

Given the delays in establishing standards and testing and certifying new voting systems, New York State has continued to use a voting system that has been working for a long time. Recognizing these delays, in July 2007 the New York State Legislature approved, and on August 6, 2007, the Governor signed into law, Chapter 506 of the Laws of 2007, which removed a deadline to replace lever voting systems in September 2007 and requiring counties to provide at least one ballot marking device in each county until there is a replacement system that is certified by the New York State Board of Elections (SBOE).

A. Ballot Marking Device:

With regard to the June 2, 2006 Order of the Court, the following ballot marking device benchmarks have been achieved:

- One or more accessible ballot marking devices were deployed in each county for the Fall 2006 elections, and that same program will be in place for the 2007 Fall elections and the February 5, 2008 Presidential Primary election.
- Outreach efforts to inform the public of the implementation of accessible ballot marking devices were initiated in 2006.¹
- In 2006, the NYSBOE developed procedures for implementing the accessible ballot marking device process, to ensure the casting and counting of ballots from voters using these devices. For use in 2007, the

¹ NYSBOE website link to the education and outreach information can be found at http://www.elections.state.ny.us/portal/page?_pageid=35,1,35_26319:35_26335&_dad=portal&_schema=PORTAL

NYSBOE adopted similar procedures to meet the requirements of State Law, Chapter 506 of the Laws 2007.²

Moving forward, Defendant Zalen and Commissioners Aquila and Kellner respectfully advise the Department of Justice that:

- At the August 16, 2007 meeting of the Commissioners of NYSBOE Board counsel was advised to inform the Department of Justice that the Board has agreed that it will put together “a revised HAVA implementation plan and as part of that we will be scheduling a meeting with the county board of elections (sic) within the next two weeks to help formulate that plan to include accessibility at every polling site in 2008.”³ That meeting took place August 28, 2007. At that meeting the county commissioners expressed deep reservations about a plan to place a ballot marking device in every polling place along with their existing voting systems. A second meeting with selected representative counties (New York City, Oswego and Monroe Counties) and disability advocacy groups was held on September 11, 2007. At that meeting, again the counties described the issues they have with operating dual voting systems at all polling places.

² Adopted by NYSBOE of Elections Commissioners on August 16, 2007. NYSBOE website link is: http://www.elections.state.ny.us/NYSBOE/hava/voting_machines/PlanB-07procedures-revFINAL.pdf

³ See Minutes of August 16, 2007 meeting attached hereto as Exhibit “A”. It is the position of the Defendant Zalen and Commissioners Aquila and Kellner that at such meeting, after a discussion in Executive Session relative to this litigation, the SBOE made a commitment to implement a plan of one ballot marking device in every polling place for the 2008 fall elections. The Defendant Kosinski and Commissioners Kelleher and Donohue have declined the submitting Defendant Zalen’s invitation to join in this submission, upon information and belief, over disagreement on this issue. Such disagreement has resulted in the filing of two (2) proposed Compliance Plans on behalf of SBOE as Commissioners Aquila and Kellner are committed to the concept of one ballot marking device in every polling place as an step in achieving HAVA compliance given the goal of increased participation in the electoral process by those suffering from disabilities.

At the same meeting, the disability advocacy groups shared their concerns and desire for full compliance with HAVA, and advised the State Board and the representative group of county board commissioners, that voting in their own respective neighborhoods, as do all other voters in New York, was in line with the disability access components of HAVA.

- As a follow up to those meetings, on September 20, 2007 the Election Commissioners Association filed with the NYSBOE a letter explaining their needs in deploying a new voting system, attached hereto as Exhibit B. Defendant Zalen and Commissioners Aquila and Kellner request that prior to the Department of Justice's response to this Plan representatives of the Department meet with county election officials to discuss their issues.
- As the Department of Justice is aware, the County Boards of Elections (County Boards) have an integral role in the implementation of the Statewide Voting System Purchase and Replacement Project. After SBOE, in conjunction with the Independent Testing Authority (ITA), tests and certifies voting systems to the federal standards and the additional New York State statutory and regulatory standards, the County Boards select a voting system from the list certified by SBOE. Those systems are purchased by the counties utilizing a statewide contract. Ultimately, the systems are delivered to the counties. The voting systems must be tested when the county accepts delivery to make sure that they function properly upon delivery. Counties must integrate the new voting system into their respective election management systems to place candidates on the ballot

and to record and organize results at the end of the election. The counties must hire and train the election workers to operate the equipment. The counties educate the voting public on the use of the machines.

- Attached as Exhibit "C", is a time line which identifies the tasks required to achieve interim HAVA compliance in 2008, via the deployment and implementation of one accessible ballot marking device in each polling location in the State of New York. Defendant Zalen and Commissioners Aquila and Kellner are committed to this facet of the proposed Plan of Compliance but this aspect has not been formally adopted by the Board of NYSBOE to date.
- NYSBOE has completed initial tasks related to the re-bidding of contracts for accessible ballot marking devices in order to allow the State to have in place by on or about January 15, 2008 a mechanism for increasing the number of such devices from which county boards may make their selections. The principle to expand the number of options that county boards may consider is being pursued to enable these interim devices to become part of each county's permanent solution. The Notice to Bid appeared in the New York State Contract Reporter on September 4, 2007. NYSBOE staff has drafted ballot marking device requirements, and is drafting, in conjunction with the Office of General Services, the contract requirements. As those documents are modified, copies will be sent to the Department of Justice.

- NYSBOE will work with the County Boards, advocates for the disabled and associated groups and agencies to expand voter information outreach efforts.

B. Statewide Voter Registration List (NYSVoter):

With regard to the June 2, 2006 Order of the Court, the following Statewide Voter Registration System, known as NYSVoter, benchmarks have been achieved:

- NYSVoter system is operational.
- *All* voters registered in the State of New York have been incorporated into NYSVoter.
- All system connectivity tasks have been accomplished.
- All County Boards have full access to NYSVoter, and can utilize the system's features to implement all list maintenance procedures.
- NYSBOE developed, approved and distributed procedures for the use of NYSVoter, identified as 9 NYCRR Part 6217.⁴
- The NYSVoter Disaster Recovery/Business Continuity Plan has been implemented, with the creation of a back-up site, located in Westchester County.
- NYSBOE is now responding to requests pursuant to the New York Freedom of Information Law with respect to this data.

⁴ NYSBOE website link is:
<http://www.elections.state.ny.us/NYSBOE/download/law/2007NYElectionLaw.pdf> (Pages 512 to 527).

Moving forward, NYSBOE respectfully advises the Department of Justice that:

- By mid-October of 2007, NYSVoter will be able to allow New York's voters to access their own voter registration data via the Internet.

C. Voting Systems:

Moving forward, NYSBOE respectfully advises the Department of Justice that:

- The SBOE has completed the initial tasks related to re-bidding to secure the services of an Independent Testing Authority (ITA), for the purposes of conducting certification testing for all voting systems being proposed for sale in New York.⁵ Proposals are due on October 9, 2007. Any necessary site visits are to be done between October 23 and 30, 2007. The estimated vendor selection is November 7, 2007. A complete contract award is estimated for December 7, 2007.
- To implement lever machine replacement, NYSBOE has completed initial tasks related to the re-bidding of contracts for complete voting systems, including the publication of a Notice to Bid (appearing in the New York State Contract Reporter on September 24, 2007), the drafting, adoption and distribution of voting system requirements identified as 9 NYCRR Part 6209,⁶ and is drafting, in conjunction with the Office of General Services, the contract requirements which will be sent to the Department of Justice.

⁵ Link to ITA procurement RFP Bid Number 1396 is:
<http://www.ogs.state.ny.us/purchase/Bidcalendarlv.asp>

⁶ Attached as Exhibit D

- NYSBOE will proceed with voting system certification testing forthwith, upon completion of a contract award to the successful ITA, and currently anticipates the start of testing in January of 2008.
- The time required to complete testing to New York's requirements 9 NYCRR Part 6209, which include New York Election Law Section 7-202 and the 2005 Voluntary Voting System Guidelines adopted by the US Election Assistance Commission, is dependent upon each submitted system's readiness to comply with same. NYSBOE estimates the time required to test to the standards identified herein is approximately nine (9) months. It is respectfully pointed out to the Department of Justice that no voting system has as yet been certified by the US Election Assistance Commission as being in compliance with the 2005 Voluntary Voting System Guidelines adopted by the US Election Assistance Commission, let alone the additional statutory requirements imposed by the New York State Legislature in Election Law Title II, Sections 7-200ff.
- Attached as Exhibit "E", is a time line which identifies the tasks required to comply with HAVA in time for the Fall 2009 elections.⁷ Voting system certification includes testing, an independent review of the testing, the creation and review of corresponding reports, review of the voting devices by the Citizens Election Modernization Advisory Committee, and final consideration by the State Board Commissioners.

⁷ The time line includes a number of dates which are estimates for the completion of tasks. The ITA will review this time line and will add and/or delete tasks and provide corresponding estimated task completion dates.

- Immediately following voting system certification, the County Board selection processes may commence, which may differ from county to county. Counties have indicated that some, all or a combination of the following, will be required, prior to the selection of a new voting system: public hearings, hands-on voter demonstrations, ad hoc committee reviews. The ultimate selection of a replacement voting system rests with the commissioners in each County Board, and in the City of New York, with the City Board of Elections. SBOE is committed to allowing a thirty (30) day period after NYSBOE notice of certification within which County Boards must complete their selection/purchase process.
- In the event that a county does not make a selection in the time frame established by NYSBOE, NYSBOE is statutorily authorized to determine the type and number of systems to be purchased and implemented in such county and shall order such voting systems for such county.⁸
- NYSBOE staff is crafting a program for the training of personnel on and the deployment of an acceptance testing program for new voting systems and ballot marking devices, as required by Election Law Section 7-206. These tasks are represented in the time line.
- On September 20, 2007, the Commissioners of NYSBOE approved proposed regulations related to the use of new voting systems. The proposed regulations are currently being reviewed by the state agencies responsible for their publication. Upon, publication, a 45-day public

⁸ Election Law Section 7-203 (3).

comment will ensue, after which the proposed regulation may be formally adopted by NYSBOE.⁹

- NYSBOE staff continues to draft and distribute for comment, procedures related to the ownership and use of new voting systems. These initiatives are represented in the time line.
- It is anticipated that these voting systems will be ready for implementation statewide in time for the Fall 2009 elections.

D. Poll Worker Training and Voter Education:

- NYSBOE has developed a poll worker training core curriculum for election inspectors and other County Board employees. This core curriculum will be supplemented with specific procedures for the use of any new voting systems or ballot marking devices. The core curriculum was developed around specific topical modules so that changes, updates or additions can be inserted into the curriculum.
- NYSBOE has completed the procurement of a contractor, OES, to develop a web-based poll worker and voter education training tool fully accessible to all County Boards which accommodates customization by individual counties.
- NYSBOE in collaboration with the Commission on Quality and Care and Advocacy for Persons with Disabilities (CQCAPD), developed a Disability

⁹ The proposed regulations are identified as 9 NYCRR Part 6210, and a link to the NYSBOE website is:
http://www.elections.state.ny.us/NYSBOE/hava/Voting_Machines/6210AdoptedProposedRegs9202007.pdf

Etiquette Program to provide instruction to poll workers to better meet the needs of voters with disabilities. A series of regional "Train-the-Trainer" training sessions were conducted in 2006. NYSBOE anticipates conducting several additional series of regional training upon certification of ballot marking devices and/or new voting systems.

- NYSBOE has established a grant program to provide funding to county boards to increase the accessibility of all of their polling sites for voters with disabilities.

E. Conclusion:

- Defendant Zalen and Commissioners Aquila and Kellner appreciate that this proposed Implementation Plan is extensively aggressive and that the most substantial burden falls to the County Boards. Given the separate legal status of the County Boards under New York state law and the fact that any resolution of NYSBOE requires a vote of three (3) Commissioners pursuant to Election Law 3-100(4), prompt Department of Justice approval of this proposed Plan and timely judicial intervention to order its implementation will undoubtedly be required, especially with respect to the requirement of a ballot marking device in each polling place for the 2008 fall elections. Given the state statutory and regulatory requirements applicable to the contract award process, such approval must be given in the short term, presumably before the end of this month, in order to implement the ambitious time table of this Plan.

October 2, 2007

Respectfully submitted,

NEW YORK STATE BOARD OF ELECTIONS¹⁰

Defendant Stanley Zalen

By: s/_____

Paul M. Collins (191384)
Special Deputy Litigation Counsel
Attorney for the New York State Board
of Elections and the Defendants
Kosinski and Zalen

¹⁰ Commissioners Kellner and Aquila only