

Meeting of the Select Committee on 2020 Emergency Election Support

Thursday, April 30, 2020 - 2:00 p.m.

Members:

- Bradford E. Cook, Chairman
- Representative Barbara J. Griffin
- Katherine M. Hanna
- Kathy L. Seaver
- Senator Tom Sherman
- Eugene Van Loan III

Also participating:

- William M. Gardner, Secretary of State
- David Scanlan, Deputy Secretary of State
- Orville "Bud" Fitch, Legal Counsel, Secretary of State's Office
- Nicholas Chong Yen, Assistant Attorney General

Deputy Secretary Scanlan:

- Established ground rules for the call: Committee members should be familiar with format. Everyone else listening to the meeting is muted. This will be a listen-only session until such time the Chair says decides to open up the mics. It was determined Dave would record the Zoom meeting.

Chairman Cook:

- Welcomed everyone, explained that this is the first meeting of the Select Committee on 2020 Emergency Election Support, intended to ensure safe and convenient voting for the 2020 elections.
- Noted that Secretary of State Gardner appointed this committee, and asked members to briefly intro themselves.

Chairman Cook is a lawyer in Manchester, and is the Chair of the state Ballot Law Commission.

- Representative Barbara Griffin is a 3rd term State Representative from Goffstown and has worked the polls a number of times. Rep. Griffin is a lawyer and serves on the House Election Law Committee.
- Kathy Seaver served as town clerk for 41 years in Farmington; retired on April 3rd. Has run several elections and hopes to bring that expertise and experience to the table.
- Senator Sherman serves as State Senator for Senate District 24 on the Seacoast and serves as Vice Chair of the Senate Election Law Committee, and is a physician.
- Kate Hanna is a lawyer in Manchester, and is originally from Keene, where she served in the Legislature over 40 years ago. She has served as legal counsel to Governor Lynch and has been involved in voter protection issues for many years.
- Gene Van Loan is a lawyer in Manchester, and lives in Bedford, where he was moderator for over 25 years. Has also served as school district moderator for approximately 15 years.

- Chairman Cook thanked the members for their service and noted that the Secretary of State has indicated he wants this committee to advise him on specific matters within his jurisdiction.
- Secretary Gardner addressed the committee.
 - He noted that on April 6th New Hampshire got the first memo about money available to states. Three days later NH requested clarification on how we could achieve the required state match. Once we got our answers, on April 14th we formally acknowledged that we would accept the funds. On April 20th the state received the money and the next day it was put in the State Treasury.
 - It was at this point that Secretary Gardner determined he would form a committee. The reason was that when NH received the first federal funds 16 years ago when HAVA was first passed, the law required each state to have a planning committee for how to spend the funds. At the time, the state had the luxury of having years to implement a plan, with a committee in excess of 20 members.
 - In this situation, we don't have the luxury of time: we have our September Primary in less than 5 months and our General Election in a little over six months. So the committee couldn't be as big, and doesn't have as much time as the previous committee. Secretary Gardner decided that it would be a six-member committee and on April 27th made the announcement of the committee.
 - Secretary Gardner thanked the members for their service and participation.
 - Secretary Gardner noted that the CARES Act makes clear that these funds are for costs related to the national emergency related to COVID-19 and ought to be spent to prepare for and respond to COVID-19 domestically or internationally for the 2020 federal election cycle.
 - The money can be spent on printing additional ballots/envelopes, additional mailing/postage costs, cleaning supplies and protective equipment at election day polling places, training on sanitation procedures, public communications on proper procedures, and pre-and post-election day cleaning of polling places, among other things.
 - The CARES Act makes clear that states must spend all federal funds by December 31st of this year, or return any unspent funds as of that date to the U.S. Treasury. States cannot spend any federal funds on activities after December 31st of this year.
 - Secretary Gardner noted that when he asked each committee member to serve, the most important attributes he considered were character and integrity, but also members who have demonstrated over the years a dedication to the public interest. That's what this must be about. He noted that we wouldn't be in this situation except that we're facing a challenging election, and it is of utmost importance that we maintain procedures voters and poll workers are familiar with, while also making adaptations as circumstances require. If we can do this, we'll have a Primary where voters feel safe and confident that they had every opportunity to cast a ballot, and that their vote counts.

Chairman Cook:

- Noted that this is the committee's organizational meeting at which we will establish when and how frequently we will meet, and who we will be soliciting information from.
- Noted the support the committee has already received from many organizations, with several encouraging offers of help, which are very appreciated. The committee will be seeking input from the public, political parties, and various organizations as the committee conducts its work.

- Encouraged committee members and those listening in to visit the Secretary of State's website where there is very helpful information and guidance that's been released.
- Noted that the existing election laws are in place, and that this committee does not have the power of the Legislature in that it cannot change the laws. If the committee identifies obstacles in current law that need to be overcome, the committee will need to explore recommending an executive order.
- Noted that individuals advocating for change of election systems, to the extent they want to make those suggestions, the committee is happy to refer them to the lawmakers on the committee, because that's the role of the Legislature. We have to make this work in our existing legal context, until and unless the law is changed, either by executive order to the extent it can be done, or by the Legislature.
- Introduced Assistant Attorney General Nick Chong Yen, head of the Election Law unit, to discuss legal context of the situation.

Assistant Attorney General Nick Chong Yen:

- During the course of this health emergency the Election Law unit has been working with agencies and community partners to identify challenges/concerns and find ways to resolve those and arrive at positive solutions to help relieve or ease difficulties being experienced by election officials.
- Outside of the context of this health emergency, the Election Law unit operates as enforcement body for election laws in NH. With respect to most recent enforcement actions, we've looked at wrongful voting cases as well as regulatory matters, and focus on helping officials navigate statutes to carry out our elections.

Chairman Cook: Does our present absentee ballot law allow for increased use of absentee ballots in the face of the COVID-19 emergency? Can you summarize the DOJ guidance around this?

Assistant Attorney General Nick Chong Yen:

- In the beginning of April we released a memo summarizing the legal analysis by which voters could access absentee ballots; this memo is available on the Secretary of State's website.
- We recognize the very unique challenges posed by COVID-19 and what that has meant for voters in the context of being able to go to polling places. There are valid concerns re: going to polling places on Election Day in the September primary and November General Elections, and sometimes in town and municipal elections.
- Under the NH absentee ballot statute, a voter can request an absentee ballot if they have a disability. In light of current health emergency, the emergency orders in effect, and substantial health guidance given by medical officials, it is reasonable for someone to conclude that they have a physical disability such that they cannot make it to the polling place to vote, and can request an absentee ballot.
- No voter should have to choose between concerns for their health and exercising their constitutional right to vote. Under existing law, we can use our existing process for absentee voting and make sure everyone is accommodated.

Chairman Cook:

- Noted that the first date in the NH political calendar is June 2nd, which is the deadline by which a voter can change their party registration. Has the DOJ analyzed the ability for voters to do that remotely?

Assistant Attorney General Nick Chong Yen: The DOJ is continuing to review and analyze that process. This situation poses some very unique hurdles and the DOJ is working with the Secretary of State's Office to identify solutions we can employ and guidance we can put out to relieve the stress incurred by elections officials under our current statutory framework.

Chairman Cook: What does the law say about the ability to register to vote remotely?

Assistant Attorney General Nick Chong Yen:

- Currently NH has an absentee voter registration process, which is outlined under RSA 654:16 and its subdivisions. It is an affidavit process. An applicant contacts their clerk's office and requests an absentee voter registration packet, which is mailed to them. During the course of filling out the application, the voter would provide proof of identity and domicile. That process is something the Secretary of State's Office and DOJ have identified some difficulties, but are continuing to look at the issues and hopeful we can come up with solution in short order.

Chairman Cook:

- Candidates who want to run for office in September in the Primary or folks seeking to be put on the ballot as Independents have different statutory hurdles to meet in order to file for office. What do we tell them about being able to do that safely and remotely?

Assistant Attorney General Nick Chong Yen:

- The DOJ is aware there is an in-person requirement associated with filing for office and declaring candidacy. Obviously in light of emergency and public health guidelines, we're trying to identify ways we can either relieve or relax requirements related to these issues. It's an ongoing process which we're actively working on and we hope to have something out shortly.

Chairman Cook:

- To the extent people want to go to the polls, if the environment allows for it, the statutes are pretty clear on what polling places have to look like, how they work, how many there must be, etc. Will these still apply?

Assistant Attorney General Nick Chong Yen:

- This is going to be an endeavor we all undertake to how to operate within the existing statutory framework while still honoring statutes and keeping everyone safe.
- Part of this committee's undertaking is to identify ways to reduce strain and burden on elections officials and identifying opportunities to do so. We can coordinate this committee with public health officials, which will be an important piece of this puzzle. We can come together to figure out how polling places should be set up, whether there should be guidance issued by the Secretary of State or DOJ, and it could be as simple as staggering voters by the alphabet, or adopt procedures in advance of election to reduce amount of voters who have to go to polling place by providing opportunity to vote absentee consistent with what we put out in our previous memo.

- There will be a variety of opportunities to explore and a larger discussion to be had with members, agencies, and officials to better understand what the picture will look like come the fall.

Kate Hanna:

- Can voters request absentee voter packages from their clerk as well as the Secretary of State?

Deputy Secretary Scanlan:

- Yes, a voter can request that packet from the Secretary of State's Office, as well as their clerk's office.

Kate Hanna:

- I haven't reviewed the affidavit for absentee registration; does that affidavit require the same statement, that one is unable to vote because of being disabled, and therefore do we need to define "disabled" for the purpose of registering to vote?

Assistant Attorney General Nick Chong Yen:

- One thing the DOJ accomplished with their memo is what "physical disability" means in the context of COVID-19, and we identified for the purposes of that memo and absentee ballots that an individual can claim disability in light of COVID-19 concerns. That legal analysis is fleshed out further in the memo. The legal analysis would be the same for absentee registration.

Kate Hanna:

- If your memo applies to absentee voting, does it also explicitly say "registration"?

Assistant Attorney General Nick Chong Yen:

- The guidance issued was for absentee ballot requests. The DOJ and Secretary of State's Office have to work on further guidance for absentee registration

Gene Van Loan:

- Wouldn't it make sense to prepare a very brief summary of the memo, saying COVID-19 concerns are sufficient to allow somebody to register by absentee as well as vote by absentee: This could be included in the package that goes out so no one needs to consult the website.

Assistant Attorney General Nick Chong Yen:

- That's one of the things that's under consideration, and part of this process where we're trying to identify solutions. The idea behind what we've done with absentee ballot requests, in terms of making it clear that all voters can request an absentee ballot on the basis of concern over the current health emergency. The Secretary of State's Office and the DOJ will put something together that is understandable and consistent with already issued guidance.

Chairman Cook:

- The sooner the committee has definite answers to these questions, with an outline of the processes voters can use, the better positioned the committee will be to advise the Secretary of State on how to publicize this information to voters.
- How much money do we have? The committee is advising the Secretary of State on how to spend money and we need to know how much we are advising on.

Deputy Secretary Scanlan:

- The State has \$3.2 million that is dedicated through HAVA funds and the CARES Act to conduct elections in the face of the pandemic. Those funds have to be above and beyond what would normally be spent on an election, so the federal government will want to look at maintenance costs, the cost above conducting elections generally, and expenses above and beyond usual expenses that are due explicitly to COVID-19.
- The money will be targeted to the local level, because that's where the brunt of these costs will be incurred. The two most obviously areas that will need financial support are the increase in absentee ballots that will be printed, and the money spent on precautions taken at polling places.
- There is money available from the federal government that was given to the state in a prior award, primarily targeted at supporting cybersecurity efforts. The federal government has now said that money can also be used to help address COVID-19 issues.
- In terms of state funds, the state has a budget for conducting elections that's tight under normal circumstances. In terms of the state effort, there isn't more money at this point unless there's an additional appropriation.

Bud Fitch:

- Directed members of the committee to the Secretary of State's website and the guidance documents provided by the Election Assistance Commission, including the text of the awards for the CARES Act funds and the underlying security grant funds.
- Noted that this money is tiered, so about a decade ago HAVA was adopted and state received funds which we've used since then. In 2019, security grant funds were added with additional restrictions on use. The funds the committee is considering were added on top of security grant funds, so it's important as the committee does its work to understand there are 3 tiers of regulation: the CARES Act, security grant funds, and HAVA—all three of which subject are subject to many federal regulations. We've tried to identify the most pertinent ones, and they're provided on the website.
- Bud and Assistant Attorney General Nick Chong Yen are available should there be follow-up questions from the committee. Questions can be submitted through Chairman Cook.

Chairman Cook:

- How does the state match work?

Bud Fitch:

- Discussion about the 20% match requirement is contained in the materials available on the Secretary of State's website.

- One option is if somebody—the state, town, or city—spends a dollar on something eligible for CARES Act funds, if funds only pay for a portion of it, and 20% comes from state or local funds, then that local expenditure will satisfy the match requirement. 20 cents of each dollar will be absorbed locally.

Chairman Cook:

- So the committee is operating with 3.2 million?

Bud Fitch:

- Correct. If we don't spend it all by the end of December we send it back to the federal government; so the committee has the option to recommend not spending it all and sending some back.

Kathy Seaver:

- Foresees the big expense of absentee envelopes provided by the state, which are anticipated to skyrocket. Is there thought of funds for that?
- Originally when first HAVA money came in, we were able to invest the money in such a way that it was making money—is any of that able to be used?

Deputy Secretary Scanlan:

- The first block of money the state received under the HAVA program was spent to meet federal mandates at the time. There are no mandates for this funding, other than supporting election efforts under the conditions of COVID-19.
- Under original HAVA funding, the state had to create a centralized voter database and provide accessible voting equipment in every polling place; now we're two or three generations into the life of that equipment. Some of that money was invested by the Legislature, with principle used to pay for federally mandated updates. 20 years later we've sustained those programs without dipping into the general fund. From a policy perspective, it makes sense to preserve that balance. Those funds also provide for substantial election training the Secretary of State's Office puts on every 2 years leading up to elections. Significant money will be spent on that, along with voter education. So, that money is something that would be not in our interest to tap. We have the 3.2 million in the care act funds for this purpose.

Chairman Cook:

- It seems like it could be quantifiable how many more envelopes we'll need. Is there an estimate of how many we'll need?

Deputy Secretary Scanlan:

- Generally the number of absentee voters in an election represents 10% of voters voting. We're looking at 50+ percent of voters voting absentee this upcoming cycle. This doesn't change the number of ballots we have to print, other than we may have to come up with something creative, like dual purpose ballots that can be used as both absentee and official ballots. As Kathy pointed out, there will be a cost associated with the extra envelopes and postage required to mail those envelopes out.

Senator Sherman:

- We have a very special population that may increase significantly our absentee voting pool: those with disabilities who may need assistance. Some voters staying home to vote may need assistance at home. How do we envision reimbursing that cost so they're able to vote?

Deputy Secretary Scanlan:

- That's an excellent point; this is a community the Secretary of State's Office has done lots of work with in the past, and we want to ensure no one is left behind in this process.
- To the extent it's not safe for folks to interact, approaching next election, we'll have to come up with creative solutions that may cost money that will allow them to vote.

Senator Sherman:

- I don't know the answer to this, but if there's need for additional assistance with the voting process, how do we capture that so that cost is covered?

Deputy Secretary Scanlan:

- That's a good open question; the committee will work toward an answer.

Chairman Cook:

- I assume we'll have at least one session and probably more on the absentee ballot issue: who can help, who safely can assist in distributing and collecting ballots, how the ballots get counted, processed, etc.

Representative Griffin:

- I don't know if there's anyone to answer this but I heard a couple things. There are municipal level local community expenses that they've all budgeted for and there are also expenses for these elections the state has budgeted for. I know in my community, in the Primary, we were dealing with special sanitation issues there that they had dealt with locally, and I expect we'll want to have standards statewide as to how that's done.
- There's also the matter of absentee ballots. Wants to ensure as we go forward that we plan in a way that funds can be evenly distributed between municipalities.
- If I'm a municipality and I need lots of PPE, am I sending the request in, or is the Secretary of State making determination of allocation of supplies per polling place? I'm not expecting answers but I see that as a real issue at local level. Town clerks and moderators are in charge of their polling places and I want to ensure everyone feels treated safely and the same.

Chairman Cook:

- I anticipate having at least one session with town clerks and one with city clerks, as they have different issues. They're the experts, and on the list of who we want to hear from.

Gene Van Loan:

- My understanding is that the expenses eligible for federal funding are expenses that relate to a federal election. We hold elections for lots of local offices with federal officers also on the ballot.

Masks used would be used while voting for local and federal candidates. Are there expenses uniquely for municipal or state officers that would not have anything to do with the federal election in either September or November that would be ineligible?

Deputy Secretary Scanlan:

- I'm going to ask Bud Fitch to jump in on this. I'd say federal funds are for elections where there are federal candidates on the ballot and in the past there have been questions about whether we can use some of the equipment paid for by HAVA for local elections. To me, that's a common sense thing: an election is an election and available equipment should be used. The federal government requires substantial record keeping information on local elections for audit purposes, and my understanding is that if the equipment is not used in a federal election then there has to be a record made of that. In other words, the feds aren't going to pay for it when no federal officers are on the ballot.

Bud Fitch:

- Deputy Secretary Scanlan is correct. It's important to understand that if something is budgeted and being paid for with local funds, federal funds may not be used to pay for that same quantity or service: it's called maintenance of effort. A federal rule says "Supplement, not supplant." These federal requirements are stringent.

Gene Van Loan:

- I understand that issue, but assume a municipality had a separate ballot for municipal officers from the federal officers' ballot. Would it be correct that the federal funds couldn't be used for those expenditures for the local ballots?

Bud Fitch:

- We haven't historically parsed that out. I don't know that this has ever come up as an issue.

Chairman Cook:

- Scheduling meetings of committee is next on the agenda. I would also direct folks online to look at the requirements of the CARES Act funding and review the question and answer slides. What is your schedule in wanting to know the answers to our recommendations? That will inform our meeting schedule.

Deputy Secretary Scanlan:

- I think you should plan on the month of May being your work-hard month and aim for having suggestions for the first or second week of June. Once the filing period closes, we'll be producing absentee ballots. Once that process starts rolling there's no stopping it until Election Day so we have lots to do in a short period of time.

Chairman Cook:

- For members of the committee we can poll ourselves by email on availability but I think we should meet 2-3 times a week at first to achieve our work. I'll be asking you for your availability. We also need to hear from the experts and we need to identify constituencies we want to hear from:

The group suggested the following:

- General public
- Town clerks
- City clerks
- Local election officials
- Public health officials on appropriate safeguards for election places
- Political parties
- Candidate campaigns
- ACLU
- Municipal Association
- Senator Levesque

Chairman Cook:

- Encouraged anyone from the public who's listening in: don't hesitate to send the committee written submissions. Communicate with the committee individually or through the Secretary of State's Office and I'll ensure those communications get sent to all members.

Kate Hanna:

- Should we hear from the Postal Service about anticipated issues in September and November? They'll be key with sending absentee ballots. Perhaps they would consider waiving some or all of the cost of sending ballots?

Gene Van Loan:

- Is it correct that contributions of time or material can be treated as part of state match if they're adequately documented? Ex: some good citizen wanted to donate 100k masks. Could that be used as part of state's match for federal funds?

Dave: answer could be yes, provided proper record keeping and accounting for that took place and provided that whatever service/product provided is above and beyond what constitutes normal maintenance of the election process and is targeted toward the COVID-19 situation.

Chairman Cook: All of our meetings are public and will be widely posted and folks will be able to give us input before, during, and after our sessions.

Senator Sherman moved to adjourn. Gene Van Loan seconded.

Meeting concluded at 3:20 p.m.