



The Association of the Bar of the City of New York

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May 18, 2004

The Honorable Thomas P. Morahan
848 Legislative Office Building
Albany, New York 12247

The Honorable Keith L. Wright
411 Legislative Office Building
Albany, New York 12248

Dear Sirs:

I write on behalf of the Association of the Bar of the City of New York, at the initiation of the Committee on Legal Issues Affecting People with Disabilities, to request that you and other members of the conference committee on implementation of the Help America Vote Act consider our suggestions regarding machine selection, access for people with disabilities, and poll worker and public training on the new machines.

The New York State Assembly and Senate have each passed a series of bills to implement the federal Help America Vote Act of 2002 (HAVA). As you know, HAVA, among other things, provides both a federal mandate to replace New York's mechanical lever voting machines with ones that meet the HAVA mandates and a fund that would offset, at least in part, the cost of such conversion. In late March, the Legislature convened a conference committee to synthesize the Senate and Assembly versions of these various bills. This letter conveys the position of the Association of the Bar of the City of New York ("ABCNY") regarding the accessibility provisions and related elements of the bills referred to the conference committee.

In 2003, ABCNY's Election Law Committee looked at the four major voting systems used in the United States: Mechanical Lever machines, Punch Card Systems, Optically Scanned Paper Ballots, and Electronic Voting Systems, including the Automated Teller Machine (ATM)-style touch screen machines in order to determine which it would advise New York to purchase. The Subcommittee articulated two major recommendations: that New York State repeal the requirement of a so-called "full-face ballot" and that it purchase ATM-style touch screen voting machines.

Since 1909, New York has been almost alone among the states in requiring that voting machines have a full-face ballot format.¹ What state law actually mandates is that the ballot be of such uniform size and style as will "fit the ballot frame." This has been interpreted over the years to require all candidates for each office and all propositions to appear on the face of a single sheet of the ballot. This requirement seems, at first

¹ Delaware has an identical provision, but reportedly allows for a waiver of these requirements on the county level, which each of the three counties in Delaware have elected.

blush, to be incompatible with the modern voting systems, including the ATM-style touch screen voting systems endorsed by the Election Law Committee, which provide a separate computer screen for each office or proposition on the ballot.

Since the antiquated full-face machines are roughly 60% more expensive than the ATM-style machines, and the format presents an unnecessary impediment to many voters with cognitive and developmental disabilities (as well as many whose primary language is other than English), we urge the Legislature to eliminate the requirement in the law. In the alternative, we ask that the Legislature clarify that the newer “page” Direct Record Electronic (DRE) machines adequately meet the law’s requirement that the ballot “fit the ballot frame.” Because the state is proceeding towards finalizing the elements that it will require in a qualified machine and since localities are preparing to purchase machines, we urge that the Legislature pass such a provision soon.

It should be noted that the oft-stated concerns about potential under-voting (the failure to vote the entire ballot) with DRE machines are resolved by these systems’ requirement that voters verify their vote before finalizing it and be warned if they have under-voted. Further, the Legislature may consider more innovative solutions to such a concern by, among other things, changing ballot order (*e.g.*, moving Assembly, State Senate and other offices to the “top” of the ballot).

Since neither the Assembly nor the Senate voted to eliminate the so-called “full-face ballot” requirement in its package of promulgated bills, or clarified its meaning to allow ATM-style machines, this letter pre-supposes the existence of the full-face ballot requirement as commonly interpreted. With regard to issues within the collective bills, we recommend that the conference committee adopt the following provisions:

1. Expand mandated accessibility elements on voting machines for voters with disabilities [A.8847 §7]

Any new voting system or systems adopted by New York must permit voters with all types of disabilities to be able to participate in the act of voting at the polls on Election Day, which is mandated by both HAVA and the Americans with Disabilities Act (ADA). Appropriately designed voting machines must at least incorporate those accessibility concerns addressed in the Assembly legislation. In order to ensure that they are accessible to many voters with disabilities, we believe that the final legislation should also explicitly include requirements for a series of currently available features that were not specified in the Assembly bill as passed. These include: 1) the ability of people in wheelchairs to reach all voting positions and the vote-activator devices, 2) a light-pressure activator device, 3) a means by which poll workers can easily and safely place the machine in an accessible position, 4) a human voice audio with volume and speed controls, 5) a secret ballot with touch or voice only controls at the election of each voter, 6) a sip and puff attachment, 7) the capacity to enlarge type up to 24 point size and adjust contrast. Any machine purchased should also be adaptable to include new features as they come on the market.

2. Create a Citizen Machine Selection Panel (CSP)

a. Broad representation on the Machine Selection Panel [A.8847 §4]

Only by involving a broad panel of representatives of the public and affected groups (*i.e.*, people with disabilities, the elderly, people whose primary language is other than English

and the youth) as well as election officials, can we achieve an important goal of HAVA – enfranchising the maximum number of voters possible. Public input into HAVA implementation in New York State has not thus far been as robust as advocates had hoped or as it has been in many other states. The machine selection process is the crucial stage where citizen involvement is necessary to ensure that any new voting system meets the needs of all voters.

b. Recommendations on machine requirements

While not in the bills regarding citizen panels, any citizen panel should be empowered to make recommendations on machine requirements and specifications that will be accepted by the State Board of Elections absent a good-cause showing that they are unwise, unattainable or too costly. This process would ensure that voters, who have the most essential interest in ensuring that the next generation of voting machines is as accessible and usable as possible, have an important role in the process.

3. NYS BOE should issue recommendations on legislation needed for the state to employ new voting technologies [A.8847 §4]

The Citizen Selection Panel (CSP) must be able to consider the total array of voting technologies currently available. The panel should not be limited to machines that are currently allowed by New York law. To this end, it is necessary that the New York State Board of Elections (NYSBOE) be able to suggest legislation enabling the use of whatever machine(s) and components the CSP selects.

4. Mandate voter-verified paper ballots [A.8847 §7 & S.6207 §6] or similar technology

Although technologically attractive, the security and reliability of ATM-style touch-screen electronic voting machines, as currently designed, have been called into serious question. Voter-verified paper ballots provide an important element of protection against vote manipulation and machine error. The paper trail involves an integral voter verification process that is done contemporaneously with the act of voting. As envisioned, the paper ballot would be viewed by the voter through a clear screen, thus permitting the voter to verify that the machine has accurately recorded his or her choices. No individual voter's ballot would be cast until such verification was confirmed. Any such process must include a means by which voters who are blind will be able to have the paper ballot conveyed to them by either a Braille mechanism or a scanning device that converts the printed ballot to audio, depending on the voter's preference. The paper ballot must also be presented in such a fashion as to be practically readable by people in wheelchairs. The paper ballot would be the official ballot in the event that the integrity of the electronic record of any machine(s), or tabulating mechanism is called into question. Following confirmation by each voter, the paper ballot would be stored in a secure box for later potential recounts, if necessary.

Such a system would help insure voter and candidate confidence in the new technology by providing physically verifiable proof of the computer's accuracy. Confidence in the system could be further enhanced by mandating that in each election a defined small percentage (at least 2, but not more than 5%) of the paper ballots be manually counted to verify the accuracy of the computer tabulations. Such manual tabulations should be completed and the results made public within the time periods allowed by statute to

contest the results or request a court supervised recount. New York should also conduct its own wide-scale testing of any new voting system prior to its being used for actual vote tabulation.

5. Adopt a single statewide voting machine [A.8847 §4] and county control of voting machines [A.8833 §2]

One statewide voting machine would provide many benefits to New Yorkers. It would allow public and poll worker education on the use of voting machines to be uniform throughout the state and, more importantly, within shared media markets. It would allow technicians to be trained to repair just one machine, and for parts to be used for all of the machines in the state. It would allow the state to use its purchasing power to command the best price per unit. These benefits would both save the state dollars and make it easier for people to vote. County ownership and control, and in the case of New York City, city control of voting machines, will help centralize a process that has been the burden of villages and towns for many decades. This will ease local costs and inefficiencies of operation and help ensure cheaper machine storage and better upkeep.

6. Mandate disability access and ADA compliance [A.5473]

In every election, many poll sites are not accessible to voters with disabilities. Some localities have properly sought and received the statutory waiver, and others have not. Getting into the polls is easily as important to voting as being able to use the voting technology once inside. Accessibility should not be subject to the waiver provision that has only been in effect since 1995 and has provided an opportunity for rampant non-compliance with polling site accessibility provisions. We must mandate that accessibility begin at the parking lot or public access areas of polling sites and not just within the voting booth.

7. Eliminate the three- and five-minute time limits for elderly voters and voters with disabilities [Not addressed in the bills passed]

The three-minute time limit for voters who vote on voting machines and the five-minute time limit for voters who vote by manual ballot should be eliminated as a reasonable accommodation to voters with disabilities and the elderly, who may require more time.

Conclusion

We urge you to adopt the aforementioned recommendations, all of which assume sufficient poll worker training and public education. This is an essential element in their proper implementation since conversion to any new voting system will otherwise likely generate significant confusion and long lines at the polls. This problem would be exacerbated by a lack of familiarity among some voters and poll workers with computer technologies used by the new voting technologies. Thus, in addition to the above proposals, we urge that the conference committee mandate that the NYS BOE create a core curriculum, create new training materials and manuals for election workers, and develop and implement mandatory examinations for election workers, which they must be required to pass [A.8833 §6]. This procedure will ensure that poll workers receive and understand the same basic information and are able to properly administer the law and tend to the needs of voters on Election Day.

It is similarly important that the State Board of Elections design and implement, in conjunction with county boards, a comprehensive voter-education program that addresses the rights of voters with disabilities, the new voter ID requirements, new voting technologies, the voters' bill of rights, and all other aspects of the process that are changing. Absent such training and education, any conversion may lead to disaster on Election Day. This was the experience in some Florida jurisdictions during the first election following their abandonment of punch-card ballots in favor of a computerized system. It is essential for smooth implementation that voters are well educated about the changes that are coming. To do otherwise is to invite serious problems on Election Day and the disenfranchisement of countless voters.

Perhaps the most important aspect of the change to electronic voting machines in New York is that thousands of New Yorkers with disabilities will, for the first time, be able to cast a vote privately, independently and in the polling booth. While using new machines will be a challenge for everyone, poll workers will need to be specifically trained on how to assist voters with disabilities and assure their rights under the law. In the past, poll workers had to know how to cast a vote for a disabled citizen if the voter sought assistance. Now poll workers need to learn how to assist the disabled citizen to vote on his or her own. This means that all poll-worker must be trained on how the disability accessibility features of the machines operate, as well as on how to instruct voters in a respectful and appropriate manner to use the new systems correctly so that they can fully exercise their right to vote independently and confidentially.

We at Association of the Bar of the City of New York remain available to assist the State in any way we can to ensure that this positive result occurs.

Sincerely yours,

A handwritten signature in black ink, reading "E. Leo Milonas". The signature is written in a cursive, flowing style.

E. Leo Milonas