UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED SPINAL ASSOCIATION, a nonprofit organization, and DISABLED IN ACTION, a nonprofit organization:

Plaintiffs,

-against-

BOARD OF ELECTIONS IN THE CITY OF NEW YORK and JULIE DENT, in her official capacity as President of the Board of Elections in the City of New York,

Defendants.

10 Civ. 5653 (DAB)(HBP)

REPORT AND RECOMMENDATION

PITMAN, United States Magistrate Judge:

To THE HONORABLE DEBORAH A. BATTS, United States District Judge,

I. Introduction

By notice of Motion dated January 27, 2017 (Docket Item ("D.I.") 182), plaintiffs move for an Order pursuant to the All Writs Act, 28 U.S.C. § 1651, joining the New York City Department of Education (the "DOE") as a defendant in this action and directing the DOE to: (1) permanently resolve accessibility barriers in specified public schools, and (2) provide training

for and/or institute disciplinary action against DOE employees who interfere with efforts to make polling sites in DOE facilities accessible on election days.

For the reasons set forth below, plaintiffs' motion is denied.

II. Facts

A. The Board of Election's Voting Program

Under New York Election Law Section 4-104(1), the Board of Elections (the "BOE") is responsible for designating polling sites each election day. Each polling site that the BOE designates must "be accessible to citizens with disabilities and comply with accessibility guidelines of the Americans with Disabilities Act of 1990." N.Y. Elec. Law § 4-104(1-a). "Wherever possible," the BOE should designate buildings exempt from taxation as polling sites, including, but not limited to, fire houses, municipal buildings and public schools. N.Y. Elec. Law § 4-104(8). Owners and lessees of publicly owned buildings designated as polling sites must "make available a room or such rooms in such building which are suitable for registration and voting," and which the BOE deems "accessible to physically disabled voters." N.Y. Elec. Law § 4-104(3). All owners and lessees of

public buildings, except the DOE, may refuse a BOE designation to use one of its buildings as a polling site within 30 days of designation. N.Y. Elec. Law § 4-104(3). "Any polling site deemed not to meet existing accessibility standards must make necessary changes and/or modifications, or be moved to a verified accessible polling place within six months." N.Y. Elec. Law § 4-104(1-b).

B. Facts Giving Rise to Plaintiffs' Motion

On July 26, 2010, plaintiffs commenced this action under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12132, et. seq., "on behalf of voters with mobility and/or visual disabilities who reside in New York City and are registered to vote, but have encountered, or are at risk of encountering," unlawful accessibility barriers at polling sites. United Spinal Ass'n v. Bd. of Elections, 882 F. Supp. 2d 615, 618 (S.D.N.Y. 2012) (Batts, D.J.), aff'd sub nom., Disability in Action v. Bd. of Elections, 752 F.3d 189 (2d Cir. 2014). The Honorable Deborah A. Batts, United States District Judge, granted partial summary judgment in favor of plaintiffs on August 8, 2012, concluding that defendants had failed to resolve "pervasive and recurring barriers to accessibility on election days" at polling sites.

United Spinal Ass'n v. Bd. of Elections, supra, 882 F. Supp. 2d at 624. Judge Batts issued a remedial Order on October 18, 2012 (Order of the Honorable Deborah A. Batts, dated October 18, 2012 (D.I. 119)), which was later modified on May 13, 2013 (Modified Order of the Honorable Deborah A. Batts, dated May 13, 2013 (D.I. 130)("May 13, 2013 Mod. Order")) and subsequently extended, with the consent of both parties, on January 4, 2017 (Order of the Honorable Deborah A. Batts, dated January 4, 2017 (D.I. 181)) (collectively, "the Remedial Orders").

Among other things, the Remedial Orders required defendants to contract with an "independent third party expert" (the "Expert") to conduct surveys of "as many polling sites as practicable," and generate reports detailing its findings and recommendations to make polling sites accessible (May 13, 2013 Mod. Order, ¶¶ 8, 10). Specifically, the Remedial Orders direct the Expert to determine whether each surveyed polling site can "reasonably be made temporarily accessible on the day of any election," and, if so, what temporary modifications are needed and how can they be accomplished (May 13, 2013 Mod. Order, ¶ 13(a)). If the surveyed polling site is a publicly owned building, the Expert is also to determine "whether it is reasonable to modify" the location permanently (May 13 Mod. Order, ¶ 13(b) (emphasis in original)). Defendants must "implement all recommenda-

tions" made by the Expert, subject to their right to challenge those proposals, in order to comply with the Remedial Orders (May 13, 2013 Mod. Order, ¶ 15(b)).

On May 14, 2014, the United States Court of Appeals for the Second Circuit affirmed the May 13, 2013 Modified Order, finding, among other things, that it is sufficiently tailored to the "nature and extent" of defendants' ADA violations, because it directs defendants to "identify accessible facilities or determine how sites may be temporarily modified," and make those modifications. See Disabled in Action v. Bd. of Elections, supra, 752 F.3d at 203 (emphasis added). Because it was never made a party to this action, the DOE is not currently bound by the Remedial Orders (see May 13, 2013 Mod. Order, ¶ 15).

Defendants hired Evan Terry Associates ("ETA") as its Expert (see Declaration of Claire Molholm, dated January 27, 2017 (D.I. 184)("Molholm Decl."), ¶ 2). ETA conducted voter accessibility surveys and generated reports for 810 active polling sites (see ETA's Site-Category Analysis, dated January 18, 2017, annexed as Ex. A to Molholm Decl.). ETA generated two types of reports for each polling site: (1) a longer report with findings and recommendations that is shared with the parties only (the "Long-Form Report") (see, e.g., ADA Survey Final Report by ETA for BOE regarding P.S. 165, dated October 28, 2014 ("P.S. 165

Long-Form Report"), annexed as Ex. C to Declaration of Christina Brandt-Young, dated January 27, 2017 (D.I. 185)("Brandt-Young Decl.")), and (2) a shorter report summarizing the corresponding Long-Form Report for the polling site, which is shared with the parties and the Court (the "Short-Form Report") (see, e.g., ADA Survey Summary Report by ETA for BOE Regarding P.S. 165, dated October 28, 2014 ("P.S. 165 Short-form Report"), at 3, annexed as Ex. D to Brandt-Young Decl.) .

The Long-Form Reports contain photographs, maps, diagrams and detailed commentary concerning each polling site barrier (see P.S. 165 Long-Form Report, at 8-45). The Long-Form Reports also recommend temporary and permanent solutions for accessibility barriers at each polling site surveyed and provide the estimated aggregate cost of the recommended permanent and temporary solutions at each polling site, respectively (see P.S. 165 Long-Form Report at 46).[1] The Long-Form Report is addressed to the BOE only and does not indicate that any entity other than the BOE is expected to bear the costs of ETA's proposed modifications (see P.S. 165 Long-Form Report).

The Short-Form Reports contain ETA's determinations

[1] The P.S. 165 Long-Form Report estimates that all permanent changes at that school will cost $10,833.20, while all temporary changes will cost $11,596.84 (P.S. 165 Long-Form Report at 46).

with respect to the reasonableness of its recommended permanent modifications (see P.S. 165 Short-form Report, at 3). Plaintiffs claim ETA considers "almost all" of its proposed permanent solutions "reasonable" (Plaintiffs' Memorandum of Law in Support of Motion to Join, dated January 27, 2017 (D.I. 183)("Pls. Mem. of Law"), at 7).[2]

Plaintiffs contend that the DOE controls 442 of the 810 active polling sites reviewed by ETA (see ETA's Public School Site-Category Analysis, dated January 18, 2017 ("ETA Public School Analysis"), annexed as Ex. B to Molholm Decl.),[3] and that approximately half of all polling sites on any election day are located at DOE facilities (see Molholm Decl., ¶ 5).[4] Of the 442 active polling sites located at DOE facilities, the ETA found that: (1) 417 polling sites require temporary remedial measures; (2) 13 polling sites require temporary remedial measures and a reduction in voters and (3) 12 polling sites must be moved

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[2] ETA does not provide any detail, reasoning or analysis in support of its conclusion that its proposed permanent alterations to P.S. 165 are "reasonable" (P.S. 165 Short-Form Report at 4).

[3] ETA has surveyed a total of 445 polling sites located at public schools (see ETA Public School Analysis). However, three of those polling sites are no longer used as polling sites (see ETA Public School Analysis).

[4] Plaintiffs' analysis shows that 55% of polling sites reviewed by ETA, thus far, and 53% of polling sites used in the November 2016 General Election, were located at public schools (Molholm Decl., ¶ 5).

entirely (see ETA's Public School Analysis). Plaintiffs also note that the Department of Justice has determined that approximately 83% of DOE-controlled public schools are "not fully accessible to people with disabilities," based on data collected and documented by the City (Letter of United States Attorney's Office for the Southern District of New York, dated December 21, 2015 ("DOJ Letter"), at 1, annexed as Ex. E to Brandt-Young Decl.). The DOJ letter recommends, among other things, that the DOE should give priority to "increas[ing] the accessibility of the first floors of school buildings," (DOJ Letter, at 11). The DOE's Amended Proposed Five Year Capital Plan for Fiscal Years 2015-2019, earmarks $127.6 million to increasing the accessibility of DOE buildings, amounting to 0.83% of the DOE's proposed $15.44 billion budget. See DOE's "Amended Five Year Capital Plan for Fiscal Years 2015-2019 7, 40(2016), https://dnnhh5cc1.blob.core.windows.net/portals/0/Capital_Plan/Capital_plans/11232016_15_19_CapitalPlan.pdf?sr=b&si=DNNFileManagerPolicy&sig=TMM1IKX5k6%2B6BLufAp7QZINoj2suUi6%2FH6OjI2AWEzI%3D.

Defendants have collected and recorded election day incidents relating to accessibility issues at polling sites, including polling sites located at DOE-controlled public schools (see BOE Election Incident Log for the April 19, 2016 Presidential Primary Election, dated June 13, 2016 ("April 2016 BOE

Complaint Log"), annexed as Ex. F to Brandt-Young Decl.; BOE Election Incident Log for the November 3, 2015 General Election, dated January 26, 2016 ("November 2015 BOE Complaint Long"), annexed as Ex. G to Brandt-Young Decl.). Defendants recorded 64 complaints at 25 DOE public schools during the April 19, 2016 Presidential Primary Election (see April 2016 BOE Election Incident Log), and 12 complaints at four DOE public schools during the smaller November 3, 2015 General Election (see November 3, 2015 BOE Election Incident Log). The most common complaints were: (1) DOE employees' use of polling site space for non-voting purposes; (2) faulty or misplaced accessibility ramps; (3) confusing or misplaced temporary signs and (4) DOE employees' resistance to the BOE's ADA Coordinators' efforts to resolve these problems (see April 2016 BOE Complaint Log; November 2015 BOE Complaint Log).

Defendants' counsel has also described defendants' difficulties with the DOE with respect to the implementation of the Remedial Orders. For instance, at a March 19, 2015 Discovery Hearing, defendants' counsel stated that DOE staff "does not let BOE staff into the designated poll[ing] site location at a minimum of twenty public-school poll[ing] sites per election," (Transcript of Proceedings regarding the Discovery Hearing held March 19, 2015, dated October 26, 2015 (D.I. 158), 70:6-15). On

at least two occasions, the BOE was forced to send its lawyers to polling sites located at public schools to ensure BOE employees could implement temporary accessibility measures (see April 2016 BOE Complaint Log at 2, 6). Plaintiffs even assert that, in at least one instance, "a poll worker trying to gain compliance from DOE officials" was compelled to call the police and "threatened to have a principal and custodian arrested," (Pls. Mem. of Law at 10).

3. Procedural History

On January 27, 2017, plaintiffs filed their notice of motion to join the DOE for purposes of implementing the Remedial Order. Although plaintiffs credit defendants for their intention "to remedy every problem ETA has identified, whether by implementing individual solutions or by moving poll[ing] sites to less problematic locations," plaintiffs argue that the "near-absolute prevalence of architectural barriers at polling places and the interference of DOE personnel in elections constitute extraordinary circumstances that frustrate the implementation of the Remedial Order." (Plaintiffs' Reply Memorandum of Law, dated March 27, 2017 (D.I. 97)("Pls. Reply Mem. of Law"), at 1). Accordingly, plaintiffs seek an Order joining the DOE to this action, and the issuance of such other Orders "as are required to

achieve the ends of justice," (D.I. 182). Specifically, plaintiffs request an Order directing the DOE to: (1) permanently resolve accessibility barriers identified by ETA at all public schools, and (2) take steps to ensure that [DOE] employees do not obstruct the accessibility of polling sites in DOE facilities. Defendants "take no position in connection with Plaintiffs' motion" (Defendants' Statement of No Position in Connection with Plaintiffs' Motion, dated March 20, 2017 (D.I. 195)).

III. Analysis

A. Legal Standards

The All Writs Act provides, in pertinent part, that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. s 1651(a). "The [Supreme] Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its jurisdiction otherwise obtained." United States v. New York Tel. Co., 434 U.S. 159, 171 (1977).

1. Jurisdiction

One of the statutory requirements of the All Writs Act is that any writ issued by a federal court, pursuant to its provisions, must be "in aid of" that court's jurisdiction. 28 U.S.C. § 1651. The All Writs Act does not itself confer jurisdiction on a federal court to issue an order. United States v. Denedo, 556 U.S. 904, 913 (2009), citing Clinton v. Goldsmith, 526 U.S. 529, 534-535 (1999); accord Henson v. Ciba-Geigy Corp., 261 F.3d 1065, 1070 (11th Cir. 2001). Rather, the All Writs Act authorizes a federal court to issue necessary orders when the court has jurisdiction over the underlying action. Baker Perkins, Inc. v. Werner & Pfeiderer Corp., 710 F.2d 1561, 1565 (Fed. Cir. 1983); accord Brittingham v. Comm'r, 451 F.2d 315, 317 (5th Cir. 1971) ("It is settled that . . . the All Writs Act, by itself, creates no jurisdiction in the district courts. It empowers them only to issue writs in aid of jurisdiction . . . acquired on some other independent ground."). Thus, a court must have jurisdiction over the underlying action before it can issue an order pursuant to the All Writs Act.

2. Necessary or Appropriate

"The All Writs Act commits to the Court's discretion whether to issue writs." Gulino v. Bd. of Educ., 96 Civ. 8414 (KMW), 2016 WL 7320775 at *14 (S.D.N.Y. July 18, 2016)(Report of Special Master), adopted at, 2016 WL 7243544 (S.D.N.Y. December 14, 2016)(Wood, D.J.), citing Citigroup, Inc. v. Abu Dhabi Investment Auth., 776 F.3d 126, 130 (2d Cir. 2015). "The power conferred by the [All Writs] Act extends, under appropriate circumstances, to persons who []though not parties to the original action or engaged in wrongdoing[] are in a position to frustrate the implementation of a court order or the proper administration of justice." United States v. New York Tel. Co., supra, 434 U.S. at 174; accord Dunn v. N.Y. State Dep't of Labor, 594 F. Supp. 238, 242 (S.D.N.Y. Aug. 8, 1984) (Duffy, D.J.).

For example, in United States v. New York Tel. Co., supra, 434 U.S. at 159, the District Court issued an Order authorizing the installation of pen registers with respect to two telephones that the government suspected were being used in connection with an illegal gambling enterprise. The Order also directed the telephone company to furnish the government with "all information, facilities, and technical assistance necessary to employ the pen register[s] unobtrusively," including "leasing"

the relevant telephone lines to the government. United States v. New York Tel. Co., supra, 434 U.S. at 161-162 (internal quotations and citations omitted). The telephone company provided the government with all of the information it needed to install the two pen registers itself, but rather than leasing the necessary telephone lines or lending technical assistance, the telephone company advised the government how it could install the pen registers without the telephone company's involvement.[5] United States v. New York Tel. Co., supra, 434 U.S. at 163. The government attempted to follow the telephone company's instruction, but after several unsuccessful attempts, it concluded the telephone company -- the only telephone company servicing the area in 1976 -- would need to provide assistance, or it would be impossible for the surveillance authorized by the District Court to be conducted. United States v. New York Tel. Co., supra, 434 U.S. at 163.

The telephone company moved to vacate the portion of the District Court's Order directing it to "furnish facilities and technical assistance." United States v. New York Tel. Co.,

[5] The telephone company instructed the government to "string cables" from the apartment where the two subject telephones were located "to another location where pen registers could be installed." United States v. New York Tel. Co., supra, 434 U.S. at 163.

supra, 434 U.S. at 163. The District Court denied the motion, concluding, in part, that the All Writs Act authorized that portion of the Order. United States v. New York Tel. Co., supra, 434 U.S. at 163.

The Supreme Court affirmed the District Court's Order. The Court considered three factors in determining whether issuance of the District Court's Order was "necessary or appropriate," within the meaning of the All Writs Act: (1) whether the requested writ "unreasonabl[y] burdens" the writs' subject; (2) whether the requested writ is "necessary" or "essential to the fulfillment of the purpose" for which a previous order has been issued and (3) whether the writs' subject is a "third party so far removed from the underlying controversy that its assistance could not be permissibly compelled." United States v. New York Tel. Co., supra, 434 U.S. at 174-178; accord In re Apple, Inc., No. 15-MC-1902 (JO), 2016 WL 783565 at *6-7 (June 9, 2017 E.D.N.Y.).

The Supreme Court concluded that the All Writs Act authorized the District Court, in its discretion, to direct the telephone company to provide assistance to the government, finding that the writ was sufficiently "necessary or appropriate." United States v. New York Tel. Co., supra, 434 U.S. at 177.

B. Application of the Foregoing Principles

1. Jurisdiction

The DOE's only jurisdictional argument is that plaintiffs are attempting to manufacture subject matter jurisdiction by "evading the necessity of prosecuting a separate action against the DOE," (DOE's Memorandum of Law in Opposition of Plaintiffs' Motion to Join, dated March 20, 2017 (D.I. 194)("DOE Mem. of Law"), at 6). The DOE's argument ignores the controlling precedents that expressly permit courts to issue orders under the All Writs Act to join non-parties to an existing action, when necessary or appropriate, in order to enforce an existing order. See United States v. New York Tel. Co., supra, 434 U.S. at 174 ("The power conferred by the [All Writs] Act extends, under appropriate circumstances, to persons who, though not parties to the original action . . . are in a position to frustrate the implementation of a court order or the proper administration of justice."); accord Dunn v. New York State Dep't of Labor, supra, 594 F. Supp. at 239 (holding that District Court was authorized under the All Writs Act to join the United States Secretary of Labor, a non-party to the action, and require the Secretary to formulate a remedial plan with defendants in order to fulfill the

obligations of the existing remedial order).

Plaintiffs commenced this action alleging a violation of the ADA, a federal statute. Thus, the Court unquestionably has subject matter jurisdiction over this action pursuant to 28 U.S.C. Section 1331, and, therefore, has jurisdiction to issue the requested Order.

2. Necessary or Appropriate

All the factors discussed in United States v. New York Tel. Co., supra, 434 U.S. at 174-178, weigh against plaintiffs' request for relief.

The first factor, reasonableness of the burden imposed, weighs strongly in favor of the DOE. Plaintiffs argue that the potential burden imposed by its requested writ is not unreasonable because it would actually "save the City money" by eliminating the need to make temporary modifications, every election day (Pls. Reply Mem. of Law at 4). Plaintiffs assert that the Long-Form Reports offer "specific recommendations for permanent solutions," and the Short-Form Reports "rate[] almost all of [those] permanent solutions reasonable," (Pls. Mem. of Law at 4 n.5, 17). Thus, plaintiffs reason, the "difficult task of figuring out how to permanently ensure the accessibility of these

public polling sites" is complete (Pls. Mem. of Law at 17). Moreover, plaintiffs contend, without citation, that the DOE has an "independent duty under the ADA to make its schools accessible to the public," everyday, and not only for purposes relating to the education of children (Pls. Mem. at 17). Thus, plaintiffs argue, burdensomeness should be measured in light of that obligation.

The DOE argues that the remedy which plaintiffs seek is "entirely inconsistent" with the Remedial Orders, because it would impose upon the DOE an obligation to implement "permanent measures" to assist defendants in meeting their duty to make polling sites accessible "a few times per year," (DOE Mem. of Law at 8-10). Specifically, the DOE contends that plaintiffs are "attempting to change the intrinsic nature of the [R]emedial [O]rder," which "is addressed to [the] BOE only and places the burden on BOE alone," by using the All Writs Act "to expand the injunction to a non-party, without provid[ing] the process due, and imposing on DOE a new set of duties which the DOE never had." (DOE Mem. of Law at 20).

In United States v. New York Tel. Co., supra, 434 U.S. at 174, the Supreme Court concluded that the District Court's Order's use of the All Writs Act did not burden the telephone company because: (1) the government had agreed to "fully reim-

burse" the telephone company "at prevailing rates"; (2) compliance with the Order required minimal effort by the telephone company and (3) compliance would not disrupt the telephone company's "ordinary business."

The same cannot be said of the order plaintiffs seek. Plaintiffs do not offer to reimburse the DOE for the cost of the alterations they seek. Rather, plaintiffs ask that the DOE "bear at least part of the cost," because the DOE "will benefit from the accessibility solutions every day and its budget dwarfs that of the BOE," (Pls. Reply Mem. Of Law at 8); plaintiffs do not even suggest who should bear the balance of the cost. Given the number of schools currently serving as polling places -- ETA has surveyed 442 active polling sites located at public schools and is only 63%-74% finished with its work -- the cost of permanent alterations to make the schools accessible will, at the very least, be tens of millions of dollars.[6]

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[6] Plaintiffs do not state the total estimated cost of implementing all permanent modifications recommended by ETA in at least 430 public schools. The only information plaintiffs provide with respect to cost is found in the P.S. 165 Long-Form Report, which estimates that the cost of permanent modifications at that location would be $10,833.20 (P.S. 165 Long-Form Report at 46). Plaintiffs do not assert, and I will not assume, that the cost of permanent modifications at P.S. 165 is representative of how much modifications would cost at other locations. Even if it were, implementing permanent modifications that cost $10,833.20 at 430 schools would cost $4,658,276.00 (P.S. 165 (continued...)

Considering the magnitude of the potential cost of permanent modifications, the number of schools at which permanent changes would need to be made and the number of DOE employees who would need to be trained, the relief plaintiffs seek will surely take more than "minimal effort." Cf. United States v. New York Tel. Co., supra, 434 U.S. at 175 (approving Order directed to non-party because "it required minimal effort" to comply with the Order).

Likewise, plaintiffs have failed to show that the requested Order would not disrupt the DOE's normal business. The coordination and resources for the relief sought would almost certainly cost the DOE a substantial amount of time, money and effort, the precise amount of which is unknown. Moreover, it would be fundamentally unfair to order the DOE to spend millions of dollars on the basis of plaintiffs' counsel's dogmatic and unsupported statement that permanent modifications are the most economically efficient remedy in the long-run, especially considering that the DOE has never had a chance to take discovery or challenge these assertions.

The second factor, necessity, also tips heavily in favor of the DOE.

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[6](...continued)
Long-Form Report at 46).

Plaintiffs argue that, because the DOE controls the majority of buildings in which polling sites are located, it is the only entity that is capable of making "necessary changes or modifications" at "such a high proportion of . . . polling sites" under New York Election Law Section 4-104(1-b). Plaintiffs assert that the DOE controls the resources necessary for the Remedial Orders to be effectuated. According to the plaintiffs, the DOE has a much larger budget than the BOE, and controls the buildings where roughly half of all polling sites are located (Pls. Mem. of Law at 14). Moreover, plaintiffs claim that DOE public schools "are the only realistic option for providing poll sites throughout the City at a reasonable cost to taxpayers," (Pls. Mem. of Law at 14).[7] Plaintiffs also contend that unless the DOE is joined to this action, the only recourse defendants will have against DOE employees who interfere with their obligations under the Remedial Orders is to call the police (Pl. Mem. of Law at 15). Thus, plaintiffs claim that a writ joining the DOE as a defendant to this action is necessary, under the All Writs Act.

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[7] Plaintiffs only citation in support of this point is to New York Election Law Section 4-104(3), which requires the BOE to designate tax exempt buildings "whenever possible", and expressly prohibits only the DOE from cancelling the BOE's polling site designations.

The DOE argues that plaintiffs have not sufficiently shown necessity, but rather "claim it as a conclusion and by anecdote," (DOE Mem. of Law at 14). The DOE asserts that it "is not necessary to this case because the BOE can make the vast majority of surveyed sites accessible with, at most, temporary measures and a reduction in voters." (DOE Mem. of Law at 15). Furthermore, the DOE reasons, the BOE's authority under New York Election Law Section 4-104(1-b) to select alternative sites undermines plaintiffs' claims of necessity (DOE Mem. of Law at 15).

Each of the cases cited to plaintiffs in which a federal court used its authority under the All Writs Act to join a non-party to an existing action involved a high degree of necessity. United States v. New York Tel. Co., supra, 434 U.S. at 175, was decided at a time when there was a single telephone company in the relevant area; without the assistance of that company, the government would have been unable to operate the pen registers. In Dunn v. N.Y. State Dep't of Labor, supra, 594 F. Supp. at 239-242, the Honorable Kevin T. Duffy, United States District Judge (retired), concluded that the New York Department of Labor's inability to comply with a nearly five-year-old remedial order directing it to provide "prompt administrative hearings on appeals from denials of unemployment benefits," was

due entirely to a lack of funding from and change of policy at the United States Department of Labor, which was responsible for reimbursing the entire cost of the New York State Unemployment Insurance program. Accordingly, Judge Duffy issued an Order joining the United States Secretary of Labor to the action "for purposes of participat[ing] in the formulation of a remedial plan." Dunn v. N.Y. State Dep't of Labor, supra, 594 F. Supp. at 239-242.

There is no similar element of necessity here. Though New York Election Law Section 4-104(8) states that the BOE "shall . . . designate" public buildings, including public schools, as polling sites "wherever possible," the BOE is not required to do so if such facilities are unsuitable. And although the DOE is the only owner or lessee of public buildings that is prohibited from cancelling a BOE designation of a polling site under New York Election Law Section 4-104(3), that does not require the BOE to use DOE buildings. Cf. Dunn v. N.Y. State Dep't of Labor, 594 F. Supp. at 242. Rather, it only makes the DOE-controlled buildings a convenient option for a polling site location.

Plaintiffs make the bold assertion that it is often impossible for the BOE to find alternative polling sites, but

provide little evidence to support this point.[8] Even if this were true, ETA has found that defendants can comply with the Remedial Orders by simply implementing temporary modifications at 94.3% of the 442 active polling sites surveyed that are located at public schools,[9] and the BOE has recorded incidents relating to accessibility on election days at only a handful of polling sites located at public schools, belying plaintiffs' assertion of necessity.

The third factor, the closeness of the writs' subject to the underlying controversy, also weighs in the DOE's favor.

Plaintiffs argue that, "[u]nder New York law, the DOE is intimately involved in poll[ing] site accessibility," (Pls. Mem. of Law at 16). For instance, plaintiffs note that New York Election Law Section 4-104(1-b) requires that "[a]ny polling

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[8] Plaintiffs note that the BOE has faced difficulty in relocating its polling site at a single public school, P.S. 153, and cite a 2004 decision of the United States District Court of the Southern District of New York, which casts doubt on the number of alternative polling sites in Westchester County. See Westchester Disabled On the Move, Inc. v. Cty. of Westchester, 346 F. Supp. 2d 473, 480 (S.D.N.Y. 2004)(Robinson, D.J). However, plaintiffs' contention is that there are no viable alternatives to public schools in New York City, not Westchester County.

[9] The BOE is also required to implement temporary changes and reductions in voters at 17 additional polling sites. When those changes are factored in, the percentage of polling sites located at public schools that will be in compliance with the Remedial Orders jumps to 97.2%.

place deemed not to meet the existing accessibility standards must make necessary changes and/or modifications, or be moved to a verified accessible polling place within six months," and that New York Election Law Section 4-104(3-d) requires the person or entity in control of a building where a polling site is located to "install, remove, store, and safeguard each ramp, or ramp and platform, at such times and dates as" is required by the BOE. Accordingly, plaintiffs argue that "the DOE already has the[] dut[y] to remedy poll sites under New York Law," and therefore "has no legitimate interest in not assisting [the BOE in implementing] the Court's Remedial Order," (Pls. Mem. of Law at 16).

The DOE contends that the BOE and the DOE are "not [the] same or even related entities," (DOE Mem. of Law at 7). The DOE argues that it is the BOE's duty to select polling sites that are accessible, not the DOE's. The DOE claims that its only responsibility relating to making polling sites accessible on election day is to "make available parts of the building that are already accessible -- not to make the building accessible for voters," (DOE Mem. of Law at 8). Moreover, the DOE contends that the relief sought by plaintiffs would "require the DOE to take particular steps at schools used for voting, putting voters first instead of children," (DOE Mem. of Law at 8).

In United States v. New York Tel. Co., supra, 434 U.S.

at 174, the Supreme Court concluded that the telephone company was sufficiently close to the underlying controversy -- the use of the telephone company's wires and facilities by suspected criminals and the District Court's Order authorizing the government to install and use pen registers -- because: (1) "there was probable cause to believe" that the telephone company's telephone lines "were being employed to facilitate a criminal enterprise on a continuing basis," and (2) the telephone company was "a highly regulated public utility with a duty to serve the public," and thus had no "substantial interest in not providing assistance."

Plaintiffs' argument that the DOE is entwined with the BOE's efforts to make polling sites located at public schools accessible on election days is not without merit. Both DOE and BOE employees occupy public schools where polling sites are located on election days, putting DOE employees in the unique position of being able to frustrate BOE employees' efforts to ensure polling sites comply with the requirements of the Remedial Orders. However, unlike the telephone company in United States v. New York Tel. Co., supra, 434 U.S. at 174, the DOE is not similarly engaged in the business or activity that the Remedial Orders address. The DOE has no duty to manage or oversee elections, nor does it have any input into the designation of polling sites. None of the provisions cited by plaintiffs require the

DOE, or any other owner or lessee of a public building where a polling site is designated, to ensure the accessibility of the BOE's polling sites, except for New York Election Law Section 4-104(3-d), which simply demands that owners and lessees install certain equipment when and where the BOE directs them to. Furthermore, it cannot be said that the DOE has no "substantial interest in not providing assistance." United States v. New York Tel. Co., supra, 434 U.S. at 174. The DOE's compliance with the Remedial Orders would divert millions of dollars the DOE had earmarked for other purposes, including educating the more than one million children who attend DOE schools.

There can be no serious argument that our government has an obligation to protect and ensure every citizen's right to vote, regardless of the individual's physical condition. And on the proper record, the relief plaintiffs seek against the DOE may be appropriate. The DOE's right to be heard is of equal significance. Plaintiffs' motion seeks to require the DOE to expend millions of taxpayer dollars to implement remedies that this Court has never even ordered -- all without the DOE having the opportunity even to address the alterations suggested by an expert that it had no role in choosing. More complete relief could, no doubt, have been achieved had the DOE been made a party at the inception of this action. That oversight cannot, however,

be remedied by the simple expedient of binding the DOE to the Remedial Orders without any opportunity to participate in discovery and be heard on the merits of the action and the appropriate form of relief.

IV. Conclusion

Accordingly, for all the foregoing reasons, I respectfully recommend that plaintiffs' motion requesting an Order pursuant to the All Writs Act, 28 U.S.C. Section 1651, joining the DOE, and directing the DOE to permanently resolve accessibility barriers at certain public schools and to take steps to ensure its employees do not frustrate defendants' implementation of the Remedial Orders (D.I. 182), be denied in all respects.

V. OBJECTIONS

Pursuant to 28 U.S.C. Section 636(b)(1)(c) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from receipt of this Report to file written objections. See also Fed. R. Civ. P. 6(a). Such objections (and responses thereto) shall be filed with the Clerk of the Court with courtesy copies delivered to the Chambers of the Honorable Deborah A. Batts, United States District Judge, Room 2510, 500 Pearl Street, New York, New York 10007, and to the

Chambers of the undersigned, 500 Pearl Street, Room 1670, New York, New York 10007. Any requests for an extension of time for filing objections must be directed to Judge Batts. FAILURE TO OBJECT WITHIN FOURTEEN (14) DAYS **WILL** RESULT IN A WAIVER OF OBJECTIONS AND **WILL** PRECLUDE APPELLATE REVIEW. Thomas v. Arn, 474 U.S. 140, 155 (1985); United States v. Male Juvenile, 121 F.3d 34, 38 (2d Cir. 1997); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir. 1992); Wesolek v. Canadair Ltd., 838 F.2d 55, 57-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237-238 (2d Cir. 1983).

Dated: New York, New York
October 11, 2017

Respectfully submitted,

HENRY PITMAN
United States Magistrate Judge

Copies transmitted to:

All Counsel