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June 26, 2009

**BY HAND**

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Hon. Joseph P. Parkes, S.J.  
Chair  
New York City Campaign Finance Board  
40 Rector Street  
New York, N.Y. 10006

Dear Father Parkes:

I write on behalf of Gioia for New York, Councilman Eric Gioia's principal committee for the 2009 election (the "Committee"), to request that the CFB issue an Advisory Opinion pursuant to Rule 1-04(q) permitting run-off fundraising for this year's Democratic primary for Public Advocate.

Based on the objective facts set forth below and in the accompanying memorandum from the Committee's pollster, Joel Benenson, a finding that a Public Advocate run-off is reasonably anticipated this year is compelled by every factor that the CFB has previously cited when making run-off fundraising determinations.

**1. The Incumbent Public Advocate Is Not A Candidate For Re-Election**

Public Advocate Betsy Gotbaum has elected not to run for re-election notwithstanding the change in the term limits law that makes her eligible for another term. She announced in an interview on October 26, 2008 that she will not run for re-election, Fernanda Santos, "Betsy Gotbaum Says She Will Not Seek Re-Election As The City's Public Advocate," New York Times, Oct. 27, 2008, and she is listed on the CFB's website as having notified the CFB that she has terminated her campaign committee. [http://www.nyccfb.info/reports/candidate\\_09.htm?sm=press](http://www.nyccfb.info/reports/candidate_09.htm?sm=press). Therefore, there will be no incumbent eligible and on the ballot for this open seat primary, a factor which militates in favor of permitting run-off fundraising. See Advisory Opinion No. 2001-1.

2. **There Is A Recent History Of A Public Advocate Run-Off**

In the most recent open seat primary for Public Advocate, in 2001, a run-off primary occurred between Mrs. Gotbaum and Norman Siegel, one of the four candidates running this year. This recent history supports a finding that a run-off is reasonably anticipated this year. See Advisory Opinion No. 1999-1.

The 2001 experience in particular supports authorizing run-off fundraising at this point this year because, in May 2001, the CFB initially declined to permit Public Advocate run-off fundraising as “no polling information was made available to the Board regarding the race for Public Advocate, and few observers [had] commented on the possibility of a run-off election.” Advisory Opinion No. 2001-3. By August 2001, with additional information available, the CFB reversed course and found that the race had “sufficiently evolved” that a run-off had become “reasonably anticipated.” Advisory Opinion No. 2001-10. This year, as shown below based on polling data, press reports and other factors, the Public Advocate primary campaign has evolved to a point akin to that considered in Advisory Opinion No. 2001-10, warranting a finding that a run-off is now reasonably anticipated.

3. **Press Reports Have Noted The Likelihood Of A Run-Off**

While the Public Advocate primary has yet to elicit substantial press coverage, several articles this year regarding the results of public polls have reported that a run-off is anticipated (see Section 4 below), which is one of the factors the CFB has cited in the past when making run-off fundraising determinations. See Advisory Opinion Nos. 2001-1, 2001-3, 2001-10, 2008-5.

Indeed, one newspaper article has reported that the current leader in public polls, former Public Advocate Mark Green, has begun preparations for a run-off:

Green says he had settled on supporting another candidate himself before getting into the race (though he will not say whom),<sup>1</sup> **and a lot of his conversations have been trying to position himself as the second choice, should the**

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<sup>1</sup> As the CFB knows from my frequent appearances on his behalf, I had the privilege of serving as counsel to each of Mark Green’s prior municipal campaigns. Several years ago, Mr. Green was kind enough to refer Councilman Gioia to me and suggested that I represent the Councilman in his planned campaign for Public Advocate. Late last year, when Mr. Green decided to campaign for Public Advocate, I advised him that I was constrained from representing both of them or switching my representation due to my ethical obligations as an attorney. See 22 NYCRR § 1200.24 (DR 5-105); Model Rules of Professional Responsibility, Rule 1.7.

**various players' first choices not make the run-off...**  
[emphasis added].

Edward-Isaac Dovore, "Mark Green Doesn't Care That You Hate Him," City Hall News, Mar. 11, 2009.

Accordingly, the press coverage to date warrants the commencement of run-off fundraising.

**4. All Of The Public Polling To Date Indicates A Run-Off Is Reasonably Anticipated**

The CFB has always looked to the results of publicly-issued polling in its run-off fundraising determinations. See e.g., Advisory Opinion Nos. 2001-1, 2001-3, 2001-10, 2008-5.

Annexed hereto is a memorandum from the Benenson Strategy Group, a consultant to the Committee, analyzing the public polls concerning this year's Public Advocate primary.

**5. The Time Remaining Between This Request And The Primary Requires That Run-Off Fundraising Commence Now**

The next Board meeting is less than two months from primary day. When the CFB has denied requests to begin run-off accounts, it has done so earlier in the campaign season, for example in the year before the election occurred, Advisory Opinion No. 2008-5, and in May of the election year, before petitioning and public polling had commenced. Advisory Opinion No. 2001-3. In contrast, in the two immediately prior election cycles, the CFB granted requests for run-off fundraising in four-candidate primary fields in June for the 2005 Mayoral primary, Advisory Opinion No. 2005-2, and in March for the 2001 Mayoral primary. Advisory Opinion No. 2001-1.

If run-off fundraising for this year's Public Advocate campaign were to wait any longer, it would put grassroots, community candidates who rely on low-dollar contributions at a competitive disadvantage. The spending limit for a Public Advocate run-off is \$1,925,000, however, the individual maximum contribution limit gets reduced to \$2,475, and the CFB provides public funds amounting to only 25 percent of the public funds a candidate receives for the initial primary. Thus, even a candidate who qualifies for the maximum amount of public funds in the primary, \$2,117,500, would receive only \$529,375 in run-off public funds and thus would still need to raise \$1,588,125 to reach the spending cap for the run-off. This would take a great deal of time and effort. If run-off fundraising were not authorized until the month before the primary, during the August vacation season, it would frustrate the level playing field purpose of the Act for a community-based candidate in a run-off.

Councilman Gioia has built his campaign around low-dollar donations. He has received contributions from more individuals than any other candidate for city office this year. The most common contribution to his campaign is \$10. Thus, deferring run-off fundraising would prejudice his campaign strategy; approving run-off fundraising at this juncture will further the level playing field purpose of the CFB program by allowing a community-based, grassroots candidate to wage a competitive run-off campaign should he qualify for the run-off.

**6. The Candidates' Fundraising Renders A Run-Off Reasonably Anticipated**

Where, as here, there is a four-candidate field in which candidates have raised significant sums of campaign contributions, the CFB has previously found as it should here that this financial factor favors the commencement of run-off fundraising. See e.g. Advisory Opinion No. 2001-1 and Advisory Opinion No. 2005-2.

As of the most recent filings, the following is the financial status of the four contending campaigns:

Candidate Name	Number of contributors	Total Raised	Cash on hand	Matching Claims	Expected Public Funds	Total raised w/ expected public funds
Eric Gioia	3,582	\$2,243,822	\$1,669,098	\$225,101	\$1,350,606	\$3,594,428
Bill de Blasio	2,027	\$1,058,952	\$563,189	\$198,758	\$1,192,548	\$2,251,500
Norman Siegel	1,042	\$232,160	\$59,295	\$99,663	\$0*	\$232,160
Mark Green	490	\$268,143	\$163,861	\$44,600	\$0*	\$268,143

\*Has not yet qualified for public matching funds

[http://www.nyccfb.info/VSAppls/WebForm\\_Finance\\_Summary.aspx?as\\_election\\_cycle=2009&sm=press\\_&sm=public\\_h1](http://www.nyccfb.info/VSAppls/WebForm_Finance_Summary.aspx?as_election_cycle=2009&sm=press_&sm=public_h1)

Based on this data, the two candidates who are currently trailing in the public polls (Councilmembers Gioia and de Blasio) have by far the most available to spend on voter contact and communications prior to primary day. The two more well-known candidates, each of whom is running for Public Advocate for the third time, have relatively little available funding for voter outreach. This, too, is a recipe for a run-off; thus, the financial factor provides additional grounds for finding that a run-off is reasonably anticipated.

**7. There Is No Reason To Expect Any Candidate To Leave The Race**

All four candidates are actively circulating nominating petitions for Public Advocate. Neither of the current office holders have frozen their 2009 committees pursuant to AO 2008-7 in order to seek re-election to the City

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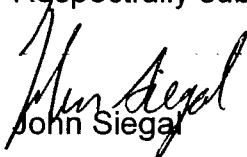
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Council. Accordingly, there is no demonstrable "possibility that any of these candidates would abandon the race," Advisory Opinion No. 2001-1, and so run-off fundraising is warranted.

\* \* \*

For all of these reasons, the Committee has met its burden under Rule 1-04(q) of demonstrating that a run-off election is reasonably anticipated. The objective facts set forth above and in the accompanying polling memorandum as applied to the CFB's precedents compel a finding that a Public Advocate primary is reasonably anticipated.

Respectfully submitted,

  
John Siegal

Enclosure

cc: Hon. Eric Gioia



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## **Analysis of Public Polls in the 2009 Public Advocate Democratic Primary**

### The Candidates

Four candidates are currently running to become the 2009 Democratic nominee for the Office of New York City Public Advocate: Eric Gioia, Mark Green, Bill de Blasio and Norman Siegel, with Green leading in current public polls.

As this analysis demonstrates, Green's historical performance in past Democratic primaries, and the fundraising, spending, institutional and grassroots-based advantages that other candidates have over him, make it reasonably likely that Green will fall below 40% on election day and that a run-off will be necessary to determine a Democratic nominee.

### Analysis of Current Public Polls

There have been three reported public polls of the Public Advocate's race to date, two conducted by Marist College and one by Quinnipiac University. None of these polls have found that any candidate exceeds the 40% needed to avoid a run-off *outside the poll's margin of error*, and indeed two of the three polls found that no candidate exceeded 40% at all.

Marist's February 20 poll showed Mark Green at 35%, with 22% undecided, while its May 13 poll showed Green at 42%, with 30% undecided.<sup>1</sup> Quinnipiac's poll released on June 17 showed Green at 35% with 34% undecided.<sup>2</sup>

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<sup>1</sup> The first poll, released on February 20, surveyed 546 registered Democrats, with a margin of error of 4.5%. Available at <http://maristpoll.marist.edu/wp-content/misc/c090216/MY090220.pdf>, it found the following percentages of people reporting that they would vote for the potential candidates:

35% - Mark Green  
15% - Adam Clayton Powell, IV  
14% - Norman Siegel  
6% - John Liu  
6% - Bill de Blasio  
2% - Eric Gioia  
22% - Unsure

The field of candidates had thinned out by the time Marist conducted its next poll, released on May 13 and available at [http://maristpoll.marist.edu/wp-content/misc/nycpolls/c090505/Bloomberg/%202009%20Dem\\_Primary\\_Public%20Advocate\\_Tossup.htm](http://maristpoll.marist.edu/wp-content/misc/nycpolls/c090505/Bloomberg/%202009%20Dem_Primary_Public%20Advocate_Tossup.htm). The poll surveyed 375 voters and had a margin of error of +/- 5%, with the following numbers reported:

42% - Mark Green  
15% - Norman Siegel  
9% - Bill de Blasio  
4% - Eric Gioia  
30% - Unsure

<sup>2</sup> Quinnipiac's poll, conducted from June 9 – 14, surveyed 1,396 New York City registered voters and had a margin of error of +/- 2.6%. The poll, available at <http://www.quinnipiac.edu/x1302.xml?ReleaseID=1315>, found the following percentages:

35% - Mark Green  
14% - Norman Siegel  
10% - Bill de Blasio  
5% - Eric Gioia  
34% - Don't Know

These polls must be read in the context of the current state of the race, Green's history in recent New York elections, and early polls' poor record of predicting the final vote in City Democratic primary elections.

First, Green is the only candidate with anything approaching citywide name recognition. As Green's competitors become better known it is all but certain that their standing in the polls will rise, eating into Green's share of the vote. Based on currently available fundraising data, two of Green's competitors, Gioia and de Blasio, will have a substantial spending advantage over Green.

Second, Green has a record of being unable to break 40% in any of his recent primary elections.

Over the past eleven years, Mark Green has run for three different offices, mounting primary campaigns in each one. In none of his most recent three primary elections was he able to break 40% in the election.

In the 2006 New York State Attorney General primary, Green predicted that a strong New York City vote would carry him to victory.<sup>3</sup> In fact, he lost the race as a whole, earning just 33% of votes across the state,<sup>4</sup> and only 36% of the vote even within the five boroughs.<sup>5</sup>

In the 2001 Mayoral primary, Green led early polls substantially – a March of 2001 poll found Green in the lead at 31%, with eventual primary winner Fernando Ferrer at 12%.<sup>6</sup> On election day Ferrer won with 35% of the vote, with Mark Green pulling the same 31% that he had started with.<sup>7</sup>

And in the 1998 U.S. Senate primary, a December 1997 poll showed Green in second place with 25% of the vote.<sup>8</sup> By election day, Green sank all the way to 19%, as Chuck Schumer vaulted past him from third place into the winner's circle.<sup>9</sup>

Finally, early New York primary polls have proven to be extremely unreliable as predictors of the final vote.

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<sup>3</sup> Michaud, Anne, "Cuomo's lead vulnerable: A good turnout among NYC voters could lift Green in AG primary race," *Crane's New York Business*, Aug. 28, 2006.

<sup>4</sup> Robbins, Tom, "Mark Green Exits, Stage Left," *Village Voice*, Sept. 12, 2006.

<sup>5</sup> New York City Board of Elections, "Statement and Return Report for Certification, Primary Election 2006 – 09/12/2006 For Democratic Attorney General," available at <http://www.vote.nyc.ny.us/pdf/results/2006/primary/recaps/20CitywideDemocraticAttorneyGeneralRecap.pdf>

<sup>6</sup> Seifman, David, "Green well ahead of Dem rivals," *New York Post*, Mar. 8, 2001.

<sup>7</sup> New York City Board of Elections, "Statement and Return of the Votes for the Office of Mayor of the City of New York," available at <http://www.vote.nyc.ny.us/pdf/results/2001/primaryelection/2001p.pdf>

<sup>8</sup> Fasman, Jonathan E. & Schlesinger, Robert, "Deemed Front-Runner, Ferraro faces daunting financial challenge," *The Hill*, Jan. 7, 1998.

<sup>9</sup> Nagourney, Adam, "Schumer is Senate Nominee; Vallone will face Pataki," *N.Y. Times*, Sept. 16, 1998.

Whether this can be explained by the fact that they reflect name recognition alone, before most voters are paying close attention, or because they have been conducted prior to candidates engaging in meaningful public communications efforts, there are repeated examples of spring and summer frontrunners who fall precipitously by the time the primary election actually occurs.<sup>10</sup> Examples dating back decades demonstrate this phenomenon, and Mark Green has been personally involved in several of the relevant races:

- 1982 New York State Gubernatorial primary: Ed Koch led Mario Cuomo 52-27 even into September, yet Cuomo won the primary and became governor
- 1993 New York City Comptroller primary: Liz Holtzman led Alan Hevesi 56-4 in the primary six months before the election, Hevesi won the primary
- 1998 U.S. Senate primary: Geraldine Ferraro was up 19 points in the primary even into August, yet Chuck Schumer closed the gap to win the primary (Green placed third)
- 2001 New York City Mayoral Primary: Mark Green led Freddy Ferrer 31-12 in March of 2001, yet Ferrer won the primary 36-31 to generate a run-off.

A more recent example comes from the 2005 New York City Mayoral primary. The race, which featured a well-known candidate who had previously run citywide and an outer borough candidate running for the first time, found Ferrer leading Congressman Anthony Weiner 36-9 in polls from June of 2005.<sup>11</sup> By election day, with the benefit of increased voter attention and the expenditure of voter contact funds, Weiner had climbed to just below 30%.

As Mark Green's then-pollster said in a 1998 interview with the New York Times: "The political landscape is littered with front-runners who ended up losing."<sup>12</sup>

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<sup>10</sup> See generally Zion, Sidney, "Truly polls apart; early leads mean nothing at all," N.Y. Post, Apr. 16, 2001 and Herbert, Bob, "When Polls Deceive," N.Y. Times, May 14, 1998.

<sup>11</sup> Janison, Dan, "Poll: Mayor leads after ad blitz," New York Newsday, June 7, 2005

<sup>12</sup> Herbert, "When Polls Deceive," supra n.10.