U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

February 4, 1999

Eric Proshansky, Esq.
Assistant Corporation Counsel
City of New York
Law Department
100 Church Street
New York, NY 10007

Dear Mr. Proshansky:

This refers to Chapter 149 of the Laws of 1998, State of New York, which changes procedures related to elections for the community school boards of the counties of New York, Bronx, and Kings in the City of New York, New York, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission on September 21, 1998. We received additional information on September 22, 1998. On November 16, 1998, we precleared most of the provisions of Chapter 149, and requested additional information about Section 5 of the submitted statute.

Section 5 of Chapter 149 repeals and replaces Education Law § 2590-c(7), replacing the single transferable vote method of election (STV) with a form of limited voting whereby voters may cast one vote for each of up to four candidates (LV 4), and the nine candidates receiving the greatest number of votes shall be elected. Section 5 also provides for tie-breaking procedures, for the use of voting machines for the proposed LV 4 elections, and for the authority of the Board of Elections to promulgate regulations for the administration of the limited voting system.

We received interim responses to our request for additional information on November 18, December 4, and December 14, 1998, and January 5, 1999. On January 7, 1999, we sent a follow-up letter indicating which information requested in our letter of November 16, 1998, we still had not received. We received further interim responses on January 13, 19, and 28, and February 1 and 2, 1999, consisting chiefly of election returns. Your letter of February 1, 1999, indicated that these responses were intended to complete the City's response to our request.

We have carefully considered all the information you provided, including the Final Report of the Temporary State Task Force on the New York City Community School Board Elections, as well as Census data, and information from our files and from other interested parties. We have reviewed the submitted limited voting system, in which each voter would have four equally weighted

votes, and have reviewed carefully the design and operation of the existing single transferable vote system.

We are aware of the City's interest in increasing voter participation in school board elections through a variety of measures, virtually all of which were precleared on November 16, 1998. However, the City has not provided reliable evidence to indicate that turnout will increase directly as a result of the change to LV4. Our investigation indicates that many of the changes already precleared are more likely to increase voter turnout.

Most significantly for our review, we found in our investigation that voting in New York City elections, including Community School Board elections, is racially polarized. We base this conclusion in part on our analysis of the election returns you provided to us. See also Puerto Rican Legal Defense and Education Fund v. Gantt, 796 F. Supp. 681 (E.D.N.Y. 1992)(3-judge court)(expert report concludes that voting in New York City is racially polarized); Butts v. City of New York, 614 F. Supp. 1527, 1545 (S.D.N.Y. 1985)(finding existence of racial bloc voting). Further, the information we have indicates that the degree of racial bloc voting in Community School Board elections, in the covered counties and throughout the city, is such that the ability of minority voters to elect their candidates of choice will be considerably reduced under the submitted change in voting method.

Under the existing STV system, minority voters need to constitute approximately 10 percent of the voting population in order to elect their candidate of choice. Under the proposed LV 4 system, that threshold is increased to approximately 31 percent. There are 18 districts where a minority group's share of the voting age population is approximately 10 percent or greater but less than 31 percent. This is three-fourths of all Community School Boards in the covered counties. These facts alone, while not dispositive, are a strong indication of retrogression, given the extent of racial polarization in New York City elections.

The City takes the position that the presence of several community school districts in which minority groups elect more representatives than their proportion in the population precludes a finding of retrogression. However, we do not believe that the Supreme Court's decision in City of Richmond v. United States, 422 U.S. 358 (1975), should be read so broadly as to be directly applicable in these circumstances. A retrogressive effect is evident here in more school districts in each covered county than simply those in which racial minority voters presently enjoy an arguably greater than proportionate voting power. In these districts the submitted LV 4 election system will have an adverse impact on the ability of minority voters to elect representatives of their choice to Community School Boards.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. Georgia v. United States, 411 U.S. 526 (1973); see also 28 C.F.R. 51.52. In light of the considerations discussed below, I cannot conclude that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the change in the method of election from single transferable vote to limited voting with four votes per voter.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes neither have the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. See 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. See 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the objected-to changes continue to be legally unenforceable. Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

With regard to the remaining changes specified in Section 5 of Chapter 149, the Attorney General will make no determination at this time, as those changes are directly related to the objected-to change in the method of election. See 28 C.F.R. 51.22(b).

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the City of New York plans to take concerning this matter. If you have any questions, please feel free to call Stephen B. Pershing, an attorney in the Voting Section, at (202) 305-1238.

Sincerely,

Bill Lann Lee
Acting Assistant
Attorney General
Civil Rights Division