

April 21, 2020

Rebecca Bond, Chief
US Department of Justice
Civil Rights Division
Disability Rights Section
950 Pennsylvania Avenue, NW
Washington, DC 20530

RE: Complaint of American Council of the Blind, American Council of the Blind of New York, the National Center on Independent Living, New York Association on Independent Living, Ian Foley, and Kerri Regan

Dear Ms. Bond:

The State of New York is in the process of implementing practices that will illegally and discriminatorily prevent people with disabilities from exercising their fundamental right to cast a private, independent ballot in the upcoming June 23, 2020 primary election. The COVID-19 pandemic is a nationwide public health emergency and the State must take steps to protect the health of its people during all upcoming elections. We applaud the Governor's decision to create a universal absentee voting program to protect the health of all New Yorkers. However, paper absentee ballots do not provide persons with mobility, dexterity, print-reading, or sight impairments the opportunity to cast an independent, private ballot and an alternative, online voting tool is necessary. Even in these difficult times, we cannot abandon the American principal that casting a private, independent vote is a civil right that all eligible individuals should be afforded the opportunity to exercise. While the upcoming election cannot occur in a traditional manner, any changes enacted by a public entity must, and can with available technology, comply with the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

This complaint concerns the mail-in absentee voting program Governor Andrew Cuomo authorized for the June 23, 2020 primary election via Executive Order 202.15 on April 9, 2020. Executive Order 202.15 makes it easier for New York voters to vote via absentee ballot. The relevant provisions of that Executive Order state:

Section 8-400 of the Election Law is temporarily suspended and hereby modified to provide that due to the prevalence and community spread of COVID-19, an absentee ballot can be granted based on temporary illness and shall include the potential for contraction of the COVID-19 virus for any election held on or before June 23, 2020.

Solely for any election held on or before June 23, 2020, Section 8-400 of the Election Law is hereby modified to allow for electronic application, with no requirement for in-person signature or appearance to be able to access an absentee ballot.

The purpose of the Executive Order is to make it easier for New Yorkers to vote remotely, thus reducing the risk that COVID-19 will be transmitted at polling places or suppress the vote. Executive Order 202.15 modifies New York Election Law, specifically Section 8-400 which governs absentee voting in the state.¹ Section 8-400 permits certain voters with an excuse specified in the Code, such as being unable to appear personally at the polling place of the election district in which he or she is a qualified voter because of illness or physical disability or being absent from the county of his or her residence, to vote absentee.² Section 8-400 also requires any voter who wishes to vote absentee to submit a paper application for an absentee ballot seven days prior to the election for which the ballot is requested.³

Governor Cuomo's Executive Order 202.15 removes the requirement that the voter must attest to one of the allowable excuses specified in Section 8-400.1 in order to be eligible to vote absentee. Instead, for the June 23, 2020, primary, all voters are eligible to vote absentee, including voters with disabilities. Additionally, Governor Cuomo's Executive Order 202.15 removes the requirement that voters apply for an absentee ballot via a paper application and permits voters to apply for an absentee ballot electronically, without the need to appear in person or provide an in-person signature. As a result of this order, any voter in New York can apply for an absentee ballot electronically, receive a paper ballot, and vote absentee in the June 23, 2020 primary election.

Governor Cuomo's decision to expand absentee voting to all voters is appropriate in light of the COVID-19 public health crisis. No voter should have to risk his or her health, and, potentially, his or her life, to participate in our democracy. Unfortunately, New York State has failed to ensure that there will be an accessible absentee ballot option that allows voters with disabilities to privately and independently receive, complete, and return their ballot from their residences. Section 8-410 requires a voter to mark an absentee ballot on paper ballots and Executive Order 202.15 does not change this requirement.⁴ To complete a paper ballot one is required to, at the

¹ NY Code. §8-400.

² NY Code § 8-400(1).

³ NY Code § 8-400(2)(c).

⁴ NY Code § 8-410. It is also worth noting that this section refers to "ballots prepared for counting by ballot counting machines" as an alternative option to paper ballots. Upon a complete reading of the NY Election Code, it appears that this reference is in regards to voters at nursing facilities where more than 25 individuals have requested absentee ballots, thus invoking NY Code § 8-407, wherein the board of elections in the county or city where the facility is located can bring a portable voting booth to that facility which voters can use to cast a private, independent ballot which is then printed and returned to the board of elections to be counted in the ballot counting machine. NY Code § 8-410.11.

least, read standard text, physically write and/or fill in the ballot choices, seal and certify the ballot via a signature on the envelope, and mail the ballot to the appropriate voting official to be counted.⁵ Each of these requirements is a barrier to accessibility for individuals with disabilities. The requirement to vote via paper ballot violates the ADA and Section 504 of the Rehabilitation Act, compromises the voting rights of voters with disabilities, and undermines our democratic electoral process.

The disability advocacy organizations American Council of the Blind, American Council of the Blind of New York, the National Center on Independent Living, the New York Association on Independent Living, along with Ian Foley and Kerri Regan, as individuals and self-advocates (together “the Complainants”), file this complaint on behalf of their constituents, New York voters with disabilities who will not be able to cast a private, independent ballot in the June 23, 2020 New York primary. It is critical that the Disability Rights Section of the Civil Rights Division of the United States Department of Justice (DRS) take immediate action to address this discrimination and assist covered entities in developing non-discriminatory voting programs before voters with disabilities are excluded from equal participation in the 2020 election process.

The history of widespread discrimination against voters with disabilities is well established. Congress has addressed this discrimination repeatedly through the passage of the Voting Rights Act, the Voting Accessibility for the Elderly and Handicapped Act, Section 504 of the Rehabilitation Act, the Americans with Disabilities Act (ADA), the National Voter Registration Act, and the Help America Vote Act, yet, the discrimination and disenfranchisement of voters with disabilities persists.

DRS has a very brief moment in which it can intercede. If DRS fails to act swiftly to clearly and firmly articulate that mail-in voting programs that use only paper ballots violate the ADA and Section 504, there will be no way for individuals with visual impairments and certain manual disabilities to vote privately and independently in the 2020 primary election. We urge you to enforce the obligation of election officials in New York to ensure an accessible balloting option is available to all eligible voters and avoid unnecessary challenges to the integrity of the election.

The Complainants

American Council of the Blind (ACB) is comprised of approximately seventy state chapter and special-interest affiliates representing a diverse range of groups within the blind community, including students, families, teachers, attorneys, governmental employees, entrepreneurs, vending stand operators and members of the LGBTQ community. During its nearly sixty-year history, ACB has become a leader in national, state, local, and even international advocacy efforts. ACB has been a national leader in working to ensure equal access to absentee and vote

⁵ *Nat'l Fedn. of the Blind, Inc. v. Lamone* 813 F.3d 494, 499 (4th Cir. 2016).

by mail balloting for voters with disabilities. ACB has multiple affiliates and many members in New York.

American Council of the Blind of New York (ACBNY) is a state affiliate of The American Council of the Blind. Its purpose is to support and promote the educational, vocational, and social advancement of blind and visually impaired persons to increase the dignity and independence of blind and visually impaired persons, including protecting the right of blind and visually impaired individuals to vote privately and independently.

The National Council on Independent Living (NCIL) is the longest-running national cross-disability, grassroots organization run by and for people with disabilities. Founded in 1982, NCIL represents thousands of organizations and individuals including: individuals with disabilities, Centers for Independent Living (CILs), Statewide Independent Living Councils (SILCs), and other organizations that advocate for the human and civil rights of people with disabilities throughout the United States.

The New York Association on Independent Living (NYAIL) is a statewide, not-for-profit membership association created by and composed of Independent Living Centers across New York State. NYAIL leads statewide Independent Living Center efforts to eliminate physical and attitudinal barriers to all aspects of life and to fight for the civil rights and full independence of all people with disabilities. NYAIL envisions a future where people with disabilities have equal opportunity to live a life free of poverty, segregation, and discrimination.

Ian Foley is a registered voter with a visual impairment from Erie County, New York, who needs an accessible electronic balloting option in order to cast a ballot privately and independently from the safety of his home. He is a member of ACBNY where he is the Legislative Co-chair and he is the President of ACB of Western New York. The absentee voting program created via Executive Order 202.15 will effectively disenfranchise him and his peers and prevent them from casting private, independent ballots in the June 2020 primary. He uses accessible technology, including, screen readers, text to speech software, and accessibility features on his smartphone on a regular basis and would use an accessible electronic ballot marking device or mobile voting application to cast his vote in the June 2020 election if made available to him.

Kerri Regan is a blind registered voter from Nassau County, New York, who needs an accessible electronic balloting option in order to cast a ballot privately and independently from the safety of her home. She has never voted absentee in the past because paper ballots are not accessible for her. She lives alone and cannot complete a paper ballot privately and independently. In the past, she voted at her polling location using the accessible voting machine. It is unclear whether polling locations will be open for the June 23, 2020 primary election and, even if they are, she should not have to risk her health in order to exercise her right to vote privately and independently. She will be unable to vote in June unless she has access to an accessible electronic balloting option. She uses accessible technology, including screen readers, text to speech software and accessibility features on her smartphone on a daily basis and would use an

accessible electronic balloting option or mobile voting application to cast her vote in the June 2020 election if one were made available to her.

Federal Law Prohibits Discrimination Against Individuals in Voting

Federal law prohibits public entities from discriminating against voters with disabilities. Based on New York's existing regulations governing absentee voting, the state is poised to conduct an election in violation of disability discrimination laws.

Legal Background

The Voting Rights Act of 1965 granted voters with disabilities the affirmative right to have necessary assistance in voting from a person of the voter's choice.⁶ The Rehabilitation Act of 1973 expanded these rights stating that "no qualified individual with a disability in the United States shall be excluded from, denied the benefits of, or be subjected to discrimination under" any program or activity that receives Federal financial assistance.⁷ Discrimination against voters with disabilities persisted and, in 1984, Congress passed The Voting Accessibility for the Elderly and Handicapped Act, furthering "the fundamental right to vote by improving access for handicapped and elderly individuals to registration facilities and polling places for Federal elections."⁸ The Act requires states to "assure that all polling places for Federal elections are accessible to handicapped and elderly voters."⁹

Then, in 1990, Congress passed the Americans with Disabilities Act (ADA) upon finding that, although physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, many people with physical or mental disabilities had been precluded from participating in all aspects of our society.¹⁰ Congress recognized that discrimination against individuals with disabilities continued to be a serious and pervasive social problem, and that discrimination against individuals with disabilities persisted in such critical areas as voting.¹¹ Accordingly, Title II of the ADA prohibits public entities from excluding from participation or denying the benefits of the services, programs, or activities of that entity, or subjecting individuals to discrimination by any such entity, on the basis of disability.¹² Voting is a quintessential program or activity of public governments.

Subsequently, Congress enacted the National Voter Registration Act of 1993, which aims, among other things, to increase the historically low registration rates of persons with

⁶ 52 USCS § 10508.

⁷ 29 U.S.C. § 794(a).

⁸ 52 USCS § 20101.

⁹ 52 USCS § 20102(a).

¹⁰ 42 USCS § 12101.

¹¹ *Id.*

¹² 42 U.S.C.S. §12132.

disabilities.¹³ Then, in 2002, recognizing the ongoing need to facilitate accessibility of the electoral process, Congress passed The Help America Vote Act which requires jurisdictions responsible for conducting federal elections to provide at least one accessible voting system for persons with disabilities at each polling place in federal elections.¹⁴ Such accessible voting systems must provide the same opportunity for access and participation, including privacy and independence, which other voters receive.¹⁵

Despite these efforts to remedy the historic discrimination against voters with disabilities, voters with disabilities continue to be excluded from equal participation in elections throughout the country and voters with disabilities have had to resort to litigation to enforce their fundamental right to vote privately and independently. In the 2014 Fourth Circuit decision, *National Federation of the Blind v. Lamone*, the Court held that Maryland's absentee voting program, which utilized paper-only ballots, violated the ADA.¹⁶ Maryland was required under the ADA to certify an accessible electronic absentee ballot as a reasonable accommodation for blind voters who could not use paper ballots privately and independently.¹⁷ Additionally, in the 2017 Sixth Circuit decision, *Hindel, et al. v. Husted*, the Court considered an ADA challenge to Ohio's paper-only absentee ballot.¹⁸ The Court denied Ohio's motion to dismiss, which was based solely on its assertion that an accessible electronic ballot would be a fundamental alteration to the state's voting regulations.¹⁹ Instead, the Court said that the question of whether an electronic balloting option causes a fundamental alteration to state voting regulations is a fact-specific inquiry.²⁰ Subsequently, the parties completed successful settlement negotiations and Ohio certified an electronic ballot option for individuals with disabilities.

New York's Absentee Voting Program Violates Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act

Title II of the ADA and Section 504 of the Rehabilitation Act (Section 504)²¹ prohibit public entities from denying individuals equal access to the benefits of the programs of that entity on the basis of the individual's disability. All individuals with disabilities who are otherwise qualified to receive the benefits of a public entity's program are entitled to equal access to that program. When a public entity refuses to provide a reasonable accommodation that ensures equal

¹³ 52 USCS § 20501.

¹⁴ Pub.L. 107-252. Title I and III of HAVA contain provisions specifically related to access to voting for individuals with disabilities. Title IX also states that use of HAVA funds must comply with the ADA.

¹⁵ 52 USCS §21081(a)(3)(A). It is also worth noting that §21081(a)(3)(B) specifically states that §21081 (a)(3)(A) can be satisfied with the use of one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place.

¹⁶ *National Federation of the Blind, et al. v. Lamone, et al.*, 813 F.3d 494 (4th Cir. 2016).

¹⁷ *Id.*

¹⁸ *Hindel v. Husted*, 875 F.3d 344, 345 2017 U.S. App. (6th Cir.).

¹⁹ *Id.*

²⁰ *Id.*

²¹ Only public entities that receive Federal funding are covered entities under Section 504. 29 U.S.C. § 794(a).

access to the benefits of its program that public entity discriminates against individuals with disabilities in violation of Title II of the ADA and Section 504.

A. The New York Board of Elections is a “Public Entity” & Voting is a “Program, Service, or Activity” Under the ADA and Section 504

Title II of the ADA prohibits public entities from excluding from participation or denying the benefits of the services, programs, or activities of that entity, or subjecting individuals to discrimination by any such entity, on the basis of disability.²² The term “public entity” includes “any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government....”²³ Similarly, Section 504 mandates that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”²⁴ Under Section 504, programs or activities receiving Federal financial assistance must make reasonable accommodations in policies, practices, or procedures when such accommodations are necessary to avoid discrimination on the basis of disability, unless the recipient can demonstrate that making the accommodations would fundamentally alter the nature of the program or activity or result in undue financial and administrative burdens.²⁵ Such federally funded programs and activities may not, in providing aids, benefits, or services, afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others.²⁶ Such programs and activities must also provide qualified individuals with disabilities with an aid, benefit, or service that is as effective as that provided to others.²⁷ In New York, the State Board of Elections is responsible for ensuring elections comply with the requirements of applicable state and federal law, including the ADA and Section 504.²⁸

B) Complainants Are or Represent “Qualified Individuals with Disabilities” as defined by the ADA and Section 504.

Under the ADA, an individual with a disability is any individual who has a physical or mental impairment that substantially limits one or more major life activities, individuals who have a record of such impairments, and individuals who are regarded as having such an impairment, whether or not they have the impairment.²⁹ Section 504 states that an individual with a disability

²² 42 U.S.C.S. §12132.

²³ 42 U.S.C. § 12131(1).

²⁴ 29 U.S.C. § 794(a).

²⁵ *Id.*

²⁶ 29 C.F.R. §32.4(b)(ii).

²⁷ 29 C.F.R. §32.4(b)(vii)(2).

²⁸ NY Code. §3-102 and New York State Board of Elections Help America Vote Act, <https://www.elections.ny.gov/HAVA.html> (Last visited April 21, 2020).

²⁹ 42 U.S.C.S. § 12102(1).

is any person who has a physical or mental impairment which substantially limits one of more major life activities including, but not limited to, walking, seeing, or working.³⁰ Blindness, visual disabilities, and manual disabilities impacting an individual's sight, mobility, and/or writing are disabilities that impact an activity of daily living and so individuals with these disabilities are individuals with disabilities as defined in the ADA and Section 504.³¹

Individuals with disabilities who are registered to vote in their state of residence are otherwise qualified to receive the benefits of the voting program of his/her state. The term "otherwise qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.³² Mr. Foley and Ms. Regan are registered to vote in New York. They are frequent voters who view participating in our elections as both a civil right and civic duty. ACB, ACBNY, NCIL, and NYAIL each have members with disabilities who are registered voters. Complainants are entitled to equal access to cast their ballots privately and independently as New York voters without disabilities and any voting program that denies them equal access to the ballot is discriminatory.

C. Absentee Voting Programs That Use Paper-Only Ballots Deny Equal Access to Voters with Disabilities.

Individuals with disabilities, including Complainants and Complainants' members, are denied equal participation in voting when states use paper-only ballots for absentee and mail-in elections. The absentee voting program itself must be accessible or provide voters with disabilities reasonable accommodations to ensure they are not denied the right to cast a private, independent absentee ballot.³³ When states use paper-only ballots for absentee and mail-in elections, the state is providing nondisabled voters with meaningful access to absentee voting, including the ability to vote privately and independently, which is not provided to disabled voters because of their disability. *See National Federation of the Blind, et al. v. Lamone, et al.*, 813 F.3d 494 (4th Cir. 2016).

D. There are Reasonable Accommodations to the New York State Absentee Voting Program That Would Provide Equal Access for Voters with Disabilities

New York is required to implement a reasonable accommodation that can provide equal access to voters with disabilities when the requested accommodation is accessible to voters with

³⁰ 20 C.F.R. §32.2

³¹ 42 USCS § 12102(2). See also *Title II Technical Assistance Manual* available at <https://www.ada.gov/taman2.html#II-3.6100>.

³² 42 U.S.C. § 12131(2).

³³ *National Federation of the Blind, et al. v. Lamone, et al.*, 813 F.3d 494 (4th Cir. 2016) and *Hindel v. Husted*, 875 F.3d 344, 345 2017 U.S. App. (6th Cir.).

disabilities and sufficiently secure while also safeguarding voters' privacy.³⁴ Complainants use screen reading technology, text to speech technology and mobile applications on a daily basis and are eager to use accessible remote voting technology to cast their ballots. Currently, there are several jurisdictions that have certified secure electronic accessible voting systems that enable voters with disabilities to receive, mark, cast, verify, and return their ballots.³⁵ In West Virginia³⁶ and Utah County, Utah,³⁷ voters are permitted to vote using an accessible mobile voting application. The systems used in these jurisdictions are accessible, tested, and secure, and can be implemented in New York.

Conclusion

Complainants request DRS immediately investigate and resolve this complaint of disability discrimination, by issuing an Opinion instructing New York election officials as to what they must do to comply with federal civil rights laws protecting the rights of all voters, including those with disabilities, to cast a private, independent ballot. Guidance is needed as soon as possible, given that the primary election is scheduled for June 23, 2020.

Please contact Margaret Hart, Counsel at Washington Lawyers' Committee for Civil Rights and Urban Affairs, at 202-319-1000 ext. 162 or margaret_hart@washlaw.org with any questions or responses regarding this complaint.

Respectfully,

/s/ Margaret Hart

Maggie Hart, Counsel
Washington Lawyers' Committee for Civil Rights
and Urban Affairs

³⁴ *National Federation of the Blind, et al. v. Lamone*, et al., 813 F.3d 494 (4th Cir. 2016).

³⁵ <https://www.ncsl.org/research/elections-and-campaigns/internet-voting.aspx> (last visited April 15, 2020).

³⁶ West Virginia Code §3-2-2.

³⁷ <https://ssl.utahcounty.gov/dept/clerkand/elections/DisabledVoter.html> (last visited April 15, 2020).