

Issue Brief

Legal Requirements for Voting Access

Voting is one of our nation’s most fundamental rights and a hallmark of our democracy. Yet we continue to struggle to ensure that individuals with disabilities are able to participate equitably in a fully accessible voting system. Important federal civil rights laws are in place to protect the fundamental right to vote for all Americans including people with disabilities. This document provides an overview of the legal underpinnings for accessible voting along with questions and answers about issues critical to ensuring accessible voting.

What are the major laws that ensure voting access for individuals with disabilities?

There are three major federal laws that require voting accessibility –

The Americans with Disabilities Act (ADA) is a federal civil rights law that provides protections to people with disabilities that are similar to protections provided to individuals on the basis of race, color, sex, national origin, age, and religion. Title II of the ADA requires state and local governments (“public entities”) to ensure that people with disabilities have a full and equal opportunity to vote. The ADA’s provisions apply to apply to all elections (federal, state and local elections) and all aspects of voting, including accessible voter registration and voter education materials, polling place accessibility, and accessible voting (selecting, verifying and casting a ballot), whether on Election Day or during an early voting process. (42 U.S.C. §§ 12131 et. seq.)

Section 504 of the Rehabilitation Act (Section 504) preceded the ADA and similarly provides that qualified individuals with disabilities shall not 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, which includes most all public entities. (29 U.S.C. § 794)

The Help America Vote Act of 2002 (HAVA) requires jurisdictions responsible for conducting federal elections to provide at least one accessible voting system for individuals with disabilities at each polling place in federal elections. The accessible voting system must provide the same opportunity for access and participation, including privacy and independence that other voters receive. (52 U.S.C. §§ 20901–21145)

What are the legal requirements for accessible online voter registration and voter educational materials?

Online services have dramatically changed the way state and local governments do business. Online voter registration systems and digital voter educational materials are becoming more and more common. As a result, people can easily access these services (e.g. voter registration and voter educational materials) seven days a week, 24 hours a day without the assistance of government personnel.

Title II of Americans with Disabilities Act (ADA) and, if the government entities receive federal funding, Section 504 generally require that state and local governments provide qualified individuals with disabilities equal access to their programs, services, or activities unless doing so would fundamentally alter the nature of their programs, services, or activities or would impose an undue burden. This includes access to online services in the form of online voter registration systems and online voter educational materials.

The ADA also requires public entities to provide equally effective communication. The purpose of the effective communication requirements are to ensure that the person with a disability can communicate with, *receive information from, and convey information to*, the covered entity (*emphasis added*). Covered public entities must provide auxiliary aids and services when needed to communicate effectively with people with disabilities. Auxiliary aids and services include a wide variety of technologies including accessibility features in electronic content and electronic and information technology that is accessible and interoperable with assistive technology such as screen readers. To be accessible and interoperable with assistive technology, online content must meet accessibility standards such as the Web Content Accessibility Guidelines (WCAG) 2.0 level AA.

To meet the ADA's requirements for equal program access and effective communication, online content must be accessible to individuals with disabilities. Please note that the only alternative to making online content fully accessible is to provide an alternative accessible way for citizens with disabilities to use the programs or services. However, there really is no alternative that will provide an equal degree of access in terms hours of operation and the range of options and programs available. For example the offer of human assistance via telephone during work hours would not provide equitable access and would create yet another set of potential access barriers for individuals with certain types of disabilities.

To highlight the issue of inaccessible online voter registration systems, the American Civil Liberties Union (ACLU) and the Center for Accessible Technology published a report that describes widespread access barriers with online voter registration websites. See: https://www.aclu.org/sites/default/files/field_document/021915-aclu-voterregonline_0.pdf

Most recently, the ACLU and others filed suit against New York claiming that the state provides eligible voters with quick, convenient, and confidential online ways to register to vote or to change their names or addresses for voting. However, those same opportunities are denied to eligible voters with disabilities because the online voter registration system is inaccessible. For the case filing see: <https://www.aclu.org/legal-document/eason-v-new-york-state-board-elections-complaint> While this case is still pending, a stipulation agreement was finalized in August of 2016 with a list of website coding and structure changes that would be made by the end of August and mid-September to increase the level of accessibility in the short-term to support access to the voter registration system prior to the November election.

What are the legal requirements for polling place accessibility?

Polling places are found in a variety of facilities, such as libraries, schools, and fire stations, or churches, stores, and other private buildings. The ADA requires that public entities ensure that people with disabilities can access and use their voting facilities. The ADA's regulations and the ADA Standards for Accessible Design set out what makes a facility accessible and should be used to determine the level of accessibility at any facility being considered for use as a polling place. The Justice Department's [ADA Checklist for Polling Places](#) | PDF provides guidance for determining whether a polling place meets ADA accessibility requirements. An additional Justice Department publication, [Solutions for Five](#)

[Common ADA Access Problems at Polling Places | PDF](#), illustrates suggested temporary solutions for several common problems found at polling places.

For example, if parking is provided at a polling place but there are no accessible parking spaces, election administrators can create temporary accessible parking by using traffic cones and portable signs to mark off the accessible spaces and access aisles. Portable ramps can be added if needed. If temporary measures will not fix an access barrier, and election offices are unable to make permanent modifications to fix a polling place access barrier, then the election office must look for an alternative, accessible polling place.

Under the ADA, jurisdictions must select polling sites that are or can be made accessible, so that voters with disabilities can participate in elections on the same terms and with the same level of privacy as other voters. When an election office is unable to identify or create an accessible polling place for a particular voting precinct or ward, election administrators may instead satisfy ADA requirements by using an alternative method of voting at the polling place. While absentee balloting can be offered to voters with disabilities, it cannot take the place of in-person voting for those who prefer to vote at the polls on Election Day. Any alternative method of voting must offer voters with disabilities an equally effective opportunity to voting in person.

For example, if the only suitable polling site in a precinct is an inaccessible building and state law allows, election administrators may provide "curbside voting" to allow persons with disabilities to vote outside the polling place or in their cars. In order to be effective, however, the curbside voting system must include:

- signage informing voters of the possibility of voting curbside, the location of the curbside voting, and how a voter is supposed to notify the official that she is waiting curbside;
- a location that allows the curbside voter to obtain information from candidates and others campaigning outside the polling place;
- a method for the voter with a disability to announce her arrival at the curbside (a temporary doorbell or buzzer system would be sufficient, but not a telephone system requiring the use of a cell phone or a call ahead notification as not all voters have cell phones and cell phone service is not always reliable in all areas);
- a prompt response from election officials to acknowledge their awareness of the voter (meaning sufficient poll worker staff must be trained and available to respond quickly even during busy times);
- timely delivery of the same information that is provided to voters inside the polling place; and
- a portable voting system that is accessible and allows the voter to cast a ballot privately and independently.

Curbside voting is permissible only under the limited circumstances described above.

What are the legal requirements for voting system accessibility?

The Help America Vote Act (HAVA) requires jurisdictions conducting federal elections to have a voting system (e.g. the actual voting machine) that is accessible at each polling place. (Some states mirror this requirement for accessible voting machines in state and local elections; others do not.) HAVA requires that the accessible voting system provide the same opportunity for access and participation, including privacy and independence that other voters enjoy. HAVA specifically identifies the use of a "direct recording electronic voting system or other voting system equipped for individuals with disabilities" as a way of complying with the requirement for an accessible voting system.

This reference to "direct recording electronic voting systems" is an important reminder that the HAVA requirement for one accessible voting machine per polling place was premised on

the assumption that fully electronic (paperless) voting would be a readily achievable solution to providing an accessible voting machine. However, security concerns raised subsequent to the passage of HAVA led state and local election officials to near total rejection of paperless electronic voting systems and a return to marked paper ballots across the country. This reversion back to paper ballots has created a set access barriers that have proven doggedly difficult to resolve to make both private and independent voting a reality for voters with disabilities.

Why are paper ballots so difficult to make accessible?

To be accessible, a voting system must support all three parts of the voting process, marking the official ballot (selecting vote choices), verifying the official ballot (verifying the vote selections on a marked ballot) and casting the official ballot (getting it to the place where it will be counted). When the official ballot is a paper record, there are daunting challenges to providing access to the verification and casting parts of the vote process.

Most voting systems that use a paper ballot utilize some sort of ballot marking device as their HAVA required accessible voting machine. Ballot marking devices utilize an electronic interface that allows voters with disabilities to mark the paper ballot using a wide range of input and output access features that all work in a digital environment. Touchscreens, tactile keypads and other alternative input devices like voice recognition or switch input can be used to control the electronic interface, navigate through the ballot, and select vote choices. Speech (with volume and speed control), large text size, high contrast text, and synchronized speech and text can be provided as output access features. All of these input and output access features enable a wide range of voters with various disabilities mark a paper ballot privately and independently.

Ensuring accessible verification of a marked paper ballot is the greater challenge. Verifying print on paper requires the print (or some encoding of the marked vote selections) to be converted back into digital form. This digital information must then be presented to a voter with a disability in an accessible output mode along with accessible input navigation and control so they can verify the marked paper ballot. This requires some form of scanning of text and/or codes that must be done in a way that does not require voters to manually handle the paper ballot (as that creates yet more access barriers for individuals with motor disabilities).

Ensuring accessible paper ballot casting is an equally vexing challenge. Once a paper ballot is marked and verified, to be truly accessible there must be a way to cast the ballot using the electronic interface with the input and output access features. This requires some kind of automatic paper handling mechanism that is controlled through the electronic interface.

Ballot marking devices designated as the accessible voting system in a polling place will typically provide a reasonable degree of accessibility for marking a ballot. Almost no ballot marking devices currently deployed provide an appropriate degree of access for verification and casting.

What access requirements apply to vote by mail?

It seems clear that HAVA did not anticipate the transition away from polling place voting to vote-by-mail or other remote voting options that do not utilize a "polling place" when it specifically required one accessible voting system per polling place. However, the ADA requirements for equal access to programs and services and effective communication are applicable to all voting by mail – when it is the main voting system used by a jurisdiction or when it is limited to absentee voting.

Vote by mail done with paper ballots mailed to the voter and mailed back might be the most inaccessible voting system in use today as it provides no access features for marking, verifying or casting a ballot. Certainly some individuals with disabilities will be able to receive and open a mailed ballot, then mark and verify the ballot, and then mail back/cast a paper ballot privately and independently. But since each of those steps requires significant visual and motor skills, a large number of voters with disabilities (perhaps even a majority) will be unable to vote by mail using paper ballots without sacrificing privacy and independence.

Jurisdictions that use vote by mail as the core voting system must still comply with the ADA's requirements for equal program access and effective communication. Jurisdictions that only offer an accessible voting machine at a vote center as an alternative to inaccessible mailed paper ballots have likely created a situation with inequitable access. Voters with disabilities must travel to a vote center to vote privately and independently whereas similarly situated non-disabled voters can vote privately and independently from home. Recent court decisions seem to clearly indicate that this would not meet the ADA requirements for equal program access and effective communication (see more discussion in remote ballot marking systems below).

<http://www.leagle.com/decision/In%20FDCO%2020160512B63/HINDEL%20v.%20HUSTED>

Minimally a vote by mail system should offer an accessible digital version of the ballot to provide some level of access to marking the ballot privately and independently. The digital file can be delivered via mail or can be delivered electronically. If a voter with a disability has their own appropriate technology that supports interacting with a digital ballot file, they should be able to mark their ballot privately and independently. While the voter will need to print the ballot they marked electronically (and may be unable to verify it unless they have scanning technology) and will need to manually mail the marked paper ballot back to cast their vote (which they may be unable to do privately and independently) – this still provides more access than only a mailed paper ballot.

Do remote ballot marking systems provide accessibility?

Remote ballot marking systems can and should provide accessibility similar to the delivery of an accessible digital file as described previously. Remote ballot marking systems provide an electronic interface that allows a voter to mark their ballot using either access features built into the application and/or the voter's own assistive technology provided the application is developed in conformance with recognized access standards, i.e. the Web Content Accessibility Guidelines (WCAG) 2.0, <http://www.w3.org/WAI/WCAG20/glance/>.

However, most remote ballot marking systems stop when the ballot marking process is complete and require the voter to print the marked ballot and returned it by mail. As a result, remote ballot marking systems typically have the same access barriers as voting by mail using a digital ballot. They do however have the advantage of providing an electronic interface with some built-in access features for voters with disabilities who do NOT have their own technology and assistive technology to use at home. If the security concerns could be resolved and a marked ballot could be left in digital form and returned electronically, the remote ballot marking system would be able to offer a truly accessible voting process.

Remote ballot marking devices have been the focus of recent litigation to ensure accessibility is available to voters with disabilities. The highest profile case to date was decided in February 2016 by the United States Court of Appeals for the Fourth Circuit in National Federation of the Blind et al. vs. Linda H. Lamone et al. This decision held that Maryland's absentee voting program which requires voters to mark their ballots by hand,

denies individuals with disabilities who cannot hand mark their ballots, meaningful access to absentee voting in violation of the ADA and the Rehabilitation Act. The American Bar Association provides a summary of the case and a link to the full ruling at <https://apps.americanbar.org/ababoard/blog/blogpost.cfm?threadid=32842&catid=14913>

More recently, a United States District Court in Ohio ruled that the immediate implementation of proposed ballot marketing tools (in time for the 2016 general election) without first complying with Ohio's certification requirements would be a fundamental alteration of the Ohio voting system and thus was not required under the ADA. This May 2016 decision relied heavily on the Maryland ruling and affirmed that providing only the option of hand marking absentee paper ballots was discriminatory under the ADA. However, the fundamental alteration exclusion of the ADA provided relief in this case and Ohio was not required to bypass the state's voting system approval process to quickly deploy a remote ballot marking system as a reasonable accommodation. The court concluded the ruling by encouraging "*both Plaintiffs and the Secretary of State to continue to work on this issue and determine if such software could be implemented for future elections*". The full case decision can be found at <http://www.leagle.com/decision/In%20FDCO%2020160512B63/HINDEL%20v.%20HUSTED>.

This recent spate of litigation on remote ballot marking systems suggests that providing accessibility for vote-by-mail and absentee voting will be a critical issue for all voting jurisdictions consider carefully for future elections especially as more and more states increase usage of mail-in and remote voting options.

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