



1 May 2020

Representative Paula Hicks-Hudson
44th Ohio House District

Representative Michelle Lepore-Hagan
58th Ohio House District

Representative Bride Rose Sweeney
14th Ohio House District

Sent Electronically

Dear Representatives,

Thank you for your letter of April 30 in which you ask me to provide direction to the county boards of election regarding how provisional ballots that were cast in the 2020 primary election should be reviewed by the boards. I am happy to report that my team and I had already begun discussing this matter with the bipartisan officials at the county boards of elections and had begun drafting such guidance by the time I received your letter.

As you know, a provisional ballot is a failsafe that allows a voter whose identity or eligibility to vote is in question to cast a ballot that is reviewed after the election and, if the voter's eligibility to vote in that election is verified, have that ballot counted. Provisional voting ensures that no eligible elector is denied the opportunity to cast a ballot in an election. In addition to Ohio law requiring provisional ballots, the Help America Vote Act ("HAVA") requires every state to offer provisional voting in each federal election.

Section 32 of HB 197, the coronavirus relief bill for which you recently voted, was the General Assembly's plan for concluding the March 17, 2020, primary election. Section 32(D)(1) of HB 197 provided that only the following classes of electors may vote in person on April 28, 2020:

(a) An elector to whom division (C)(1)(a) of this section applies, who has a disability, and who wishes to cast absent voter's ballots using a direct recording electronic voting machine or marking device that is accessible for voters with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation, including privacy and independence, as for other voters. Each board shall have at least one such machine or device available for use at the office of the board.

(b) An elector to whom division (C)(1)(a) of this section applies and who is unable to receive mail at the place where the elector resides or at another location.

Sections 32(C)(3) and 32(E) of HB 197 required all other electors who had not yet voted in the 2020 primary election to apply for an absentee ballot by mail and to return the same to their board of elections. Section 32(C)(7) of HB 197 explicitly required that a county board of elections provide a voter with a provisional ballot by mail if the board determined that a voter's absentee ballot application was "not valid because the applicant is an elector who has moved or had a change of name without updating the elector's registration, as described in section 3503.16 of the Revised Code, or for any other reason, . . ."

I understand that because of the current COVID-19 pandemic, it was the intention of HB 197 to drastically limit the number of voters who could vote in person on April 28 to only the two classes of voters described above. But despite your best intention of protecting the public and the elections officials on duty by limiting who could vote in person that day, my staff and I anticipated that there would be other voters who would likely appear at the polling locations on April 28th. We anticipated that on April 28 there would be instances where voters submitted applications for absentee ballots by the statutory noon deadline on April 25 but did not receive their ballots in their mail and still wished to vote. And we anticipated that on April 28 there would likely be voters who were not informed of, or who were misinformed about, the limited, in-person voting requirements you set in HB 197. Those two situations were not addressed in Section 32 of HB 197.

Because HB 197 did not explicitly address those two situations, and because Ohio and federal law require it, on April 17, 2020, boards of elections were directed to provide provisional ballots to voters who appeared at the county's polling location on April 28. The poster that accompanied Directive 2020-08 was created to inform potential voters arriving at the polling locations on April 28 about the limitations HB 197 placed on in-person voting. The poster also stated, however, that if a voter had applied for an absentee ballot but did not receive it in the mail, then the voter could enter the polling place to seek assistance from an election official.

While Ohio and federal law require that these other April 28 in-person voters be allowed to cast provisional ballots, whether each provisional ballot cast is counted is a different legal issue. As in every election, it is the four members of each bi-partisan county board of elections who determine the validity of a provisional ballot after each election. In a properly advertised public meeting, the board members must verify the eligibility of each person who cast a provisional ballot and the validity of each provisional voter statement. Boards must follow a Step-by-Step Process set forth in Chapter 6 of our Election Official Manual ("EOM") in deciding whether a particular provisional ballot cast should be counted.

Today I issued guidance on provisional ballots to the eighty-eight county boards of election in Directive 2020-09, a copy of which is attached for your reference. The directive applies HB 197 and permanent state and federal law to state that if a voter applied for an

absentee ballot by mail, received a provisional ballot in the mail from their board of elections, and the voter returned that provisional ballot to their board by the pertinent deadline, then that voter's bi-partisan board will review the circumstances that led to a provisional ballot being mailed to the voter and follow the Step-by-Step Process in the EOM to determine if the provisional ballot that was cast by the voter should be counted.

For provisional ballots cast in-person on April 28 by voters who were not eligible to vote in person on April 28 under HB 197, the Directive states that if a board received an absentee ballot application from the in-person provisional voter by the HB 197 deadline of noon on April 25, 2020, the board should proceed with the Step-by-Step Process that is set forth in the EOM in deciding whether to count such a provisional ballot. As part of this analysis, the board will review its records to determine whether the provisional voter cast another ballot in this election.

However, for provisional ballots cast in-person on April 28 by voters who were not eligible to vote in person on April 28 under HB 197, and from whom the board did not receive an absentee ballot application by the HB 197 deadline of noon on April 25, 2020, the board shall not need proceed with the remainder of the Step-by-Step Process. In this instance, the provisional ballot is not eligible for counting because under HB 197, only those voters who have a disability or are unable to receive mail were eligible to vote in person on April 28. All other voters must have met the HB 197 deadline of noon on Saturday, August 25, 2020 to request an absentee ballot by mail. Unfortunately, if the in-person, provisional voter did not have a disability or inability to receive mail and the voter did not apply for an absentee ballot by the HB 197 deadline of noon on April 25, 2020, then under the measure approved by a unanimous, bipartisan vote of the General Assembly on March 25, the voter was not lawfully eligible to vote in person on April 28.

I sincerely wish this were not the case. I ran to serve as Ohio's Chief Elections Official to make the ballot box more accessible for every eligible Ohioan who wants to make their voice heard. However, as a constitutional office holder in the executive branch, I am bound by my oath of office to abide by the law as you and your colleagues write it, even though I advocated for a different path.

I hope this addresses your questions and concerns.

Yours in service,



Frank LaRose