



ELECTION COMMISSIONERS' ASSOCIATION OF THE STATE OF NEW YORK 2007 - 2008

September 19, 2007

Norman P. Green
President
7 North Erie Street
Mayville, NY 14757
Phone: 716-753-4260

Helen M. Kiggins
First Vice-President

William W. Scriber
Second Vice-President

Joan M. Silvestri
Third Vice-President

William Fruci
Secretary - Treasurer
50 West High Street
Ballston Spa, NY 12020
Phone: 518-885-2249
Fax: 518-884-4751

Donald M. Wart
Chairman,
Executive Committee

Dennis Ward
Chairman,
Legislative Committee

Neil W. Kelleher, Co-Chair
Douglas A. Kellner, Co-Chair
Evelyn J. Aquila, Commissioner
Helena Moses Donohue, Commissioner
New York State Board of Elections
40 Steuben Street
Albany, NY 12207-2108

Dear Commissioners:

The Election Commissioners Association of the State of New York [ECA] respectfully submits this Report and Recommendation regarding the vital need to continue to have only a limited implementation of ballot marking devices for the 2008 elections. This submission follows the meeting held last week between the staff of the State Board of Elections ["SBOE"] and the New York State Attorney General's Office and Commissioners and staff from several County Boards of Elections.

Upon the conclusion of that meeting, the leadership of the ECA contacted each Commissioner of Elections within the State to advise them of the State Board's possible course of action. ECA regional telephone conferences ensued and the virtually unanimous consensus was that the State Board's proposal to require a ballot marking device (BMD) in every poll site for the 2008 Elections is not feasible without negatively impacting the County Boards' management of elections with its current voting machines and systems and without significantly diminishing the County Boards' capabilities to continue the progress being made in planning, evaluating, procuring and implementing New York State certified, HAVA-compliant voting systems.

The ECA has quickly surveyed its membership on the State Board's proposal and the results are summarized in the enclosed report (spread sheet).

As you are aware, as a result of the 2006 Federal Court Order each County placed and/or used ballot marking devices ["BMDs"] at a limited number of locations within each jurisdiction. The devices placed and/or used at each of these sites were programmed to mark any ballot for any election district located within the jurisdiction. Accordingly, any disabled voter in the State had the opportunity to cast a ballot utilizing a BMD at the appropriate site.



That plan supplemented the current voting options for disabled voters in that a disabled voter may continue to vote at his or her current poll site and use a lever voting machine, with assistance if necessary. In addition, disabled voters may continue to vote absentee if they choose.

As a result of our experience with these devices in 2006, the ECA urged and the Governor and Legislature enacted Chapter 506 of the Laws of 2007 on August 6th of this year. That legislation mandates that each County "shall provide at least one location with one or more ballot marking devices which are equipped for individuals with disabilities and provide individuals with disabilities the same opportunity for access and participation as other voters".

This legislation reflects the reality that County Boards of Elections cannot effectively operate dual voting systems in every poll site without the serious risk of disenfranchising all of the voters we must service this year and each year until permanent replacements for lever voting machines are certified by the State Board of Elections and purchased by the County Boards of Elections.

The problems created by expanding the number of ballot marking devices deployed for a given election are complex and difficult. Each County's Board of Elections will need to procure additional devices and perform acceptance testing as mandated by the State Board of Elections under their supervision and oversight. For each election using these BMDs, each County Board must "set-up" that election in the BMD's election management system, enter the contents of each ballot and format each as well. Where applicable the County Board must comply with the minority language requirements of Section 203 of the Voting Rights Act and enter the ballot in the appropriate language. After loading each BMD with the specific election data for the jurisdictions using the BMD, extensive testing must be performed that included a review of each displayed ballot, audio ballot and where applicable, printed ballot and testing of each BMD's functionality, including each of the features for use by voters with disabilities. Under the New York State Election Law, this work must be managed and performed by the same knowledgeable and experienced staff members of each County Board who are responsible for managing the entire election process (utilizing the County's existing voting machines and systems).

An additional and perhaps more challenging issue relates to the recruitment and training of thousands of additional poll workers to staff the BMDs. Specific requirements for each county are set forth in the attached schedules we have compiled from information provided by the respective counties.

Each and every Commissioner of Elections in the State of New York is committed to the complete implementation of the Help America Vote Act ("HAVA"), 42 U.S.C. § 15301 *et seq.*, particularly its provisions concerning the replacement of lever voting machines with a modern and fully accessible voting system. We fully support the purpose of HAVA to protect against

the repeat of the electoral disaster that occurred in Florida in 2000 by implementing new voting systems that provide unambiguous, reliable results and providing a better, more inclusive voting experience. The Commissioners have long advocated for the necessary State legislation and regulatory actions by the New York State Board of Elections ("State Board"), such as the certification of new voting systems that will allow each County Board to implement HAVA and purchase new systems.

None of the County Boards of Elections are responsible for their current inability to comply with HAVA's requirements. It is due to extraordinary delays and improper actions by the United States Election Assistance Commission and the State of New York that every County Board finds itself unable to comply with HAVA.

As Co-Chair Kellner has stated on numerous occasions, New York State may be the last in the nation to comply with HAVA, but when we do it, we should and will do it right the first time. The State is moving in this direction. Any attempt to implement this partial and costly interim measure on the voters of the State of New York, will significantly hinder those efforts and create the conditions for catastrophic failure in the elections conducted in the Empire State in 2008.

Despite these delays by entities outside the membership of the ECA, the various County Boards have undertaken preparations for the implementation of new voting systems. However, as we have consistently and publicly explained, it will take many months to undertake and roll out such a significant project properly. We have therefore emphasized that important actions by the State Board, such as testing and certifying voting systems and completing the State procurement process, must occur far before an election in order to have the hardware and software delivered in time to complete all of the extensive preparations each Board must conduct. In accordance with this fundamental principal, the Association, at its Summer Meeting this past June, recommended that the State of New York enact legislation providing that the implementation of new voting systems take place the year following the year of certification of new voting systems. We still believe that is the correct framework to undertake the implementation of a new method of voting here in the Empire State.

In addition, the ECA deplors the failure of the United States of America through the Election Assistance Commission to promptly advise the State of New York and all other jurisdictions of its actions with respect to the independent testing authority initially contracted for by the State to assist in the certification process. It is inexcusable that election administrators had to receive notice from the New York Times rather than a direct communication from the federal agency created to help us implement HAVA.

Following the September 11, 2007 meeting at the State Board of Elections, each County Board has reviewed its own ability to conduct an expanded deployment of ballot marking devices for the September 2008 Primary Election and the November 2008 General Election. Upon careful consideration, each Board, cognizant of the unique issues that complicate the process for running elections and introducing new voting devices, believes that it cannot expand the number of sites to which BMDs are deployed. The number of BMDs deployed to

the current sites could be increased slightly if warranted by increased turnout in a Presidential election.

These issues include:

- the very large number of candidates and races that will appear on the 2008 ballot;
- the location of the vast majority of poll sites in public facilities that may not have necessary electronic or spatial resources;
- the need to comply with minority language requirements;
- the difficulty of identifying and training more than 124,000 poll workers who would be needed to staff a ballot marking device in each and every one of this State's 6,508 poll sites; and
- the need to educate more than 11 million registered voters on this substantial voting change.

In view of these issues, the introduction of any new voting devices while continuing to utilize the existing voting systems raises an extraordinary level of concern that Boards of Elections will not have both the necessary control and flexibility to run orderly elections that protects the franchise. The County Boards of Election must not plan or be asked to undertake a plan that will result in the electoral equivalent of a "train wreck." To require us to place a BMD in every poll site puts us on that collision course to make New York in 2008 the Florida of 2000.

The ECA does not believe that the State Board of Elections, the U.S. Department of Justice nor the U.S. District Court for the Northern District of New York wants to set this State's electoral system on that collision course. Therefore, we do not believe that we should just do the same things we did in 2006. Nevertheless, the ECA believes that we can work to increase voter participation within the disability community.

Along those lines, the ECA believes that for the 2008 election cycle, the State Board of Elections, along with other State agencies should develop a comprehensive public education campaign to notify disabled voters of the temporary, alternative option for the 2008 primary and general elections. This was not done on a coordinated, integrated Statewide basis in 2006. In this instance, the State would fund this intensive outreach and communications program.

The State of New York, using many of its agencies including the Commission for the Quality of Care of the Disabled, the Office of Temporary and Disability Assistance, the State Department of Transportation and the various regional transportation authorities can and should expand both the informational opportunities made available to the members of the disability community as well as enhance the transportation activities to enable them to get to and from their homes to these poll sites in a reasonable and reliable manner. Also, both the State and County Boards of Elections should continue to work with local government agencies as well as community based organizations (CBOs) to promote increased participation in the electoral process by persons with disabilities.

In addition, each of the County Boards will also continue to improve the overall voting experience of disabled voters to ensure that all voters have the opportunity to exercise their franchise despite difficulties with independently using the current lever voting machines. This includes additional outreach efforts regarding both the BMDs and the procedures for applying for an absentee ballot.

All Commissioners are cognizant of the growing concerns the public has with new voting technology, and we have sought to have a credible and orderly introduction of new voting systems. To ensure that the voting public continues to have confidence in the electoral process as Boards' fully implement HAVA, any actions for 2008 must be carried out in a limited, controlled and responsible manner.

The statewide introduction of any new voting system, even if only a ballot marking device for voters with disabilities within the State of New York, is an incredibly complicated project. As of April 1, 2007, there were 11,222,042 registered voters in the State. In the November 2006 election, throughout the State 16,359 lever voting machines were used in 16,359 election districts located at 6,508 poll sites. These poll sites were staffed by more than 124,000 poll workers. In both the 2006 primary and general elections, thousands of candidates appeared on the ballot in contests across the State. Boards of Elections throughout this State serve a diverse voting population and several administer elections consistent with the minority language requirements of Section 203 of the Voting Rights Act, 42 U.S.C. § 1973aa-1a.

In order to implement a ballot marking device at every poll site in 2008, each County Board of Elections would need to do, among other things, the following:¹

- Select a system or systems to be used in 2008 for the limited implementation; it may or may not be the same as the one used in 2006 or 2007 and may not be part of the new permanent voting system;
- Execute the necessary procurement documents;
- Conduct a thorough preliminary analysis of the system after receiving at least one voting system, which includes the ballot marking devices, its supporting software, and any other required components;
- Test each aspect of the voting system separately;
- Develop a software interface to extract ballots and other related data from each Board's central computer systems and import it into the new voting system. This process alone may take at least six to eight weeks;
- Test this integrated voting system;
- Receive the complete shipment of the voting system, and conduct acceptance testing (in accordance with the SBOE requirements) of each BMD

¹ As noted above, many of the steps in this process can only begin after the State Board authorizes HAVA-compliant devices, the State procurement procedures allow for the purchase from the manufacturer, and the manufacturer has sufficient stock to deliver.

and the attendant computer systems to ensure that each component functions correctly;

- For each election, "set-up" that election in the BMD's election management system, enter the contents of each ballot used and format each ballot style;
- Where applicable, enter data for other language ballots;
- Configure/load each BMD with the ballot data (both displayed and audio) for every election district at the site the device serves;
- Prior to each election, perform extensive testing of each BMD, including a review of each displayed ballot, audio ballot and where applicable printed ballot as well as testing of each BMD's functionality, including each of the features for use by voters with disabilities;
- Find available storage space for the devices and attendant computer systems;
- Develop staff procedures for the setup, testing, deployment, operation, take down, and storage of the ballot marking devices;
- Build protocols for the configuration and use of the devices to ensure full security of the vote;
- Determine the shipping and trucking needs of the ballot marking devices to ensure they are safely deployed;
- Develop a back-up plan in case of failure of the devices or their computer systems;
- Develop policies and procedures for the production and translations for the audio interface into each of the required minority languages;
- Program the audio interface of each device, including potentially making a recording of the names of every candidate;
- Develop policies and procedures for ensuring that the devices comply with the minority language assistance requirements of Section 203 of the Voting Rights Act;
- Survey every site and ensure that each may be configured to accommodate the electrical, and spatial necessities of the devices;
- Develop procedures to determine how to organize the sites;
- Attract and train a new set of poll workers to manage the devices;
- Design the procedures for canvass of the ballots produced by the ballot marking devices;
- Modify the procedures for coordinating the reporting of unofficial results and closing the sites; and
- Conduct a public education campaign on the availability of the new devices and how they will be integrated into the voting experience.

In addition, to implement such a change, both the State Board of Elections and the Board of Elections in the City of New York will require the United States Department of Justice to grant preclearance under Section 5 of the Voting Right Act, 42 U.S.C. § 1973c, for the changes to

voting procedures as provided for in any plan.² Section 5 provides in relevant part that when any covered jurisdiction (which, in New York State, are the counties of New York, Bronx, and Kings) seeks to make a change in voting practices or procedures, it must submit this change to the Department of Justice or institute a proceeding in the U.S. District Court for the District of Columbia. If the County Board chooses to submit to the U.S. Department of Justice, the Department will review the proposed change to determine whether it has the purpose or effect "of denying or abridging the right to vote on account of race or color" or membership in a minority language group.

It is clear to the members of the ECA that any drastic action that requires us to provide a ballot marking device in all poll sites, may have the effect of denying or abridging the right to vote on account of race or color" or membership in a minority language group. This will be the direct consequence of the diversion of the resources of the County Boards of Elections from administering the Election Law and related procedures for all voters to that of the operation of ballot marking devices.

The ECA views the plan discussed herein (similar to that undertaken in 2006) as another opportunity to use ballot marking devices that are accessible to the disabled. **However, this is only a limited and temporary solution.** The prompt goal must be the replacement of the State's lever machines with a full implementation of a new HAVA-compliant voting system – a project the ECA has long called for but has not been able to carry out because no voting system has yet been certified by the State Board. Indeed, it is possible that any devices bought for 2008 (like those acquired in 2006) may be used only for a very limited time frame because when the State Board finally provides a selection of certified HAVA-compliant voting systems, some of these certified systems may allow disabled voters to use them along with all other voters without the need for a separate BMD.

Efforts to expand the number of sites using BMDs in 2008 will further retard this State's movement towards full HAVA compliance. It also jeopardizes the voting rights of the State's 11 million plus registered voters by diverting resources and control from the other vital election administration functions. Given the limited resources of both the State and County Boards of Elections, our full efforts must be devoted to the certification, selection and purchase of new voting systems before the 2010 federal election cycle.

Therefore, we urge that the State Board of Elections, the U.S. Department of Justice and the United States District Court for the Northern District of New York consider the concerns expressed herein by the ECA and its member Commissioners and Boards of Elections representing all sixty-two of New York's State counties and act in accordance with the recommendations made herein to enable all of New York State's citizens to freely exercise the franchise and participate without impediment in the elections of 2008.

² The Department of Justice discusses the need for preclearance on page 13, n.9 and page 20 of the "United States' Response To State Of New York's HAVA Remedial Plan" filed in *United States v. New York State Board of Elections, et al.*, Index No. 06-CV-0263 (GLS), on April 28, 2006.

By copy of this letter, we are forwarding the enclosed materials to the New York State Attorney General as well as to all the members of the Election Commissioners Association of the State of New York.

Very truly yours,



Norman P. Green
President



Donald M. Wart
Chair, Executive Committee

Enclosures

Copy: Hon. Andrew M. Cuomo, Attorney General of the State of New York

Peter S. Kosinski, Co-Executive Director
Stanley Zalen, Co-Executive Director
New York State Board of Elections

Commissioners of Elections in each County within the State of New York

NPG/DMW:SHR