room.”

In addition, the term “polling place” should be defined. As we argued in the Comment Letter, pp. 1 and 2, “polling place” has a specific meaning under N.J.S.A. 19:8-1. As such, any regulation should state, “‘Polling place’ means the actual room or location within a building where the tables and voting machines are set up, but does not mean the entirety of the building itself.”

The absence of a definition of “exit polling” also troubles us. We have previously explained that this term is subject to varying interpretations. See generally Amicus Brief at pp. 7-9 and 25-26. If adopted, the regulation should explain that “‘exit polling’ means any voluntary and non-coercive communication with a person exiting a polling place about how the person voted in the election or how the person experienced the voting process, including but not limited to the presence or absence of knowledgeable and respectful poll workers, poll workers’ demands or requests for identifying documents, the presence or absence of voter information in the polling place, the availability of information or assistance in multiple languages, and barriers to voting.”

Proposed section 13:17-7.3 also concerns us. Subsection (a) suggests that only an “entity” may submit a letter to the county boards for exit polling. Obviously, individuals unaffiliated with an “entity” should have the same rights to perform exit polling, and we therefore suggest that the regulation be revised to read “entity or person” at all places throughout the regulation.

Next, subsection (a) requires the request letter to “provide sufficient information to confirm that the entity is authorized by law to” conduct exit polling and subsection (b) requires a county board to evaluate this information. These provisions imply that some groups are “authorized” to perform exit polling, but others are not. We are unaware of any existing process by which someone becomes “authorized” to conduct exit polling, and indeed the First Amendment may very well prohibit such a licensing scheme on speech. Natural persons, as well as unincorporated, for-profit, non-profit, and even tax-exempt entities, all are authorized to conduct exit polling, in that all of them possess inherent speech rights. (See Comment Letter, p.7). If this sentence is intended to inquire as to whether an incorporated entity might be acting *ultra vires*, i.e., outside its corporate purposes as stated in its articles of incorporation, then it should so state, but we question whether that inquiry has any relevance to the core purpose of the

electioneering statute. The proposed draft provides no guidance for distinguishing between authorized or unauthorized groups, nor does it explain how county boards would possess the ability to distinguish them, especially in the short time frames under which county boards will be acting. We recommend deleting the last sentence of subsection (a) and any terms in subsection (b) about the county boards' review of letters for "authorization" to conduct exit polling.

Finally, subsection (b) does not provide any deadline by which the board must provide the "authorization letter" and individuals' credentials. In the case of groups, applicants must obtain the credentials and distribute them to the persons acting on their behalf in sufficient time before the election. Therefore, we recommend that subsection (b) provide that the board must hand-deliver or use the mail or an overnight courier service to deliver the authorization letter and credentials so that the applicant receives them not less than five business days before election day.

Discussion section

We also have a few observations about the discussion section of the proposed regulation.

First, we respectfully disagree with the assertion in the discussion that "the February 5, 2008, primary election proceeded without incident insofar as the Directive is concerned." While we acknowledge that the February 5 primary may have proceeded without incident insofar as the Attorney General is concerned, this observation pretermits the very issue raised in In re Attorney General's "Directive on Exit Polling". In connection with that litigation, the American Civil Liberties Union of New Jersey filed three certifications from persons which contradict the State's claim of no Directive-related incidents. Moreover, an April 17, 2008, letter from the Asian American Legal Defense and Education Fund, addressed to you, also disputes the claim of no Directive-related incidents during that election. At a minimum, therefore, the record reveals a factual dispute about problems with implementation of the Directive.


In addition, a regulatory proposal (as distinct from a pre-proposal) will normally include a federal standards analysis or other forms of justification for its adoption. This proposal's discussion section implies that criminal penalties may be imposed on exit pollsters and election protection workers who are assisting voters in exercising the franchise in areas where they can normally aid voters. However, the federal Voting Rights Act protects the rights of persons who are "aiding [another] person to vote or attempt to vote." 42 U.S.C. § 1973i(b); see also Johnson v. Mississippi, 421 U.S. 213, 236 (1975) (Marshall, J., dissenting). We therefore look forward to reading your views of how Appendix A of this regulation (i.e., the Directive) is justified in the face of this apparently pre-emptive federal statute.

Thank you for your consideration of our views. We look forward to a continuing and productive dialogue on this matter.

Very truly yours,

RONALD K. CHEN
Public Advocate

By:


FLAVIO L. KOMUVES
Deputy Public Advocate

cc: Kay Henderson, Esq.