

**New York State
HAVA Implementation Task Force
Minority Report
In Response to State Implementation Plan**

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INTRODUCTION

The Help America Vote Act of 2002 (“HAVA”) holds great promise to improve election administration in New York State. However, unless the law is properly implemented there is great peril that decades of long fought reforms to enfranchise the state's diverse populations will be thwarted at the polls. Peter S. Kosinski, Deputy Director of the State Board of Elections, acting on his own putative authority, issued a State Implementation Plan (“SIP” or “Plan”) pursuant to section 254 of HAVA.²

For the reasons stated herein, several members of the Task Force now find it necessary to issue this minority report to address many issues not reached by the Final State Implementation Plan.

This report is necessary by the serious deficiencies in the HAVA Implementation Task Force process noted already by many advocates and members of the Task Force itself. These defects are compositional and procedural. The composition of the Task Force fails to represent adequately the diverse citizens of New York State, especially those racial, ethnic and language minority communities protected under the Voting Rights Act who were entitled to representation as “stakeholders” on the Task Force pursuant to Section 254 of HAVA. Nor is the Task Force sufficiently diverse in terms of gender or geography.

Procedurally, the Task Force was prevented from playing any significant role in the preparation of the SIP. Mr. Kosinski refused to even convene the Task Force to consider the draft he authored. No doubt, one consequence of the closed drafting process is the lack of specificity that pervades the SIP. While the Plan reiterates HAVA’s requirements and frequently speaks laudably of New York State’s commitment to comply with the same, the Plan includes few details about how New York’s state and local election officials will, in fact, implement these requirements to improve our election process. This essential failure to articulate a true plan of action threatens to leave important goals unmet, or at the very least to leave too many items to the sole discretion of the staff of the New York State Board of Elections (the “State Board”) without public comment or participation. The Plan also failed to identify numerous areas where implementation of HAVA will require state implementing legislation, and the SIP failed to endorse or advance necessary legislation. In sum, the Plan is no plan at all.

² Mr. Kosinski never presented the SIP to the HAVA Task Force or to the State Board of Elections for approval. Despite this, the SIP was submitted unilaterally by Mr. Kosinski to Federal officials and the document purports to bind the State Board to a HAVA implementation plan. Given that Mr. Kosinski has no unilateral authority under HAVA or state law to make policy decisions on behalf of the State Board of Elections, this is troubling. Ironically, the explicit recognition of Mr. Kosinski’s SIP that the State Board of Elections is the responsible entity for HAVA implementation serves to underscore the dubious nature of Mr. Kosinski’s exercise of authority to promulgate policy for the State Board of Elections. *See, e.g., Saratoga County Chamber of Commerce, Inc. v. Pataki*, 2003 N.Y. Slip Op. 14925 (June 12, 2003).

This report focuses on seven key areas of HAVA that are not adequately addressed by the SIP: (1) voting system standards; (2) provisional voting; (3) the creation of a computerized statewide voter list and related voter identification requirements for voters who register by mail; (4) new voter identification requirements; (5) voter education and election worker training; (6) voters' bill of rights; and (7) administrative complaint procedures and judicial review.

It is our hope that in releasing this report, we will produce a consensus that leads to the recommendations of this report becoming part of HAVA implementation in New York State.

I. VOTING SYSTEM STANDARDS

Replacing Lever Voting Machines

HAVA requires that all voting systems³ meet certain requirements by the first election after January 1, 2006, including that all lever machines are replaced by that time if a state chooses to receive federal funds under Section 102 of HAVA for this purpose. These requirements provide New York and other states an opportunity to improve both the accessibility and the accuracy of our elections through new technologies and improved administration. The SIP fails to provide any details to indicate that New York State will take full advantage of this opportunity.

With respect to the responsibility to replace the voting machines, the SIP merely reflects the status quo and thus fails to propose improvements to New York's system of machine purchases and maintenance. In relevant part, it states that *"Each county board of elections is responsible for implementing the replacement voting system in their county, however, the State Board is leading the statewide effort for replacement and is therefore ultimately responsible for meeting this performance measure."* Current state law allows and encourages towns, villages, and a small number of counties to select and purchase their own machines, albeit from among those certified by the State Board. The status quo thus does not facilitate the selection or purchase of a single, uniform voting system for the whole state.

The SIP should not only include the Task Force's proposed changes to existing state laws to allow for county ownership of the voting machines, but also should articulate a more proactive, central role for the State Board to ensure uniformity across the state while simultaneously affirming the independent, state constitutionally derived powers of local election commissioners. The SIP should call for all polling places to offer the same uniform, integrated voting systems to all voters. This will ensure uniformity of the voting experience and the same quality of service to all voters. Such a role for the State Board would better facilitate collective purchasing of the machines in larger quantities to achieve a better per unit cost from a vendor. It would also minimize long-term repair and upkeep costs, allow poll workers and maintenance workers to be trained on the same machinery and software, ensure uniform public education through common media outlets, and permit a broader interchange of equipment and personnel.

Certification Process

³ Under HAVA, the term "voting system" is defined, in relevant part, as

The total combination of mechanical, electromechanical, or electronic equipment (including the software, firmware, and documentation required to program, control, and support the equipment) that is used. . .to define ballots; cast and count votes; to report or display election results; and to maintain and produce any audit trail information; and the practices and associated documentation used . . . to maintain records of system errors and defects . . . and to make available any materials to the voter (such as notices, instructions, forms, or paper ballots).

42 U.S.C. § 15481(b)(1).

The selection process for new voting machines in New York State must be free of partisan lobbying and favoritism. Instead, the process should focus squarely on the quality, features, and cost of the machines and software under consideration. The Assembly has passed legislation that would appoint an independent advisory panel to review and recommend appropriate voting machine specifications for New York State⁴. In addition, under the Assembly legislation, the State Board would select a single voting machine through a competitive bidding process that includes meaningful opportunities for public comment. The Task Force should endorse these proposals and include detailed language to that effect in the final SIP. In addition, the final SIP should establish that any voting machine contracting process should be transparent and open to the general public through public forums and hearings.

Full Face Ballot Requirement

The State Board of Elections, acting through an advisory committee, should undertake a comprehensive analysis of New York’s ballot configuration requirements. Emphasis should be placed on assessing New York’s full face ballot requirement. The results of such study should be forwarded to the legislature along with specific legislative recommendations. Notably, the SIP does not address the full face ballot issue, despite the fact the issue was raised often at public hearings and was frequently discussed at Task Force meetings. At very least, an honest, comprehensive assessment of New York’s ballot configuration rules is necessary to ensure that New York’s election modernization efforts are not hindered by laws written in an era before electronic voting machines. Assembly Bill 8847 mandates an assessment of ballot configuration laws.

Accessibility for Voters with Disabilities

The SIP includes a brief discussion of the State Board’s intentions to enhance accessibility of voting systems for voters with disabilities, but lacks the specifics necessary to ensure meaningful reforms. Specifically, the SIP states “*the state will engage in statewide efforts to ensure accessibility to voting systems and all procedures directly connected to the election process.*” In addition, the Plan indicates three steps that it will take to improve accessibility, namely (1) replacing the lever voting machines with “accessible” voting machines or rendering existing machines more accessible with “accessible devices” by the 2004 federal election, (2) “encourag[ing] public-private partnerships to enhance the voting participation of all voters with disabilities,” and (3) requiring county officials to report on the outcomes of city and town inspections of polling places to determine compliance with state and federal laws and regulations on physical accessibility. While laudable, these steps are both overly vague and inadequate to ensure truly enhanced accessibility.

The SIP should better address five critical areas that must be addressed if New York State is serious about improving accessibility to voters with disabilities.

- The SIP should state in much greater detail the types of “accessible devices” and other alterations to existing voting systems the State Board will require to improve accessibility. The aforementioned legislation passed by the Assembly

⁴ Assembly Bill 8847.

specifically requires that at least one voting machine in every polling place include human voice audio voting, a handheld voting device, and sip and puff voting technology. The SIP should identify these and other specific adaptive technology and interfaces that the State Board will mandate for New York State's machines.

- The SIP is entirely silent concerning the role, if any, that representatives of the disability community and voters with disabilities will play in selecting, reviewing, testing, and commenting on the voting machine technologies available in New York State prior to their final selection. The State Board of Elections should provide for specific procedures to obtain ongoing feedback from disability advocacy groups, such as the New York State Independent Living Center ("NYSILC"), and voters with disabilities on the different technologies being considered for certification or purchase. New machine rollout should also include extensive consumer use surveys executed throughout the rollout process so that New York can adjust the voting system elements as conditions in the field and needs of voters become known through experience with the new technologies. In addition, the SIP should expressly state that New York will adhere to the ADA standards adopted in the Assembly legislation (A.5473-A), as well as all other applicable federal and state standards.
- The SIP should indicate that the State Board will apply the definition of "disability" included in the New York State Human Rights Law to determine who is covered by the disability rights mandates of HAVA.⁵
- To ensure polling place accessibility it is not enough for the State Board to require counties to pass on information on inspections gathered by cities and towns. Self-reporting of this kind is notoriously ineffectual. Such a passive role for the State Board will lead only to noncompliance and incomplete reporting by some localities. Under New York election laws, the State Board has broad powers and the *duty* to enforce the election laws and expeditiously investigate any violations of the laws, including by appointment of special investigators, issuance of subpoenas, inspections, judicial proceedings, and other mechanisms. *See* N. Y. Elec. L. §§ 3-102, 3-104, 3-107. The SIP should expressly state that the State Board will implement an enforcement program specifically to monitor and enforce polling place accessibility requirements throughout the state. The SIP

⁵ "Disability" under the New York State Human Rights Law means:

(a) a physical mental or medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such impairment or (c) a condition regarded by others as such an impairment

N.Y. Exec. Law § 292(21). This definition is broader than that contained in the Americans with Disabilities Act (ADA) in that it does not require that a limitation be "substantial" or that it be a limitation to a "major life activity."

should include specifics as to the personnel and other resources that the Board will devote to this program. Specific amounts of HAVA monies should be earmarked for targeted inspection of polling sites for accessibility, directly or through contracts with appropriate organizations. In addition to monitoring county reports on the accessibility of polling sites, funding should also be earmarked for identifying alternate, accessible or adaptable polling sites within the immediate area of any inaccessible sites that cannot be readily rendered accessible. The SIP should also indicate that the State Board will produce a comprehensive guide to polling place accessibility.

- The SIP should provide details as to how the State Board will identify both public and private resources and the specific ways in which each of those resources will be used in order to “enhance the voting participation of all voters with disabilities.” These should include NYSILC, all independent living centers across the state, vocational rehabilitation agencies, the State Advocate’s Office, protection and advocacy organizations, all officials elected to county, local and statewide elected office. Part of the effort should include paid and public service announcements in various languages, distributed through all newspapers used for any official state notices and significant non-English language papers, and all of the larger radio and television broadcast media in the state, as well as on the Board’s website. Clear and explicit written and recorded information on the voting systems should be widely distributed to voters and organizations that represent voters with special needs and voters whose primary language is other than English. Publicity should include information about the Voters’ Bill of Rights, the right to accessible polling places, the use of any new voting systems including all of its adaptive equipment, updated information about newly accessible polling sites, the procedure for obtaining absentee ballots, and the means of filing complaints about any violation of voters’ rights.

Accessibility for Voters with Limited English Language Proficiency

Section 301 of HAVA requires that New York State’s voting systems be accessible to language minorities and specifically incorporates the Language Assistance Provisions of the Voting Rights Act (*i.e.*, Section 203). 42 U.S.C. § 15481(a)(4). Under Section 203, certain counties must provide translated ballots, voter registration forms, voting instructions, and all other voting materials and provide interpreters to assist limited English proficient voters. After Census 2000, language assistance is required under the Voting Rights Act, and now also HAVA, in the following New York counties and languages: Queens: Korean, Chinese and Spanish; Kings and New York: Chinese, Spanish; Bronx, Nassau, Suffolk and Westchester: Spanish.

Given the opportunity presented by new voting machine technology, translating the ballot into numerous languages should require little added expense or difficulty. The SIP should therefore do a lot more than the minimum required under the Voting Rights Act. Multiple language options should be made available on a statewide basis. The SIP simply refers generally to complying with the Voting Rights Act and indicates that the State Board’s role is simply to provide “assistance and cooperation” with the county boards. The State Board must and can do

much more to provide alternative language accessibility to New York State's many citizens with limited English proficiency and the SIP should reflect that responsibility.

First and foremost, the SIP must articulate the State Board's plan to address the numerous existing deficiencies in the state's current provision of language assistance under Section 203. Specifically, the SIP should outline a program for the State Board to address any instance of mistranslated ballots and failures to provide voters with translated materials or interpretation in the required languages at polling places.

Second, the SIP should identify ways to expand language assistance beyond the minimum requirements of the Voting Rights Act. The Board should develop a specific methodology to determine which languages and counties to include. At a minimum, voter registration forms, instructions in how to vote/operate voting machines, and ballots should be translated into Bengali, Urdu, Russian and Haitian/Creole in New York City. Also, the state should provide assistance for Spanish-speaking voters in certain counties in upstate New York not currently receiving such assistance. The SIP should also mandate that anything written, presented in auditory form or displayed in English must be displayed, at least, in Spanish, Chinese and Korean for voters with both disabilities and limited English language proficiency.

Third, the SIP should indicate a firm commitment to certify and purchase only those voting machines that may be easily equipped to comply with expanded language requirements in the future.

Voter-Verifiable Audit Trail

The SIP does not address the issue of audit trails produced by the new voting machine technologies, an important issue for New York's future. A secure, anonymous "voter-verifiable" physical record of each vote diminishes security concerns over electronic election counts and helps to ensure the integrity of elections. A voter verifiable-audit trail allows officials to double-check results if discrepancies or other concerns arise. Some advocates for voters with disabilities have expressed serious concerns that any requirement of a voter-verifiable audit trail would inevitably raise the cost of machines and thus reduce the resources available to ensure fully accessible machines. However, the need for some voter-verifiable check on the potential for fraud or malfunctions with the computerized machines is undeniable. Accordingly, the SIP should make clear that the State Board will require that any new voting system that is certified or purchased in New York State is technologically advanced, optimally accessible for voters with disabilities and language minority voters, and capable of producing a voter-verifiable paper audit trail.

Versatility of Machines

The SIP should state expressly that the State Board will ensure that any new voting systems certified or purchased in New York State must be versatile. For example, voting machines should be able to be programmed to accommodate instant run-off voting or cumulative voting. While these modes of voting are not used in New York presently (and this report takes no position on the appropriateness of such voting tabulation methods), it is clear that any

machine approved for use in New York should be sufficiently flexible so as to not foreclose future options.

Security

Election officials must have access to all information necessary to verify the integrity of electronic voting systems. State and independent experts should review the hardware, source-code and software of any voting system to test its security and to assure the public of the system's integrity. Additionally, the SIP should insist that ballot preparation, all facets of user programming and the counting of election results remain in public hands. HAVA must not become a gateway to the privatization of the electoral process.

II. PROVISIONAL VOTING

Although New York State is fortunate to already have in place a system of provisional voting known as affidavit balloting, the HAVA implementation process offers an opportunity to improve New York's system.

The SIP should endorse legislation pursuant to which all affidavit ballots cast by voters who are not currently registered will be processed as voter registration applications. At present, when a voter votes by affidavit ballot and the vote is not counted because the voter does not live in the jurisdiction or is not registered to vote, the board of elections notifies the voter of this fact by mail and sends the voter a registration application. This process should be consolidated to maximize voter registration and to conserve public resources. If a voter is not registered in New York State or is registered outside the county in which that person is voting, the affidavit and ballot envelope should be considered a registration form by boards of elections, and the voter should be registered in accordance with state law. Of course, the current practice of automatically updating the voting records of a voter who already lives in the jurisdiction but who voted at a new polling place should continue.

III. COMPUTERIZED VOTER REGISTRATION LIST

New York Voter Registration List

The creation of an official, uniform and nondiscriminatory statewide computerized voter registration list that is centralized and interactive marks a major departure from established voter registration procedures now in place in New York's sixty-two counties.

Unfortunately, the SIP is distressingly vague as to how the State Board will meet the substantial new responsibilities associated with a statewide voter registration list. With no detail, the Plan merely reports that the State Board will “*implement a statewide voter registration list . . . define functional requirements, roles and responsibilities of carrying out the functions of voter registration . . . [and] determine, define and establish technical and functional requirements. . .*” The Plan also indicates that the State Board will establish procedures to use the database of the New York State Department of Motor Vehicles, and access the Social Security Administration and other statewide databases.

The SIP should endorse Assembly Bill A.8842 which provides a detailed blueprint for a statewide voter registration list. Further, if the State Board is truly committed to “enhancing the administration of voter registration and the election process for the citizens of New York,” then the SIP must incorporate the following elements:

- The SIP must clearly outline the process for assembling the statewide voter registration list from the existing lists so that the integrity of the constituent data is preserved. To such end, the SIP should at least minimally identify the relevant individuals responsible for this process, a description of the database models to be considered, and the methods by which the system will be initially tested. Just as important, the SIP must do more than discuss transitioning data, but must also address transitional training, monitoring and assistance to be provided to the local election officials who will use the data.
- The State Board must be committed to issuing sufficiently clear statewide standards for county election officials to follow as they interact with the statewide list in order to avoid non-uniform treatment of voter registration applications or inconsistent list maintenance procedures. We note, however, that while the State Board must take a more substantial role in setting uniform standards, it is imperative that the powers entrusted to local boards of elections related to voter registration not be infringed. The State Board can and must, in this context, ensure that the voter registration list contains the names and registration information of every legally registered voter in the state, and that no voter be removed from the list without full compliance with the “notice and opportunity to correct” provisions mandated in the National Voter Registration Act.
- The final SIP must designate a specific network of state databases that the State Board will access to verify a registrant’s identity and eligibility to vote in a certain jurisdiction. The Plan’s vague reference to “other statewide databases” is insufficient. Instead, the document should call on the State Board to design a computerized statewide registration system that can access data from the DMV and other agencies where voter registration is offered under the National Voter Registration Act (NVRA), Medicaid/Medicare offices, other social service agencies, judicial and correctional agencies, public education, financial aid, small business and disability services offices. A system of this reach can best accomplish HAVA’s goal of producing clean and accurate voter lists without creating new and unjustifiable barriers for eligible voters.

☑ **Driver's License and Social Security Numbers on Voter Registration Forms**

The SIP notes HAVA's requirement that new registrants provide a driver's license or the last four digits of their social security numbers, and indicates that the State Board will access the databases of the Department of Motor Vehicles and the Social Security Administration to verify voter registration identification. Regrettably, the Plan offers no guidance to county boards of elections or notice to the public as to the treatment of voter registration forms with erroneous or missing driver's license or social security numbers. Such guidance and notice is essential, given the fact that such data is vulnerable to errors either in transmission or through a failure to integrate the data sufficiently with the relevant databases. This may produce difficulties in matching database records, and thus leave many new voters unregistered.

As an initial matter, the SIP must make clear that a registrant's failure to provide a driver's license or partial social security number will *not* cause a rejection of the registration application. Instead, the state will be required to assign the registrant a unique identifying number that will be used in the statewide voter registration database.⁶ The State Board must in unequivocal terms direct that county boards of elections follow the proper procedure and disenfranchise no citizen for failure to provide a driver's license or partial social security number.

The SIP should also provide guidance as to how county boards of elections are to use this broad network of databases. Where, for example, a registrant provides her name and date of birth but only a partial or incorrect driver's license number, the county board should access the DMV database (and all additional databases integrated into the statewide system) to correct the driver's license number and continue processing the application for voter registration. Under most circumstances, rejecting a registration without a valid driver's license or social security number would be a violation of HAVA.

The State must ensure that county and local election officers do not misinterpret the law's requirements, and have sufficient access to an extensive pool of state databases such that voter information can be properly matched and voters registered.

⁶ Senator Dodd, the chief Senate sponsor of HAVA, made clear the states' responsibility to implement HAVA in a manner that preserves voters' access to registration, and indicated the drafters were careful to ensure such flexibility:

[N]othing in this section [i.e., § 303(a)(5)(A)] prohibits a State from accepting or processing an application with incomplete or inaccurate information. Section 303(a)(5)(A)(iii) specifically reserves to the States the determination as to whether the information supplied by the voter is sufficient to meet the disclosure requirements of this provision. . . . Moreover, nothing in this section prohibits a State from registering an applicant once the verification process takes place, notwithstanding the fact that the applicant provided inaccurate or incomplete information at the time of registration . . . or that the matching process did not verify the information.

Floor Statement of Connecticut Senator Christopher J. Dodd, October 16, 2002, available at <http://www.congress.gov/cgi-lis/query/Z?r107:S16OC2-00>.

Again, the SIP should endorse Assembly Bill 8842.

IV. VOTER IDENTIFICATION REQUIREMENT

The disproportionate impact of HAVA's new ID requirements is dramatically illustrated by the vast demographic difference in the state's population that hold driver's licenses, the key form of ID called for under HAVA. In New York City only 53% of those 18 and over possess a license, while outside of the City that number jumps to 93% of the population over 18 years of age.

The SIP states that New York State is "*strongly committed to diminishing the number of persons required to provide ID when they vote. . . .*" Unfortunately, the Plan is vague as to how the State Board will accomplish that goal. The entire discussion of this critical issue barely exceeds one page in the 51-page document. The SIP must outline a detailed plan to reduce the onerous impact of the new voter identification requirements, as the Assembly has done in passing its election reform legislation that is now in the Rules Committee of the Senate. Further, the Plan's language appears to undermine attempts to ensure uniform implementation of HAVA's ID requirements by recommending that counties will remain responsible for all related aspects of voter registration, "*include[ing], but not . . . limited to, the receipt and processing of voter registration applications*"

First, the HAVA Task Force should establish a clear, *inclusive* list of acceptable forms of identification for county election officials and others to adopt. The relevant legislation passed by the Assembly (A.8842) includes such a comprehensive list that should be embraced by the Task Force. The SIP should also make clear that current and "valid photo identification" shall include any form of identification containing a photograph of the voter, including non-driver's identification, valid student identification cards, and credit or automated teller cards. A "current utility bill, bank statement, government check, pay check, or other government document" should include a full list of acceptable public documentation as is laid out in detail in the Assembly proposed legislation.⁷

Second, county boards of elections should be required to send to each affected first-time voter who registers by mail a postage-paid mailer in which the voter may send a copy of his qualifying identification to election officers in advance of Election Day. This or a similar pre-election procedure would greatly reduce the potential confusion and threats to voters' rights at the polls on Election Day. The SIP should include this or similar requirements.

⁷ These forms of acceptable identification should include but not be limited to: voter registration cards, Electronic Benefit Transaction (EBT) cards, public housing lease and rent statements and agreements, including rent statement agreements provided pursuant to subsidized housing programs, public housing identification cards, Social Security Administration check statements, student identification cards or tuition statements or bills from public colleges and universities, insurance cards issued pursuant to government administered or subsidized health insurance programs, copies of correspondence from a federal, state or local government, bills from a federal, state, or local government, tuition bills and statements from public colleges and universities, discharge certificates, pardons, or other official documents issued to the voter in connection with the resolution of a criminal case, indictment, sentence or other matter, in accordance with state law, senior citizen discount cards issued by public transportation authorities or providers, or identification cards issued by government homeless shelters and other temporary or transitional housing facilities.

Third, HAVA's new voter identification requirements only apply to first-time voters who register *by mail*. Accordingly, the Task Force should establish that only those voters who actually mail in their registration applications shall be subject to these requirements. Voter registration drives that collect registration applications from new voters *in person* and then deliver these applications to election officials by hand or even by mail should not be subject to these requirements under HAVA. This is true even if mail-in registration forms are used for these registration drives. If the voter registers in person, that should be sufficient to serve the letter and spirit of HAVA to reduce voter fraud, regardless of how the application form reaches the board of elections. The SIP should clarify this definitional question for county boards.

Fourth, the SIP should eliminate the requirement for ID checks for certain voters who move between counties in the state. Voters who move within the same "jurisdiction" are exempt from the ID mandate required of first-time voters registering by mail. With the creation of a single statewide database of registered voters, "jurisdiction" should clearly be defined to mean New York State. This will prevent voters who move from one county to another from being subject to unnecessary ID checks.

V. VOTER EDUCATION AND ELECTION WORKER TRAINING

The SIP includes significant discussion of the need for improved voter education and election worker training. The Plan envisions a "*uniform, statewide comprehensive training program for poll workers and election officials*," new strategies to recruit election workers, and the development of a voter outreach/education campaign. The SIP should include additional details of the steps that the State Board will take to educate the voters and train election workers more fully.

Voter Education

With respect to the new voting machines, mail and media will help New York voters learn the voting system, but practice on the actual machines will help a great deal more. New York voters have been voting on the lever machines for decades now, computerized machines may prove to be a challenge to the voters. Once the state certifies or procures these new machines, the State Board should sponsor demonstrations throughout the state and each county should be required to hold demonstrations in cities and towns to ensure that voters will be familiar with the new machines prior to Election Day.

Currently, it is illegal to ask voters for ID at the polls. It needs to be made clear to voters that certain first-time voters registering by mail may be required to show ID at the polls if they do not provide such ID by mail or otherwise meet a HAVA exception. Clear, plain language information listing voters' rights when confronted with an ID check should be made available at the polls. But the State Board should also ensure that such information is also published in all newspapers used for official state notices, and by all of the larger radio and television broadcast media outlets in the state. The SIP should outline a detailed plan for this area of voter education.

Election Worker Training

The proper measure of success is not how many poll workers and inspectors are trained but instead how many are qualified to work on Election Day. The SIP should include not only a detailed statewide training program, but also a uniform testing requirement for all election workers. This should be a closed-book examination as required by section 3-412 (3) of the Election Law. The legislation passed by the Assembly provides a valuable model from which to borrow provisions for inclusion in the SIP⁸.

In addition, the SIP should include plans to produce a training video on Election Day procedures and HAVA requirements for distribution to all poll workers statewide and shown on cable and public access networks. This will also enable the voters to know what to expect at the polls.

Finally, the SIP does not include any discussion about the recruitment, training, or quality control for language interpreters. The SIP should include provisions to ensure that all interpreters are trained and that quality control measures are in place in every county and local jurisdiction.

VI. VOTERS' BILL OF RIGHTS

In the SIP there is no definitive outline or draft of a Voters' Bill of Rights. HAVA requires all polling places to post certain information on Election Day, including but not limited to a sample ballot, instructions on how to cast a provisional ballot, polling place hours, general information on voting rights under state and federal laws, and instructions for first-time voters who registered to vote by mail. A draft of the proposed Voters' Bill of Rights should be provided immediately on the State Board's website to allow for notice and meaningful public comment. The State Board of Elections should, in addition to ensuring the Voter's Bill of Rights is posted in each polling place, request that major news media display or announce these rights as part of their election coverage, and display these rights prominently on the websites of all county boards of elections and of the State Board. In addition to an English version, the state should post translated versions in Spanish, Chinese and Korean, and in other languages not covered by the Voting Rights Act, but spoken by a large number of New York citizens. The final SIP should not only provide a draft Voters' Bill of Rights in its pages, but also outline the details of such plans to disseminate the document to voters.

At a minimum, the Voters' Bill of Rights should include the following provisions and allow for the filing of an administrative complaint with the State Board of Elections to enforce its provisions. The Voters' Bill of Rights should include, but not be limited to the assurance that every voter has a right to:

- a. *non-discriminatory equal access to voting, including the right to vote without being required to furnish any identification or proof of citizenship unless you are a first-time voter in the state who registered through the mail;*

⁸ Assembly Bill 8833.

- b. *you may take any information into the polls with you, but may not engage in electioneering;*
- c. *request and receive a demonstration of proper use of the voting machine prior to voting;*
- d. *request and receive assistance if you cannot read, or operate the voting machine because of a disability, or are visually impaired or otherwise need assistance, and such assistance shall be provided by either a bipartisan team of poll workers who must provide aid without influencing your vote, or from anyone you choose, other than your employer or union representative;*
- e. *if your name does not appear on the list of eligible voters for the election district where you live, you have a right to vote by affidavit ballot at that polling place;*
- f. *if your name does appear on the list of eligible voters, you have a right to vote on the voting machine even if challenged, provided you take the required oath or make the required affirmation;*
- g. *if your name has changed, you have a right to vote on the voting machine after signing a form correcting your name or updating your address if you have changed your name or moved within the same election district since the last general election;*
- h. *register one time and not be removed from the list of registered voters due to failure to vote so long as you reside at the address for which you originally registered;*
- i. *be informed by local election officials before your name is purged from the state's voting records, and be informed of the process for challenging such a purge at least 90 days before the election;*
- j. *be informed of the process for restoring your right to vote after you have served your sentence of incarceration and parole if you lose that right due to conviction of a crime;*
- k. *vote independently and in privacy at a polling place, regardless of physical disability;*
- l. *vote by paper emergency ballot if the voting machine is broken or otherwise not operable when you come to vote;*
- m. *bring a minor into the voting booth with you;*
- n. *demand translation in Spanish, Chinese, or Korean at certain polling places;*
- o. *vote or wait to vote in a manner free of intimidation and coercion, without anyone electioneering or otherwise attempting to influence your vote in the polling place or in any public street within a 100 foot radius of the polling place; and*

p. vote if you are in line when the polls close at 9 pm, or at any other time between 6 am and 9 pm.

VII. ADMINISTRATIVE COMPLAINT PROCEDURE

HAVA requires that states receiving funding to implement this legislation develop procedures for administrative review and alternative dispute resolution of complaints. No express provision is made for state court review of such violations, though such review is not prohibited and is critical. While the SIP provides for such a procedure, it leaves most of the details to the future discretion of the State Board.

The SIP should articulate in detail the complaint procedure to protect voters: (1) administrative complaint review by the State Board, (2) an independent, alternative dispute resolution process, and (3) judicial review in state court of final determinations produced by the administrative complaint process. In addition, the Task Force should encourage the Legislature to authorize the attorney general to investigate and enforce the law as another independent protection of voters' rights.

In the first instance, complaints should be heard by the State Board through an internal review procedure. The key points concerning this first step include timely resolution within 90 days of the complaint being filed, the State Board's provision of a full hearing procedure with costs borne by the Board rather than by the complainant, and detailed plans to ensure access to the complaint procedure for voters with disabilities or with limited English proficiency. All forms and instructions, and any and all written communications with complainants, must be made available not only in English but also in those languages required by sections 4(f)(4) and 203(c) of the Voting Rights Act of 1965 and HAVA. Such materials shall also be made available in a form accessible to the blind and visually impaired.

If the State Board does not issue a final determination within 90 days, then a complaint must be referred under HAVA to an alternative dispute resolution procedure established by the state. Unless the complainant consents to a longer period, this second stage must produce a final determination within 60 days after referral. For this second stage, the State Board should appoint an independent screening committee to select independent, qualified arbitrators or contract with a reputable, independent alternative dispute resolution entity to provide arbitrators. The arbitrator should be granted subpoena power to procure testimony and documents, and the authority to permit depositions to be taken and other discovery to be sought. The parties should be allowed to examine witnesses fully. All expenses involved in administering such proceedings and the arbitrators' fees should be paid by the State Board. As with the initial stage of this process, it is important that all proceedings and communications during the alternative dispute resolution stage be made fully accessible to those who have disabilities or have limited English proficiency.

The third and final stage in the complaint review process is judicial review. All complainants should be notified at several points during the first two stages of the complaint process that they have the right to obtain judicial review of the final arbitration determination in state court. In essence, such review would come as the result of an Article 78 proceeding

brought in New York Supreme Court. The SIP should include a statement of this right, as well as the notification requirement, and a commitment that the State Board will educate voters on this point.

RESPECTFULLY SUBMITTED BY THE FOLLOWING HAVA TASK FORCE MEMBERS:

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New York State Independent Living Center
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Reproduced Letter of Brad Williams to Assemblyman Keith L.T. Wright:

August 28, 2003

Assemblyman Keith L.T. Wright
749 LOB
Albany, NY 12248

Dear Assemblyman Wright:

On behalf of the New York State Independent Living Council, Inc. (NYSILC), we are writing this letter to state our support for your NYS HAVA Implementation Task Force Minority Report. In particular, we support the concerns raised for people with disabilities, especially since this is the primary reason for our participation in the process. NYSILC fully supports the sections of the report that outline concerns related to the Certification Process, Full Face Ballot Requirement, and Accessibility for Voters with Disabilities. I should clarify that while we support a comprehensive analysis of the full-face ballot requirement, the disability community has been unified in the stronger position of eliminating the requirement. It provides people with disabilities greater choice and increased access.

⁹ Please see Mr. Williams' letter to Assemblyman Wright dated August 28, 2003 reproduced following this report indicating his support for this report and raising other issues.

There are three other items in the report that we need to qualify our position on. First, we don't have any official opinion about the Voter-Verifiable Audit Trail at this time. As NYSILC sorts out its position, we want to note two practical concerns. We are truly concerned about the timing of this issue and impact it has on delaying access at the polls for Election Day 2004 and beyond. We are not pleased by this development, as many voters with disabilities have been excluded from the right to vote independently and confidentially throughout the history of voting in this country. We can guarantee that New Yorkers with disabilities will crawl to the polls if needed in 2004 out of protest for the continued denial of our integrated voting rights. As this issue gets resolved, we also do not want to see funds diverted away from the purchase of accessible voting machines and the verification of polling place accessibility. This postponement has already taken away our time; we can't allow it to also take away money for access.

Second, the Computerized Statewide Voter List is slated to use only the NYS Department of Motor Vehicles and the Social Security Administration (SSA) databases, with the suggestion that "other" statewide databases be used as well. We want to reiterate that this has to explicitly include the Medicaid database. A significant number of people with disabilities receive this benefit, including those who do not have a driver's license or non-driver's ID, nor receive SSA benefits. Third, for Language Accessibility, we ask that anything offered to the voter in a written or auditory form be offered in language of choice and available in alternative formats including Braille, large print, or disk.

We thank you for your leadership on this issue. Our community is genuinely excited about the prospects that HAVA provides. As you are aware, the lack of specificity in the state plan submitted to the Federal government makes it difficult for us to identify and communicate tangible benefits to our colleagues or to ensure the promise of HAVA.

Respectfully,

Brad Williams, Executive Director, NYSILC
Christine Zachmeyer and Sharon Shapiro-Lacks, Co-Chairs, NYSILC Election Reform Subcommittee

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