

ASSISTIVE TECHNOLOGY CAN MAKE VOTING A REALITY

Enforcing Voting Rights Laws to Obtain Assistive Technology And Ensure Ballot Access for Persons with Disabilities

Myron is an accountant who is legally blind with significant mobility impairments. After many years working for a major energy conglomerate, he decides in April of 2004 to retire and move to Scottsdale, Arizona to bask in the sun. After establishing his residency, Myron decides to register to vote. He goes to his local motor vehicle department where he is handed a voter registration form. Myron has difficulty as the form is not in Braille. An agency employee assists Myron in filling out the form and he obtains his voting identification card in the mail a few weeks later.

On November 2, 2004, Myron goes to his local precinct to cast his vote. The polling place is located at Forever Sunny High School which has six entry steps to the polling place. Unfortunately, no ramp exists and Myron must be carried up the stairs to the polling place. Myron obtains his paper ballot but cannot read it and requires assistance to cast his vote. Under Arizona law, Myron must be accompanied by two people of opposing party affiliation into the poll booth to assist him. Myron is furious that he cannot vote privately or confidentially, but relents to having the poll workers assist him in casting his vote. After all, he would not want his failure to vote result in that "other candidate" winning the presidential election.

Following the election, Myron decides that enough is enough and that he wants to assert his right to vote independently and privately. He learns that there is a Protection and Advocacy (P&A) program in his newly adopted state and gets through to you when he calls the agency for assistance. How do you, as a P&A attorney or advocate, aid Myron in obtaining the assistive technology (AT) devices he needs to vote independently and confidentiality? Are there federal and state laws you can use to

enforce the right to a ramped entrance or to a ballot/voting machine that uses the latest in AT for the blind?

When first researching Myron's case, you realize that discrimination faced by voters with disabilities is unique. Rather than facing a poll tax or an education test which barred blacks and other minorities from voting through much of our history, voters with disabilities faced physical barriers to the polling place and have been denied participation in the voting process because of an inability to actually read the ballot by virtue of blindness, low vision, or intellectual disability. Historically, the ability and right to vote, for individuals with disabilities, varied from precinct to precinct, county to county, and state to state. According to one source, at least 40 percent of polling places are inaccessible and many do not allow individuals with disabilities to cast a secret ballot.

This article will use the hypothetical case of Myron to review the federal voting laws and anti-discrimination laws that may help Myron obtain the use of AT devices that will allow him to vote independently and privately. To provide further context for the discussion and to take advantage of the expertise of our guest author (see box, p. ...), we will assume Myron seeks to vote in Arizona. Specifically, we will discuss the following federal laws:

- the Voting Accessibility for the Elderly and Handicapped Act of 1984;
- the National Voter Registration Act of 1993;
- the Americans with Disabilities Act of 1990;
- section 504 of the Rehabilitation Act of 1973; and
- the Help America Vote Act of 2002.

We will also look to the laws of Arizona to see what help they might offer Myron in his quest to vote independently and privately.

Several P&A Grants Can Be Used to Enforce Voting Rights

The voting rights issues that come to a P&A agency will most likely fit into one of three broad categories: inability to obtain physical access to the polling place or polling equipment; inability to use the ballot or voting machine due to blindness or visual impairment; and inability to use the ballot or voting machine due to some cognitive limitation.

As we explain under the Help American Vote Act (HAVA) discussion, one of the newest P&A programs was created by the HAVA legislation and is referred to as P&A for Voting Access (PAVA). However, a P&A agency cannot use PAVA funds to engage in litigation to enforce voting rights. Rather, the thrust of PAVA is to provide extensive outreach, education, and technical assistance to voters with disabilities to ensure they are able to register and vote.

If your P&A program is to consider litigation to enforce Myron's right to independent and private voting, you may be able to pursue litigation on his behalf under P&A for the Developmentally Disabled (PADD) if his blindness can be classified as a developmental disability, or under P&A for Individual Rights (PAIR) if Myron is ineligible for services under PADD (e.g., if he has adult-onset blindness). Of course, since resolution of Myron's problems is likely to involve the use of AT, you could probably pursue any remedy, including litigation, using your P&A for AT (PAAT) grant. More than likely, given the high-profile nature of the PAVA outreach and education work, cases like Myron's are likely to come to

your PAVA staff who can refer the case to attorneys or advocates working under the PADD, PAIR, or PAAT grants if the case will require more than negotiation.

Voting Accessibility for the Elderly and Handicapped Act

Congress passed the Voting Rights Act of 1965 to protect every American citizen from racial discrimination in voting, 42 U.S.C. §1973 to 1973aa-6, and, for the first time, addressed the rights of voters who are blind to bring persons of their choice into the ballot box for assistance. *Id.* §§ 1973aa. But it was not until 1984 that Congress first addressed the unique barriers and disparities faced by persons with disabilities when it passed the Voting Accessibility for the Elderly and Handicapped Act of 1984 (VAEHA). *Id.* §1973ee-6(3).

VAEHA generally requires that all polling places for federal elections must be accessible to persons with disabilities and the elderly. *Id.* §1973ee-1(a). However, if it is determined by the chief election official (in Arizona, as in most states, the Secretary of State) that an accessible polling place is not available, then upon advance request of the voter, the chief election official may reassign the voter to an accessible voting place or provide an alternative means for casting a ballot on the day of election. *Id.* § 1973ee-1(b) et seq. This can include voting by absentee ballot or even curbside voting.

Each state is required to provide registration and voting aids in the form of instructions in large print, which must be conspicuously displayed at each permanent registration facility and each polling place, and provide information by telecommunications devices for the deaf such as a TTY or TTD. *Id.* § 1973ee-

3(a)(1)-(2). No medical certification is required for an absentee ballot or for an application for one unless the state requires it for automatically receiving an absentee ballot on a continuing basis or if the voter is requesting an absentee ballot after the deadline has passed for requesting an absentee ballot. *Id.* § 1973ee-3(b)(1)-(2). The chief election officer is required to provide notice of availability of aids intended to reach elderly and the disabled. *Id.* § 1973ee3(c).

The main advantage of VAEHA is that there are two enforcement possibilities. The U.S Department of Justice or a private right of action may be used to enforce the provisions of the Act, through remedies such as an injunction or declaratory relief. *Id.* § 1973ee-4. The VAEHA does not allow attorney's fees unless it is in an action to enforce an original judgment of a court. *Id.* §1973ee-4(c). Unfortunately, the law failed to address issues of voting independently and privately - - two issues that are a big concern to Myron.

You realize from your experience as a P&A attorney that the VAEHA provides limited access to AT devices. Congress never appropriated any money to implement the legislation and states did not take accessible polling issues very seriously. Implementation was sporadic at the state, county and precinct levels. VAEHA basically failed in its attempt to provide a national standard by which persons with disabilities could reasonably expect their polling place to be accessible because it allowed the state to determine what constituted an accessible polling place without providing any guidelines. *Id.* § 1973ee-3(a)(1)-(2).

Remedies would be limited to ensuring access to the various accommodations stated above.

National Voter Registration Act

You also examine the National Voter Registration Act of 1993, also known as the “Motor Voter Act.” This Act deals with issues relating to low voter registration of minorities and persons with disabilities. This law requires all offices of state-funded programs that are engaged primarily in providing services to persons with disabilities to provide all program applicants with voter registration forms, to assist them in completing the forms, and to transmit completed forms to the appropriate state official, i.e., the Secretary of State in Arizona. 42 U.S.C. § 1973gg-5(a)(2)(B). Enforcement may be through the U.S. Attorney General or through a private right of action. *Id.* § 1973gg-9(a)-(b). Under the Motor Voter Act, attorney’s fees, litigation expenses and costs are available to the prevailing party. *Id.* § 1973gg-9(c).

You explain to Myron that remedies under the Motor Voter Act are limited and do not address the polling place voting and access issues that he has presented. You suggest that the ADA and section 504 should be a better option.

The Americans with Disabilities Act and Section 504

The Supreme Court’s 2004 decision in *Tennessee v. Lane*, 541 U.S. 509 (2004), upheld the constitutionality of Title II of the ADA when the issue of discrimination involves a fundamental right such as courtroom access (involved

in Lane) or voting. In addition, the Help America Vote Act (discussed below) does not go into full force and effect until January 1, 2006, 42 USC §15481(d), and it applies only to federal elections. In light of these factors, remedies under the ADA and section 504 should be examined to help Myron obtain the AT he needs for voting.

P&As have used Title II of the ADA and section 504 of the Rehabilitation Act with good results. Advocacy, Inc., the Texas P&A program, launched one of the earliest challenges to make elections more accessible to persons with disabilities through the use of existing AT devices, including ear phones and a cassette recorder. This challenge was initially successful at the district court level, with the court holding that Texas Secretary of State violated the ADA by not modifying his duties and practices to accommodate voters with disabilities. *Lightbourn v. Gaza*, 928 F. Supp 711 (W.D. Tex. 1996). However, the Fifth Circuit reversed the district court's decision. *Lightbourn v. Gaza*, 127 F.3d 33 (5th Cir 1997,) *cert. denied* 118 S. Ct. 700 (1998).

Advocacy, Inc. then sued individual counties regarding secret balloting for those with visual impairments and has reached settlements with most. Depending on the type of balloting - - punch card, machine, etc., - -different systems that accommodate persons with visual impairments have been adopted by the counties. See Harrington, James, *Pencils Within Reach and a Walkman or Two: Making the Secret Ballot Available to Voters Who Are Blind or Have Other Physical Disabilities*, Texas Forum on Civil Liberties & Civil Rights, 87, 94-

96(1999). Texas then passed a law requiring all voting systems purchased anywhere in the state to be accessible to people with physical disabilities. Tex. Election Code Ann § 43.034.

Pennsylvania P&A Inc., in *NOD v. Tartaglione Unreported Case (E.D. Pa.)*, settled a class action that will make every Philadelphia polling place accessible to persons who are blind or use wheelchairs. Pursuant to the settlement, by January 1, 2006 each polling place must have at least one electronic voting machine with earphones and audio instructions.

But not all challenges under the ADA have been successful. In *Nelson v. Miller*, 170 F.3d 641 (6th Cir.1999), the Sixth Circuit ruled against all registered voters who are blind and sought secret ballot protection in Michigan. The court stated that the ADA and the Rehabilitation Act did not require the state to impose secret ballot protection through such technologies as Braille ballot overlays or templates, taped text, or phone-in voting systems as guaranteed under the Michigan Constitution.

Title II of the ADA and the section 504 both provide for attorney's fees and costs to the prevailing party. 42 U.S.C. §12132; 29 U.S.C. §794a(b). Keep in mind, however, that the Supreme Court's decision in *Buckhannon v. West Virginia*, 532 U.S. 598 (2001), still applies and limits the award of fees to a judgment on the merits or a court-ordered consent decree. The ADA and section 504 appear to provide a broad range of remedies such as modifying the polling place for accessibility and creating an accessible ballot through a variety of AT devices and provide the ability to obtain attorney fees.

Help America Vote Act of 2002

The Supreme Court's *per curiam* decision in *Bush v. Gore* held that equal protection concerns extend to the right to vote in federal elections. 531 U.S. 98 (2000)(a *per curiam* decision is written in the name of the Court rather than by an individual justice). To assist states in complying with *Bush v. Gore*, Congress passed the Help America Vote Act of 2002 (HAVA). 42 U.S.C. § 15301 et seq. HAVA deals with several voting issues for persons with disabilities and provides funds to purchase AT to resolve those issues. Its main goal is to provide uniform and non-discriminatory election technology and administration requirements. *Id* § 15481. HAVA also provides grants to states to replace punch card voting machines and lever voting machines. *Id* § 15302(e)(1)-(7)(describing punch card voting machines as C.E.S., Datavote, PBC Counter, Pollstar, Punch Card, Vote Recorder, and Votomatic). It creates an independent Election Assistance Commission, provides payments to states and units of local government to assure access for voters with disabilities, and it provides payments to each state's P&A system, creating the PAVA program to ensure full electoral process for individuals with disabilities. *Id* § 15461(a).

HAVA deals with disability access in two distinct areas: physical access of the polling place and access to participation in the voting process. Regarding physical access, local governments are required to ensure polling place accessibility by making the path of travel, entrances, exits, and voting areas of

each polling place accessible to persons with disabilities, including those who are blind or have low vision. *Id.*

In addition, the accessibility of the voting process must be done in a manner that provides for the same access and participation as available to other voters, including privacy and independence. *Id.* Each polling place can satisfy the requirement by making available at least one direct recording electronic voting system or other accessible voting system. 42 USC § 15481(a)(3)(A). Polling places should have voting machines that "talk," and/or provide large print or Braille ballots and materials, and provide interpreters for voters who are deaf or hearing impaired. Polling places should also provide for a simplified voting process for the elderly and those who have intellectual disabilities. Local governments are also required to provide persons with disabilities with information on accessibility of voting places by using outreach programs. Local governments are also required to train election officials, poll workers, and election volunteers on how to best promote access and participation of voters with disabilities in federal elections. *Id.* § 15421(b)(2)

Enforcement Possibilities under HAVA. HAVA establishes two separate enforcement possibilities. The first is to use the U.S. Attorney General's office. Under HAVA, the Attorney General has the authority to bring a civil action seeking declaratory and injunctive relief, including a temporary restraining order. The Attorney General may also seek a permanent, temporary, or other

appropriate order to enforce the uniform and non-discriminatory provisions of HAVA. *Id.* § 15511.

The second enforcement possibility is the use of the state-based administrative complaint system. The Act requires that states receiving HAVA funding must establish a complaint system. States that do not receive HAVA funds must still establish a grievance procedure or submit a compliance plan to the Department of Justice. The complaint system must be uniform and nondiscriminatory. *Id.* § 15512(a).

A side benefit of HAVA is that public places that serve as polling places, such as public schools, court houses, or other public buildings may use HAVA funds to make their buildings accessible. This could allow a municipality, for example, to address both Myron's voting access complaints and a similar access complaint by one of your teenaged clients with a mobility impairment who wants to attend Forever Sunny High with his friends.

Arizona's Implementation of HAVA. You explain to Myron that in September of 2003, Arizona's Secretary of State of Arizona awarded a contract to Diebold Election Systems to provide optical scan and touch screen voting systems. However, the touch screen voting system will not be purchased in Arizona until 2005 when federal money is available and many of the recent problems such as leaving a paper trail are resolved.

One system that was tested in the 2004 election in limited areas was the ES&S AutoMARK voting machine. Its features included screen audio and sip/puff technology, along with a zoom feature, multi-language ability, and the

ability to support write-in candidates while also incorporating a paper ballot. This piece of AT could address many of Myron's privacy concerns as well as those of other persons with differing disabilities.

Recent Work of the P&A Under PAVA Program. You also explain to Myron that the Arizona Center for Disability Law (ACDL – his state's P&A), through its new PAVA grant, is coordinating training of poll workers by contacting people within the disability community to conduct the training. In addition, ACDL is working with election officials to make websites accessible and develop a consumer friendly complaint process. ACDL does voter education through community outreach directly and through a contract with the Arizona Mental Health Association.

During the 2004 election cycle, ACDL recruited voters with disabilities to conduct on-site accessibility surveys of polling places during the primary and general elections. The checklist used for the 2004 primary, which covers the main concerns of HAVA relating to physical access, is reprinted on page, below.

Enforcement Rights Under State Law

Many states have state law provisions that can be used to enforce rights to voting access. More than likely, those rights will appear in general anti-discrimination laws rather than a law that is specific to voting.

Arizona's Revised Statutes §41-1421(B), (C) provides that it is unlawful to discriminate or exclude a person with a disability from participating in voting. It also requires that any political subdivision of the state (including schools) must

make reasonable modifications to its policies and remove architectural barriers and provide auxiliary aids and services during the voting process.

A state law may also allow for damages and attorney's fees for voting rights violations. For example, Arizona Revised Statutes § 41-1472 *et seq.* allows for actual and compensatory damages, damages for emotional distress, and the possibility of a civil penalty against the person responsible (\$5000 for the first violation, \$10,000 for each subsequent violation), as well as attorney's fees and costs. You explain to Myron that available remedies will often determine whether to proceed in federal or state court.

So, What Will You Do For Myron?

Myron, upon hearing of his rights, is pleased and would like you to pursue them right away. On a practical level, however, what you are able to do for him may depend on several factors.

At the outset, you and Myron agree to work with your agency's PAVA staff to determine whether the existing state plans to implement HAVA, through purchase of new voting technology, will resolve the actual voting issue once Myron can get into the building. On the need for a ramped entrance, you also agree that the PAVA staff will look into the issue to see if a resolution is available short of litigation.

You then present Myron's case to your litigation team. They agree on the injustice to Myron, but because your P&A has limited funds they would like to recoup some of the P&A's costs. The general rule regarding attorney's fees is that the parties must bear the burden of their own fees absent explicit legislative

approval for fees. Since HAVA is silent regarding the award of attorney's fees, presumably fees will not be available under that law. However, other avenues are available to a P&A attorney to obtain attorney's fees such as the ADA, section 504, and possibly state law.

Your litigation team then discusses which of your P&A programs has the resources to commence major litigation, if that is what is needed. In the end, it is agreed that your PAIR attorney will collaborate with your PAAT attorney to pursue the litigation.

Conclusion

Myron comes away from your meetings with a sense of hope and optimism. HAVA addresses accessibility issues far more extensively than other federal legislation has in the past and requires equal access for all voters. The recent Supreme Court decision of *Tennessee v. Lane* indicates that the Court will hold state and local officials accountable under Title II of the ADA when persons with disabilities face violations of fundamental rights such as voting access and participation.

How your P&A will address a situation like Myron's will, of course, depend on many factors: your agency's resources, how the issues presented square with your agency's priorities, other efforts within your agency and within your state to address these issues, and the expected reception a case like this might get in either your state or federal courts. While this kind of case is unlikely to be

a major initiative of your PAAT in most states, you may want to use PAAT resources to co-counsel in the event that major litigation is expected.

=====

Our Guest Author, Ed Myers

Our lead article is guest authored by Edward L. Myers, III, an attorney who works with the Arizona Technology Access Project as a Policy and Funding Specialist. Ed has also worked at the Protection and Advocacy programs in both Montana and Arizona. In both states he specialized in AT advocacy work. Ed also serves on our National AT Advocacy Project's advisory board.

=====

AT Court Watch

Polling Place Accessibility Project Polling Place Evaluation Form

LOCAL INFORMATION

County _____ Municipality _____

Polling Place Number and Address: _____

Your Name: _____ Phone: _____

PARKING:

- | | | | |
|----|---|-----|----|
| 1) | Is accessible parking available? | Yes | No |
| 2) | Is the accessible parking as close as possible to the entrance? | Yes | No |
| 3) | Is the accessible parking clearly marked? | Yes | No |

RAMPS AND CURB CUTS:

- | | | | |
|----|---|-----|----|
| 4) | Do the sidewalks leading to the polling place have curb cuts? | Yes | No |
| 5) | Does the polling place have ramps or is access barrier free? | Yes | No |
| 6) | Are there handrails on both sides of the ramp? | Yes | No |

ENTRANCE:

- | | | | |
|----|---|-----|----|
| 7) | Is at least one entrance to the building wheelchair accessible? | Yes | No |
| 8) | If the main entrance is not accessible, does a sign direct people to the accessible entrance? | Yes | No |
| 9) | Are doors to the polling place wide enough so people using wheelchairs or other assistive devices (walkers, canes, etc.) can enter? | Yes | No |

INTERIOR ACCESS:

- | | | | |
|-----|---|-----|----|
| 11) | Is there a clear path from the entrance to the voting area? | Yes | No |
| 12) | Are there any doors on the path to the voting area? | Yes | No |
| 13) | Do all of the doors have a lever-type handle or push-plates so that twisting a door knob is not required? | Yes | No |

VOTING ASSISTANCE:

- | | | | |
|-----|---|-----|----|
| 14) | Is there one voting booth for persons with physical disabilities? | Yes | No |
| 15) | Are ballots available in large print or Braille? | Yes | No |
| 16) | Was there help available to assist you in voting? | Yes | No |

Please indicate any other barriers to voting you identified. If you need more room, use the back of this sheet. ¹

Additional Legal Cases

- *McKay v. County Election Commissioners of Pulaski County, Ark*, 158 F.R.D. 620 (E.D. Ark. 1994)
- *People of the State of New York v. County of Delaware*, 2000 WL 1264302 (N.D.N.Y. 8/16/00) - The court ordered the counties of Delaware and Schoharie to bring their polling places into compliance with the ADAAG and other state accessibility laws by June 14, 2000.
- *AAPD v. District of Columbia*, Civil Action No. 01-1884. (D.C.8/14/02), Unreported Case -The District of Columbia Board of Elections agreed to purchase direct record electronic (DRE) voting systems sufficient to place at least one DRE in each precinct and to have all polling places physically accessible to voters with mobility impairments by May 2004 presidential primary.
- *AAPD v. Hood*, 278 F. Supp. 2d 1345 (M.D. Fla. 2003) - The court ruled that a fact issue existed whether election officials wrongly rejected assistive technology that would have allowed people with disabilities to cast secret ballots. The court ruled that the plaintiff could bring suit under the ADA against election officials regardless of their duties under the state laws such as the Voting Accessibility for the Elderly and Handicapped Act (VAEH).
- *AAPD v. Hood*, No. 01-CV-1275 (M.D. Fla. 1/4/04) - The court held that the county violated the ADA by failing to provide accessible voting systems for voters with visual impairments. The county was ordered to have accessible voting systems in time for its next election in August. A written opinion is pending.

17

17

¹ Reprinted with permission from Arizona Center for Disability Law. For a more extensive checklist, the

Department of Justice has a polling places accessibility manual which can be found at <http://www.usdoj.gov/crt/ada/votingck.htm>

Resources for Enforcing Voting Rights

- Federal Election Assistance Commission
<http://www.fec.gov/hava/hava.htm>
- Department of Justice has a polling places accessibility manual
<http://www.usdoj.gov/crt/ada/votingck.htm>
- Administration on Developmental Disabilities disperses PAVA funds
<http://www.acf.hhs.gov/programs/add/HAVA.htm>
- National Association of Protection and Advocacy
http://www.napas.org/HAVA/HAVA_II_home.htm

Legal Treatise

- James Harrington, *Pencils within Reach and a Walkman or Two: Making the Secret Ballot Available to Voters Who Are Blind or Have Other Physical Disabilities, A Chronology of Litigation History, Theory, and Results*, 4 Texas Forum on Civil Liberties & Civil Rights 87 (1999)