

STATE OF NEW HAMPSHIRE

MEMORANDUM

TO: New Hampshire Election Officials

FROM: William M. Gardner, Secretary of State
Gordon J. MacDonald, Attorney General

RE: Election Operations during the Public Health Crisis

DATE: **August 19, 2020**

***Note: This guidance is based on health guidelines and Emergency Orders issued as of the date of this memorandum and is subject to updates as necessary.**

Thank you for your service to the voters of our state. New Hampshire has a rich tradition of well-run elections and the robust exercise of the right to vote. Much of that is due to the strength and effort of our election officials. The novel coronavirus public health emergency continues to present unprecedented challenges. Many of these challenges will present themselves during the upcoming September Primary and November General Elections.

In the continuing the tradition of New Hampshire's well-run elections, we will rely on the skill of our election officials in solving the problems the coronavirus poses in the election context, and imbuing voters with confidence and assurance that they can efficiently, effectively and safely cast their ballots during this pandemic. We are confident that the upcoming elections will be as successful as ever, again, due to your efforts and skill.

Q1: Can towns and cities adopt the “drive-up” voting procedures that were used during the 2020 municipal and school meetings for the 2020 September Primary and November General Elections?

A: No.

During the 2020 municipal and school meetings, New Hampshire Laws of 2020, Chapter 8 allowed towns, village districts, and school districts to conduct their municipal meetings using a “drive-up” voting process. However, an entirely different set of statutes and procedures governs Primary and General Elections. Those statutes and procedures preclude using this process in the upcoming Primary and General Elections. Thus, local

election officials cannot use “drive-up” voting procedures for the Primary and General Elections.

Q2: Can election officials designate locations at the town or city clerk’s office and/or at the polling place where completed absentee ballots can be delivered?

A: Yes, subject to the guidelines below.

a. Prior to Election Day

Some election officials have asked whether they can designate, at the town or city clerk’s office, a location to which absentee ballots can be delivered. The law provides that a completed absentee ballot may be returned to the town or city clerk by: (a) the absentee voter or his/her delivery agent (defined below) personally delivering the completed absentee ballot package; or (b) the absentee voter or his/her delivery agent mailing the completed absentee ballot package to the town or city clerk. RSA 657:17, I.

These statutes allow for election officials to provide a “dropbox” at the town or city clerk’s office before Election Day. If officials choose to use a “dropbox” at the town or city clerk’s office, it must be staffed by a properly trained election official throughout the course of its use.

For absentee ballots delivered by a delivery agent, the delivery agent shall show identification and sign a “Return of Ballot” form.

b. On Election Day

For the 2020 Primary and General Elections only, voters can appear at the polling place and deliver their own completed absentee ballots in the same manner they would deliver an absentee ballot to the clerk prior to Election Day.

Election officials can utilize a “dropbox” at the polling place on Election Day. The following procedures must be followed:

1. The “dropbox” must be staffed by a properly trained election official throughout the course of its use on Election Day.
2. The delivery agent must show identification to the election official at the “dropbox” and complete a “Return of Ballot” form. RSA 657:17, III; RSA 657:17-a.
3. The 5:00 PM cutoff on Election Day must be observed and procedures for marking and retention of ballots after that time must be followed.

Voters who deliver absentee ballots after 5:00 PM on Election Day shall be told that their absentee ballots cannot be accepted, in accordance with RSA 657:22, but they can still vote by entering the polling place.

Election officials should make clear to voters who is authorized to deliver a completed absentee ballot package. The relevant statutory provisions identifying these select parties appear below.

RSA 657:17, II –

As used in this section, "delivery agent" means:

- (a) The voter's spouse, parent, sibling, child, grandchild, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepparent, stepchild; or
- (b) If the voter is a resident of a nursing home as defined in RSA 151-A:1, IV, the nursing home administrator, licensed pursuant to RSA 151-A:2, or a nursing home staff member designated in writing by the administrator to deliver ballots; or
- (c) If the voter is a resident of a residential care facility licensed pursuant to RSA 151:2, I(e) and described in RSA 151:9, VII(a)(1) and (2), the residential care facility administrator, or a residential care facility staff member designated in writing by the administrator to deliver ballots; or
- (d) A person assisting a blind voter or a voter with a disability who has signed a statement on the affidavit envelope acknowledging the assistance.

Q3: If towns and cities have multiple polling places, can they consolidate those into one, larger polling place?

A: Consolidation of polling places is governed by statute. Municipalities may only consolidate polling locations consistent with governing statutes. If consolidation is precluded by statute, we will offer assistance in locating resources and exploring options to address challenges posed by the public health crisis.

The law applicable to the consolidation of polling places in towns and cities is summarized below. We also set forth additional considerations with respect to consolidating polling places. Election officials should consult with their legal counsel with respect to the applicability of these laws.

Applicable Law

1. Towns: Towns may add additional polling places or discontinue established polling places through a vote by the town. The following statutes apply:

RSA 658:10 states that “[i]f any town shall so vote, the selectmen shall provide one or more additional polling places in such town and shall, at least 30 days before the next following general election, determine the boundaries of the voting district to be served by each such additional polling place.” This statute requires a vote by the Legislative Body, which in most circumstances, would require a Town Meeting.

RSA 658:17 states that “[a] voting district and polling place so established shall continue to be such for successive state elections until the town shall vote to discontinue the same, but the selectmen may from time to time increase or diminish the boundaries thereof in order to effectively accommodate the voters.”

2. Cities: Cities are similarly authorized to adopt an additional polling place within a ward, as outlined under RSA 658:10 through 658:17.

An additional polling place in a city would, in effect, split a ward into two voting districts. This means that an additional polling place is limited to being within the boundaries of the ward it will serve.

Under RSA 44:4, each ward “shall be a town for the purpose of the election of governor, councilor, state senator, representative to the general court, all county officers, senator and representative in congress, and electors of president and vice-president of the United States, and in all matters relating to jurors.”

Part I, Article 11 of the New Hampshire Constitution further outlines that “[e]very person shall be considered an inhabitant for the purposes of voting in the town, ward, or unincorporated place where he has his domicile.”

These provisions taken together require every city ward to have a polling place to allow a qualified voter to exercise the constitutional right to vote in the ward in which he/she is domiciled. Absent a charter amendment to eliminate wards within a given city, there is no authority to consolidate polling places under the law or New Hampshire Constitution.

Q4: What discretion do moderators have to not require or require voters to wear a face covering/mask inside the polling place?

A: Moderators have broad authority to regulate the conduct of polling within their jurisdictions. That includes the authority to choose whether to not require or to require a face covering/mask at their respective polling places. Moderators who choose to implement face covering/mask requirements, therefore, must provide

registration and voting alternatives to voters who either cannot or will not wear face coverings/masks inside the polling location.

Background

Recognizing there are divergent views among moderators on the extent to which masks should be required in the polling place, the Secretary of State, Attorney General and their staff invited two moderators representing different sides of the spectrum for a conversation on the topic. The result was a very thoughtful discussion in an attempt to find common ground on how best to keep voters and poll workers safe in the polling place. Not surprisingly, both moderators wanted to make sure the act of voting was safe and efficient. Both acknowledged that all polling places are different, and decisions made by the moderator are dependent on factors and influences that are unique to their location.

Specifically, they both believed that Center for Disease Control (CDC) and other authoritative professional health guidance should be used in making determinations about whether or not masks should be required in the polling place. If a polling place is large enough to meet CDC social distancing guidelines a moderator may decide not to require masks. However if a polling place is cramped and a moderator believes proper social spacing cannot be sustained a mask requirement would be appropriate. The bottom line is that both moderators believed that the discretion should be left to the moderator to make the call based on the circumstances unique to their polling place.

Both moderators also believed that if a mask requirement is imposed, voters who will not wear a mask for whatever reason must be afforded an opportunity to cast their votes in a reasonable alternative way protecting all voters rights to safely cast a ballot in the September 8th Primary Election and November 3rd General Election. The guidance being issued by the Attorney General and Secretary of State memorializes major components of this discussion.

Guidance

As discussed below, the Centers for Disease Control (“CDC”) and the New Hampshire Division of Public Health (“DPH”) recommend face coverings/masks as one component of the COVID-19 mitigation strategy. It has been further recommended by federal and state health officials that people wear masks in public settings, especially when other social distancing measures are difficult to maintain.

For many moderators, requiring face coverings/masks inside the polling place may be critical to Election Day operations, both for the comfort and safety of Election Day volunteers and other voters casting in-person ballots. For others, some polling places may allow for social distancing and other protective measure, and moderators may choose not to require a face covering/mask.

The moderator has broad authority to manage the polling location. This includes choosing to not require or to require a face covering/mask in order to enter the polling place.

Each polling place is different and unique. The ability to appropriately social distance at one polling place may be easier than at another. In deciding whether to impose a face covering/mask requirement, moderators should consider any factors they view as relevant and important to their consideration. Factors might include, but are not limited to:

- Size of polling place;
- Number of other rooms or spaces offered by the polling place;
- Other physical characteristics of the polling place;
- Volume of voters expected to vote in-person;
- Particular risk factors either of the voting population or the election officials.

Again, these factors are not exclusive. Moderators should use their best judgment to determine whether and to what extent to encourage or mandate face coverings/masks.

Moderators who implement a face covering/mask requirement may encounter some voters who will refuse to wear face coverings/masks due to physical or medical conditions or other personal reasons. Every qualified voter, however, must be given an opportunity to cast a ballot. To properly implement a face covering/mask requirement, therefore, moderators must establish alternative means of registration and voting for in-person voters who refuse to wear face coverings/masks. While there are no hard and fast guidelines, alternative means must allow the voter to register and vote efficiently, privately, and in a manner that best allows the realization of the full extent of that voter's right to vote. The alternatives cannot, through inefficiency or difficulty of use, make it harder for a non-face covered/masked voter to register and vote.

We encourage moderators to consult with town or city legal counsel on these issues

Q5: Can election officials require voters to show their faces during the voter check-in and Challenged Voter Affidavit processes?

A: Yes.

During the check-in process, many election officials have asked how a ballot clerk can check-in a voter and confirm that the person in front of the ballot clerk matches the photo identification if the individual is wearing a face covering/mask.

We conclude it is possible to administer the normal check-in process – or the Challenged Voter Affidavit process as applicable – while following public health guidelines.

In many cases, a voter will be identifiable even when he or she is wearing a face covering/mask. For example, the election official can still determine the voter's eye color, hair color, and head shape. An official at the polling place may also know the voter checking-in. See RSA 659:13, II(b).

Consistent with public health advisories, if an election official requests that a voter show his or her face for verification, hand sanitizer must be used by the voter prior to and after showing the voter's face. No voter's face should be revealed for an extended period of time.

We encourage the use of the sneeze guards, which have been purchased and distributed by the Secretary of State's Office, for the voter check-in tables. During the check-in process, the voter should remain on one side of the sneeze guard with the election official on the other.

Additionally, during the Challenged Voter Affidavit process, the Secretary of State's Elections Division has reported that a photograph can be taken through the sneeze guard with the voter's face showing. Hand sanitizer must be used by the voter prior to and after showing the voter's face. No voter's face should be revealed for an extended period of time. As such, we similarly encourage the use of the sneeze guards during the Challenged Voter Affidavit process.

Q6: Can election officials use two rooms inside the same polling location as voting areas?

A: Yes, provided both voting areas fully comply with all polling place requirements.

Some officials have asked about using two rooms inside the same polling place as voting areas to facilitate social distancing or employ a system as outlined under FAQ4. There is no prohibition in doing so. However, it is important for officials to be mindful that all rooms used for voting purposes comply with polling place requirements. They should be adjoining rooms if at all possible. Those requirements are as follows:

1. Each voting room must have a moderator (assistant/deputy) present overseeing the voting. One official overseeing multiple rooms will not suffice.
2. Officials are encouraged to have a deputy or assistant clerk who can be in the second room on an ongoing basis if needed.
3. Each room must have an area where the public can observe. It need not be large, but the general public cannot be barred from the room. This likely

means that some form of guardrail inside each room (i.e. rope, tape, etc.) may need to be used as opposed to using the room walls as the complete guardrail.

4. The political parties must be given notice of the additional voting area and the parties should be asked to notify campaigns. If a party wants a “challenger” present to observe both voting rooms, it may consider sending more than one challenger.
5. The aggregation of votes from the two rooms at the end of the day must be transparent and managed in a way that keeps marked ballots secure and the public present at the polling place well informed about what is going on and how the votes cast in the separate rooms will be aggregated. The additional polling place laws only apply to using more than one building as a polling place. However, the procedural alternatives set out in those statutes may be the best guide to how to use two rooms inside the same polling place. Following one of the procedures in those statutes would make the process more easily defensible.

Q7: Can election officials be required to wear Personal Protective Equipment (PPE)?

A: Under New Hampshire’s Constitution, the moderator has the authority and responsibility to govern elections. The use of face coverings/masks by election officials is in accordance with guidance by public health officials, including the Centers for Disease Control. A moderator’s requirement that election officials wear face coverings/masks or other personal protective equipment is, in our opinion, within his or her constitutional authority. Moderators should first consult with their town or city legal counsel.

Part II, Article 32 of the New Hampshire Constitution states that the moderator has the authority and responsibility to govern elections. We believe that this grant of authority would extend to a requirement that local election officials wear face coverings/masks or other personal protective equipment. Under the same constitutional provision, all of the selectmen (or their designees appointed under RSA 658:21-a) are required to be present at the polling place on Election Day. Because the selectmen must be present, they cannot be required to wear face coverings/masks while in the polling place if they are unwilling to do so. However, it is within the moderator’s authority to require that they remain in a designated area more than 6 feet away from other election officials and voters.

There are implications for such decisions and we encourage moderators to consult with their legal counsel. In making the decision, local officials should consider that some voters may feel uncomfortable voting in an environment where election officials are not wearing face coverings/masks. In addition, it may be hard to attract sufficient volunteers to staff local election locations unless a face covering/mask requirement is in place.

There is a risk of legal challenge involving a moderator's decision on this important issue.

Q8: Can a single absentee ballot request form be used to obtain an absentee ballot for both the 2020 September Primary and 2020 November General Elections?

A: Yes, pursuant to HB 1266.

Under *HB1266*, RSA 657:4 has been suspended through December 31, 2020. Instead, the bill has authorized the Secretary of State to create a new application form for absentee ballots that permits voters to use one (1) request form to request absentee ballots for both the 2020 September Primary and 2020 November General Elections.

The new application form for absentee ballots is available on the Secretary of State's website and can be found using the following link:

<https://sos.nh.gov/VotingEmergency.aspx>

If the voter asks for ballots for both the primary and the general election, the clerk must make a copy of the application. Use the copy to attach to the returned envelope with the completed absentee ballot for the Primary and the original application to attach to the returned envelope with the absentee ballot for the General Election.

If a voter has already submitted an absentee ballot request application, and it is the version that existed before *HB1266*, officials may still accept the application and fulfill the absentee ballot request consistent with routine practice.

Q9: Can the moderator utilize *pro tem* election officers inside the guardrail who are not domiciled in the polling location's town or ward?

A: No. A *pro tem* appointed poll worker can be used only for those roles that are outside the guardrail.

RSA 659:21 states that “[n]o person other than the election officers, the voters admitted or those admitted to aid a voter pursuant to RSA 659:20 shall be permitted within the guardrail except by the authority of the election officers and, then, only for the purpose of keeping order and enforcing the law.”

“‘Election officer’ shall mean any moderator, deputy moderator, assistant moderator, town clerk, deputy town clerk, city clerk, deputy city clerk, ward clerk, selectman, supervisor of the checklist, registrar, or deputy registrar.” RSA 652:12.

“Any elected or appointed official for whom one of the qualifications for his or her position is eligibility to be a voter in the area represented or served shall be

considered to have resigned if the official moves his or her domicile so that he or she can no longer qualify to be a voter in the area represented or served.” RSA 654:1, II.

Read together, these statutes require that an election officer who works inside the guardrail be domiciled in the town or city ward where the polling place is located.

As such, we conclude that moderators may utilize *pro tem* appointed poll workers (not election officers) who are not domiciled in the town or city ward of the polling place, provided those *pro tem* poll workers are only permitted to work outside the guardrail. (i.e. Ballot Clerk check-in table, Assistants to the Supervisors of the Checklist table, Greeter, etc.). Just as the position of greeter is not explicitly provided for in statute, a *pro tem* poll worker will be appointed by the moderator, supervisors, or clerk, take an oath, but will not be an election officer.

A *pro tem* poll worker assisting with voter registration can help the voter complete the voter registration form, help organize the applicant’s proof documents or, if needed, help the applicant complete a domicile and/or qualified voter affidavit, but may not make the final decision to approve the applicant. The completed application form and proof of qualifications must be reviewed and approved by an elected supervisor or a supervisor *pro tem* who is domiciled in the town or ward.

This means that those election officials counting the ballots must be voters in the town or ward.

Additionally, election officers are, by definition, locally elected officials who must be voters in the town or ward. Appointed *pro tem* election officials are also required to be voters in the town or ward.

We also understand many officials are having a difficult time filling ballot clerk positions due to the challenges caused by the public health crisis in finding volunteers.

RSA 658:25 states in relevant part, that “[t]wo of the inspectors, one from each of the 2 political parties, shall be designated by the moderator at the opening of the polls to act as ballot clerks.” We do not construe this to prohibit the Moderator from designating officials other than inspectors of elections as ballot clerks.

In present circumstances, however, when necessary a town or city may use individuals, for example non-resident municipal employees, to be appointed and sworn in as *pro tem* poll workers to assist at the election provided the non-residents are assigned only to tasks outside the guardrail.