

STATE OF NEW YORK  
NEW YORK STATE BOARD OF ELECTIONS

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In the Matter of:

SARA LISS,

Complainant,

HAVA Complaint No. 16-04  
Determination

-v-

THE NEW YORK CITY BOARD OF ELECTIONS,

Respondent.

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**Procedural Background**

On December 5th, 2016, the New York State Board of Elections (hereinafter SBOE) received a written, sworn, signed, and notarized Complaint (the "Complaint") dated November 18, 2016, filed by Sara Liss, alleging certain conduct that constitute violations of Title III of the Help America Vote Act of 2002 (52 U.S.C. § 21081). Specifically, Complainant alleges that, during the Election held on November 8, 2016, she attempted to use the Ballot Marking Device (BMD) at a polling site located at Bishop Ford Central Catholic High School, 500 19<sup>th</sup> Street, Brooklyn, New York. After several attempts to use the touch screen, she discovered that the screen was inoperable. Subsequently, poll workers instructed Complainant to use the buttons on the BMD. When the Complainant attempted to print her ballot, an unspecified error appeared on the BMD screen. The poll workers did not know what was wrong with the BMD or how to fix it. After troubleshooting, poll workers were unable to get the BMD to work. After about one hour, the Complainant was unable to mark her ballot using the BMD. The Complainant is unaware if technicians were ever called to fix the BMD. Complainant recommends that old and malfunctioning BMDs should be replaced; that technicians should be readily available to fix BMDs; and that poll workers should be better trained to call technicians should a BMD malfunction.

SBOE accepted the Complaint and issued a notice of acceptance on December 7, 2016. Subsequently, pursuant to 9 NYCRR 6216(c)(4), Complainant served the Respondent, New York City Board of Elections (hereinafter NYC BOE) and filed proof of such service on December 15th, 2016.

On December 23, 2016, Michael J. Ryan, NYC BOE Executive Director, filed a written response on behalf of NYC BOE. The Response states that after Complainant's attempt to use the BMD, a technician was dispatched and recalibrated the BMD at 4:44 pm. NYC BOE notes that there were no reported malfunctions after the recalibration. NYC BOE also states that it trains poll workers each year and provides instruction on the use and set up for the BMDs, including a segment on the proper etiquette for addressing voters' abilities. The Response also states that each poll worker must take and pass a proficiency exam prior to being assigned to work on Election day. NYC BOE further notes that it operates 1,200 poll sites, and employs approximately 37,000 elections, and that it employs two Americans with Disabilities Act coordinators to assist with compliance. NYC BOE further explains that given the volume of voters, poll sites, poll workers and complexity of election administration, moments can occur where circumstances will be less than ideal.

Neither party requested a hearing in this matter.

In issuing this Determination, the written submissions of the parties have been received and considered, the credibility has been weighed, and the Complaint and the responses thereto have been considered. Additionally, SBOE applies a preponderance of the evidence standard in these findings. N.Y. Elec. Law § 3-105.

### **Jurisdiction**

Section 402 of Help America Vote Act of 2002 requires the State to create a state-based administrative complaint procedure to assure compliance with Title III of the Help America Vote Act of 2002 (hereinafter HAVA). Subdivision 16 of § 3-102 of the New York State Election Law (hereinafter

Election Law) directs SBOE to establish a HAVA administrative complaint procedure. Section 3-105 of the Election Law outlines the Complaint procedure, such as that a formal complaint shall be in writing, signed and notarized; that the evidentiary standard shall be a preponderance of the evidence; and that the final determination shall be published and appropriate action shall be taken by the state Board of Elections as necessary. Additionally, 9 NYCRR § 6216.2 further outlines the administrative complaint process.

As the Complaint was written, signed and notarized, and as the Complaint alleges conduct that constitutes a violation of Title III of HAVA, SBOE determines that Sara Liss has standing to bring a Complaint.

### **Issues Raised by the Complainant**

The Complainant, Sara Liss, alleges the following:

1. That poll workers failed to adequately troubleshoot or assist the Complainant in relation to the inoperable BMD.
2. The poll workers failed to timely contact technicians to fix the BMD.
3. That technicians should be readily available to fix BMDs.
4. That the BMD is old, inoperable, and should be replaced.

### **Legal Authority**

Title III of HAVA, section 301(a), outlines the minimum standards for polling locations used in federal elections. Title III specifically states that all voting systems must be accessible to persons with disabilities. 52 U.S.C. § 21081 (a)(3)(A). Furthermore, Title III outlines particular requirements that states must satisfy-namely, providing non-visual accessibility to the blind and visually impaired and

maintaining at least one voting system at each polling location equipped for persons with disabilities. Id.  
§ (a)(3)(A-B).

Title III also requires that the voting opportunities provided by elections officials to persons with disabilities “be accessible .... in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters(.)” 52 U.S.C. § 21081 (a)(3)(A). Section 4-132 of the Election Law requires that booths or devices used for voting be construed in a manner as to ensure secrecy. Section 8-102 of the Election Law requires election inspectors to inspect ballot devices and BMDs to ensure they are in working order prior to the opening of the polls, and to inspect the polling site to ensure that there is sufficient privacy when using devices, booths, and BMDs.

Per page 45 of the 2016-2017 NYC BOE Basic Poll Worker Manual, when a BMD breaks down, a voter is to be given the following choices:

1. Wait until the BMD is repaired;
2. Return to poll site later after the repair is completed; and
3. Vote with assistance from a bipartisan team of inspectors.

### **Findings of Fact**

Complainant states that she was unaware whether a technician was contacted to fix the BMD. As such, SBOE concludes that the poll workers at the site failed to inform Complainant that a technician was contacted to repair the BMD, nor did they inform Complainant that she had three options while waiting for the BMD to be repaired; 1) wait until the BMD is fixed, 2) return to the poll site after the BMD is fixed, or 3) vote with the assistance of a bipartisan team of inspectors. The poll workers in question failed to follow the troubleshooting process laid out in the NYC BOE’s manual. The consequences of this failure are great. Without these options, certain voters with a disability may not be able to vote, making the voting process inaccessible in violation of Title III of HAVA. As such, SBOE

determines and finds that the poll workers failure to inform the Complainant that the BMD is in the process of being repaired and failure to inform her of the available options outlined in NYC BOE's manual constitute a violation of Title III of HAVA.

In regards to whether poll workers contacted a technician to fix the BMD, SBOE finds that NYC BOE's testimony that the BMD was fixed and calibrated at 4:44pm credible; however, as noted above, SBOE did find that failing to inform the Complainant that the BMD was going to be fixed, and failing to provide the Complainant the available options outlined in NYC BOE's manual, constitutes a barrier in violation of Title III of HAVA.

In regards as to whether a technician should be readily available to repair inoperable BMDs, this allegation goes to whether the BMD was repaired in a reasonable amount of time. It is unclear from the Complaint exactly when, during Complainant's one-hour voting process, it was concluded that the BMD was inoperable and required repair. The only information submitted is that he BMD was recalibrated on 4:44 pm. Given the uncertainty of the time frames, SBOE cannot conclude that he BMD was repaired in an unreasonable amount of time.

In regards to whether the BMD in question is old, malfunctioning, and needs to be replaced, Complainant offers no evidence, nor alleges that the BMD has passed its useful life. NYC BOE's response indicates that the BMD was recalibrated at 4:44pm, and that there were no reports of a malfunction after the recalibration. SBOE finds NYC BOE's response to be credible, which indicates that the BMD is still operable. As such, SBOE determines that the temporary inoperability of the BMD is not, in and of itself, a violation of Title III of HAVA, as NYC BOE caused the BMD to be repaired and there were no other reports of the BM breaking down.

It is understandable that, under Election Day pressure, and the volume of voters, mishaps may happen from time to time. This does not mitigate the responsibility of the county to ensure poll workers

are adequately trained to ensure that persons with disabilities are able to vote in privacy and with dignity.

## **Remedy**

Section 3-105 of the Election Law requires that “(w)hen a violation has been found, the final determination shall include an appropriate remedy for any violation of Title III of the Help America Vote Act of 2002 (HAVA) found by the state board of elections.” Further, 9 NYCRR 6216.2(f)(1) states that “(r)emedies may consist of a directive to the local or State official(s) or entities to undertake or to refrain from certain actions or to alter certain procedures pertaining to Federal elections.”

Pursuant to this authority, SBOE directs NYC BOE to do the following:

NYC BOE shall submit a report to the SBOE within sixty (60) days of this determination, detailing:

1. Improvements to poll worker training for future elections in relation to BMD troubleshooting;
2. The “improvements” to poll worker training must include lessons learned from the issues raised by the instant Complaint; and
3. The “improvements” should also include training for the poll workers at the poll site in question; and

Further, NYC BOE shall amend the “Basic Poll Worker Manual” to clarify that if a BMD continues to be inoperable after troubleshooting, the emergency breakdown number on the side of the BMD must be called immediately;

## **Determination**

For the reasons stated above, SBOE finds the allegations in the Complaint to be credible, finds that there were violations of Title III of HAVA, and directs NYC BOE to comply with the Remedy section of these findings.

William J. McCann, Jr.  
Deputy Counsel, New York State Board of Elections

Nicholas R. Cartagena  
Deputy Counsel, New York State Board of Elections

Dated: March 3, 2017