

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

FILED
SS.

2002 DEC -5 P 11: 01

CLERK OF DISTRICT COURT
JACKSONVILLE, FLORIDA

American Association of People with
Disabilities, et al.,

Plaintiffs

v.

Jim Smith, et al.,

Defendants.

Civil Action No. 3:01-CV-1275-J-21TJC

**CONSOLIDATED OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS
OR FOR SUMMARY JUDGMENT**

Plaintiffs respectfully submit this consolidated opposition to Defendants' motions to dismiss or for summary judgment. This consolidated opposition addresses arguments made in both of the Motions.¹ Plaintiffs have also filed a supplemental opposition memorandum to Defendant Stafford's Motion requesting relief under Rule 56(f) because summary judgment is neither appropriate nor has there been sufficient factual development to consider such a request.²

INTRODUCTION

Despite this Court's refusal to dismiss Plaintiffs' ADA and Rehabilitation Act ("RA") claims, Defendants again move to dismiss. In doing so, they mischaracterize or ignore this Court's October 16 Order, making many of the same arguments already rejected. And despite this Court's explicit permission to file an amended complaint clarifying Plaintiffs' reliance on the statutes' "generic discrimination" provisions, Defendant Stafford argues that Plaintiffs have

¹ In determining the specific arguments made in both Motions, Plaintiffs note that Defendant Stafford's attempt to "join [the State's Motion] to the extent the grounds asserted are applicable to him" (*Stafford Motion* at 13) does not satisfy his obligations under Rule 56 or Rule 12.

² Plaintiffs will timely file a supplemental opposition under Rule 56(f) to the State's Motion on or before December 11, 2002.

“violated” the Court’s order in doing so. (*Stafford Motion* at 3.) The State implicitly makes the same argument. (*State Motion* at 5.) Their Motions must fail.

I. THE COURT’S OCTOBER 16 ORDER SUSTAINED THE ADA AND RA CLAIMS

In its October 16 Order, the Court made it clear that Plaintiffs’ ADA and RA claims survive:

- “. . . Section 1 of the Florida Constitution provides for a program, activity, or service of direct and secret voting that is properly interpreted to permit the kind of assistance provided in Section 101.051, Florida Statutes. **The question still remains, however, whether the program, activity, or service provided violates the ADA or the Rehabilitation Act.**” (Order at 23, *emphasis added*.)
- “. . . Plaintiffs have alleged that voting equipment approved by Defendants Smith and Kast’s predecessors and purchased by Defendant Stafford and the Counsel is not **‘readily accessible’** to visually and manually impaired voters. In light of the facts alleged in the Complaint, **the Court cannot say with certainty that the Plaintiffs would not be entitled to relief** under any state of facts which would be proved in support of their claim under the ADA.” (*Id.* at 28, *emphasis added*.)
- “In light of the factual allegations of the Complaint, **Plaintiffs may be able to prove that visually and manually impaired voters are being denied meaningful access** to the service, program, or activity. And so, **the Court cannot say with certainty that the Plaintiffs would not be entitled to relief** under any state of facts that could be proved in support of their claim under the Rehabilitation Act. (*Id.*, *emphasis added*.)
- “**Plaintiffs may also be able to prove facts supporting a claim under the ADA pursuant to 28 C.F.R. §35.160**, of Subpart E (“Communications”) of 28 C.F.R. PT 35 . . . In the instance case, **Plaintiffs have alleged that Defendants have failed to furnish appropriate auxiliary aids, the Court cannot say that there is no set of facts which, if proved, would support their claim that Defendants violated 28 C.F.R. §35.160.**” (*Id.* at 28-29, *emphasis added*.)

The allegations of the Amended Complaint are materially identical to those allegations already held by the Court to state claims under the ADA and RA. With various degrees of vigor,

both Defendants – one by silence, the other by affirmative argument – ignore this fact. For this reason alone, the Motions must be denied.

Moreover, Defendants seem to believe that Plaintiffs are no longer free to argue that Defendants violate the ADA and RA by denying disabled voters a secret ballot, when the means to grant equal treatment is readily available. (*Stafford Motion* at 2; *see also State Motion* at 4-8.) But this Court has clearly recognized that the ADA and RA contemplate *both* discriminatory treatment *and* denial of government benefits or exclusion from government programs:

. . . Title II of the ADA and Section 504 of the Rehabilitation Act proscribe more than such ‘exclusion’ and ‘denial.’ They both, in addition, more generically proscribe disability ‘discrimination’ by the pertinent public entities.

(*Id.* at 29-30, *emphasis added.*)

Despite the Court’s ruling, Defendants suggest that the Order precludes any allegations that the “generic discrimination” faced by Plaintiffs occurs because disabled voters have no other option than to use third party assistance. However, Plaintiffs do not argue that it is illegal to provide assistance to disabled voters—only that it is discriminatory to *require* them to, among other things, tell their vote to a third party, when it is entirely possible to vote independently. Plaintiffs’ “generic discrimination” allegations are different from their “program exclusion” allegations; the “generic discrimination” allegations are that Plaintiffs have been discriminated against by, among other things, the burdens flowing from being “forced” to use third party assistance. (Amended Complaint at ¶ 82.) The Court has held that third party assistance is constitutional, not that its discriminatory impact is permissible under the ADA and RA when it is the **only option** for Plaintiffs to cast their votes. (Order at 23.)³

³ The Amended Complaint is not based only on discrimination flowing from third party assistance as the sole option for disabled voters. There are numerous allegations of discrimination related to the additional burdens and impediments to voting faced by Plaintiffs that are not faced by non-disabled voters caused by the voting equipment used by Duval County. (*See, e.g.,* Amended Complaint at ¶ 82.)

Further, implying that the Court dismissed Plaintiffs' "generic discrimination" claim, Defendant Stafford argues that Plaintiffs were ordered by the Court "to make additional allegations . . . under the more *general* anti-discrimination provisions" (*Stafford Motion* at 3, *emphasis in original*.) The State implies the same. This was not the Court's ruling. The Court expressly ruled: " . . . suffice it to say that such counts [ADA and RA counts] appear to include allegations under the more generic proscription" (Order at 29-30.) The Court then indicated that "since Plaintiffs will be afforded the opportunity of filing an amended complaint . . . such amended complaint should allege more clearly in Counts One and Three the bases, if any, for their reliance upon the more generic proscription" (*Id.* at 30.) The Court's express Order did not dismiss Plaintiffs' claim for "generic discrimination;" it requested "appropriate clarifying allegations." (*Id.* at 39.) That is precisely what the Amended Complaint includes:

- **"Defendants have discriminated and continue to discriminate against Plaintiffs and other similarly situated voters with visual or manual impairments on the basis of their disabilities by failing to ensure that such voters can vote under the same or similar conditions as non-disabled persons in Duval County. Generally, the discrimination includes: (a) that the voting equipment in use in Duval County, Florida is not readily accessible to Plaintiffs and others similarly situated; (b) the Defendants' failure to furnish appropriate auxiliary aids necessary to afford Plaintiffs and others similarly situated an equal opportunity to participate in and enjoy the benefits of the activity of voting; (c) the Defendants' failure to give primary consideration to or otherwise honor the requests of the Plaintiffs and others similarly situated with respect to the type of auxiliary aids and services necessary; and (d) the Defendants otherwise subjecting the Plaintiffs and others similarly situated to discrimination by requiring them to vote in a manner materially different from, and substantially more burdensome than, the manner by which non-disabled voters cast their votes in Duval County."** (Amended Complaint ¶ 38, *emphasis added*.)
- Defendants have violated the ADA by **discriminating against Plaintiffs and others similarly situated because of their disabilities by failing to provide voting machines that are readily accessible so that visually impaired voters and manually impaired voters can vote in the same or similar manner as non-disabled voters.** (*Id.* ¶ 73, *emphasis added*.)
- "As alleged throughout this Amended Complaint, Defendants have discriminated against Plaintiffs and other similarly situated Duval County voters with visual or

manual impairments. The particular discrimination against Plaintiffs and other similarly situated voters manifests itself as follows: (a) being **forced** to reveal their votes to a third-party; (b) risking having (and actually having) **their votes revealed by the third-party** to other people; (c) risking having (and actually having) the **third-party attempt to influence their candidate choice**; (d) having to vote in a manner that singles them out in the polling place; (e) **having to wait long periods of time** until a third-party is available to assist the voter; (f) having to incur the burden and impediment of **traveling to the Office of Elections' headquarters** to use the three accessible voting machines in the event Duval County ever purchases such machinery; and (g) **having to suffer embarrassment and distress during the voting process for each of the foregoing reasons and the fact that they are required to vote in a manner materially different from, and substantially more burdensome than, the manner in which non-disabled voters cast their votes in Duval County.**

(*Id.* ¶ 82, *emphasis added.*)⁴

It is clear that the Amended Complaint adequately alleges “generic discrimination,” just as the initial complaint did. It is even more apparent that both Defendants have ignored this fact in an attempt to avail themselves of perceived – but nonexistent -- protection under the Court’s Order.

II. THE AMENDED COMPLAINT SATISFIES RULE 12(B)(6) STANDARDS

Dismissal of a complaint is proper only if the defendants can demonstrate “beyond [a reasonable] doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief.” *Brooks v. Blue Cross & Blue Shield, Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46) (*emphasis added*). The Court must “accept the facts in the complaint as true” and construe those facts “in the light most favorable to the nonmoving party.” *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1370 (11th Cir. 1998) (citations omitted). These standards are rarely met in discrimination cases, as the Supreme Court has held that the complaint must only “‘give the defendant *fair notice* of what the plaintiff’s claim is and the grounds upon which it rests.’” *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 512

⁴ See also, Amended Complaint ¶¶ 50, 76.

(2002) (quoting *Conley v. Gibson*, 355 U.S. 41, 47) (*emphasis added*).⁵ There is no doubt that the Amended Complaint satisfies these standards.

Specifically, the Motions themselves demonstrate that Defendants have “fair notice” of Plaintiffs’ claims and “the grounds upon which [they] rest[.]” *Swierkiewicz*, 534 U.S. at 512.. Further, in the hearing on the initial motions to dismiss, Defendants conceded that they have fair notice of the Plaintiffs’ claims:

Mr. Makar: ...[T]he plaintiffs have spelled out their case. This isn’t a case in which there’s a bare bones pleading under the Gibson versus Conley type of issue. They’ve laid it out already....

(2/28/02 Hearing at 22-23) (*emphasis added*). This concession applies with equal force to the allegations of the Amended Complaint. This should be the end of the Court’s inquiry for purposes of Rule 12(b)(6).⁶

III. PLAINTIFFS HAVE VALID CLAIMS UNDER THE ADA AND THE RA

There is no dispute that Plaintiffs are a “public entity” as defined by the statutes. (*See Amended Complaint* ¶¶ 10-30, 70.) Nor is it disputed that the individual Plaintiffs are “qualified individuals with a disability.” (*See Id.* ¶¶ 4-8, 69.) Defendants’ sole challenge to the Amended Complaint is that Plaintiffs have not been excluded from participation in a program or activity, denied the benefits of a program or activity, or subjected to discrimination on the basis of their disabilities. The Amended Complaint alleges that Defendants have violated the ADA in three

⁵ The courts heighten the scrutiny of Rule 12(b)(6) motions where, as here, the Plaintiffs have alleged civil rights violations. *See Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir. 1994); *De Mallory v. Cullen*, 855 F.2d 442, 445 (7th Cir. 1988) (“[I]n ‘complex cases involving both fundamental rights and important questions of public policy, such peremptory treatment [as dismissal] is rarely appropriate’”) (*citation omitted*).

⁶ Defendants never discuss applicable summary judgment standards, much less state the specific bases for their random references to summary judgment. It is not clear what arguments are made to support summary judgment versus dismissal. In any event, both this Consolidated Opposition and Plaintiffs’ supplemental Rule 56(f) opposition indicate that genuine issues of material fact exist, and that Defendants misapprehend applicable law.

ways: (1) by discriminating against Plaintiffs on the basis of their disabilities; (2) by failing to ensure accessible design and construction of the new voting equipment; and (3) by failing to provide auxiliary aids and services to Plaintiffs. (*See generally* Amended Complaint ¶¶ 68-98.) Plaintiffs' allegations with respect to each of these ways have already been sustained by the Court. (*See*, Section I, *supra*.) Therefore, the only possible issue before the Court is limited to whether Plaintiffs' "clarifying allegations" under the "generic discrimination" clause of the ADA and the RA sufficiently state claims.

A. The Amended Complaint States A Claim For "Generic Discrimination"

Both the ADA and the RA provide that "no qualified individual with a disability shall, by reason of such disability . . . be subjected to discrimination . . ." 42 U.S.C. § 12132; 29 U.S.C. § 794(a). The anti-discrimination clause is a "catch-all phrase that prohibits all discrimination by a public entity, regardless of the context." *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 45 (2d Cir. 1997). A public entity cannot discriminate against individuals with disabilities "by placing additional burdens on them" for participation in its services, programs, or activities. *Ellen S. v. Florida Bd. of Bar Examiners*, 859 F. Supp. 1489, 1494 (S.D. Fla. 1994); *see also* *Shotz v. Cates*, 256 F.3d 1077, 1080 (11th Cir. 2001).

Defendants argue that because the Court upheld the constitutionality of third party voting under the Florida Constitution, **regardless of the burdens incident thereto**, there can be no violation of the ADA or RA. (*See, e.g., Stafford Motion*, at 3-4.) Contrary to Defendants' assertion, the ADA and the RA are violated because Plaintiffs cannot vote in the same or similar manner as non-disabled voters can, but instead, vote in a manner fraught with burdens and discrimination. (*See e.g., Amended Complaint*, ¶¶ 38, 76, 79, 80, 81, 82). On these grounds, the Amended Complaint adequately states claims for relief under the ADA and RA. *National Org. on Disability v. Tartaglione*, No. 01-1923, 2001 U.S. Dist. LEXIS 16731 at *13 (E.D. Pa. Oct. 11, 2001).

Courts that have considered the application of the “generic discrimination” clause to the voting process confirm the sufficiency of the Amended Complaint. In *Tartaglione*, visually and manually impaired voters alleged that the Pennsylvania third-party assistance statute violated the ADA and RA because it imposed burdens upon them not placed upon non-disabled voters. *Id.* In *Tartaglione*, just as Defendants do here, the defendants argued that no violation could occur because the plaintiffs had not been prevented from voting. The Court rejected this argument:

Defendants’ argument that Plaintiffs cannot state claims for relief [under the ADA and Rehabilitation Act] because Plaintiffs have not been prevented from voting mischaracterizes the Complaint. . . . Plaintiffs claim to have been discriminated against in the process of voting because they are not afforded the same opportunity to participate in the voting process as non-disabled voters. The complaint alleges that assisted voting . . . is substantially different from, more burdensome than, and more intrusive than the voting process utilized by non-disabled voters The Complaint alleges that the . . . Plaintiffs . . . cannot participate in the program or benefit of voting in the same manner as other voters but, instead, must participate in a more burdensome process [T]he Court concludes that the Complaint states a claim for discrimination in the process of voting. . . .

Id. at *11-*13. The allegations of the Amended Complaint are materially identical to those sustained by the Court in *Tartaglione* (see Amended Complaint at ¶¶ 38, 81-82 and *Section I supra*). See also, *Shotz v. Cates*, 256 F.3d 1077, 1079 (11th Cir. 2001).⁷ Therefore, Defendants’ Motions must be denied.

B. *Nelson v. Miller* Is Inapposite

The thrust of both Motions is a re-hash of the Defendants’ arguments in their initial motions to dismiss that *Nelson v. Miller* is dispositive of this case. (*Stafford Motion*, at 5; *State*

⁷ Similarly, in *Lighbourn v. County of El Paso*, the district court concluded, *after a trial on the merits*, that a violation of the ADA and the RA had occurred where the “statutory methods of assisting blind persons to vote both abridge the right to a secret ballot and “cause ‘embarrassment and sometimes humiliation.’” 118 F.3d 421, 424 (5th Cir. 1997). On appeal, the Secretary of State did not challenge this ruling. *Id.* at 425. Thus, the district court’s ruling with respect to the anti-discrimination clause of the ADA and the RA stands.

Motion, at 4.) This argument ignores that *Nelson* raises different legal issues than those presented in the Amended Complaint. Based on these differences, *Nelson* is inapposite.⁸

1. *Nelson* Did Not Involve A Claim Under the Generic Proscription Against Discrimination

Defendants concede that the central question before the court in *Nelson* is distinct from the central questions raised by the Amended Complaint. *Nelson* involved whether Michigan's third-party voter assistance statute excluded disabled voters from participating in Michigan's voting system. *Nelson v. Miller*, 170 F.3d 641, 650 (6th Cir. 1999) ("[a]ppellants readily admit that their ADA and RA claims depend entirely upon their being denied access, because of their disability, to this 'secret voting program' that they claim the Michigan Constitution mandates"); *Stafford Motion* at 9, *quoting Nelson*, 170 F.3d at 649-50 (the *Nelson* "plaintiffs claimed 'that the State has violated the ADA and RA by exclud[ing them] from participation in or . . . den[ying them] the benefits of the State's constitutionally mandated secret voting program'"). The issue of whether the additional burdens placed on disabled voters under Michigan's voting system violated the "generic discrimination" clauses of the ADA and RA was not before the court. For this reason, *Nelson* simply does not apply. By contrast, *Tartaglione* is directly on point, and requires denial of the Defendants' Motions. *See* Section III.A, *supra*; *see also Shotz*, 256 F.3d at 1079.

2. *Nelson* Did Not Involve the Purchase of New Voting Equipment

Because *Nelson* did not involve the purchase of new equipment, it was based on entirely different legal standards than those applicable here. Plaintiffs allege that Duval County

⁸ Defendants admit that this argument is a second bite at the apple. (*Stafford Motion* at 5 and n.3.) If the argument was meritorious at this stage of the case, the Court could have dismissed this case in its entirety under the October 16th Order. By this reference, Plaintiffs re-assert all arguments regarding *Nelson* made in their January 17, 2002 Opposition Memoranda to the initial Motions to Dismiss. Additionally, Plaintiffs have filed a motion for reconsideration of the Court's October 16th Order and preserve all rights for later appeal pending the Court's ruling on the motion for reconsideration.

“purchased approximately 300 optical scan voting systems. . . .” (Amended Complaint at ¶ 52.) The fact that the Florida voter assistance statute *may have* satisfied the ADA in the past is irrelevant, because once Defendants purchased *new* voting systems a heightened accessibility standard was triggered.⁹ Indeed, when a public entity purchases a new “facility,” it must make the new facility readily accessible to the “**maximum extent feasible**.” 28 C.F.R. § 35.151(b); Order at 25-26 (*emphasis added*); *see also Kinney v. Yerusalim*, 9 F.3d 1067, 1071 (3d Cir. 1993). This standard required Defendants to make the new voting equipment *fully accessible to all voters*, including those with visual or manual impairments. *Kinney*, 9 F.3d at 1071 & 1073.¹⁰

By contrast, *Nelson* was decided under the less stringent “readily accessible” standard. In *Nelson*, the State had not purchased new voting equipment. Rather, the *Nelson* plaintiffs sought an affirmative injunction forcing the State to purchase new voting equipment. 170 F.3d at 644. This alone makes *Nelson* inapplicable to this case.

Importantly, under the correct legal standard, Defendants *admit* that Duval County’s newly purchased voting equipment is not readily accessible to the “maximum extent feasible.” 28 C.F.R. § 35.151(b). Indeed, the State’s Motion concedes that “both Congress and the Florida Legislature have, in effect, acknowledged that voting systems **should be more accessible . . .**” (*State Motion* at 13) (*emphasis added*.) If, as the parties agree, Duval County’s voting equipment “should be more accessible,” it cannot possibly be readily accessible to the “maximum extent feasible.” This admission requires denial of Defendants’ Motions.¹¹

⁹ As the Court recognized in its October 16th Order, voting machines constitute “facilities” under the ADA. (Order, n.16.)

¹⁰ Indeed, Congress recognized that altered or new facilities presented “an immediate opportunity to provide full accessibility.” *Kinney*, 9 F.3d at 1074. Accordingly, it required such changes to be made free of discrimination and to be usable by all. *Id.* at 1073.

¹¹ For these reasons, the State’s arguments regarding reasonable accommodations (*State Motion* at 17-18) completely miss the mark as well.

C. Defendants' Reliance On Other Extraneous Federal Laws and Materials Is Misplaced

Defendants assert that non-binding and antiquated opinions of the Department of Justice and the Federal Elections Commission, as well as other federal laws, exonerate them from liability under the ADA and RA. The State goes as far as to allege that none of the burdens and discrimination the Plaintiffs allege, "as interpreted by the courts, the Department of Justice, and the Federal Elections Commission, violate [the ADA]." (*State Motion* at 8.) These authorities do not shield Defendants' admittedly discriminatory acts from liability.

1. The 1993 DOJ Opinion

The 1993 Department of Justice Letter of Findings (*State Motion*, at 8 n.1; *Stafford Motion*, at 10-12) has no bearing on the sufficiency of the Amended Complaint. This opinion letter is neither binding nor controlling authority. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *Gonzalez v. Reno*, 215 F.3d 1243, 1245 (11th Cir. 2000). Moreover, the Department's letter was written at a time when accessible electronic voting systems did not exist.

The 1993 DOJ letter, in reviewing Pinellas County's election practices, concluded that, because no alternative for a blind voter to cast a ballot existed, third-party assisted voting allowed blind voters to participate in and enjoy the benefits of a service, program, or activity conducted by a public entity. (Exhibit 1.) The DOJ found that "electronic systems of voting by telephone that meet the security requirements necessary for casting ballots **are not currently available.**" (*Id.*, *emphasis added.*) Consistent with this acknowledgement, as technology has changed so have the views of the DOJ.

In its *amicus curiae* brief in *Nelson*, the DOJ stated its current view: "If reasonable modifications were available that would allow blind or visually impaired voters to cast their ballots without assistance and that would assure ballot secrecy, **the plain import of the ADA and its implementing regulations would require the state to adopt those modifications.**" (Exhibit 2.) In 2002, electronic voting systems do exist and are readily available. (*Amended*

Complaint ¶¶ 1, 37.) As such, this outdated 1993 DOJ Letter of Findings does not excuse Defendants discriminatory practices.¹²

Moreover, whether Defendants must provide electronic voting systems in order to afford Plaintiffs an “equal opportunity to obtain the same benefit” as that provided to non-disabled voters can be decided only after full factual development and trial. 28 C.F.R. § 35.130(b)(1); *see also Crowder v. Kitagawa*, 81 F.3d 1480, 1486 (9th Cir. 1996) (“the determination of what constitutes reasonable modification is highly fact-specific . . .”); *accord Staron v. McDonald’s Corp.*, 51 F.3d 353, 356 (2d Cir. 1995); *McCray v. City of Dothan*, 169 F. Supp. 2d 1260, 1275 (S.D. Ala. 2001) (“[w]hether an accommodation is reasonable ‘involves a fact-specific . . . inquiry that considers . . . the effectiveness of the modification in light of the nature of the disability . . .’”); *see also Hahn v. Linn County*, 130 F. Supp. 2d 1036, 1047 (N.D. Iowa 2001).

2. 1996 FEC Report and 1991 FEC Letter

Defendants’ reliance on an isolated reference to page 51 of the 1996 Federal Election Commission’s (“FEC’s”) “Innovations in Election Administration 15: Ensuring Accessibility Of the Election Process” report is misleading. (*State Motion* at n.8.) Considered in its entirety, the report requires denial of the Motions.

First, the isolated reference upon which the State relies is from a 1991 opinion letter. *Christensen*, 529 U.S. at 587 (opinion letters are neither binding nor controlling). This 1991

¹² Congress also appreciated the importance of implementing advances in technology. The House Committee made it clear that “technological advances can be expected to further enhance options for making meaningful and effective opportunities available. . . .” H.R. Rep. No. 101-485 (II), at 108 (1990), reprinted in, 1990 U.S.C.C.A.N. 303, 391. That Committee intended accommodations and services to “keep pace with the rapidly changing technology of the times.” *Id.*; *Molloy v. Metropolitan Transp. Auth.*, 94 F.3d 808, 812 (2d Cir. 1996) (holding the installation of a new, technologically advanced, ticket vending machine (TVM), was an alteration under the ADA, and was not readily accessible to the maximum extent feasible because it lacked an audio component); *Civic Ass’n of the Deaf v. Guiliani*, 970 F. Supp. 352, 360 (S.D.N.Y. 1997) (converting the current street alarm boxes to new boxes that are not accessible and usable by hearing-impaired people violated the heightened standard requiring new facilities to be readily accessible to the maximum extent feasible).

opinion letter was drafted at time when there were no accessible voting systems that could enable disabled voters to vote in the same or similar manner as non-disabled voters do. Indeed, the State ignores the FEC's recognition in the report that voting technology that enabled disabled voters to vote in the same or similar manner as non-disabled voters *did not yet exist* at the time. *See*, Exhibit 3 at 3-4 (*emphasis added*) ("it is reasonable to expect that, *at the current rate of technology*, voting devices that facilitate independent voting by the blind *may soon appear on the market*").

Second, the State ignores that the 1991 opinion letter analyzed whether the provision of voter-assistance was sufficient under an existing voting system. Similar to the inquiry in *Nelson*, the FEC letter has no bearing on a public entities' duties under the ADA and RA when a *new* voting system has been purchased – new facilities must be readily accessible to the "maximum extent feasible." (*See* Section V.B.2, *supra*.) For these reasons, the FEC report does not relieve Defendants from liability for discrimination under the ADA and RA.

3. Other Federal Laws

Defendants assert that because the third-party voter assistance statute is sanctioned by the Voting Rights Act of 1965 ("VRA") and the Voting Accessibility Act ("VAEH"), they cannot violate the ADA by providing this third-party voting system. (*State Motion*, at 5-7; *Stafford Motion*, at 12-13.) According to Defendants, there can be no ADA claim where the Defendants have complied with these two laws. This is faulty logic.

First, as Defendants acknowledge, the ADA provides:

Nothing in this Act shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction *that provides greater or equal protection for the rights of individuals with disabilities* that are afforded by this Act.

42 U.S.C. § 12201(b) (*emphasis added*), *quoted at State Motion* at 6. Contrary to Defendants' contention, the ADA does not *limit* or displace any rights under the VRA or VAEH; it *expands*

those rights. This fact is acknowledged by the FEC in a portion of its 1996 report not disclosed by the Defendants:

The Voting Accessibility for the Elderly and Handicapped Act (VAA) of 1984 was the first to bring federal focus directly on the need for accessible voting facilities and procedures. **The Americans with Disabilities Act (ADA) of 1990 further expanded and clarified the responsibilities of State and local election officials in ensuring the accessibility of the election process.**

(Ex. 3 at 1.) (*emphasis added.*) The ADA provides expanded rights to disabled voters wholly consistent with the VAEH and the VRA.¹³

Moreover, the FEC considers the ADA, together with the VRA and the VAEH, to be one of “[f]ive federal statutes pertain[ing] to the accessibility of the election process to persons with disabilities. **These laws work together** to ensure that all persons with disabilities, young and old, can enter a facility, cast their vote, and exit the polling place along with their fellow citizens.” *Id.* at 5-7. (*emphasis added.*) To argue that Defendants can implement a new voting system that imposes disparate burdens on disabled voters without violating the anti-discrimination clause of the ADA ignores the FEC’s pronouncement and would, in essence, obviate this clause of the ADA. Taken to its logical end, Defendants’ contention would take the

¹³ To the extent Defendants argue that the ADA is not an election law, Plaintiffs respectfully suggest that the Fifth’s Circuit’s conclusion in *Lightbourn* is plainly wrong. The Senate Report accompanying the ADA provides that “focused on the need to ensure access to polling places: ‘You cannot exercise one of your most basic rights as an American if the polling places are not accessible.’” S. Rep. No. 101-116, at 12 (1989). The House hearings described how some jurisdictions had implemented the Voting Accessibility Act in a manner that was “demeaning to the disabled person” and that “create[d] a loss of dignity and independence for the disabled voter.” *Americans with Disabilities Act of 1989: Hearing Before the Subcomm. on Select Education of the House Comm. on Education & Labor*, 101st Cong., 1st Sess. 41 (1989). Former-Vice President (then Senator) Gore stated: “As a practical matter, many Americans with disabilities find it impossible to vote. Obviously, such a situation is completely unacceptable and unconscionable. We must take strong action to end the tradition of blatant and subtle discrimination that has made people with disability second-class citizens.” (See 135 Cong. Rec. S10753 (1989).); *accord* 135 Cong. Rec. S10793 (1989) (remarks of Senator Biden). The ADA is an “election law” that added accessibility requirements applicable directly to voting, and its reach is not limited to the narrow protections afforded by prior laws enacted long before today’s technological advances.

teeth out of any federal law enacted subsequent to the VRA and the VAEH that provides accessible and non-discriminatory voting systems to disabled voters – including the Help America Vote Act of 2002. There is no authority supporting Defendants’ extraordinary position. *Tartaglione*, 2001 U.S. Dist. LEXIS 16731, at *10-*11 (additional steps beyond alternative ballot procedures of VAEH were necessary to avoid discrimination under ADA).

D. Defendants Smith and Kast Have A Duty to Ensure Local Officials Comply With The ADA And Are Indispensable Parties To This Litigation

Defendants Smith and Kast further argue, without explanation, that the ADA does not require them to certify only voting systems that will permit Plaintiffs to vote independently. (*State Motion* at 9.) This argument ignores their broader duty to ensure that local election officials comply with the ADA.

Specifically, Defendants Smith and Kast have the express statutory duty to “adopt uniform rules for the purchase, use, and sale of voting equipment” in Florida. Fla. Stat. 101.294(1). This duty necessarily requires them to ensure uniformity at the local level with respect to the purchase of voting systems. Further, Defendants Smith and Kast “*shall* adopt rules to achieve and maintain the *maximum degree of correctness*, impartiality, and efficiency of the *procedures* of voting, including write-in voting, and of counting, tabulating, and recording votes by voting systems used in this state.” Fla. Stat. 101.015(3) (emphasis added). These duties too require Defendants Smith and Kast to ensure compliance at the local level. Indeed, “counting, tabulating, and recording votes” are uniquely local functions. Whether Defendants Smith and Kast are complying with their statutory duties are matters for discovery and trial.

Further, the January 2002 hearing, the State explicitly conceded that Defendants Smith and Kast are indispensable parties. The Court specifically asked the State:

“Well, how do you envision that would play out? Another suit be brought if [the Secretary of State] took the position that she wasn’t going to certify them? Or abide by the judgment of the court that she was not a party to?”

Mr. Finkel, counsel for the State, responded:

It theoretically could be necessary, and it is also theoretical that she won't abide by it. ... And yes, I agree that if the court were to enforce the – wanted to enforce the judgment against her, against the department, that she would have to be rejoined or brought in.

The Court then asked, "Would she have the right to relitigate these same issues if joined later?" Mr. Finkel responded, "She might. ..." (Feb. 28, 2002 tr. at 8-9.) In light of these concessions, Smith and Kast are indispensable.¹⁴

Under identical circumstances, the Court in *Tartaglione* concluded that the Pennsylvania Secretary of the Commonwealth was an indispensable party because:

The Pennsylvania Election Code prohibits the use of voting machines which have not been pre-approved by the Secretary of the Commonwealth Defendants aver, and Plaintiffs concede, that the Secretary of the Commonwealth has not approved any electronic voting machines with the audio output technology required by the visually impaired Plaintiffs. Consequently, if Plaintiffs were to succeed in this proceeding, the Court could not order Defendants to use the accessible voting machines sought by the visually impaired Plaintiffs.

2001 U.S. Dist. LEXIS 16731, at *25-*26. *Tartaglione* compels the conclusion that Defendants Smith and Kast are indispensable parties to this action.

E. The Complaint Properly Alleges The Receipt Of Federal Financial Assistance By The State Defendants

The only specific attack lodged by any of the Defendants against Plaintiffs' RA claim is that "to state a claim and avoid summary judgment, plaintiffs must allege and demonstrate that the specific program or activity with which [Smith and Kast] are involved receives or directly benefits from federal financial assistance."¹⁵ (*State Motion* at 18-19.) Neither the Eleventh Circuit nor any Florida federal or state court has addressed whether federal financial assistance must be "receiv[ed by] or directly benefit[]" a "specific program or activity" to state a

¹⁴ This is particularly true here, where the three touch screen voting machines Duval County has decided to place in the Office of Election's headquarters are not yet certified by the State. (Amended Complaint at ¶ 55.)

¹⁵ Defendant Stafford's Motion does not expressly address federal financial assistance, neither admitting nor denying receipt of such funds.

Rehabilitation Act claim, much less whether a complaint must allege that it is “received[ed by] or directly benefits” a “specific program or activity” to survive Rule 12(b)(6). There is ample authority that “the specific program or activity with which [the defendants] are involved” need not “receive[] or directly benefit[] from federal financial assistance” – *i.e.*, “for use by the Division of Elections, or use in elections related functions” – as the State’s Motion suggests.¹⁶ In any event, a Rule 12(b)(6) motion is inappropriate to resolve this issue, and consideration of summary judgment is premature.

First, the issue of whether a state entity “receives federal financial assistance within the meaning of the civil rights laws . . . requires inquiry into factual matters outside the complaint and, accordingly, is a matter better suited for resolution after both sides have conducted discovery on the issue.” *Sims v. Unified Gov’t*, 120 F. Supp. 2d 938, 955 (D. Kan. 2000); *see also Shepard v. United States Olympic Comm.*, 94 F. Supp. 2d 1136, 1146-47 (D. Colo. 2000); *Communities for Equity v. Michigan High Sch. Athletic Ass’n*, 26 F. Supp. 2d 1001, 1008 (W.D. Mich. 1998); *Bowers v. NCAA*, 9 F. Supp. 2d 460, 492 (D.N.J. 1998); *Gazouski v. City of Belvidere*, No. 93-C-20157, 1993 U.S. Dist. LEXIS 17675, (N.D. Ill. Dec. 13, 1993); *Gonzalez v. Dev. Assistance Corp.*, No. 88-0191-LFO, 1989 U.S. Dist. LEXIS 6921 (D.D.C. June 21, 1989); *Bellamy v. Roadway Express, Inc.*, 668 F. Supp. 615, 618 (N.D. Ohio 1987). Discovery does not close until April 3, 2003, and Plaintiffs have not had the opportunity to conduct discovery on this issue. (*See Rule 56(f) Motion.*) For example, despite serving discovery requests regarding federal financial assistance in July, Plaintiffs received the attachments to Hal Lench’s declaration

¹⁶ *Jim C. v. United States*, 235 F.3d 1079, 1082 (8th Cir. 2000) (holding that the Arkansas Department of Education is subject to a Rehabilitation Act § 504 claim for any of its activities not merely those activities or programs that actually receive federal funds), *cert. denied*, 533 U.S. 949 (2001); *Shepherd v. United States Olympic Comm.*, 94 F. Supp. 2d 1136, 1146 (D. Colo. 2000) (holding that the U.S. Olympic Committee is subject to a Rehabilitation Act claim where the federal funding went to the committee for other activities not the athlete training program in question); *Sharrow v. Bailey*, 910 F. Supp. 187, 193 (M.D. Pa. 1995) (holding that a doctor who did not receive federal funding was subject to a Rehabilitation Act claim where hospital at which he worked did receive federal financial assistance).

for the first time when the State served its Motion. Plaintiffs have the right to depose Mr. Lench and others regarding the untested conclusions set forth in his declaration.

Second, preliminary factual investigation also reveals that the Secretary of State's Select Task Force On Voting Accessibility received "written and oral presentation" regarding the applicability of the RA to the voting process in Florida. (Exhibit 4.) The written presentation concludes:

The Rehabilitation Act of 1973 - requires that all federal grants and programs or entities that receive federal funding, comply with physical, program and service accessibility. It is currently an estimated 20% of people with disabilities who are LESS LIKELY to vote, when compared to the general population, and another 10% who are LESS LIKELY to register to vote due to lack of accessibility. There are presently 33.7 million Americans with disabilities of voting age, and if all polling sites were accessible, an additional 5-10 million of these disabled would vote.

(*Id.*)

Why would the Select Task Force solicit specific advice about the RA if it did not apply? What was said in the "oral presentation" about the RA, the nature of the federal financial assistance received by the State, and the alleged "directness" requirement? These issues can be resolved only through full discovery and trial. *See Lightbourn*, 118 F.3d at 427 (full trial conducted regarding, among other things, whether the Texas Secretary of State received federal financial assistance.)

F. The Complaint Properly Alleges an Existing Case or Controversy

The State Defendants contend that this case is not ripe for adjudication because the alleged injuries are "hypothetical," or "speculative" and are not "fairly traceable" to the State.¹⁷ (*State Motion* at 14, 16). This argument fails for the following reasons.

¹⁷ State Defendants also suggest that the Court should exercise its discretion and declare this case "unripe" for "prudential reasons". This position is unpersuasive and untenable. First, the State Defendants fail to identify any "prudential reason" to justify the exercise of such "discretion" in the case at hand. Second, the State Defendants do not provide any binding

First, this Court has already ruled that a case or controversy exists which is ripe for adjudication.

...Plaintiffs have adequately alleged the existence of an actual or threatened injury caused by the conduct of Defendants Smith and Kast or their predecessors that could be redressed by a favorable decision of this Court.... [T]he Court cannot say that Plaintiffs would be unable to prove any state of facts that would satisfy the ripeness and standing requirements.”

(*Order* at 10.) In so ruling, the Court left only one issue unresolved regarding ripeness and standing—whether the State Defendants can certify only machines presented to them by the counties. (*Order* at 10, n.6.) The Amended Complaint explicitly alleges that Smith and Kast “can certify voting systems that are presented to them directly by third parties and do not have to wait for a county to request certification of a particular voting system.” (Amended Complaint ¶ 44.) As such, State Defendants’ renewed case or controversy argument fails.

Second, the Amended Complaint alleges “actual” injury, not “speculative” or “conjectural” injury. For example, Plaintiffs’ claim that “Defendants **have discriminated** and **will discriminate** against the Plaintiffs....” (*Amended Complaint* ¶104.) Plaintiffs further allege that they are:

(a) **being forced** to reveal their votes to a third-party; (b) risking having (**and actually having**) their votes revealed by a third-party to other people; (c) risking having (**and actually having**) the third-party attempt to influence their candidate of choice; (d) **having** to vote in a manner that singles them out in the polling place; (e) **having** to wait long periods of time until a third-party is available to assist the voter; (f) **having** to incur the burden and impediment of traveling to the Office of Elections’ headquarters to use the three accessible voting machines in the event Duval County ever purchases such machinery; and (g) **having** to suffer embarrassment

precedent for their contention that the Court can exercise such discretion when, as here, the alleged injuries are not speculative. Reliance on *O’Shea* is misleading. *O’Shea* does address the exercise of discretionary power for “prudential reasons”. *Brown*, a Sixth Circuit business judgment case in which the Court exercised its discretion to declare a case unripe, involved alleged injuries already classified as speculative in nature.

and distress during the voting process for each of the foregoing reasons and the fact that they are required to vote in a manner materially different from, and substantially more burdensome than, the manner in which non-disabled voters cast their votes in Duval County.

(Amended Complaint ¶82, *emphasis added*.)


Third, Defendants provide no authority supporting their argument that the frequency of the discrimination is legally relevant. (*See State Motion* at 11, 16-17.) Assuming *arguendo* that the frequency of the discrimination has some legal relevance, Plaintiffs have alleged that these manifestations of discrimination are not isolated incidences. (Amended Complaint ¶ 82.) Further, whether the discrimination is “isolated” clearly raises issues of fact. Indeed, issues of fact likely resolved by the Secretary Task Force’s finding that “**significant, severe, and pervasive** obstacles [] have been placed in the path of Florida’s voters with disabilities.” (*Task Force Report* at i; *emphasis added*.)

Fourth, the Plaintiffs allege that the State Defendants’ failure to fulfill their statutory duties caused the alleged injury. (Amended Complaint ¶¶ 39-50; 74-76; 82) These allegations must be taken as true for purposes of the Defendants’ Motions. *Brooks* at 1369. Further, the State Defendants’ contention that the alleged injury cannot be traced to them is rife with factual issues and assumes the Court will rule in their favor on the substantive issues of their Motion. Plaintiffs have addressed those substantive issues *supra*, Section III. For these reasons, the Motions fail.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants’ Motions.

Respectfully submitted,


J. Douglas Baldridge

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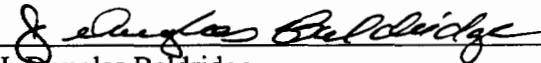
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Opposition to the Defendants' Motions to Dismiss were served by Federal Express this 4th day of December, 2002, upon each of the parties listed below:

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J. Douglas Baldridge

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II-7.1000

August 25, 1993

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXX, Florida XXXXX

RE: Complaint Number XXXXXXXXXXXX (formerly XXXXXXXXXXXXXXXX)

Dear Ms. XXXXXX:

This constitutes our Letter of Findings with regard to your complaint against the Supervisor of Elections, Pinellas County, Florida, under title II of the Americans with Disabilities Act (ADA), which prohibits discrimination against qualified individuals with disabilities on the basis of disability by State and local governments. Specifically, you allege that the Supervisor of Elections of Pinellas County does not provide Braille ballots or an electronic system of voting, such as voting by telephone, to blind voters. You further allege that the present system of providing assistance at the polling place does not allow a blind voter to cast a secret ballot.

The Civil Rights Division has completed its investigation of your complaint. Our investigation revealed that the Supervisor of Elections of Pinellas County follows the Florida statute (Chapter 97.061, F.S.), which requires the following provisions for voters with visual impairments: 1) the assistance of any two election officials at the polling place; or 2) the assistance of any one person of the individual's choice. Pinellas County also provides a magnifying lens at polling places. In a telephone conversation with our office, Ms. Dorothy Ruggles, Supervisor of Elections, stated that when a blind person comes to the polling place to vote, the poll workers offer a choice of allowing someone the person knows or two poll officials to assist in casting the ballot.

Legal Requirements

The Department of Justice's regulation implementing title II provides that a public entity must ensure that its communications with individuals with disabilities are as effective as communications with others and must furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity. 28 C.F.R. § 35.160. A public entity is not required to take any steps that would result in a fundamental



alteration in the service, program, or activity or in undue financial and administrative burdens. 28 C.F.R. § 35.164

In determining what type of auxiliary aid or service is necessary, a public entity must give primary consideration to the requests of the individual with a disability, that is, the public entity must provide an opportunity for individuals with disabilities to request the auxiliary aids and services of their choice and must honor that choice unless it can demonstrate that another effective means of communication exists or that provision of the aid or service requested would result in a fundamental alteration or in undue financial and administrative burdens. 28 C.F.R. §§ 35.160(b)(2); 35.164.

Discussion

The Pinellas County Supervisor of Elections provides magnifying lenses and readers for individuals with vision impairments seeking to vote. The election procedures specify that an individual who requests assistance will be assisted by two poll workers, or by one person selected by the voter. Your complaint alleged that the provision of assistance to an individual who is unable to fill out a printed ballot is inadequate because it does not allow a blind voter to cast a secret ballot. A Braille ballot, however, would not meet your objective of keeping your vote secret, because it would have to be counted separately and would be readily identifiable. Also, electronic systems of voting by telephone that meet the security requirements necessary for casting ballots are not currently available.

Although providing assistance to blind voters does not allow the individual to vote without assistance, it is an effective means of enabling an individual with a vision impairment to cast a ballot. Title II requires a public entity to provide equally effective communications to individuals with disabilities, but "equally effective" encompasses the concept of equivalent, as opposed to identical, services. Poll workers who provide assistance to voters are required to respect the confidentiality of the voter's ballot, and the voter has the option of selecting an individual of his or her choice to provide assistance in place of poll workers. The Supervisor of Elections is not, therefore, required to provide Braille ballots or electronic voting in order to enable individuals with vision impairments to vote without assistance.

Based upon the facts and legal requirements discussed above, we have determined that the Pinellas County Supervisor of Elections is not in violation of title II with respect to the issues you have raised. If you are dissatisfied with our determination, you may file a private complaint in the appropriate United States District Court under title II of the ADA.

You should be aware that no one may intimidate, threaten, coerce, or engage in other discriminatory conduct against anyone who has either taken action or participated in an action to secure rights protected by the ADA. Any individual alleging such harassment or intimidation may file a complaint with the Department of Justice. We would investigate such a complaint if

the situation warrants.

Under the Freedom of Information Act, 5 U.S.C. § 522, we may be required to release this letter and other correspondence and records related to this complaint in response to a request from a third party. Should we receive such a request, we will safeguard, to the extent permitted by the Freedom of Information Act and the Privacy Act, the release of information which could constitute an unwarranted invasion of privacy.

If you have any questions, please contact Linda King at (202) 307-2231.

Sincerely,

Stewart B. Oneglia
Chief
Coordination and Review Section
Civil Rights Division

1 This interpretation is consistent with long-standing interpretation of section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability in federally assisted programs and activities. See the discussion of the general prohibitions of discrimination in the preamble to the Department's title II regulation at 56 FR 35,703 and the analysis of the Department of Health, Education, and Welfare's original regulation implementing section 504 (later transferred to the Department of Health and Human Services) at 45 C.F.R. pt. 84, Appendix A.

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202 3059775 P.02/33

No. 97-1155

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KING NELSON, et al.,

Plaintiffs-Appellants,

v.

CANDICE S. MILLER, in her official capacity as
Secretary of State for the State of Michigan,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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MISCELLANEOUS:

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Supp., § II-7.1100 11

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U.S. CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 97-1155

KING NELSON, et al.,

Plaintiffs-Appellants,

v.

CANDICE S. MILLER, in her official capacity as
Secretary of State for the State of Michigan,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case involves the relationships among four statutes enforced by the United States: Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (Section 504); Section 208 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973aa-6 (Section 208); the Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. 1973ee et seq. (Voting Accessibility Act); and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 et seq. (ADA Title II). The district court effectively held that the ADA and Section 504 do not impose any requirements regarding voting accessibility beyond those imposed by the Voting Accessibility Act and Section 208. That holding, if affirmed, could significantly affect the government's enforcement responsibilities under these statutes.

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STATEMENT OF THE ISSUE

Whether the district court properly dismissed plaintiffs' complaint alleging that the failure to provide a means for blind voters to cast secret ballots violated the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Section 504).

STATEMENT OF THE CASE

1. This case arises on the pleadings. Plaintiffs are six blind Michigan voters. They are suing on behalf of all legal voters in the state "who are blind or visually impaired and are in need of appropriate modifications to the voting procedures in order to exercise their fundamental constitutional right to vote and to do so by secret ballot" (R. 1: Complaint at 7 (§ 35)).¹ They challenge Michigan's procedures for assisting blind or visually impaired voters. Under those procedures, voters who are blind or visually impaired may receive the assistance of either two poll officials or an individual of their choice in marking their ballots (R. 1 at 4 (§ 19)). The state does not, however, "provide them with a ballot or voting system which would allow them to read and mark the vote in private" (R. 1 at 4 (§ 21)).

Plaintiffs contend that the state's procedures impermissibly deprive blind or visually impaired people of the right to vote by secret ballot -- a right guaranteed to all other Michigan citizens (R. 1 at 5-6 (§§ 29-34)). See Mich. Const., Art. 3, § 4. In addition to the intrusion on secrecy inherent in having a

¹"R. ____" refers to entries on the district court's docket sheet.

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third party present in the voting booth, one plaintiff alleges that an election worker "shouted out her voting choice in front of other voters present at the polling place" (R. 1 at 5 (§ 23)). Plaintiffs seek "ballots in a format which would allow them the right to vote by secret ballot" (R. 1 at 6 (§ 34)). They allege that "inexpensive technologies that are currently in commercial use" such as "brailled ballot overlays or templates, taped text or phone-in voting systems" would "permit persons who are blind to read and mark ballots without involving a third party" (R. 1 at 6 (§ 34)).

2. On September 26, 1996, plaintiffs brought this suit in the District Court for the Western District of Michigan. The Michigan Secretary of State, sued in her official capacity, was the sole defendant (R. 1 at 3 (§ 10)). Plaintiffs claim that the state's failure to provide ballots in an accessible format violates Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 et seq. See R. 1 at 8-9 (§§ 41-48). Specifically, they contend that the state's current procedures "deny voters who are blind an equal opportunity to vote by secret ballot" and that the provision of ballots in alternative formats would constitute a reasonable modification that would avoid discrimination on the basis of disability" (R. 1 at 9 (§§ 47-48)). For essentially the same reasons, plaintiffs also claim that defendants have violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. See R. 1 at 9-10 (§§ 49-54).

On December 20, 1996, the district court granted the state's

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motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) (R. 17: Opinion). The court observed that the Voting Accessibility Act and Section 208 of the Voting Rights Act explicitly addressed issues of accessibility in voting (R. 17 at 2-4). Because "Congress did not intend that the ADA displace the Federal Voting Rights Acts" (R. 17 at 2), the district court first addressed whether Michigan's current procedures violated either of these two statutes (R. 17 at 3-4). The court concluded that the state's procedures do not violate Section 208 or the Voting Accessibility Act. Indeed, Section 208 specifically requires states to allow blind or visually impaired voters to be assisted by a person of their choice. 42 U.S.C. 1973aa-6.² In fact, the Voting Accessibility Act allows the states to set their own accessibility standards -- and it does not apply to state and local elections. 42 U.S.C. 1973ee-6(1).

²Section 208 entitles "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write" to receive assistance "by a person of the voter's choice." 42 U.S.C. 1973aa-6. By its terms, the Michigan voter assistance statute (M.C.L.A. § 168.751 (West 1989)) does not fully comply with Section 208. The Michigan law allows people with disabilities to receive assistance by a person of their choice only if they are "disabled on account of blindness"; unlike Section 208, it does not extend this right to persons with other disabilities or persons who are illiterate. See M.C.L.A. § 168.751 (West 1989). Even as to blind voters, the Michigan law allows the voter to obtain assistance only from "a member of his or her immediate family" or a person of his or her choice over 18 years of age; the federal statute contains no age or familial limitation. In correspondence initiated by the United States in 1984, however, Michigan assured us that it fully complies with Section 208 in practice, notwithstanding the limitations incorporated in the state statute. See letter from Gary P. Gordon, Assistant Attorney General, to Gerald W. Jones, Chief, Voting Section (Aug. 31, 1984) (attached as addendum).

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The court next disposed of plaintiffs' ADA and Section 504 claims (R. 17 at 5-6) (footnotes omitted):

Clearly, if the Plaintiffs were excluded from being able to cast a ballot, the Defendant would be in violation of the Voting Rights Acts, §12132 of the ADA, and §504 of the RA. However, the Plaintiffs do not contend that they are being denied the right to cast their ballots. Instead, they want this Court to go even further and find that Congress intended to elevate a blind voter's privacy in casting a ballot to a protected right under the ADA or RA. There is no indication from the wording of the ADA and RA or the legislative history of either Act that Congress intended such a broad reading. This conclusion is further strengthened when the ADA and RA are read in harmony with the Voting Rights Acts, which also do not mandate the result proposed by the Plaintiffs.

Without citing any language in the ADA or its legislative history, to support its conclusion, the court announced that "[s]imilar to the Voting Rights Acts, Congress intended that blind voters have access to the voting booth and freedom from coercion within the voting booth, not complete secrecy in casting a ballot. This Court will not rewrite the ADA or RA to require such a privacy right" (R. 17 at 7).

SUMMARY OF ARGUMENT

Michigan generally guarantees voters the right to cast secret ballots, but it does not enable blind or visually impaired voters to vote in secret. Under the state's procedures for assisting voters with disabilities, blind or visually impaired voters must announce their choices to one or more assistants, who then cast their ballots. Plaintiffs have alleged, however, that inexpensive alternative technologies exist that would guarantee ballot secrecy to blind or visually impaired voters. Taking this allegation as true, as this Court must at the pleading stage,

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plaintiffs have stated a claim for a violation of the Americans with Disabilities Act. The ADA prohibits states from providing services in a manner that denies persons with disabilities an equal opportunity to gain the same benefits as those provided to others, and it requires states to adopt reasonable modifications to their existing practices where those modifications would avoid such discrimination and would not result in a fundamental alteration of the nature of their program. Plaintiffs' complaint alleges that Michigan has refused to adopt reasonable modifications to its voting practices that would afford blind or visually impaired voters the same ballot secrecy the state provides to voters in general. Should plaintiffs establish that such modifications exist, defendants will be liable for violating the ADA. The district court therefore erred by dismissing plaintiffs' complaint under Rule 12(b)(6).

In ruling for the defendants, the district court appeared to conclude that the ADA imposes no requirements for accessible voting procedures beyond those set forth in two pre-ADA statutes: the Voting Accessibility Act and Section 208 of the Voting Rights Act. That conclusion is incorrect. By its plain terms, the ADA applies with full force to discriminatory election practices, whether or not those practices comply with pre-ADA federal accessibility standards. Indeed, Congress specifically identified voting as an area in which disability-based discrimination persisted at the time it enacted the ADA. The Act's legislative history confirms that Congress believed the existing voting

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accessibility laws to be inadequate.

The district court also appeared to conclude that only the outright denial of the franchise -- and not the discriminatory denial of ballot secrecy -- could make out a violation of the ADA. That conclusion, too, was incorrect. While the ADA prohibits the complete exclusion of persons with disabilities from government services or benefits, it independently prohibits discrimination in the manner in which services or benefits are provided. Michigan's current procedures deprive blind or visually impaired voters of an important benefit -- ballot secrecy -- generally afforded to voters in the state. Plaintiffs have stated a claim that those procedures violate the ADA.

ARGUMENT

THE DISTRICT COURT ERRED BY DISMISSING PLAINTIFFS' COMPLAINT

This case arose on the pleadings. Accordingly, the district court was required to "construe the complaint in a light most favorable to the plaintiff, accept all of the factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. When an allegation is capable of more than one inference, it must be construed in the plaintiff's favor."

Columbia Natural Resources, Inc. v. Tatum, 58 F.3d 1101, 1109

(6th Cir. 1995) (citations omitted) (citing cases), cert. denied, 116 S. Ct. 1041 (1996). Applying this standard to plaintiffs' complaint, Rule 12(b)(6) dismissal was inappropriate here.

Under Michigan's election system, blind or visually impaired

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voters lack an important benefit generally guaranteed to voters in the state -- the ability to cast their ballots in secret. Plaintiffs have alleged that inexpensive technologies exist to assure blind or visually impaired voters ballot secrecy. Taking that allegation as true, as the court must at this stage of the litigation, plaintiffs' complaint clearly states a claim that Michigan has violated the ADA.³ Those allegations, if proven at trial, would establish that the state has failed to adopt reasonable modifications of its existing procedures that would eliminate discrimination. The only other federal court case of which we are aware that has addressed these issues found a violation of the ADA. See Lightbourn v. County of El Paso, 904 F. Supp. 1429 (W.D. Tex. 1995). The district court accordingly erred in granting defendants' motion to dismiss.

A. Plaintiffs Have Stated A Claim That Michigan's Voting Assistance Procedures Discriminatorily Deny Blind Voters Ballot Secrecy In Violation Of The ADA

1. Title II of the ADA covers "public entities" -- that is, units of state and local government. 42 U.S.C. 12131(1). The operative section of Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be

³The remedies available to a plaintiff under the ADA are precisely the same as those available under Section 504. See 42 U.S.C. 12133. Because, on the allegations of this case, plaintiffs could not prevail on their Section 504 claim without also prevailing on their ADA claim, this brief focuses on the ADA. Cf. 42 U.S.C. 12201(a) (setting forth relationship between ADA and the Rehabilitation Act).

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subjected to discrimination by any such entity." 42 U.S.C. 12132 (emphasis added). The Act vests the Attorney General with authority to promulgate legislative rules to implement this provision. 42 U.S.C. 12134.

Pursuant to that authority, the Attorney General has issued regulations that "establish the general principles for analyzing whether any particular action of the public entity violates [Title II's general nondiscrimination] mandate." 28 C.F.R. Part 35, App. A § 35.130. These regulations state, *inter alia*, that a public entity may not "[p]rovide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others." 28 C.F.R. 35.130(b)(1). They also require public entities to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. 35.130(b)(7).

The regulations also apply these principles to the specific context of communications with the public. They require public entities to "take appropriate steps to ensure" that communications with people with disabilities "are as effective as communications with others." 28 C.F.R. 35.160(a). In particular, such entities must "furnish appropriate auxiliary aids and services

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where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity" they conduct. 28 C.F.R.

35.160(b)(1). Public entities must "give primary consideration to the requests of the individuals with disabilities" in determining what auxiliary aid or service to use. 28 C.F.R.

35.160(b)(2). An exception occurs only when the public entity can prove that providing the requested aid or service would result in a fundamental alteration or an undue financial or administrative burden. See 28 C.F.R. 35.164.

2. Plaintiffs have clearly pleaded a violation of these requirements. "The State of Michigan has guaranteed the right to vote by secret ballot to all Michigan citizens" (R. 1 at 5 (¶ 29)). But the state's current voter assistance procedures do not provide blind or visually impaired voters with ballot secrecy. Thus, the state provides blind or visually impaired voters "with an aid or service that is not as effective in affording equal opportunity to obtain the same benefit, to gain the same benefit, or to reach the same level of achievement as that provided to others." 28 C.F.R. 35.130(b)(1); see Lighbourn, 904 F. Supp. at 1433. And although plaintiffs have alleged that "reasonable modifications" of the state's current procedures -- such as the adoption of alternative ballot formats -- would avoid this discrimination, the state has refused to adopt those modifications, in violation of 28 C.F.R. 35.130(b)(7). As alleged in the complaint, the state's refusal also violates the effective

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communications regulations, for the state has failed to furnish auxiliary aids and services (alternative ballots) that would afford blind or visually impaired voters "an equal opportunity to participate in, and enjoy the benefits of," the state's voting activities, 28 C.F.R. 35.160(b)(1), and the state has failed to "give primary consideration to the requests" of those blind or visually impaired voters who desire ballot secrecy. 28 C.F.R. 35.160(b)(2).

The United States has previously addressed these issues in our Title II Technical Assistance Manual. The 1994 Supplement to that publication discussed a hypothetical case in which a county allowed blind voters to vote with the assistance of "two poll workers, or one person selected by the voter," but rejected a blind voter's request to complete a ballot that had been printed in Braille. ADA Title II Technical Assistance Manual, 1994 Supp., § II-7.1100 at 5-6. We stated that the denial of the voter's request would not violate Title II, because a Brailled ballot "would have to be counted separately and would be readily identifiable, and thus would not resolve the problem of ballot secrecy." ADA Title II Technical Assistance Manual, 1994 Supp., § II-7.1100 at 5-6.

The discussion in our technical assistance manual rested on the factual premise that Brailled ballots would not assure ballot secrecy and that no other accommodations were available that would assure ballot secrecy. If reasonable modifications were available that would allow blind or visually impaired voters to

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cast their ballots without assistance and that would assure ballot secrecy, the plain import of the ADA and its implementing regulations would require the state to adopt those modifications. Here, plaintiffs have alleged that such reasonable modifications exist. Unlike the hypothetical plaintiff in our technical assistance manual, they have not sought Brailled ballots. Rather, they have requested that the state employ such alternatives as "brailled ballot overlays or templates" (which would not require their ballots to be counted separately or be readily identifiable once cast), as well as "taped text or phone-in voting systems" (R. 1 at 6 (§ 34)). Plaintiffs allege that these alternative formats "would allow them the right to vote by secret ballot" (R. 1 at 6 (§ 34)).

In light of these allegations, Rule 12(b)(6) dismissal was improper. The complaint, taken in the light most favorable to the plaintiffs, see Columbia Natural Resources, Inc., 58 F.3d at 1109, alleges that inexpensive balloting formats are available that would allow them to vote without compromising their secrecy. If those allegations are proven, plaintiffs will have established a violation of the ADA. Plaintiffs are entitled to an opportunity to prove their allegations.

B. The ADA's Requirements Of Voting Accessibility Are Not Limited By The Less Protective Requirements Of Pre-ADA Statutes

In granting the motion to dismiss, the district court appeared to conclude that the ADA did not impose any accessibility requirements on the voting process beyond those already

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embodied in the Voting Accessibility Act and Section 208 of the Voting Rights Act. See R. 17 at 2 ("Congress did not intend that the ADA displace the Federal Voting Rights Acts."); R. 17 at 6 (stating that the court's conclusion that the ADA cannot afford plaintiffs relief "is further strengthened when the ADA and RA are read in harmony with the Voting Rights Acts, which also do not mandate the result proposed by the Plaintiffs"); R. 17 at 7 ("This Court does not find anything in the ADA to indicate that Congress believed that the Voting Rights Acts were insufficient."). That ruling is incorrect.⁴

By its plain terms, ADA Title II's general prohibition of discrimination applies to discriminatory election practices. Indeed, that prohibition "applies to anything a public entity does." 28 C.F.R. Part 35, App. A § 35.102; see also Innovative Health Sys., Inc. v. City of White Plains, 931 F. Supp. 222, 232 (S.D.N.Y. 1996) (finding "nothing in the text or legislative history of the ADA to suggest that zoning or any other governmental activity was excluded from its mandate"); H.R. Rep. No. 485, Part 2, 101st Cong., 2d Sess. 84 (1990) (Title II applies "to all actions of state and local governments").⁵ Title II provides, without qualification, that "no qualified individual with a

⁴The district court also erred in presuming that the Michigan statute complies with Section 208. As we have explained, see n.2, *supra*, the Michigan statute on its face violates Section 208, although state officials have assured us that they comply with federal law in practice.

⁵By contrast, the Voting Accessibility Act does not even apply to a state's administration of state and local elections. See 42 U.S.C. 1973ee *et seq.*

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disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. On its face, this broad language would appear to reach any state action that subjects people with disabilities to "discrimination" as defined in the ADA regulations -- regardless of whether that action complies with the requirements of pre-ADA statutes such as the Voting Accessibility Act and Section 208.

In reaching a contrary conclusion, the district court purported to rely on the principle that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Morton v. Mancari, 417 U.S. 535, 551 (1974) (quoted in R. 17 at 2). But the district court's decision directly contradicts that principle. Under that ruling, the ADA has no independent effect in the voting area, for the court read Section 208 and the Voting Accessibility Act to occupy the field. In short, the district court undertook "to pick and choose among congressional enactments," which "[t]he courts are not at liberty to" do. Morton, 417 U.S. at 551.

Congress itself made clear that earlier, less protective statutes cannot limit the application of the ADA. The ADA's savings provision specifically addresses this question. That provision preserves the operation of other state and federal disability rights laws, but only to the extent that those laws

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"provide[] greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter." 42 U.S.C. 12201(b). This provision underscores Congress's intent "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. 12101(b)(1), and not to limit people with disabilities to the often ineffectual protections of prior laws. While the ADA does not prohibit plaintiffs from invoking the remedies available under laws such as Section 208 and the Voting Accessibility Act,⁴ those alternative remedies do not in any way limit the application of the ADA itself. Cf. Staron v. McDonald's Corp., 51 F.3d 353, 357 (2d Cir. 1995) (ADA savings clause "does not state, and it does not follow, that violations of the ADA should go unaddressed merely because a state has chosen to provide some degree of protection to those with disabilities").

In rejecting this conclusion, the district court stated that it had found "[no]thing in the ADA to indicate that Congress believed that the Voting Rights Acts were insufficient" (R. 17 at 7). But the district court overlooked several portions of the statute and its legislative history that bore directly on this question. In the ADA's statement of findings, Congress singled

⁴See Ellenwood v. Exxon Shipping Co., 984 F.2d 1270, 1277 (1st Cir.) (ADA savings clause "allow[s] overlapping remedies for employment discrimination"), cert. denied, 508 U.S. 981 (1993); H.R. Rep. No. 485, Part 3, 101st Cong., 2d Sess. 70 (1990) (ADA savings clause allows a plaintiff "to pursue claims under a state law that does not confer greater substantive rights, or even confers fewer substantive rights, if the plaintiff's situation is protected under the alternative law and the remedies are greater").

out "voting" as one of the "critical areas" in which "discrimination against individuals with disabilities persist[ed]," 42 U.S.C. 12201(a)(3) -- even though Section 208 and the Voting Accessibility Act had been on the books for eight and six years, respectively. See Lighbourn, 904 F. Supp. at 1432, ("Evidently, Congress did not feel that [the Voting Accessibility Act] was sufficient, as it revisited and specifically addressed the same issue six years later in the ADA."). The Senate Report accompanying the Act quoted the testimony of Illinois's Attorney General, who "focused on the need to ensure access to polling places: 'You cannot exercise one of your most basic rights as an American if the polling places are not accessible.'" S. Rep. No. 116, 101st Cong., 1st Sess. 12 (1989). In the House hearings on the bill, the limitations of the Voting Accessibility Act were specifically discussed. One witness described how some jurisdictions had implemented that statute in a manner that was "demeaning to the disabled person" and that "create[d] a loss of dignity and independence for the disabled voter." H.R. 2273, Americans with Disabilities Act of 1989: Hearing Before the Subcomm. on Select Education of the House Comm. on Education & Labor, 101st Cong., 1st Sess. 41 (1989) (statement of Nanette Bowling, Staff Liaison to the Mayor's Advisory Council for Handicapped Individuals, Kokomo, IN).² (The plaintiffs in this case have alleged

²The issue of voting accessibility also arose in the floor debates over the ADA. See 135 Cong. Rec. S10753 (1989) (remarks of Senator Gore) ("As a practical matter, many Americans with disabilities find it impossible to vote. Obviously, such a
(continued...)

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that defendants' procedures have caused them a similar loss of dignity. See R. 1 at 5 (¶ 23). These statements demonstrate that Congress specifically targeted the problem of voting accessibility when it enacted the ADA. They provide further support for the conclusion that is apparent from the statutory text: Title II added additional accessibility requirements; its reach is not limited to the narrow protections afforded by existing laws. The district court erred in reaching a contrary conclusion.

C. Discriminatory Denial Of Ballot Secrecy Violates The ADA Even If It Does Not Result In Complete Denial Of The Franchise

In ruling for defendants, the district court also concluded that the denial to blind or visually impaired voters of ballot secrecy -- as opposed to the outright deprivation of the right to vote -- is not sufficiently serious to constitute prohibited discrimination under the ADA. See R. 17 at 5-6 ("[T]he Plaintiffs do not contend that they are being denied the right to cast their ballots. Instead, they want this Court to go even further and find that Congress intended to elevate a blind voter's privacy in casting a ballot to a protected right under the ADA or RA."); R. 17 at 6 n.3 ("Neither the ADA [n]or the RA indicate that voting privacy for blind voters was a 'benefit' Congress sought to protect or a 'discrimination' that Congress sought to

^{2/} (...continued)

situation is completely unacceptable and unconscionable. We must take strong action to end the tradition of blatant and subtle discrimination that has made people with disability second-class citizens."); 135 Cong. Rec. S10793 (1989) (remarks of Sen. Biden).

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prevent."); R. 17 at 7 ("Similar to the Voting Rights Acts, Congress intended that blind voters have access to the voting booth and freedom from coercion within the voting booth, not complete secrecy in casting a ballot."). That ruling is also incorrect.

The operative provision of Title II is phrased in the disjunctive: "no qualified individual with a disability shall * * * be excluded from participation in or be denied the benefits of" a service, program, or activity "or be subjected to discrimination" by a public entity. 42 U.S.C. 12132 (emphasis added). This language plainly prohibits both the outright exclusion of people with disabilities from government activities and discrimination in the manner in which those activities are administered. See Crowder v. Kitagawa, 81 F.3d 1480, 1483 (9th Cir. 1996). While the Michigan system does not entirely deprive blind or visually impaired voters of the franchise, it clearly discriminates against them. As alleged in the complaint, all other voters in the state are entitled to ballot secrecy, but blind or visually impaired voters are not, simply because the state has failed to adopt reasonable modifications to its existing procedures. As we have explained, that conduct would constitute "discrimination" within the meaning of the ADA and its implementing regulations.

The district court concluded that finding a violation here would improperly "elevate a blind voter's privacy in casting a ballot to a protected right" under the ADA (R. 17 at 5-6). The

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district court misconceived the proper inquiry. Title II's prohibition on "discrimination" is not limited to discrimination that affects a "protected right." Rather, it encompasses all disability-based discrimination committed by a public entity. See Crowder, 81 F.3d at 1483; Innovative Health Sys., Inc., 931 F. Supp. at 232; Oak Ridge Care Ctr., Inc. v. Racine County, 896 F. Supp. 867, 872-873 (E.D. Wis. 1995). In this respect, the ADA functions like the Equal Protection Clause, which subjects to strict scrutiny all discriminations involving suspect classifications, whether or not those discriminations also involve "fundamental rights." See Lighbourn, 904 F. Supp. at 1433 ("The ADA is about equality; Plaintiffs seek to be afforded the same rights and privileges as their non-handicapped peers on election day.").

In any event, Michigan's voting assistance procedures deprive blind or visually impaired voters of an exceptionally important interest -- ballot secrecy. The state's constitution itself explicitly protects the "secrecy of the ballot." Mich. Const., Art. 3, § 4; see Belcher v. Mayor of Ann Arbor, 262 N.W.2d 1, 2 (Mich. 1978) (ballot secrecy may not be compromised absent showing that voter acted fraudulently). The Supreme Court has similarly recognized that the secret ballot serves compelling state interests. See Burson v. Freeman, 504 U.S. 191, 206 (1992); see also McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1517 (1995) (observing that the "respected tradition of anonymity in the advocacy of political causes" is "perhaps best exemplified by the secret ballot, the hard-won right to vote

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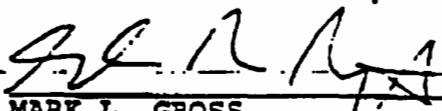
one's conscience without fear of retaliation'); Buckley v. Valeo, 424 U.S. 1, 237 (1976) (Burger, C.J., concurring in part and dissenting in part) ("[S]ecrecy and privacy as to political preferences and convictions are fundamental in a free society. For example, one of the great political reforms was the advent of the secret ballot as a universal practice."). Given their allegations that alternative, inexpensive ballot formats are available, plaintiffs have stated a claim that the failure to choose those alternatives unlawfully "denie[s]" blind or visually impaired voters an important "benefit[]" -- the benefit of ballot secrecy. Thus, even if the Michigan system did not violate the "discrimination" prong of Title II, plaintiffs would still have adequately alleged a violation of the "deny a benefit" prong of that Title. The district court accordingly erred in granting the motion to dismiss.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully Submitted,

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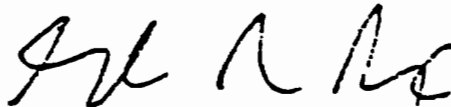
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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 1997, two copies of the foregoing Brief for the United States as Amicus Curiae were served by first-class mail, postage prepaid, on the following counsel:

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ADDENDUM

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STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



STANLEY D. STEINBORN
Chief Assistant Attorney General

FRANK J. KELLEY
ATTORNEY GENERAL

LANSING
48913

August 31, 1984

Mr. Gerald W. Jones
Chief, Voting Section
United States Department of Justice
Washington, D.C. 20530

ATTN: Mrs. Schwartz

Re: 1982 Amendments to the Voting
Rights Act, Public Law 97-205

Dear Mr. Jones:

Your letter inquiring as to what steps the State of Michigan has taken or will take to comply with § 208 of the 1982 amendments to the Voting Rights Act, Public Law 97-205 has been referred to me for reply. The Michigan Election Law, 1954 PA 116, § 751; MCLA 168.751; MSA 6.1751 discusses what assistance may be given to an elector who is unable to mark his or her ballot and provides that this assistance shall be rendered by two inspectors of election or, if the elector is blind, he or she may be assisted by a member of his or her family or by any person over 18 years of age designated by the blind person.

This provision of Michigan Election Law appears to be in conflict with § 208 of Public Law 97-205 in that the handicapped individual must be assisted by inspectors of election only, unless the elector is blind. However, the Michigan Secretary of State, through his authority as the chief election officer of the State of Michigan with supervisory authority over local election officials, has specifically directed these officials to comply with the provisions of the 1982 amendments to the Voting Rights Act. Copies of directions to the local election officials are

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Mr. Gerald W. Jones
Page Two
August 30, 1984

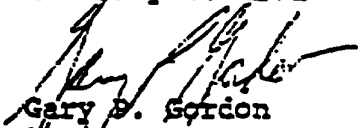
attached to this letter indicating that § 208 of the Voting Rights Act was to be complied with by the local clerks and precinct officials at Michigan's recent primary election.

Therefore, based upon the attached instructions of the Secretary of State issued to local election officials directing them to comply with the Voting Rights Act, no change in Michigan law is required for compliance with the Voting Rights Act at the present time. However, it may be advisable for the Michigan Secretary of State, based upon his position as director of Michigan elections, to request the Legislature to amend Michigan Election Law to specifically comport with the provisions of § 208 of the Voting Rights Act. However, in the interim, please be assured that the Michigan Secretary of State and this office will make every effort to insure that the Voting Rights Act provisions are complied with by all Michigan election officials.

If you have any additional questions or desire further information, please do not hesitate to contact me.

Very truly yours,

FRANK J. KELLEY
Attorney General



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Assistant Attorney General
650 Law Building
525 West Ottawa Street
Lansing, MI 48913
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GPG/jad

Attachments

MPK-23-2001 10-02 DOW/CRD/DRS
MICHIGAN DEPARTMENT OF STATE
RICHARD H. AUSTIN • SECRETARY OF STATE
MUTUAL BUILDING
208 N. CAPITOL AVENUE



LANESING
MICHIGAN 48918

August 2, 1984

TO ALL COUNTY CLERKS:

Please be advised that the Federal Voting Rights Act of 1965 was amended by Public Law 97-205 of 1982 which added the following section:

Voting Assistance

"Sec. 208. Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of that employer or officer or agent of the voter's union."

This amendment took effect in 1984 and differs from Michigan Law 168.751 which reads as follows:

"Sec. 751. When at an election an elector shall state that the elector cannot mark his or her ballot, the elector shall be assisted in the marking of his or her ballot by 2 inspectors of election. In an elector is so disabled on account of blindness, the elector may be assisted in the marking of his or her ballot by a member of his or her immediate family or by a person over 18 years of age designated by the blind person."

Both of these sections are in effect for all elections conducted in Michigan. Precinct inspectors are to be advised of the following procedures.

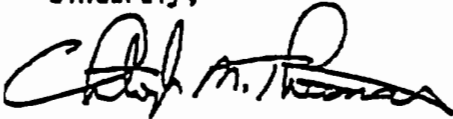
If a person is requesting assistance of two precinct inspectors, the voter only needs to state that he or she needs assistance. No reason for need of assistance is required. The precinct inspectors shall note the name of the assisted voter in the remarks section of the poll book; that assistance was given; and the names of the two inspectors assisting.

August 2, 1984
Page two

If the person is requesting to be assisted by a person of their own choice the following question must be asked of the voter: "Are you requesting assistance to vote by reason of blindness, disability, or inability to read or write?" Only a "yes" or "no" answer is required. Specific details are not necessary. If the answer is yes to the question, the person who will assist the voter is to be asked: "Are you the voter's employer or agent of that employer or an officer or agent of an union to which the voter belongs?" If the answer is NO, the person may assist the voter. In such a case the precinct inspectors shall note in the remarks section of the poll book the name of the voter being assisted and the name of the person assisting the voter. Under this provision there is no age requirement on who may assist the voter.

Please advise all city and township clerks in your county of the contents of this letter.

Sincerely,



Christopher M. Thomas
Director of Elections

CMT:jmf

Voter requiring assistance: "I will require some help in voting my ballot."

Election Inspector: Are you requesting assistance from two election inspectors or from a person of your choice?

Answer 1

Assisted Voter: "I would like two election inspectors to assist me."

Note: No further questions are required. The election inspector shall note the name of the assisted voter in the remarks section of the poll book; that assistance was given; and the names of the two inspectors assisting.

Answer 2

Assisted Voter: "I would like Mr. John Smith to assist me."

Election Inspector: "Are you requesting assistance to vote by reason of blindness, disability, or inability to read or write?"

Note: Only a "yes" or "no" answer is required. Specific details are not necessary.

Assisted Voter: "Yes."

Election Inspector: Question to the person named to assist: "Are you the voter's employer or agent of that employer or an officer or agent of a union to which the voter belongs?"

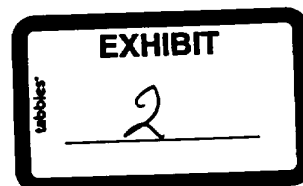
Person Chosen to Assist the Voter: "No" - The person may assist the voter. The election inspector shall note in the remarks section of the poll book the name of the voter being assisted and the name of the person assisting the voter.

Person Chosen to Assist the Voter: "Yes" - The person shall not be allowed to assist the voter if he or she is the employer or agent of that employer of the voter or an officer or agent of a union to which the voter belongs.

3

Innovations in Election Administration 15

**Ensuring the
Accessibility
of the Election
Process**



Ensuring the Accessibility of the Election Process

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Introduction by the Office of Election Administration

This report is another in the series on *Innovations in Election Administration* being published by the FEC's Office of Election Administration.

The purpose of this series is to acquaint State and local election officials with innovative election procedures and technologies that have been successfully implemented by their colleagues around the country.

Our reports on these innovations do not necessarily constitute an endorsement by the Federal Election Commission either of any specific procedures described or of any vendors or suppliers that might be listed within the report. Moreover, the views and opinions expressed in these reports are those of the authors and are not necessarily shared by the Federal Election Commission or any division thereof.

We welcome your comments on these reports as well as any suggestions you may have for additional topics. You may mail these to us at:

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Introduction

The purpose of this publication is to provide information and guidance in order to help election officials ensure access to the election process for persons with disabilities.

The Voting Accessibility for the Elderly and Handicapped Act (VAA) of 1984 was the first to bring federal focus directly on the need for accessible voting facilities and procedures. The Americans with Disabilities Act (ADA) of 1990 further expanded and clarified the responsibilities of State and local election officials in ensuring the accessibility of the election process. And today, many States also mandate accessible polling places.

But voting accessibility is not just about complying with the law. It is also about the willingness of State and local election officials to serve persons with disabilities by routinely considering their particular needs in all aspects of the election process — in voter registration and in providing public information as well as in the voting process itself.

Many State and local election officials have developed creative and innovative ways to accommodate disabled voters, many of which are not costly but involve simple forethought and common sense. Some of these ideas are outlined in the following pages along with other guidelines and suggestions that you may find helpful.

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The Scope of the Problem

There are an estimated 49 million persons with disabilities throughout the United States. And although most people, when they hear the word "disability", think of wheelchairs, there are actually four broad categories of disability to which election officials will want to be sensitive:

- impaired vision
- impaired mobility
- impaired communication, and
- impaired dexterity.

It is important to note, however, that there is a range of impairment within each of these categories. And in improving the accessibility of your election facilities, you will want to bear in mind not just the extremes of these impairments but also those less severely impaired who may nevertheless require some measures to ensure functional accessibility to voting and registration facilities.

It should also be said that disabilities may come in combinations. But many of the measures suggested in this volume (such as large type instructions or ramped stairs) may also accommodate more than one disability.

Impaired Vision

Although total blindness is the extreme form of visual impairment, there is also a substantial number of people who are sighted but whose sight is seriously impaired. Such persons may have

difficulty reading small type instructions or the ballots themselves. Many of their needs can be accommodated by providing such items as:

- good illumination both in the polling places and in the registration facilities themselves as well as in indoor passageways (and especially staircases) leading to such facilities
- large type (12 point bold or larger) instructions — such as large, reusable, laminated posters that can be affixed to tables, voting devices or booths, or on the walls of the polling place
- magnifying glasses or devices that can be made available on request from the chief poll workers
- assistance in voting provided under the requirements of State law (remembering that Section 208 of the federal Voting Rights Act permits virtually any person of the voter's choice to provide them assistance)
- assistance (using either a staff reader or, preferably, an audio recording) in reading materials that you have made available to the general public.

Federal law does not require that braille materials of any type be provided (since braille materials would in any even serve fewer than 20% of the blind population). There are at this writing, however, a few lawsuits that seek some means for the blind to vote unassisted and in privacy. But whatever the final outcome of these cases, it is reasonable to expect that, at the current rate

of technology, voting devices that facilitate independent voting by the blind may soon appear on the market.

Impaired Mobility

The most noted form of impaired mobility is the wheelchair. And later sections of this report contain a number of specific measures that you can take to ensure the accessibility of your election facilities to wheelchair users. Yet it is crucial to recognize that measures to ensure access for wheelchair users may not be sufficient to serve the needs of others who are ambulatory but nevertheless impaired. Those who use walkers, canes, prosthetic devices or who suffer from dystrophy, sclerosis, heart ailments, obesity, infirmity of old age, or any number of other impairments frequently have limitations on the distances they can traverse or on performing essential transactions while standing.

In addition to the other measures described later in this volume, then, election officials will want to consider:

- ☐ avoiding long distances to be traversed either within the facility or from parking areas to the facility
- ☐ ensuring that doors are not unduly heavy or difficult to open
- ☐ ensuring that any internal steps or stairs are either ramped or have elevator alternatives
- ☐ ensuring that walking surfaces are non-skid and unencumbered with items over which one might trip or stumble
- ☐ providing seating areas within the facility (especially along unavoidably long corridors and in places with waiting lines)
- ☐ providing seats at tables or in voting devices.

Impaired Communication

Impaired communication refers both to impaired hearing and to impaired speech. Many of the practical problems of those with impaired hearing can be overcome by the same large type instructions suggested above for the visually impaired. And although impaired speech presents fewer practical problems, election officials may want to include some sensitivity training as a component to their standard poll worker and employee training curricula (See Appendix A).

Impaired Dexterity

Impaired dexterity refers primarily to problems in grasping items in the hand. Its extreme form is, of course, complete paralysis. But less severe forms, such as muscular disorders or even arthritis, are not uncommon. Accordingly, election officials will want to make sure that:

- ☐ any doorknobs are fitted with devices that convert them to levers, and that
- ☐ any stylus or other ballot marking instrument has a knob that can be readily grasped.

Endnote

Many of the remedies to inaccessible polling places that are suggested in this volume are relatively simple and easy to apply. Others may require some equipment, construction, or expert guidance. For this reason, we have provided in Appendix D a listing of sources you might turn to for the more challenging problems you encounter.

Relevant Federal Laws and Applicable Guidelines/Standards

Five federal statutes pertain to the accessibility of the election process to persons with disabilities. These laws work together to ensure that all persons with disabilities, young and old, can enter a facility, cast their vote, and exit the polling place along with their fellow citizens. The following federal laws apply to all State and local jurisdictions:

The Voting Rights Act of 1965 (42 U.S.C. 1973aa-6)

The Voting Rights Act of 1965 was originally designed to protect and facilitate the voting rights of racial minority groups. Subsequent amendments have, however, expanded it to include other minority groups as well as more general matters regarding voting qualifications and procedures. Section 208 of that Act applies to all elections in all jurisdictions and reads in its entirety:

"Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or agent of the voter's union."

This provision supersedes any incompatible State law that may restrict the number of voters a person may assist or that may place restrictions, such as on children, on who may enter a polling booth with a voter requiring assistance. It does not, however, preclude obtaining a signed and sworn affidavit from any person providing voter assistance.

The Rehabilitation Act of 1973 (29 U.S.C 791 et seq)

Section 504 of the Rehabilitation Act of 1973 requires recipients of federal funds to make their programs and activities accessible to persons with disabilities. Included are both private and public entities. State and local governments that receive some type of federal funding, such as Community Development Block Grants, are considered to be covered by Section 504.

The accepted standards for newly constructed or altered facilities under Section 504 are the Uniform Federal Accessibility Standards (UFOS) issued jointly by the General Services Administration, Department of Housing and Urban Development, Department of Defense, and the U.S. Postal Service.

The Voting Accessibility for the Elderly and Handicapped Act of 1984 (42 U.S.C. 1973ee Through 1973ee-6)

The Voting Accessibility for the Elderly and Handicapped Act (VAA) of 1984 contains provisions expressly intended to "promote the fundamental right to vote by improving access for handicapped and elderly individuals to registration facilities and polling places for Federal elections." Key provisions require:

- that each political subdivision responsible for conducting elections within each State assure that all polling places for federal elections are accessible to elderly and handicapped voters *except* in the case of an emergency as determined by the State's chief election officer or *unless* the State's chief election officer
 - determines, by surveying all potential polling places, that no such place in the area is accessible nor can be made temporarily accessible, *and*
 - assures that any handicapped voter assigned to an inaccessible polling place will, upon advanced request under established State procedures, either be assigned to an accessible polling place or be provided an alternative means of casting a ballot on election day.
- that each State or political subdivision responsible for voter registration for federal elections provide a reasonable number of accessible permanent registration facilities *unless* the State has in effect a system which provides potential voters an opportunity to register by mail or at their residence.
- that each State make available to handicapped and elderly individuals registration and voting aids for federal elections *including* large-type instructions conspicuously displayed in every permanent registration facility and polling place *and* information by telecommunication devices for the deaf (TDD's).
- the elimination of any notarization or medical certification requirement for handicapped voters to obtain (or apply for) an absentee ballot *except* for medical certifications required to establish eligibility, under State law, for automatically receiving such an application or ballot on a continuing basis *or* for applying for an absentee ballot after the deadline has passed.
- that each State's chief election officer provide public notice, calculated to reach elderly and handicapped voters, of the availability

- of the registration and voting aids required above
- of the voter assistance provisions under Section 208 of the Voting Rights Act of 1965, *and*
- of the procedures for voting by absentee ballot not later than general public notice of registration and voting is provided.

Although it was not the intent of this Act to impose any national standard of accessibility, the chairman of the House Subcommittee on Elections (in Hearings conducted in 1987) asked the Federal Election Commission to explore ways of achieving a greater commonality of approach in the various States. Accordingly, the FEC's National Clearinghouse on Election Administration joined with the National Association of Secretaries of State and the Coalition for Voter Accessibility in an effort to devise a polling place evaluation and reporting form which might be adopted voluntarily by the States. This form was designed to be comprehensive, flexible enough to accommodate variations in individual States specifications, yet fairly easy to complete. It appears in Appendix B of this report.

The Americans with Disabilities Act of 1990 (42 U.S.C.)

Title II of the Americans with Disabilities Act (ADA) prohibits discrimination by State or local entities in any of its services, programs, or activities — including the election process. State and local election entities are thereby obliged to ensure the accessibility of the election process by qualified persons with disabilities.

The applicable standards for assessing public facilities under this Act are either the Uniform Federal Accessibility Standards (UFAS) or the Americans with Disability Accessibility Guidelines/ADA Standards for Accessible Design (ADAAG).

A Note on The Relationship of the Voting Accessibility for the Elderly and Handicapped Act to the Americans with Disabilities Act

A number of State and local election officials were concerned in 1993 about the impact of the Americans with Disabilities Act on their efforts to comply with the Voting Accessibility for the Elderly and Handicapped Act of 1984. For although there are no direct statutory linkages between the Acts, they both address the same subject.

Indeed, the House Subcommittee on Elections, in their 1991 Hearings on the VAA requested the Federal Election Commission's understanding of the relationship between the two Act. Their response, which you will want to review, is provided in Appendix C.

The National Voter Registration Act of 1993 (42 U.S.C. 1973gg)

This Act applies to all federal elections in all States except Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming which are exempted by 42 U.S.C. 1973gg-2 as amended. In all other States, this Act, among many other things:

- requires that individuals be given an opportunity to register by mail using either a State mail voter registration form or the national mail voter registration form
- requires that individuals be given an opportunity to register to vote (or to update their voter registration data) when applying for or renewing a driver's license or other personal identification document issued by a State motor vehicle authority
- requires that individuals be given the opportunity to register to vote (or to change their voter registration address) when applying for services or assistance

- at any office in the State that provides public assistance including, but not limited to, the Food Stamp program; the Medicaid program; the Special Supplemental Food Program for Women, Infants, and Children (WIC) program; and the Aid to Families with Dependant Children (AFDC) program;
 - at other offices designated by the State;
 - at Armed Forces recruitment offices;
- and, most important for the purposes of this volume
- at or through any office in the State that provides State funded programs primarily engaged in providing services to persons with disabilities.

Local election officials should consult their chief State election official to learn which agencies within their State have been designated as voter registration facilities.

Ensuring Access to the Polling Place

Only those features of a site which are a necessary part of the process of getting to the polling place, and which facilitate accessibility for voters with disabilities are included in this section. Notwithstanding efforts already undertaken by facility owners to provide for accessibility, election officials are charged by the Voting Accessibility for Elderly and Handicapped Act with insuring the accessibility of the polling place. The use of all or a portion of both a site and building for a polling place may be quite different from its normal use. Special temporary measures may be required to convert the existing facility to a polling place to providing accessibility for voters with disabilities. For instance, the polling place may be only a small part of a larger building remote from the building's main entry. The existing secondary entrance may be used for the primary entry to the polling place but may not be accessible, and far from designated accessible parking spaces. In this case, some accommodations will have to be made by election officials to address the barriers created by the polling place setup and operation.

Accessible Site for Polling Place

An accessible site for a polling place will provide an accessible route or routes to an accessible building entry to the polling place. Typically, there should be an accessible route from public streets or sidewalks. If on-site parking is afforded voters, then accessible parking with an accessible

route to the polling place should be provided. If there is a nearby public transportation stop, there should be an accessible route from the public transportation stop to the polling place site. An accessible passenger loading zone should also be provided.

Accessible On-Site Car and Van Parking

The Americans with Disabilities Accessibility Guidelines (ADAAG) for new construction requires that when on-site parking is provided for self-parking by employees (and volunteers) or visitors (voters), then accessible parking spaces shall be provided:

If on-site parking is available at the voting/registration area, the parking area should comply on at least a temporary basis with ADAAG requirements for new construction for both van accessible and overall total number of accessible parking spaces. The required parking spaces may be provided in the particular lot, or could be provided in another location if equivalent or greater accessibility in terms of distance from an accessible entrance, cost and convenience is ensured. Accessible parking spaces should be located on the closest accessible route of travel from adjacent parking to the accessible entrance of the voting/registration facility. If the parking area is curbed, a curb ramp will be needed on the accessible route to the facility entry.

Total Parking Spaces	Accessible Spaces
1 to 25	1 (van accessible)
26 to 50	2 (1 van accessible)
51 to 75	3 (1 van accessible)
76 to 100	4 (1 van accessible)
101 to 150	5 (1 van accessible)
151 to 200	6 (1 van accessible)
201 plus	refer to ADAAG 4.1.2(5)(a&b)

Note that for parking areas constructed prior to ADAAG, if the parking area provides for accessible (handicapped) parking spaces, it may not have provided for van accessible parking or provided an adequate number of accessible parking spaces.

Figure 1
Accessible Parking Bay Without Curb

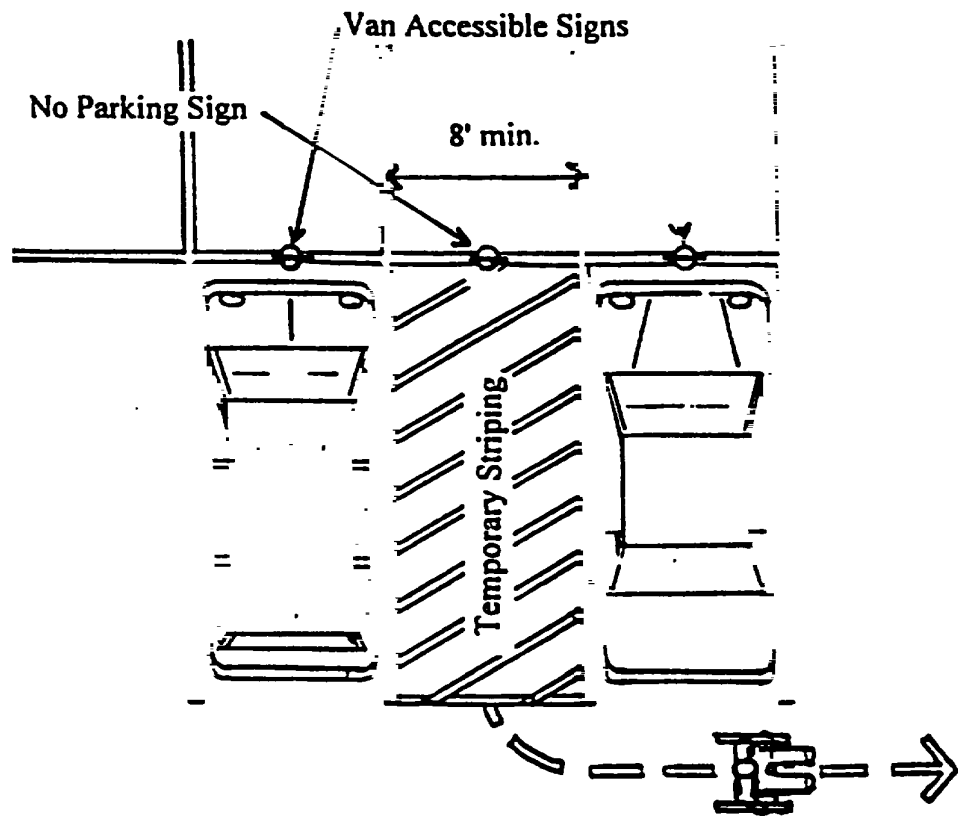
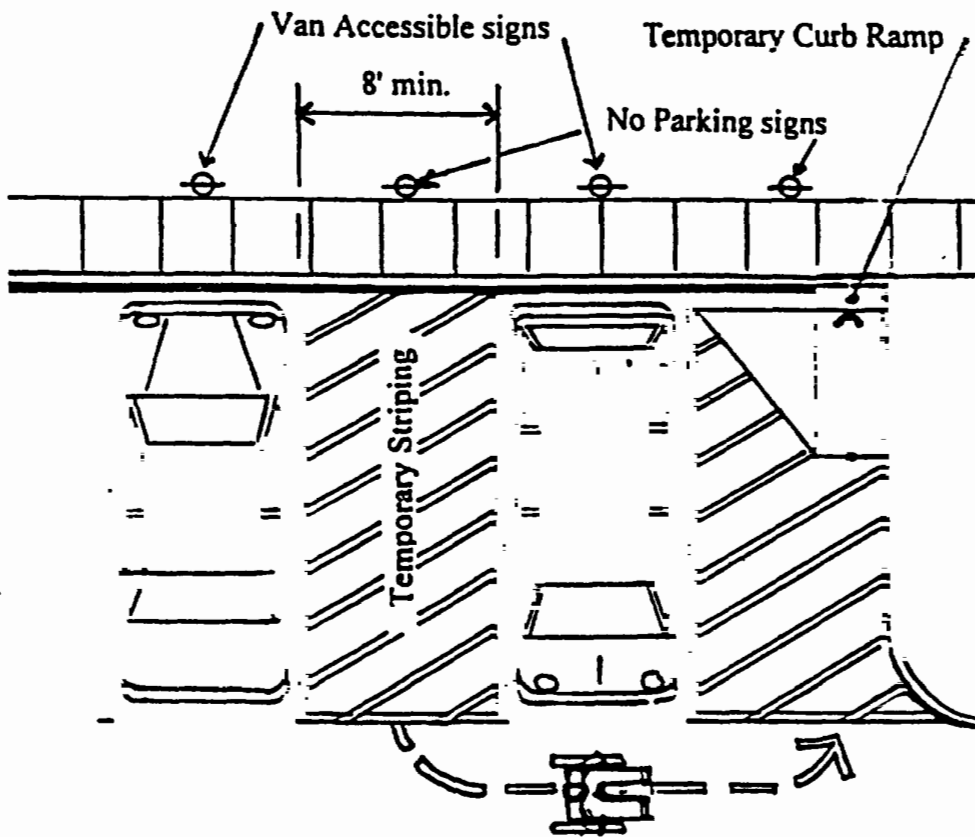


Figure 2
Accessible Parking Bay with Curb

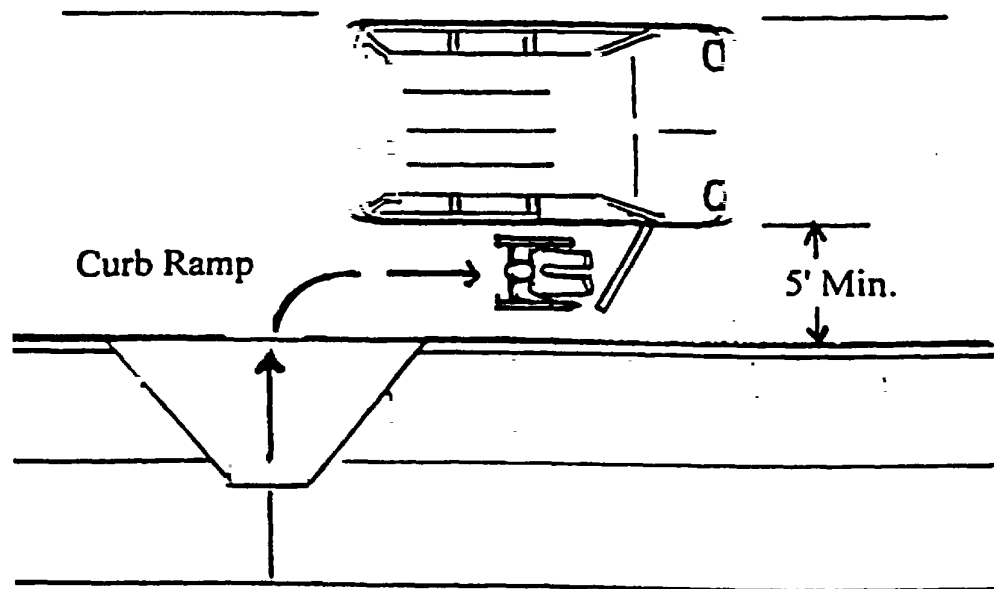


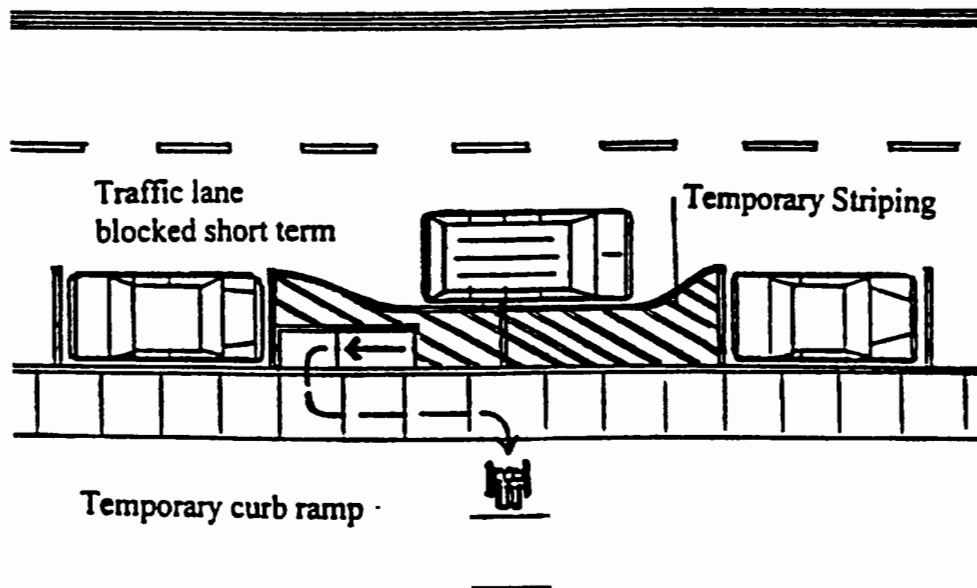
Accessible Passenger Loading Zones

If adequate on-site or on-street parking close to the voting or registration site is not available, then a passenger loading zone with an access aisle close to an accessible entrance should be provided on at least a temporary basis. If this loading zone includes a curb, a curb ramp will be required.

Many voters with disabilities will arrive at the voting/registration site via a pool vehicle which requires a passenger loading zone for drop off. While some of these voters can disembark/embark a high floor vehicle such as a van or a lift equipped vehicle at curb level, many others with mobility impairments and wheelchair users must get in and out at pavement level, especially from low floor vehicles such as most passenger cars.

Figure 3
Accessible Passenger Loading Zone





Public Transportation Stops

Voters with disabilities may elect to arrive via public transportation if available. If a bus or subway stop is close to the voting/registration site, an accessible route from the transit stop should be verified. An accessible route might require the installation of new curb ramps or cross walks. These off site modifications should be permanent improvements if possible.

Accessible Route

- **Curb ramps:** A curb on an otherwise accessible route is an insurmountable barrier for many voters with disabilities using wheelchairs or walking aids. A curb ramp with a maximum slope of 1:12 and a minimum width of 36" is re-

quired to overcome the curb barrier. Curb ramps work best if they are cut out of the curb back into the sidewalk, and hence are a permanent site or off-site improvement. A temporary curb ramp which does not cut the curb must project 6' from a 6" curb line without extending into vehicular traffic. In many instances, space limitations on existing sidewalk's will not permit the installation of this ramp. As an alternative, a temporary projecting built up curb ramp can be made with asphalt paving patch material which can be rolled with smooth feather edges. Temporary projecting curb ramps can be made out of wood with 2" high curbs on both sides of a 3' wide ramp, but should be securely fastened to pavement, and tapered to a maximum 1/4" vertical lower threshold, with a minimal gap at curb line.

Figure 5

Example of Permanent Curb Ramp

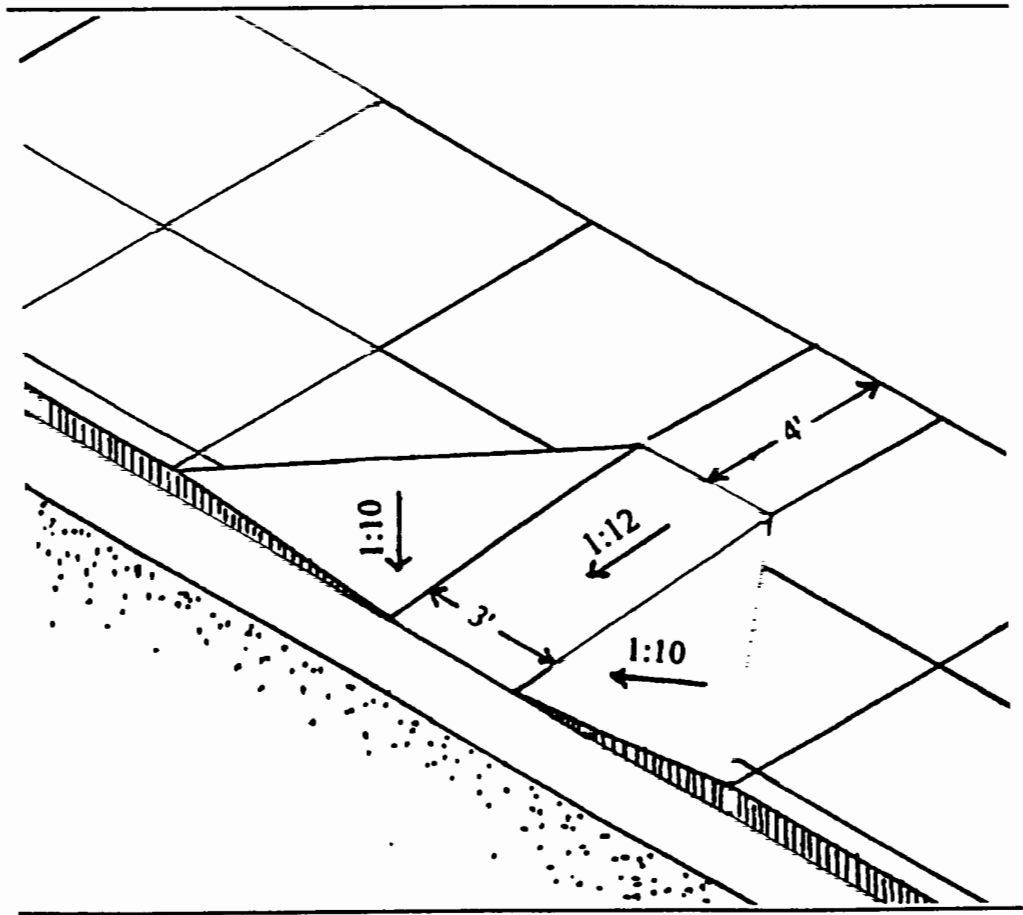
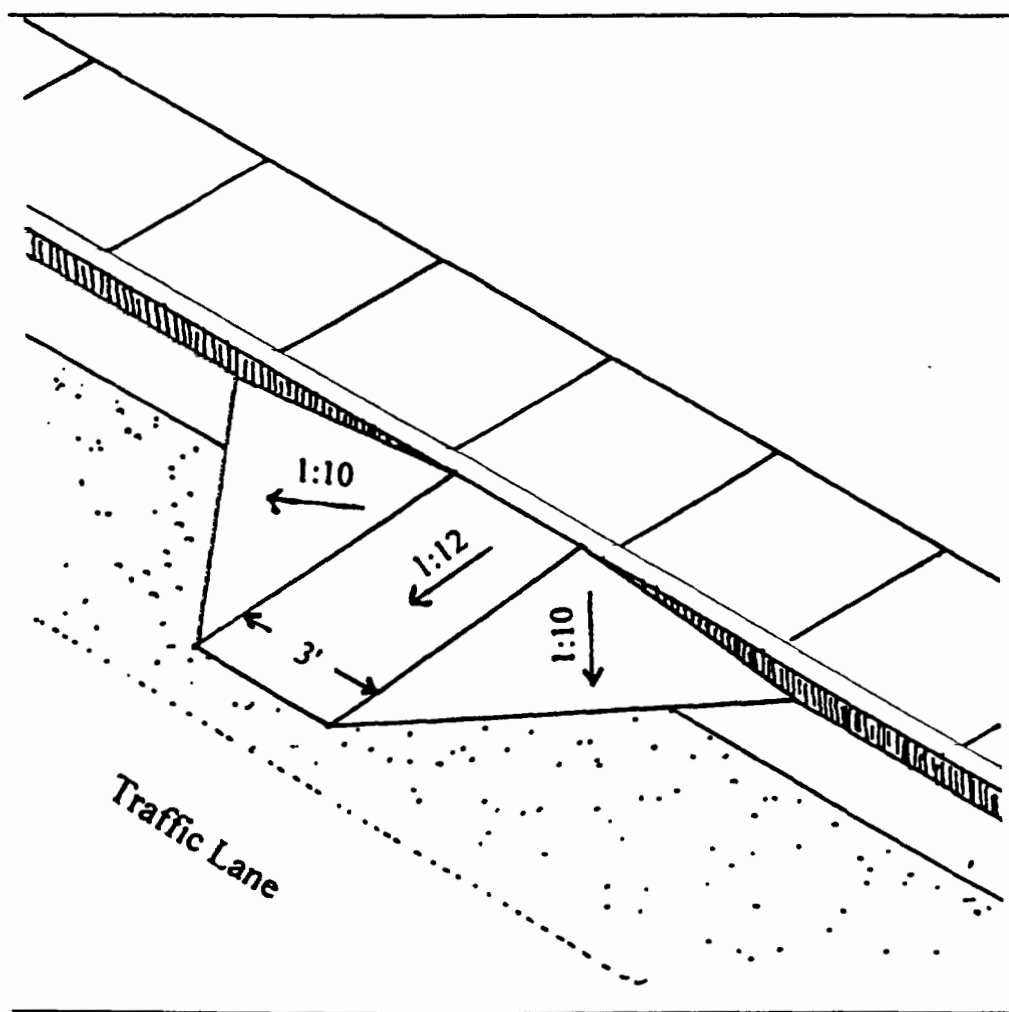
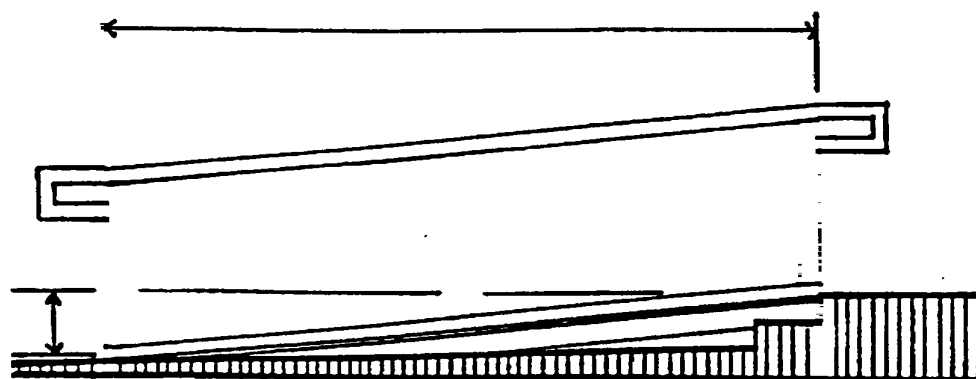


Figure 6
Example of Temporary Built-up Curb Ramp



- **Walkways:** The minimum clear width of a walkway should be 36". If less than 60" wide passing spaces 60" by 60" should be provided at reasonable intervals not to exceed 200'. A T-shaped walkway intersection is an acceptable passing space. The walkway surface should be stable, firm and slip-resistant. Typically, the walkway will be asphalt or concrete pavement, but compacted crushed rock and gravel, or tamped earth which is passable to wheelchairs in inclement weather is also acceptable. The walkway should have a cross slope not to exceed 1:50 so that wheelchair users can maintain a straight path. The running slope should not exceed 1:20; slopes over 1:20 are considered a ramp and will require handrails and intermittent landings 60" long at 30" height gain intervals.
- **Entry:** Voters with disabilities should be able to enter the polling place by the same entry as other voters. Steps at the entry to a polling place are an insurmountable barrier for voters using a wheelchair or walking aid. Separately routing these voters to a back service or loading entry is strongly discouraged. A low stepped entry barrier can be overcome by either a permanent or temporary ramp. Stepped entry's with a total height gain of 30" can be overcome by a single ramp run with a maximum slope of 1:12 (1' horizontal ramp run for each inch of height gain). Note a slope of 1:16 is easier for persons with disabilities to use and thus preferable if space permits. A stepped entry with between 30" and 60" of total height gain will require two ramp runs with an intermittent 60" landing. It may not be spatially feasible to overcome a stepped entry over 60" high with ramps and the effort required may be too taxing for many disabled voters; a portable or permanent platform lift may be an alternative solution.

Figure 7
Temporary Ramp to Overcome Steps at Entry



Length of Ramp

Step Height	1:16 Slope	1:12 Slope
	Recommended	Maximum
6"	8'	6'
12"	16'	12'
18"	24'	18'
24"	30'	24'
30"	40'	30'
over 30" to 60"	2 ramps with 60" intermediate landing	

Ensuring Access Inside the Polling Place

Only those features of a building which are a necessary part of the process of getting to the voting booth to cast a ballot, and which facilitate accessibility for voters with disabilities are included in this section. Support features such as water fountains and toilet rooms are not included because they are not essential to casting a vote. Nevertheless, these and other accessible support features are necessary for persons with disabilities to participate as poll workers and election officials.

Doors

Doors at the building entry and interior doors encountered en route to the voting booth may pose a barrier to access by voters with disabilities.

- **Revolving doors:** Revolving doors at an entry are a barrier to passage of voters in wheelchairs and elderly voters using walkers or crutches. An alternate accessible door should be available.
- **Double doors:** Double doors, including those without a central fixed post (astragal), are not accessible unless one of the doors fully open meets the minimum clear passage width. However, double doors linked to act in concert so that opening one door opens the other are accessible if they provide the minimum clear passage width between door faces when fully open 90 degrees.
- **Doors in series:** Two doors in series such as an airlock at building entry are not accessible unless there is a minimum of 48" between the doors plus the width of any door opening into intervening space. Doors in series should either both open in the same direction or in opposite directions away from the intervening space.
- **Clear passage width:** To permit passage of voters in wheelchairs and elderly voters with walkers or crutches, the doorway clear opening should be a minimum of 32" wide with the door open 90 degrees, measured from the door face to opposite stop (latch side). Given a typical door thickness of 1 1/2" to 2" the minimum actual width of a door permitting this accessible passage is nominally 36".

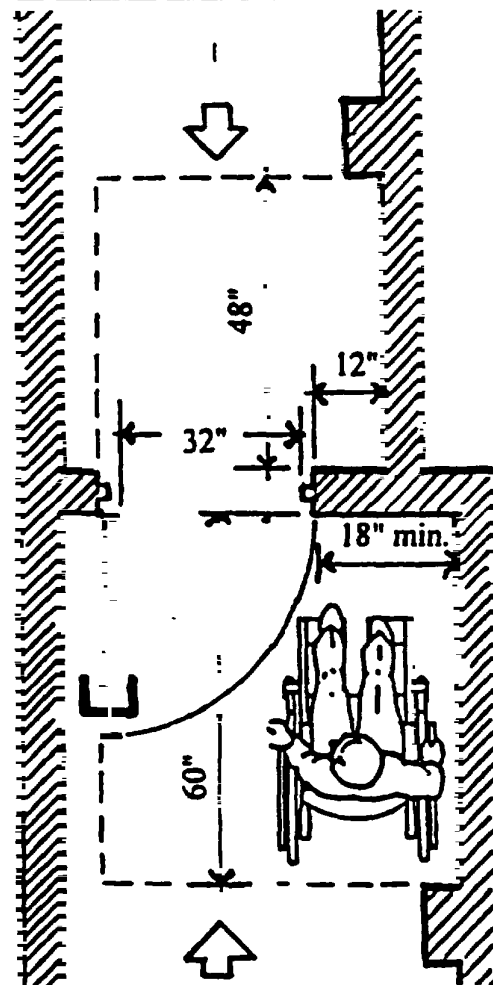
Doorways not permitting this 32" clear passage for accessibility, but measuring 32" or more between stops, may be made accessible by temporarily removing the door or remounting the door on special offset hinges. Note that removing a door may not be permitted by weather considerations or fire code. If the doorway is too narrow, providing a wider door can be a relatively expensive permanent solution, typically involving new structural reframing and refinishing of the wall, and a new door frame and threshold as well as a new wider door.

■ **Door hardware:** Accessible doors should be operable with one hand, without having to tightly grasp, tightly pinch or twist the wrist to open. Lever handles, push bar mechanisms, and U-shaped pull handles are acceptable, but door knobs are not.

■ **Door closers:** Automatic door closers can constitute a barrier for voters with disabilities if doors close too quickly to permit passage. Door closers should be adjusted to allow at least 3 seconds from the fully open to nearly closed position.

Figure 8

Doorway Clear Width and Maneuvering Clearances



■ **Thresholds:** Doorway thresholds can constitute a barrier that impedes voters who use wheelchairs and elderly voters with walkers or crutches if the threshold is too high or abrupt. Thresholds should not exceed 1/2" in height and should be beveled at a slope no greater than 1:2. If a threshold is not accessible, a temporary accommodation may be necessary. A poll worker may also have to be positioned to hold the door open for voters using wheelchairs, walkers, or crutches.

Accessible Route

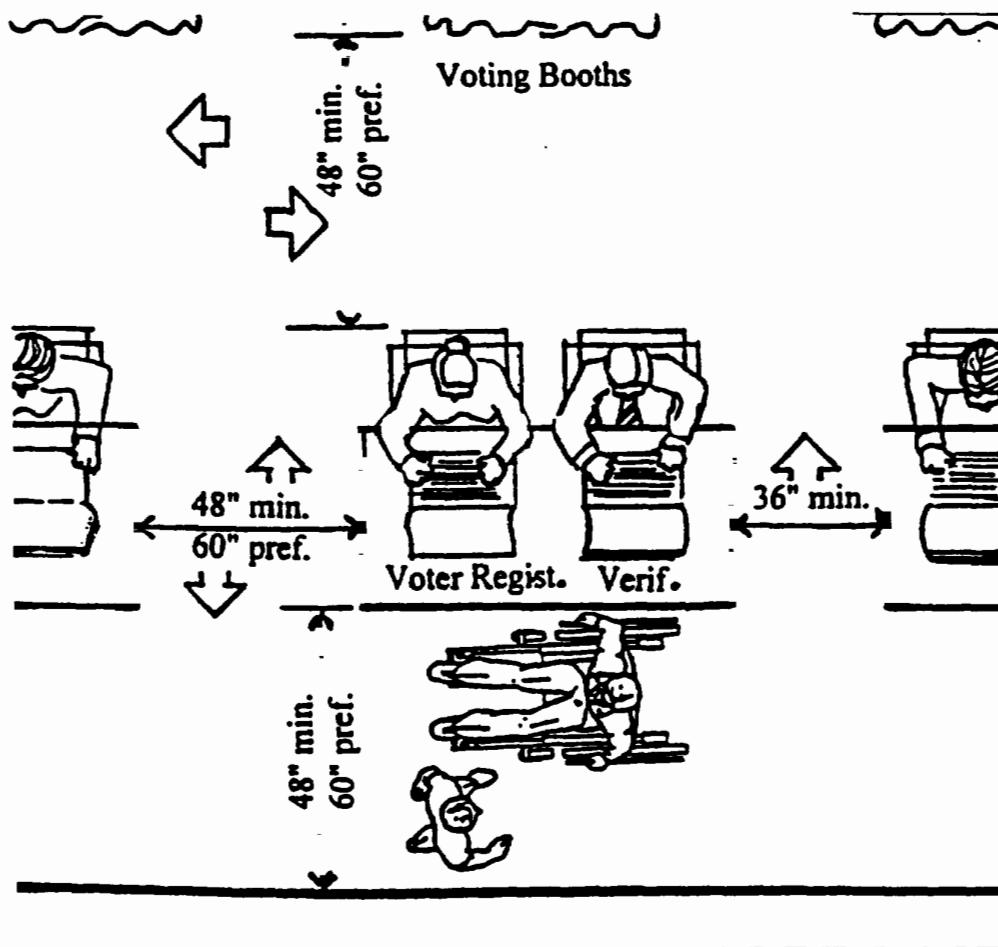
There should be an accessible route of travel for voters with disabilities extending from the accessible building entry to the voting machine or voting booth. Exit after voting may be by the same or another accessible route may be used.

■ **Minimum width:** To permit the one way passage of voters with disabilities using wheelchairs, walkers, crutches or service animals, a 36" minimum wide route is required. Note that this minimum width pertains to the furniture placement in rooms, including tables, chairs and voting booths as well as fixed architectural components such as halls and corridors. This minimum width can be reduced at points down to 32" for up to 24" of travel such as past the narrow end of a table or an architectural pilaster. This minimum width only permits one way passage of persons using a wheelchair, walking aid or service animal - no person, whether ambulatory or not, could pass by a wheelchair, walking aid or service animal user in either direction. Therefore, an accessible route less than 60" wide will require passing spaces 60" by 60" at regular intervals.

■ **Recommended minimum width:** Many polling places are likely to be crowded on Election Day and a 36" minimum accessible route could aggravate the congestion. The minimum width for a voter with a disability using a wheelchair, walking aid or service animal to bypass an ambulatory person is 48". The minimum width for two wheelchairs or walking aid users to pass each other or for an ambulatory person to pass by a wheelchair, walking aid or service animal user

without turning sideways is 60". To ease congestion and to permit the flexibility and courtesy of allowing voters with disabilities in wheelchairs, or with walking aids and service animals to go to the front of the line a minimum continuous width for an accessible route of 60" is recommended, with a minimum of 48" at furniture passage points such as registration verification tables and voting booths.

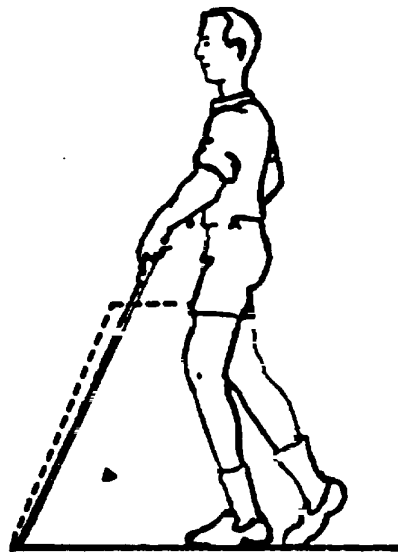
Figure 9
Minimum Width for Accessible Passage



■ **Protruding objects:** Objects which extend from the wall along an accessible route such as a fire extinguisher, drinking fountain or public telephone stand reduce the effective width of the accessible route at that point and may present a hazard for voters with disabilities who are visually impaired. A visually impaired voter using a

cane cannot detect a protruding object mounted with its lower edge over 27" above the floor and may walk into it. Similarly, free-standing objects such as temporary directional signs on posts or temporary saw horse barriers will not be detected by visually above the floor.

Figure 10
Protruding Objects and Overhead Clearances



Overhead clearance: A minimum overhead clearance of 6' 8" should be maintained. Signs, including fire exit signs, old door closers which hang below the door head, light fixtures, and especially the open underside of staircases are examples of overhead hazards not detected by blind or visually impaired persons using a cane without a warning barrier.

Accessible Voter Registration Verification

Verification of voter registration is typically done at tables. Tables should be no higher than 34" with 29" clear under them to both allow for wheelchair users to be poll workers, and voters in wheelchairs to approach the table. Elderly voters may not be comfortable having to stand to answer registration questions, and having chairs available for their use will help put them at ease. If there are long lines for either verification of voter registration or to use the voting booths, then chairs should be available where elderly voters can await their turn. Elderly voters should not have to shuttle from chair to chair to maintain their place in line, but, instead, should be called when their turn is near, allowing them some extra time for transit. Chairs intended for elderly use should be equipped with arms, which will assist the elderly in both sitting and arising. In arranging the furniture at the polling place, it is important to maintain adequate clearances to permit the passage and maneuver of persons with disabilities and the elderly.

Voting

- **Accessible voting machine booths:** An accessible voting machine should provide suffi-

cient room for a voter with a disability such as a wheelchair user to vote in complete privacy behind a curtain or screen to insure a secret ballot. Any levers, buttons or other voting means should be within an easy reach range of a wheelchair user. For a frontal approach, this booth space should be a minimum of 36" wide by 48" deep; this depth can be reduced to 36" if the voting machine is set up on a table or otherwise provides 29" high knee space 19" deep for wheelchair users. The reach range of a wheelchair user for a frontal approach is limited to 48" high. If a wheelchair user can position themselves parallel to the machine, the reach range is increased to 54" high, but minimum space is increased to 48" wide by 36" deep.

- **Accessible voting booths in lieu of machines:** Some voters with disabilities may not be able to use a voting machine. And some polling places may not have a sufficient number of registered voters to warrant the use of voting machines, and may instead use a voting booth and hand-marked ballots. An accessible voting booth for handmarked ballots should have a screened table with a maximum height of 34" and 29" clear height to permit wheelchair voters. A curtained or screened booth a minimum of 36" wide and 36" deep will accommodate a wheelchair user.
- **Accompanied voters with disabilities:** Federal law allows voters with disabilities to be accompanied and to receive assistance by another person in the voting booth. To ensure a secret ballot, the curtained or screened voting booth of at least one machine or manual ballot should be 48" wide by 48" deep to accommodate accompanied voters with disabilities.

Figure 11
Accessible Voting Machine Booth (No Kneespace)

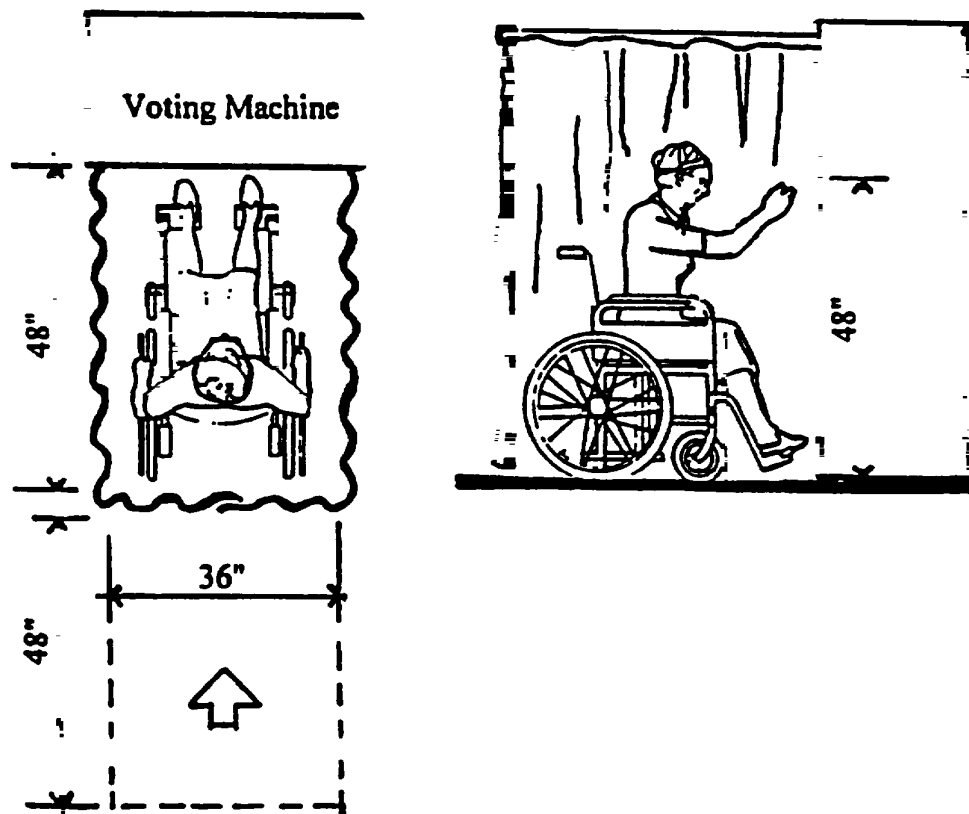


Figure 12
Accessible Voting Machine Booth with Kneespace

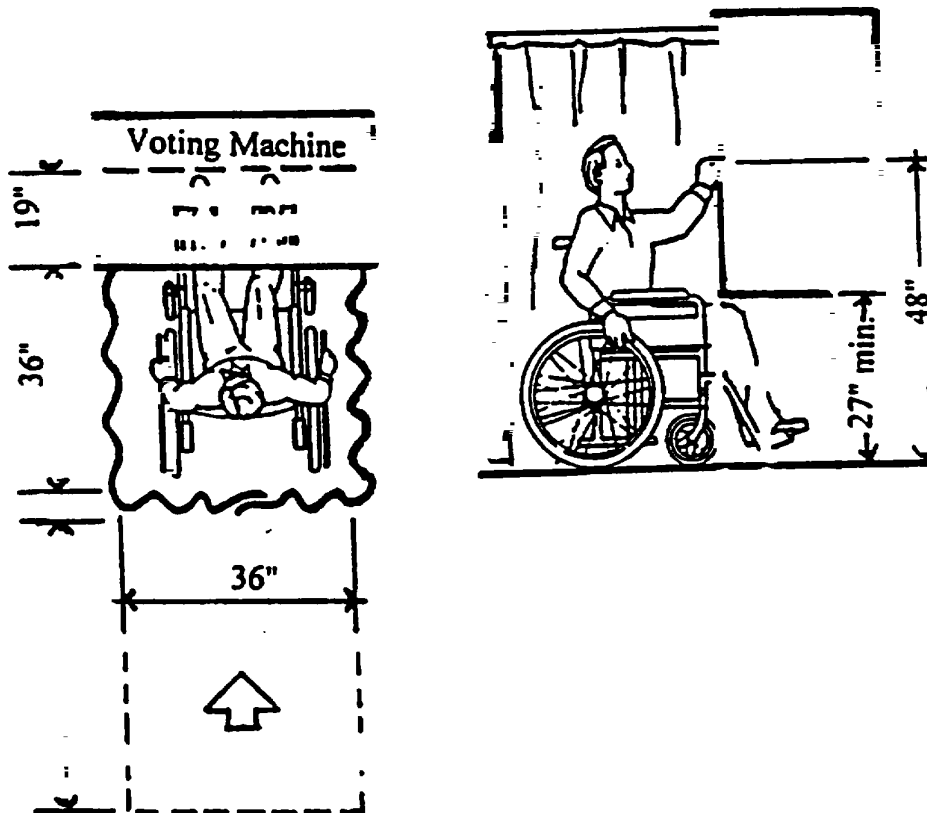


Figure 13
Accessible Voting Machine Booth (No Kneespace)

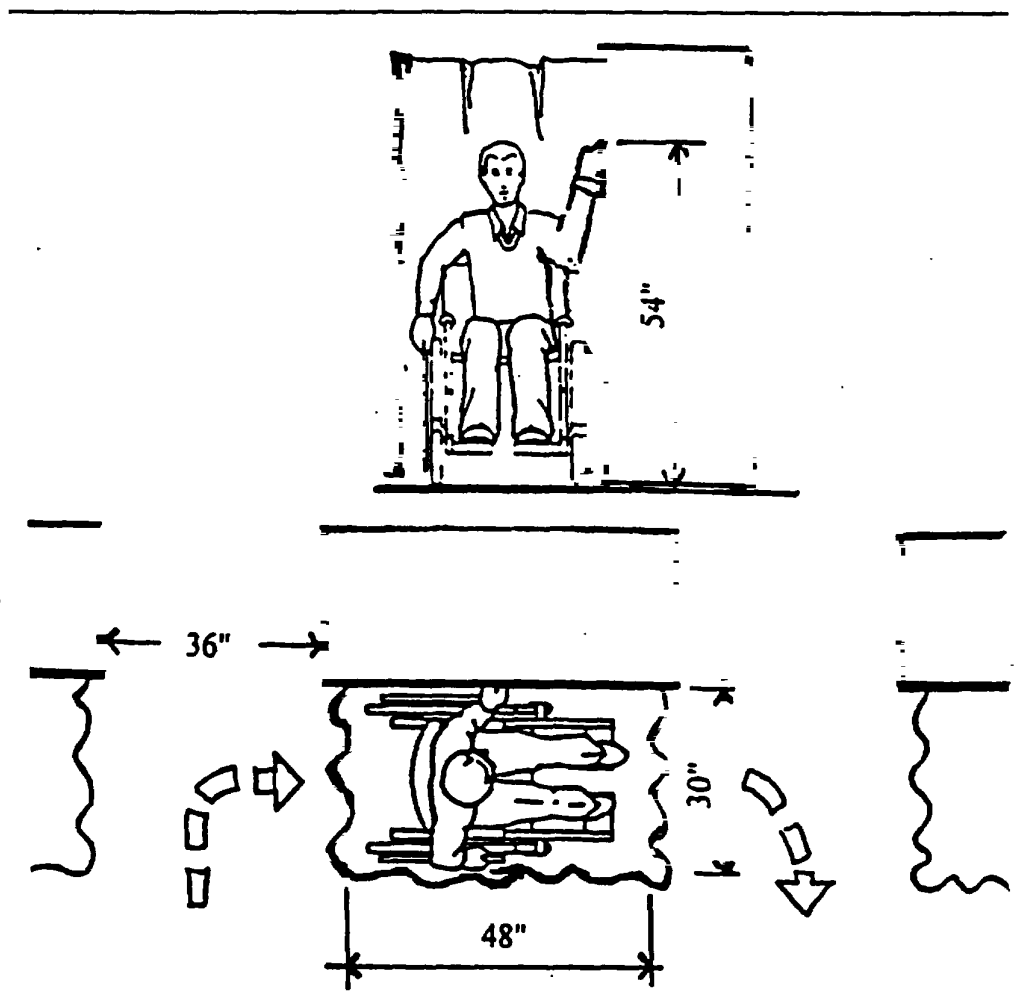
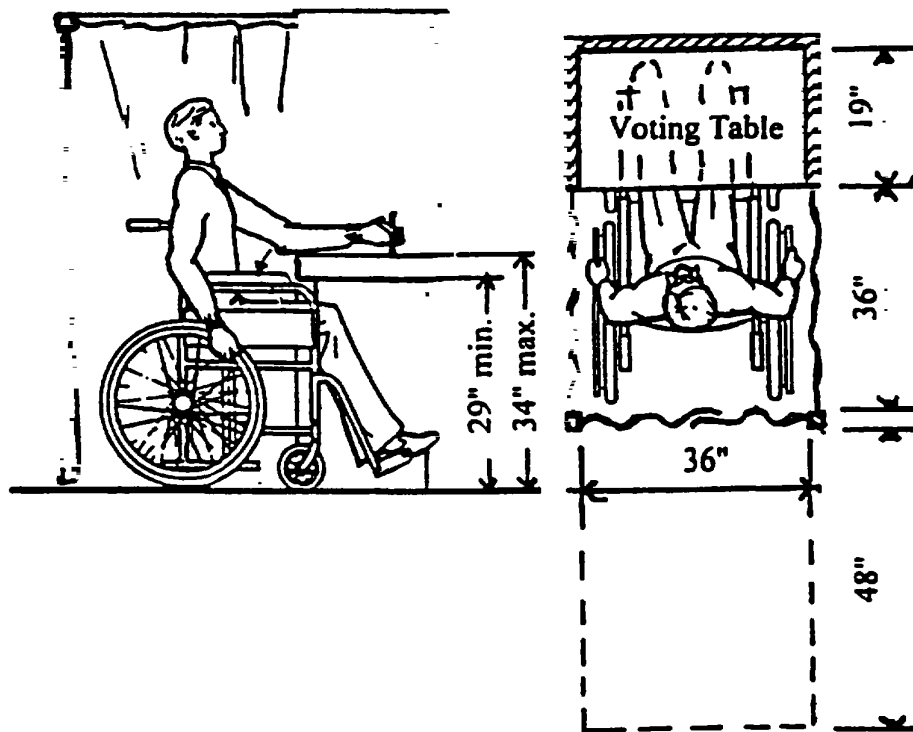


Figure 14
Accessible Voting Booth with Table



Funding Accommodations for People with Disabilities

Frequently, making accommodations to achieve accessibility to polling places for people with disabilities requires the expenditure of funds for items such as portable ramps, special hardware or special adaptive equipment. Most states do not budget for these accommodations, so imaginative and innovative funding methods have to be devised.

In most cases, fundraising is a one-time effort and not an annual necessity. Once the items needed to provide accessibility are acquired, they can be used for each subsequent elections. Most local organizations take on annual fundraising for the charities and causes they adopt and are not able to add to those efforts on an annual basis. However, as a one-time effort, they are more open to helping.

Here are some of the ways in which election districts across the nation have met the funding challenge:

Service clubs: Service clubs such as the Junior Chamber of Commerce, the Lions, Kiwanis or Rotary clubs have "adopted" a polling place and used a variety of fundraising approaches to raise money to help make polling places accessible. If approached and given the nature of the problem, these community organizations will take on the one-time job of raising funds to provide the necessary accommodations as a part of their community action programs.

Political parties: Local political parties can be called upon to help raise funds for accessible accommodations at election polling places. If approached in an effective manner, political leaders can see a public relations benefit in helping out. It also tends to increase their awareness of people with disabilities in the community and their desire to be a part of the political process by exercising their franchise.

Civic clubs: Organizations such as the League of Women Voters and other civic organizations can be a resource for raising funds. These groups often have a very direct interest in seeing that voter turnout is maximized and therefore are quick to realize the benefit of providing accessible polling facilities for people with disabilities in their communities.

Veterans organizations: The American Legion, the Paralyzed Veterans of America and other veteran's groups have local chapters across the country and can be called upon to help raise funds, which help their members who have disabilities get out to vote.

Local disability groups: Local disability groups, such as the chapters of the Easter Seal Society, can often be called upon to assist in raising funds to provide accessible accommodations which provide a direct benefit to their members and enhance their reputations as community organizations.

Schools: Local high schools and colleges can be approached to help raise funds. In most cases, students show considerable energy and creativity in raising money from such events as car washes, dances, and other special events. Civics and social studies classes are especially easy to approach and challenge to help raise funds.

Appendices

Appendix A

Common Courtesies and Guidelines

- Be considerate of the extra time it might take for a person who is disabled or elderly to get things done, and give unhurried attention to a person who has difficulty speaking.
- Speak directly to the person who has a disability rather than to a companion who may be along.
- Speak calmly, slowly and directly to a person with a hearing problem. Your facial expressions, gestures and body movements help in understanding. Don't shout or speak in the person's ear. If full understanding is doubtful, write a note to the person with a hearing problem.
- Before pushing someone in a wheelchair, ask if you may do so and how you should proceed.
- Greet a person who is visually impaired by letting the person know who and where you are. Provide a guiding device such as a ruler or card for signing forms. When offering walking assistance, allow the person to take your arm and tell him or her if you are approaching steps or inclines.
- Be aware that dogs who assist people with disabilities should be admitted into all buildings. Such dogs are highly trained and need no special care other than that provided by the owner.
- Be aware that federal law allows voters with disabilities to be accompanied and to receive assistance by another person in the voting booth.
- Remember that all voters deserve courteous attention in exercising their right as citizens to vote.
- If space allows, provide seating outside the polling place for voters to sit while they wait for rides or for their companions to vote.
- In advance of election day, offer to make available a voting booth to demonstrate to people with disabilities how it works so they can become familiar with its operation and be ready to cast their vote on election day.

APPENDIX B



Polling Place Accessibility Survey Form

COUNTY/CITY/TOWN:

POLLING PLACE NAME/NUMBER:

POLLING PLACE ADDRESS/LOCATION:

INSTRUCTIONS

The purpose of this form is to evaluate the practical accessibility of polling places to the disabled pursuant to the requirements of the Voting Accessibility for the Elderly and Handicapped Act of 1984. This form is designed to facilitate a walk-through inspection of each polling place from the parking area to the voting area. Completing the form should require no more than a yardstick, a tape measure, and approximately 30 minutes.

Please respond to *all* questions in each category by marking either "YES", "NO", or "NOT APPLICABLE", as appropriate. Items with clear boxes are *required* while items with shaded boxes are *recommended*. Thus, a "NO" response in any clear box renders the polling place INACCESSIBLE whereas a "NO" response in any shaded box renders it ACCESSIBLE BUT INCONVENIENT provided that all other responses are "YES" or "NOT APPLICABLE."

We recognize that a polling place may be inaccessible for more than one reason. It is therefore especially important to respond to every item and to summarize the responses by category on the back page.

1. Name, address, and telephone number of person completing this form:

2. Date on which inspection was conducted: _____

A. Was the inspection conducted on site? _____

**CATEGORY I:
PARKING**

YES NO N/A

1. Are there off-street parking spaces either permanently or temporarily designated for the handicapped?

2. With regard to off-street parking:

- a. Are such parking spaces at least ____ feet wide?

- b. Are such parking spaces on level ground (with a slope no greater than a rise of ____ foot in ____ feet)?

- c. Is the parking area paved (concrete, asphalt, macadam, etc.)?

- d. Are the parking spaces within a reasonable travel distance (____ feet) of the building?



- e. Is there a curb cut to connect these parking spaces to an accessible walk or to the building entrance?

- f. Are these parking spaces designated by post-mounted signs bearing the symbol of accessibility?

3. Is there a relatively level passenger drop-off zone at least ____ feet wide with a curb-cut connecting it to an accessible walk or to the building entrance?

**END OF CATEGORY I.
PLEASE PROCEED TO NEXT CATEGORY.**



**CATEGORY II:
WALKWAYS OR PATHWAYS TO THE BUILDING**

YES NO N/A

1. Is the walkway or pathway to the building paved (concrete, asphalt, macadam, etc.)?

2. Is the walkway or pathway to the building at least ____ inches wide?

3. Are all curbs along the pathway to the building cut or ramped with at least a ____ clear width and with slopes of no more than a ____ inch rise in ____ inches?

4. Are all stairs or steps along the walkway or pathway to the building either ramped (with a slope of no more than a ____ foot rise in ____ feet) or else provided with a suitable alternative means of access?

5. Do stairsteps along the walkway or pathway to the building have non-slip surfaces and hand-rails?

6. Is the walkway or pathway to the building entrance:

a. free of protrusions (such as fire hydrants, tree trunks, or other obstacles) which narrow the passage to less than ____ inches?

b. free of any abrupt edges or breaks in the surface where the difference is over ____ inches in height (such as where it crosses a driveway, parking lot, or another walkway, etc.)?

WALKWAYS OR PATHWAYS TO THE BUILDING (cont'd)

	YES	NO	N/A
c. free of any overhanging objects (such as tree branches, signs, etc.) which hang lower than _____ inches?			
d. free of any slopes or inclines greater than a _____ foot rise in _____ feet?			
e. free of any grating with openings of over _____ inches wide?			
7. Are walkways always well lighted?			
8. Are provisions made to ensure that walkways are free of such hazards as ice, snow, leaves, or other debris on the day of election?			
9. Are there signs which identify the accessible route of travel if that route is different from the primary route of travel to the building?			

**END OF CATEGORY II.
PLEASE PROCEED TO NEXT CATEGORY.**



**CATEGORY III:
RAMPS AND ELEVATORS ENTERING OR INSIDE THE BUILDING**

YES NO N/A

1. Are building stairs or steps which are over _____ inches high (either at the entrance or between the entrance and the voting area) provided either with a ramp, with an elevator, or with an alternative means of unassisted passage (such as a chairlift or an alternative route of travel)?

2. With regard to ramps:

- a. Do all ramps have a slope no greater than a rise of _____ foot in _____ feet?

- b. Are ramps provided with non-slip surfaces?

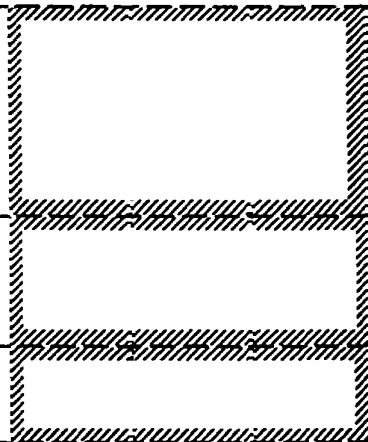
- c. For any ramp rising more than _____ inches or longer than _____ inches or longer than _____ inches, is a handrail provided?

- d. Are handrails at least _____ inches above ramp surface?

- e. Can handrails be gripped?

- f. Are ramps and landing areas with drop-offs provided with at least a _____ inch curb at the side to prevent slipping off the ramps?

- g. If there is a door at the top of the ramp, is there a level space of at least _____ feet by _____ feet where a wheelchair can rest while the door is opened?



RAMPS AND ELEVATORS ENTERING OR INSIDE THE BUILDING (cont'd)

	YES	NO	N/A
3. With regard to elevators (if elevators are the only accessible route):			
a. Is the elevator cab at least ____ feet by ____ feet wide?			
b. Do elevator doors provide at least ____ inches clear width?			
c. Are elevator controls less than ____ inches high (i.e. can a person in a chair operate the controls)?			
d. Are control panels marked with raised lettering?			
e. Is the elevator in close proximity to the entrance of the building?			

END OF CATEGORY III.
PLEASE PROCEED TO NEXT CATEGORY.



**CATEGORY IV:
OTHER ARCHITECTURAL FEATURES**

YES NO N/A

1. With regard to doors along the route of travel:

a. Do all doors have an opening which clears at least ____ inches wide?

b. Are all door thresholds less than ____ inch high?

c. Are all doors equipped with either arch or lever-type handles, pushplates, or automatic openers (so that twisting a doorknob is not required)?

d. Where automatic doors are used, does the door remain open at least ____ seconds?

e. Are glass doors marked with safety seals?

2. With regard to stairs along the route:

a. Do stairs have non-slip surface?

b. Do stairs have handrails at least ____ inches above step level?

c. Can handrails be gripped?

d. Do all steps have risers (the little vertical walls at the back of each step)?

e. Do all steps have tread areas at least ____ inches deep?

OTHER ARCHITECTURAL FEATURES (cont'd)

	YES	NO	N/A
f. Are all steps less than ____ inches in height?			
g. Are stairs well lit?			
h. Are stairs free of obstacles?			
3. With regard to corridors along the route:			
a. Is the corridor at least ____ inches wide?			
b. Is the corridor free of obstacles or protrusions (such as boxes, water fountains, etc.) which extend more than ____ inches from the wall?			
c. Is there sufficient lighting at all points along the route?			
d. Is there a seating or rest area in any corridor longer than ____ feet?			
e. Does the corridor have a non-slip surface?			
f. Are all rugs and mats securely fastened?			

**END OF CATEGORY IV.
PLEASE PROCEED TO NEXT CATEGORY.**



**CATEGORY V:
FEATURES WITHIN THE VOTING AREA**

	YES	NO	N/A
1. Are instructions for voting printed in _____ point or larger type in simple language, and plainly displayed?			
2. Is there sufficient unobstructed space for the reasonable movement of voters in wheelchairs?			
3. Can all necessary parts of the voting equipment be reached by a person seated in a chair or, at least, is an alternative means of casting a ballot provided?			
4. Are magnifying devices available for those who request them?			
5. Is there adequate lighting in the voting area?			
6. Is seating available for elderly or handicapped voters awaiting their turn to vote?			

END OF CATEGORY V:



OTHER REASONS FOR INACCESSIBILITY (Describe):

**PLEASE COMPLETE THE SUMMARY
OF ACCESSIBILITY ON BACK**



SUMMARY OF ACCESSIBILITY BY CATEGORIES

Please review the responses within each category on the previous pages and indicate below whether each category is:

- INACCESSIBLE (if there is a "NO" response in *any* unshaded box in the category)
- ACCESSIBLE BUT INCONVENIENT (if all "NO" responses in the category are only in *shaded* boxes and all the responses in the *unshaded* boxes are either "YES" or "N/A".)
- FULLY ACCESSIBLE (if *all* responses in the category are either "YES" or "N/A")

Category	Inaccessible	Accessible But Inconvenient	Fully Accessible
I. Parking			
II. Walkways or pathways to building			
III. Ramps and elevators entering or inside of the building			
IV. Other architectural features			
V. Voting area			
VI. Other			

OVERALL DETERMINATION OF POLLING PLACE ACCESSIBILITY
(mark one box only)

If one or more of the categories above is marked "INACCESSIBLE", then the polling place isINACCESSIBLE ☐

If no category is marked "INACCESSIBLE" but one or more is marked "ACCESSIBLE BUT INCONVENIENT" then the polling place isACCESSIBLE BUT INCONVENIENT ☐

If *all* categories above are marked "FULLY ACCESSIBLE", then the polling place isFULLY ACCESSIBLE ☐

DISPOSITION OF INACCESSIBLE POLLING PLACE

If the polling place is INACCESSIBLE	Yes	No
a. Has an alternative accessible facility been sought?	<input type="checkbox"/>	<input type="checkbox"/>
b. Are permanent or temporary alterations planned to render the polling place accessible in the coming general election?	<input type="checkbox"/>	<input type="checkbox"/>

Appendix C



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

October 7, 1991

OFFICE OF THE CHAIRMAN

The Honorable Bob Livingston
United States House of Representatives
Washington, D.C. 20515

Dear Representative Livingston:

The purpose of this letter is to advise you of this Commission's understanding of the relationship between the Voting Accessibility for the Elderly and Handicapped Act (VAA) of 1984 and the Americans with Disabilities Act (ADA) of 1990.

As you know, the Federal Election Commission (FEC) has certain duties and responsibilities both under the Federal Election Campaign Act (2 U.S.C. 438(a)(10)) and under the VAA (42 U.S.C. 1973ee-1). Pursuant to these obligations, we have received over the past few weeks a number of questions from State and local election officials regarding the impact of Title II of the ADA on the requirements of the VAA. Moreover, you will recall that in the May 14, 1991 hearing on the VAA held before the House Subcommittee on Elections, you requested of this Commission, "Either now or for the record, would you state your understanding of how these two Acts interrelate?" This letter, then, responds to that request.

The questions coming to us address four general issues:

- o the appropriate standards to use in determining the accessibility of existing physical facilities (with special reference to polling places)
- o the extent to which individual instances of inaccessible polling places or registration sites might be actionable under the ADA
- o the nature of the auxiliary aids required for the disabled, and
- o the application of the self-evaluation requirements imposed on public entities by the ADA.

In examining these issues, this Commission has read with interest the Department of Justice (DOJ) regulations (28 CFR Part 35) and has reached the following conclusions.

o Item 1: The appropriate standards to use in determining the accessibility of existing physical facilities.

Subsection 3(a) of the VAA (42 U.S.C. 1973ee-1) requires, essentially, that all polling places for Federal elections be accessible to elderly and handicapped voters. Section 8 of the VAA (42 U.S.C. 1973ee-6) further defines "accessible" to mean "accessible to handicapped and elderly individuals for the purpose of voting or registration, as determined under guidelines established by the chief election officer of the State involved."

At the specific request of the House Subcommittee on Elections in its October 6, 1987 hearing on the VAA, this Commission (in consultation with the Coalition for Voter Accessibility and the National Association of Secretaries of State) recommended a set of polling place accessibility criteria in order to assist the chief election officers of the States in developing their accessibility guidelines. These criteria have subsequently been adopted by approximately 40 of the States.

Subsection 35.151(c) of the DOJ regulations offers at least two alternative sets of accessibility criteria for New Construction and Alterations -- either the Uniform Federal Accessibility Standards (UFAS) or else the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG). Importantly, however, this section further states that "Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided."

Section 35.150 of those regulations provides no parallel guidance with respect to physical accessibility criteria for Existing Facilities.

Yet, even if the standards for new constructions suggested in Subsection 35.151(c) apply equally to existing facilities, it is this Commission's understanding that any polling place accessibility guidelines established by the chief election officer of a State would satisfy the requirements of the ADA if they clearly provide "equivalent access to the facility." Further, it is our understanding that the polling place accessibility criteria recommended by this Commission, because it is clearly evident that they would provide equivalent access to

the facility, therefore satisfy the requirements of the ADA provided that the particular measures left blank on the form are not less than the standards set forth in the UFAS or ADAAG standards.

o Item 2: The extent to which individual instances of inaccessible polling places or registration sites might be actionable under the ADA.

Subsection 3(b) of the VAA (42 U.S.C. 1973ee-1) provides for certain exceptions to the general requirement of ensuring that all polling places for Federal elections be accessible. These exceptions are:

- (1) in the case of an emergency, as determined by the chief election officer of the State; or
- (2) if the chief election officer of the State--
 - (A) determines that all potential polling places have been surveyed and no such accessible place is available, nor is the political subdivision able to make one temporarily accessible, in the area involved; and
 - (B) assures that any handicapped or elderly voter assigned to an inaccessible polling place, upon advance request of such voter (pursuant to procedures established by the chief election officer of the State)--
 - (i) will be assigned to an accessible polling place, or
 - (ii) will be provided with an alternative means for casting a ballot on the day of the election.

At the same time, Section 4 of the VAA (42 U.S.C. 1973ee-2) requires that:

- (a) Each State or political subdivision responsible for registration for Federal elections shall provide a reasonable number of accessible permanent registration facilities.
- (b) Subsection (a) does not apply to any State that has in effect a system that provides an opportunity for each potential voter to register by mail or at the residence of such voter.

In reviewing the DOJ regulations, we note that the exceptions and procedures provided for in the VAA conform nicely to the concept of "program accessibility" enunciated in the preamble to Section 35.150. Moreover, we note that Subsection 35.150(a) of the regulations provides that:

A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety [emphasis added], is readily accessible to and usable by individuals with disabilities. This paragraph does not--

- (1) Necessarily require a public entity to make each of its existing facilities [emphasis added] accessible to and usable by individuals with disabilities.

Accordingly, it is this Commission's understanding that the ADA has the effect of expanding the requirements of the VAA to encompass polling places and registration sites in all, rather than just Federal, elections.

Further, it is our understanding that individual instances of inaccessible polling places or registration sites are not in and of themselves actionable under the ADA provided that: (a) they result from the exceptions encompassed by Subsection 3(b) and Section 4 of the VAA, (b) they are accompanied by the alternative procedures provided for by Subsection 3(b) and Section 4 of the VAA, and (c) they are not part of an overall pattern or practice of discrimination against disabled persons in the registration or voting process.

In a related matter involving liability, we note that Subsection 35.150(d)(2) of the regulations assigns responsibility for "providing curb ramps or other sloped areas where pedestrian walks cross curbs" to that public entity which "has responsibility or authority over streets, roads, or walkways."

It is this Commission's understanding, then, that although curb ramps are an essential criterion in determining the accessibility of a polling or registration facility, election officials (who do not have authority over streets, roads, or walkways) cannot, under the ADA, be held legally accountable for failing to provide them (and that any legal action under the ADA involving curb ramps should instead be directed to the public entity that has authority over them).

o Item 3: The nature of the auxiliary aids required for the disabled.

Subsection 5(a) of the VAA (42 U.S.C 1973ee-3) requires that:

Each State shall make available registration and voting aids for Federal elections for handicapped and elderly individuals, including --

- (1) instructions, printed in large type, conspicuously displayed at each permanent registration facility and each polling place; and
- (2) information by telecommunications devices for the deaf.

Section 208 of the Voting Rights Act (42 U.S.C 1973aa-6) requires that:

Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union.

Section 35.161 of the DOJ regulations requires telecommunication devices (TDD's) for the hearing or speech impaired while Subsection 35.160(b) states that:

- (1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.
- (2) In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual.

Subsection 35.160(b) is conditioned, however, by Section 35.135, which excludes purely personal devices and services, and by Section 35.164, which excludes any action that a public entity can demonstrate "would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens."

Section 35.164 further provides that the head of the public entity (or a designee) carries the responsibility of proving any such burden in a written statement. And even so, it provides that:

If an action required to comply with this subpart would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.

These things taken together, it is this Commission's understanding that meeting the requirements of the VAA, of the polling place accessibility criteria recommended by this Commission, and of Section 208 of the Voting Rights Act (VRA) would satisfy the requirements of the ADA with regard to the communication needs of the hearing impaired, of the visually impaired, and, to some extent, of the totally blind. With regard to the totally blind, however, election offices must now provide additional auxiliary services. These services need not necessarily include providing taped, recorded, or braille ballots, registration forms, or other public records or documents if the head of the election office has determined in writing that such services would constitute an undue administrative or financial burden. But services must include, at a minimum, effective means of providing access to the election process such as providing someone qualified to read and to help in the completion of the registration form, to read and to help in the completion of the ballot (should the blind individual not request the assistance of another under Section 208 of the VRA), and to read other public documents.

o Item 4: The application of the self-evaluation requirements imposed on public entities by the ADA.

Subsection 3(c)(1) of the VAA (42 U.S.C. 1973ee-1) provides that:

each State shall report to the Federal Election Commission, in a manner to be determined by the Commission, the number of accessible and inaccessible polling places in such State on the date of the preceding general Federal election, and the reasons for any instance of inaccessibility.

In practice, this requirement is met by local election officials surveying their polling places on the basis of accessibility criteria recommended either by this Commission or by the chief election officer of the State.

Subsection 35.105(a) of the DOJ regulations states that:

A public entity shall, within one year of the effective date of this part, evaluate its current services, policies, and practices, and the effect thereof, that do not or may not meet the requirements of this part and, to the extent modification of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications.

It is this Commission's understanding that (1) such a self-evaluation on the part of local election offices extends to an evaluation of polling places, but that (2) a survey of polling places pursuant to the requirements of the VAA and based on the criteria recommended by this Commission would satisfy at least that aspect of the ADA requirement. The ADA simply expands such self-evaluation to include the central office and any other outlying or satellite offices or registration facilities.

o Item 5: Miscellaneous Issues

(A) With regard to providing public notice, Subsection 5(c) of the VAA (42 U.S.C. 1973ee-3) requires that:

The Chief election officer of each State shall provide public notice, calculated to reach elderly and handicapped voters, of the availability of aids under this section, assistance under Section 208 of the Voting Rights Act of 1965 (42 U.S.C. 1973aa-6), and the procedures for voting by absentee ballot, not later than general public notice of registration and voting is provided.

Concomitantly, Section 35.106 of the DOJ regulations states that:

A public entity shall make available to applicants, participants, beneficiaries, and other interested persons information regarding the provisions of this part and its applicability to the services, programs, or activities of the public entity, and make such information available to

them in such manner as the head of the entity finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part.

Subsection 35.163(a) states that:

A public entity shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

It is this Commission's understanding that the public notice requirements of the ADA would be satisfied by the incorporation of such information into the public notices required by the VAA.

(B) With regard to signage, we note that Subsection 35.163(b) of the DOJ regulations states that:

A public entity shall provide signage at all inaccessible entrances to each of its facilities, directing users to an accessible entrance or to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each accessible entrance of a facility.

By the same token, item 9 in category II of the polling place accessibility criteria recommended by this Commission requires that there be "signs which identify the accessible route of travel if that route of travel is different from the primary route of travel to the building."

It is this Commission's understanding that, with the addition of the international symbol of accessibility at accessible entrances, adherence to the FEC accessibility criteria would satisfy the signage requirements of the ADA.

(C) With regard to special requirements imposed by the ADA on public entities that employ 50 or more persons, we note that Subsection 35.105(c) of the DOJ regulations states that:

A public entity that employs 50 or more persons shall, for at least three years following completion of the self-evaluation, maintain on file and make available for public inspection:

- (1) A list of the interested persons consulted;
- (2) A description of areas examined and any problems identified; and
- (3) A description of any modifications made.

Section 35.107 of the regulations further requires that public entities employing 50 or more persons shall "designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part", "shall make available to all interested individuals the name, office address, and telephone number" of such designated employee, and "shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by this part."

And finally, Subsection 35.150(d)(1) requires, in part, that:

In the event that structural changes to facilities will be undertaken to achieve program accessibility, a public entity that employs 50 or more persons shall develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes.

and that such a plan must involve the participation of interested persons and be made available to the public.

It is this Commission's understanding that while these requirements apply to local election offices employing 50 or more persons, such employees do not, for these purposes, include part-time, temporary, or seasonal employees such as election day workers or deputy registrars.

o Item 6: Summary

In summary, it is this Commission's understanding that the ADA imposes the following additional requirements on election officials: That --

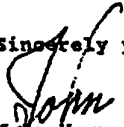
- (1) polling places and registration sites now be made accessible in all, rather than just Federal, elections (as noted in Item 2);
- (2) election offices now provide certain additional auxiliary services to the blind (as noted in Item 3);

- (3) local election offices now extend their self-evaluation to include central office as well as satellite facilities (as noted in Item 4);
- (4) the international symbol for accessibility be used at each accessible entrance of a facility (as noted in Item 5); and
- (5) election offices that employ 50 or more persons now meet certain special requirements (as noted in Item 5).

With the addition of these five measures, full compliance by State and local election officials with the provisions of the Voting Accessibility for the Elderly and Handicapped Act along with strict adherence to the accessibility criteria recommended by the Federal Election Commission would constitute their full compliance with Title II of the Americans with Disabilities Act. Further, any failure by State or local election officials to comply fully with the provisions of the VAA or with the FEC accessibility criteria might be actionable under the ADA.

We hope this information fully responds to your request. Should you have any other questions regarding these matters, please do not hesitate to contact us.

Sincerely yours,


John Warren McGarry
Chairman
Federal Election Commission

cc: Representative Al Swift, Chairman
House Subcommittee on Elections

John Wodatch, Director
Office on the Americans with Disabilities Act
Department of Justice

APPENDIX D

National Disability Organizations

The Paralyzed Veterans of America
801 18th Street, NW
Washington, DC 20006
(202) 872-1300

United Cerebral Palsy Associations

1660 L Street, Suite 700
Washington, D C 20036
(202) 776-0406

The National Easter Seal Society

70 East Lake Street
Chicago, IL 60601
(312) 726-6200

The National Organization of Disability

910 16th Street, NW
Suite 600
Washington, DC 20006
(202) 293-1960

National Institute for Disability and Rehabilitative Research

U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202
(202) 732-1134

American Foundation for the Blind

15 West 16th Street
New York, NY 10011
(212) 620-2000

National Rehabilitation Association

633 South Washington Street
Alexandria, VA 22314
(703) 386-0850

National Multiple Sclerosis Society

205 East 42nd Street
New York, NY 10017
(212) 986-3240

Muscular Dystrophy Association

810 Seventh Avenue
New York, NY 10019
(212) 586-0808

National Head Injury Foundation

P.O. Box 567
Framingham, MA 01701
(617) 879-7473

APPENDIX E

Terms and Descriptions

ADA: These initials refer to the Americans with Disabilities Act, a Federal civil rights law enacted in 1990. The law extends civil rights protections to persons with disabilities in employment, transportation, public accommodations, state and local services, and telecommunications.

Accessibility: This term refers to aspects or elements of the design, construction, or operation of a facility that are intended to make the performance of basic activities easier and safer for as many people as possible, including those with disabilities. Accessible elements can be special provisions for wheelchair users such as a ramp or different provisions for a spectator who is deaf such as a TDD telephone.

Amputation: Surgery resulting in a missing body part such as an arm, leg, or hand.

Autism: Autism is a developmental disability that significantly affects the way in which a person learns to communicate and develop social relationships.

Auxiliary aids and services: This ADA phrase refers to technologies or operational procedures that facilitate effective communication. Examples of auxiliary aids and services are assistive listening devices for individuals who are hard-of-hearing, sign language interpreters for individuals who are deaf, and descriptive services for individuals who are blind.

Blindness/Vision impairment: "Blindness" refers to a total loss of vision. "Vision impairment" refers to partial vision, which may also be correctly called partial sight.

Cerebral palsy: Umbrella term for a group of disabling conditions resulting from central nervous system damage. Do not assume that a person with cerebral palsy also a mental retardation; the two disabilities do not necessarily or typically occur together.

Congenital disability: A disability that has existed since birth. Do not use the term "birth defect;" the word "defect" is not a synonym of "disability."

Deafness/Hard of hearing: "Deafness" refers to a total loss of hearing. "Hard of hearing" refers to partial hearing loss and a range of hearing disabilities from slight to severe. People with hearing impairments sometimes use American Sign Language (ASL), a visual gestural language.

Developmental disability: Any mental or physical disability manifested before the age of 22 that may continue indefinitely and result in substantial limitation in three or more of the following life activities:

- self care
- receptive and expressive language
- learning
- mobility
- self-direction
- independent living
- economic sufficiency

Disability: A condition caused by accident, trauma, genetics or disease which may limit a person's mobility, hearing, vision, speech or mental function. Some people have one or more disabilities

Epilepsy: Umbrella term for various disorders marked by disturbed electrical rhythms of the central nervous system and typically manifested by seizures-involuntary muscular contractions.

Handicap: A physical or attitudinal constraint that is imposed upon a person, regardless of whether or not that person has a disability. Webster's Ninth New Collegiate Dictionary defines handicap as "to put to a disadvantage."

Learning disability: A disorder in one or more of the basic psychological processes involved in understanding or in using spoken or written language, which may affect one's ability to listen, think, speak, read, write, spell, or do mathemati-

cal calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain disfunction, dyslexia, and developmental aphasia.

Mental Illness/Mental disorder: Disturbances of thinking, feeling and behaving that may be due to physical or psychological factors. Do not use terms such as "mentally deranged," "deviant" or "crazy." "Mental disorder" is a more comprehensive term that describes any of the recognizable forms of mental illness or severe mental disorders. These specific forms include "schizophrenia," "psychosis," "mania," or "depression." Such terms have well-defined clinical meaning and should not be used casually. Also, people are not "schizophrenics," but should be described as persons with "schizophrenia."

Paraplegia/Hemiplegia/Quadriplegia: "Paraplegia" refers to paralysis of the lower half of the body involving the partial or total loss of function of both legs. "Hemiplegia" refers to full or partial paralysis of one side of the body caused by brain damage most often due to disease, trauma, or stroke. "Quadriplegia" refers to paralysis of the body involving partial or total loss of function in both arms and both legs.

Personal attendants: Attendants help people with some types of disabilities in a wide range of difficult activities including eating, mobility, and toileting. An attendant may be a paid professional employee or a friend or relative. Attendants should be allowed to accompany people with disabilities in order to provide necessary assistance in the polling booth.

Service animals: Seeing eye dogs and other animals that are used to assist individuals with disabilities are called service animals. These animals are permitted to accompany their owner into any polling place.

Speech impairment: Limited or difficult speech patterns. The presence of a speech im-

pairment does not mean that there is a problem in hearing or in mental ability.

TDD: These initials refer to a Telecommunication Device for the Deaf (also called text telephones). These devices allow the transmission of written text over telephone lines through use of a special relay system. TDD units can be either portable equipment that are used in conjunction with conventional telephones or special keyboards that are built-in to a public pay telephone. Most venues will have TDD's available.



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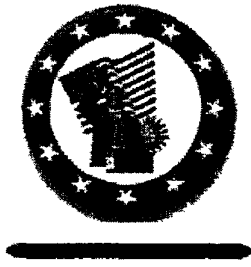
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4



Secretary's Select Task Force on Voting Accessibility

Minutes of September 10, 2001 meeting Tallahassee, Florida

The Organizational meeting of the Secretary of State's Select Task Force on Voting Accessibility was held in Room 412, Knott Building, Tallahassee, Florida, on September 10, 2001.

All members were present, except: Lyn Bodiford, representing AARP-Florida, who sent Jeff Johnson in her place, Senator Manny Dawson, and Gloria Mills.

Following a self-introduction of the members, many of whom thanked Secretary Harris for the creation of this Task Force, Assistant Secretary of State, David Mann, welcomed the members and thanked them on behalf of the Secretary for their willingness to serve. The Co-Chairmen, Senator Richard Mitchell and Representative Larry Crow, introduced the staff director, Fred Dudley and staff secretary, Ginger Simmons.

The staff director then made presentations to the members regarding the Ethics laws, and the requirements for both public records and public meetings. Also, members were given copies of the reimbursement vouchers, with a written explanation of allowable charges, and a request to complete, sign and turn in to Ms. Simmons at the end of each meeting.

The members reviewed and approved the "purposes" of the Task Force, as follows:

1. To ascertain the obstacles persons with disabilities face in voting in Florida's elections.
2. To develop and implement solutions for overcoming these obstacles.
3. To devise a mandatory training program for all election officials and poll workers, which includes instruction from persons with disabilities.
4. To propose a funding mechanism for the estimated costs association with implementation and training.

Julie Shaw made a written and oral presentation regarding the various legal requirements applicable to disabled Americans, as follows:

The Rehabilitation Act of 1973 - requires that all federal grants and programs or entities that receive federal funding, comply with physical, program and service accessibility. It is currently an estimated 20% of people with disabilities who are LESS LIKELY to vote, when compared to the general population, and another 10% who are LESS LIKELY to register to vote due to lack of accessibility. There are presently 33.7 million Americans with disabilities of voting age, and if all polling sites were accessible, an additional 5-10 million of these disabled would vote.

1984 Voter Accessibilities For the Elderly and Handicapped Act - for the first time required that all polling places be physically accessible, or moved to another location if not made temporarily accessible. Alternative voting,

such as by absentee ballot or by curbside voting, were authorized.

1992 Final Report on Compliance - indicated that only 86% of polling places were physically accessible to voters with disabilities. However, the accuracy of this report has been seriously questioned, with independent surveys and court cases suggesting that only about 60% of all U.S. polling places do not pose significant accessibility problems.

1990 Americans with Disabilities Act ("ADA") - requires accessibility of all facilities, programs and services in all state and local governmental entities ("Title II"). It should be noted that "program" accessibility may be permitted in lieu of actual "facility" accessibility, so that accessibility to the entire building would not be required if accessibility were available to the areas where voting is conducted, and to the exit. Churches are exempt from the ADA, and the Florida Accessibility Code or buildings constructed since 1997, EXCEPT where they are used as polling places. Initial compliance lies with the local supervisors of elections.

Finally, Julie pointed out the need for accessibility at pre-elections activities, such as candidate forums, and public broadcasts, such as debates and interviews, all to better inform every voter, including those who have disabilities. In addition, she stressed that "we must not provide unequal opportunities," by which she explained that we should not create "different" or "separate" facilities or services for those with disabilities, nor discriminate in the procurement process.

Ms. Shaw concluded her presentation with some key recommendations, as follows:

1. Consider "alternative" methods of permitting voting to occur, such as large type ballots, use of TTY machines, audio ballots;
2. Trained volunteers to assist the disabled,
3. Distribution of "disability etiquette guidelines;"
4. Help to close the severe digital divide by increasing access of computer technology by those with disabilities.
5. Set up a minimum state standard for all polling places;
6. Define an accessible piece of voting equipment and environment;
7. Identify and hold a single state elections official responsible for compliance with these new standards;
8. Design and implement poll worker education on disabled voters.

Steve Hardy questioned Julie on the current status of federal requirements for closed captioned television broadcast. Staff was directed to undertake a survey of Florida television stations to determine how each of them were progressing on upcoming compliance requirements for closed captioning. The federal deadline is 2006, with all televisions now having the capability.

Robert Miller pointed out that transportation to and from the polls in a timely fashion is another barrier to effective participation by disabled citizens in the voting process. David Evans agreed, and pointed out the need

to increase state funding for the existing transportation program, such as that being sought by Senator Mitchell in Senate Bill 100 during the past legislative session.

Mr. Evans also sought clarification that a disabled voter, such as an elderly blind citizen who didn't want to use the latest technology could continue to have the right to request assistance at the polls, as in the past. The general consensus was that this right to assistance would be continued, regardless of other alternatives later employed to allow more secret and confidential voting controls.

Chris Wagner agreed that the transportation problem is a major obstacle for those with disabilities, as well as the need to have someone at each polling place to assist with questions regarding the equipment and the process. Mr. Miller stated that training of both poll workers and disabled persons is essential. Pam Dorwarth inquired about any present requirements for "sensitivity" training, and the consensus seemed to be that there are no such requirements at the present time.

Valerie Breen about the present job descriptions of poll workers. Teresa LaPore pointed out that Palm Beach County hires and trains approximately 4,000 poll workers in each election, and that such training there does include sensitivity training on the needs of disabled voters; she also referred to several accessibility and sensitivity training videos prepared by the state of North Carolina, which she has obtained permission to use them, and to share them with other Florida Supervisors of Elections.

Mr. Kracht questioned the likelihood that several days of sensitivity training will be given for a one-day job. Ms. Breen agreed, and suggested that we should review any existing training and sensitivity requirements before we propose additional ones. Ms. LaPore pointed out that the recent election law changes require six (6) hours of training spread throughout the year prior to the general election.

Michael Phillips pointed out that no one particular type of voting is going to meet the needs of every disabled voter, but that he thought Internet voting would allow more disabled citizens to vote.

Chairman Mitchell directed Mr. Dudley to survey Florida television stations regarding their willingness and ability to being closed captioning even prior to the 2006 deadline. Ms. Shaw pointed out how critical this capability would have been during a disaster like Hurricane Andrew when many disabled persons were unable to obtain safety and health information from their televisions. David Evans pointed out that, for the blind and visually impaired, failure of stations to read aloud the "number at the bottom of the screen" should be avoided, especially in disaster situations. Mr. Hardy pointed out that the current FCC requirements for closed captioning are merely voluntary prior to 2006, and not mandatory until that date.

Kristi Reid Bronson, a staff attorney with the State Division of Elections, made a presentation on state and federal election laws, a written copy of which is located in each member's Handbook under Tab 8. To Ms. Shaw's description of federal laws, she added the "Motor Voter" Act of 1993 (effective in 1995). Among other things, this act requires state funded programs, such as for welfare assistance, that are primarily engaged in providing services to persons with disabilities to also provide these same persons with the opportunity to register to vote. These program offices are required to provide not only the registration forms, but assistance in filling them out and forwarding them to the appropriate Supervisor of Elections.

However, this law applied only to registration for federal elections only.

In 1994, Florida passed similar legislation for registration in state elections as well; the state law also contains a complaint process for anyone who believes that they have been aggrieved by any violation of the federal or state requirements. Such complaints are processed and monitored by the state Division of Elections, who act as mediators to resolve problems (as does the Office of Governor if the complaint is against the Elections Division). Requests for assistance is a part of both federal and state registration requirements.

Ms. Bronson also described section 101.715, Florida Statutes, regarding the accessibility of polling places, which includes minimum widths for doors, entrance and exists, handrails on stairs and ramps, and location of any barriers between the door and the voting booth itself. These requirements have been in the law since 1976, according to Ms. Bronson, and some of them (such as minimum door width of "29 inches" conflicts with the Florida Accessibility Code according to Ms. Shaw. Richard Labelle cited Article VI, Section 1 of the state constitution, and Ms. Bronson acknowledged that she was unaware of any cases or statutes that modifies or qualifies the right secured therein to a "direct and secret vote."

Jeff Johnson inquired if the definition of "disability" in the state elections code would include difficulty speaking or reading the English language, and Ms. Bronson said that it would not. Further, Mr. Dudley pointed out the technical difficulty of section 101.051, Florida Statutes, regarding the need for an actual sworn statement from someone who needed assistance. Mr. Miller commented on the lack of uniform requirements for information regarding one's disabilities.

Next, Mr. Paul Craft, Chief of the Elections Division's Bureau of Voting Systems, described some his work over the past ten (10) years. He pointed out that, pursuant to section 101.5, Florida Statutes, no voting system may be used in the state, unless his office has first certified it. He described the certification program as an engineering evaluation which he claims is being used widely as one of the best in the country, with the following standards required for certification:

1. It has to tell what races are going to be voted on;
2. It has to tell how many candidates are in each race.
3. It has to explain the rules for voting (for example: vote for one, etc.).
4. It has to identify what candidates are in each race.
5. It has to allow the voter to select a candidate.
6. It has to allow the voter to review their choices, and modify their selections until the ballot is cast.
7. It has to allow for a write-in candidate, and for the edit of a write-in candidate;
8. It must have a definitive moment when the ballot is cast without further changes.

With the application of these standards, Mr. Craft claims that his bureau has

already certified several new machines, one of which is actually certified with an audio ballot interface. HOWEVER, Mr. Craft DOES NOT HAVE ANY STANDARDS FOR ACCESSIBILITY. On the other hand, he agreed that he needs such standards, and asked our Task Force to develop same for use by his bureau.

Mr. Craft reported that there are currently two (2) MARSYMS systems used throughout the state at the present time: the Optechs Eagle (used in Clay, St. Johns, Escambia, and several other counties), whose manufacturer is currently working on a touch screen, and Global Elections (as is used in Leon County). Tech Company is also working on a touch screen certification. As a result, there should be at least three (3) units from major manufacturers to choose. In addition, he reported that a telecommunications company has already done a lot of work with voice recognition systems.

Mr. Labelle sympathized with Mr. Craft's evaluation tasks, and thanked him for this work, which also pointing out his agreement with Mr. Phillips' concern that there is not a "one-size-fits-all" solution, as has been the case in the past with punch card ballots.

Mr. Miller pointed out that, as with the transportation problems faced by many disabled voters which greatly varies from place to place, it is important to maximize the choices we have among different certified voting systems.

Mr. Kracht was also appreciative of Mr. Craft's difficult responsibilities, and likewise expressed his appreciation for the job being done. However, he expressed frustration about the failure or refusal of companies to bring new products forward for certification, and grave concern about the on-going acquisition of new voting equipment without first dealing with certification. Mr. Craft responded that he thought the market place was going to adapted rapidly now that the first touch screen technology has been certified, and that the real question is whether or not to place mandatory requirements on the market.

Ms. Grubb differed with Mr. Craft on her perception of the market place by claiming that many manufacturers have been intentionally withholding their "access" packages until their main products were first certified. She claims that these companies are "treating their access packages as step children." In this vain, Chairman Mitchell inquired of Mr. Craft about the adoption of a rule requiring an "access package" as part of the certification process. Mr. Craft was not opposed to that idea, but argued that a statutory mandate would be stronger, especially in light of the on-going certification process and the likelihood of legal challenges to such a rule. Chairman Mitchell countered that the statutory mandate would take longer, and that perhaps both a statute and a rule would be appropriate (to which Mr. Craft seemed to agree). Ms. Shaw pointed out the year-old Texas full accessibility statute, mandating the use of new voting equipment in every county.

Mr. Clay Roberts, Director of the Division of Elections, indicated to the Task Force that he was concerned about any mandates by rule alone, and urged the Task Force to also consider recommendation of a statutory change as well. At the same time, he indicated to the members that the department will proceed with a rule in this area.

Senator Sanderson pointed out that she and fellow Task Force member, Representative Dudley Goodlette, serve as the chairs of the respective legislative Elections committees, and might be able to fast-track such legislation. After further discussion in which several members expressed

concern that all Supervisors of Elections need to be aware of this problem and the possible solution, it was agreed that Mr. Dudley would work with the respective committee staff directors and the chairs to formulate such a letter to be signed by both Senator Sanderson and Representative Goodlette.

(Editor's Note: Before this day was over, Mr. Dudley had scheduled such a meeting with Richard Hixon, Representative Goodlette's staff director of the House Rules Committee, for the following date at 2:00 p.m. The tragic circumstances of the following morning, Tuesday, September 11th, caused the meeting to be canceled when Governor Bush ordered an evacuation of the Capitol complex. However, in discussing this matter with Mr. Roberts later in the week, Mr. Dudley drafted and submitted a Memorandum for Secretary Harris' consideration and signature, a final mailed copy of which is found under Tab 11).

Mr. Evans expressed his belief that there is not something in all of these systems for every contingency, and that counties may well have to use several different types of voting equipment in order to meet all the needs. Mr. Dudley pointed out that some changes in current laws will be needed in order to "tally" all votes at each precinct unless different equipment can be interfaced in order to communicate with other equipment being used at the same location.

Chairman Mitchell directed the staff to arrange for a presentation by the various vendors of their products. Mr. Phillips asked Mr. Craft about the use of the Internet for voting. Mr. Craft responded that work on such a system has been underway since 1997, including a Department of Defense Internet voting project in the 2000 elections; however, he reported that the well-documented findings are that there is no good way to secure the voter's choice once it leaves their computer; it may pick up a virus or script that would change the vote either before or after it left the computer.

At approximately 12:40 p.m., the members took a lunch break, reconvening at 1:50 p.m.

Mr. Doug Towne was recognized to make a presentation regarding the barriers to voting by those who are disabled. He first explained that, while he had been involved in the creation of this Task Force he was not serving as a member, because he had since been retained by one of the product vendors as a consultant. He identified some of the following "barriers" to voting accessibility:

1. To overcome attitudes by enforcing current laws and finding new laws and rules to assure accessibility.
2. Elimination of non-accessible polling places (perhaps with the use, in some cases, of absentee ballots).
3. Flexibility to substitute technology.
4. Inadequate transportation.
5. Systematic and social barriers based on perceptions about disabilities.

Chairman Mitchell lead the members in a discussion of "problems and solutions," with the following results:

Ms. Grubb: Expressed her pleasure at seeing the Task Force moving to

accomplish its mandate to assure accessibility in voting for all citizens, not as a "favor," but because it is the right thing to do. She pointed out that every single person will be touched by our successful efforts, whether due to their own disability brought on by accident, disease or aging, or due to the disability of someone they love.

Mr. Miller: Hope all of us have learned from today's discussions that there are many reasons for the lack of voting accessibility, such as inadequate transportation and insufficient use of close captioning.

Mr. Evans: He will propose to his local Transportation Disadvantaged Coordinating Council in Palm Beach County that they include voting access as part of its top priority on the same level as serious medical care.

Ms. LePore: Expressed her belief that all Supervisors of Elections are supportive of maximizing voting accessibility.

Ms. Dorwarth: Posed the question about the existence of any statutory mandate to survey the accessibility of each polling place (to which Ms. LePore indicated that there was no such requirement, and that such determination is done on a county-by-county basis).

Ms. Shaw: Creating such a survey should be one of the duties of this Task force.

Mr. Phillips: Also encouraged the use of an accessibility survey, including the use of the Internet as a viable option (referencing materials he has given to Mr. Dudley).

Mr. Miller: Recommended that we look strongly at some of the telephone technologies for convenience.

Mr. Evans: Also encouraged the use of telephone technology, especially in rural areas where transportation is also a major accessibility problem. In addition, he would like the Task Force to prepare a list of all the available technologies.

Mr. Labelle: Encouraged the proposed legislation and rule changes as having the greatest long-term impact, but is still concerned about the ongoing process around the state of counties continuing with the purchase of new voting equipment (citing to his own observation in Tampa). Also urged that the Task Force put Boards of County Commissioners "on notice" to use great caution in committing to purchase voting equipment which may later be determined NOT to be accessible. He recommended that we maximize input from manufacturers, including those out of the country, with "accessibility" and "security" being the two considerations (including the Internet). Finally, he suggested the use of a subcommittee to begin drafting legislation.

Mr. Kracht: Stressed his sense of urgency and immediacy to the issue of voting accessibility, especially as it relates to delivering a strong message to both Commissioners and Supervisors.

Ms. Dorwarth: Sought, and obtain, clarification of the current law, which prohibits the expenditure of funds to purchase voting equipment not yet certified. Also expressed concern about the apparent discrepancies in the various state laws dealing with accessibility standards (and recommending a subcommittee to look into that issue as well).

Mr. Hardy: Expressed his concern about people with language problems, including speakers of languages other than English, and suggested pictures of the candidates be used on the ballots.

Mr. Miller: Pointed out that at least one voting system has been certified that is "accessible," being the touch screen product described by Mr. Craft.

Senator Sanderson: Offer to work with her House counterpart, Representative Goodlette, and Mr. Dudley, to draft a strong letter to Supervisors and Commissioners.

Ms. Shaw: It might also be instructive for the Task Force to review the work on accessibility recently completed in Texas.

Representative Goodlette: Expressed his hope that all new purchase contracts would contain an "accessibility component." He also mentioned the possibility that some federal funds may become available for new purchases.

Mr. Evans: Discussed pending federal funding bills, and the required stipulation of "accessibility."

Ms. Shaw: We should look not only at the pending federal legislation, but the actions of other states, such as Washington, Missouri, Michigan and Texas, to "steal" their best ideas.

Chairman Mitchell: Inquired of Senator Sanderson and Representative Goodlette if their committee staffs might be able to obtain such information for us. (Off record indication was "yes.")

Ms. Sumlin: Agreed that taking ideas from the federal and other states' efforts was good, and encouraged us to prepare a list of accessibility standards as soon as possible.

Ms. Grubbs: She has talked with people in Texas, California and Georgia, who have already certified accessible equipment which has not yet been certified in Florida.

Chairman Mitchell then summarized a number of issues on which the Task Force has appeared to have reached consensus, as follows:

1. Transportation is a main problem or barrier for voting access.
2. Accessibility technology should include the use of Internet and telephones.
3. A determination of accessibility as to specific polling places may involve use of a survey.
4. Development of accessibility standards for certification of new voting equipment.
5. Require voting equipment of include an accessibility component.

The chairman concluded his remarks by observing the difficulty of the overriding factor of "funding."

A discussion next ensued about the use of a web site for Task Force information, such as the minutes. The Chairs agreed to work something out with the Department of State for use of their website for all this information.

Representative Crow: Reviewed Mr. Labelle's suggestion for a subcommittee to begin drafting legislation, but agreed, in light of the sunshine law requirements for notice of all meetings, that any member with ideas along these lines should send them to Mr. Dudley. He also brought back up the idea of studying the accessibility work of the federal government and other states, and agreed that we could use the resources of the Senate and House committees for this purpose as well.

Ms. Dorwarth: Again raised the subject of possible discrepancies in state laws governing accessibility, and suggested that they be reviewed. Mr. Dudley agreed to do so.

Mr. Dudley then reviewed the other meeting dates and locations, including the switching of the Tampa meeting from October 29th to October 4th, and moving the West Palm meeting from October 4th to October 29th to facilitate the use of Ms. LaPore's new office complex. Several members expressed concerns about the upcoming meeting dates, but they are very firm in light of the efforts to get some legislation filed for consideration as soon as possible in advance of the next regular session which is due to commence on January 22, 2002.

A change in the time for starting the Orlando meeting to 9:00 a.m. was approved.

Finally, Mr. Dudley reviewed the proposed time frames for drafting and finalizing the Task Force's Report to Secretary Harris (November 12th), so that legislation could be filed shortly thereafter. Both chairs, Senate Mitchell and Representative Crow, have agreed to serve as the prime sponsors of each chamber's bill, and both Senator Sanderson and Representative Goodlette have indicated prompt action from their respective committees.

Ms. Shaw suggested that a better effort be made to advertise our meetings to the disabled community. Mr. Miller offered to do that for the upcoming meeting in Orlando.

Mr. Phillips requested that all e-mail from the staff be in Word format, and Mr. Dudley agreed to do so in the future (as his firm is now switching over from Word Perfect to Word).

No further business appearing, the meeting as adjourned at approximately 3:45 p.m.

Respectfully submitted,
Fred R. Dudley