

Access Denied: Protecting the Voting Rights of Senior Citizens and People with Disabilities



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SUMMARY

Voting is the foundation of our democracy and a fundamental right of every American. For generations, Americans have fought – sometimes in the face of incredible adversity – to secure and protect this right. It therefore should be of great concern to all citizens when any group or individual is denied his or her voting rights.

As part of its statutory duties to promote the public interest and advocate on behalf of New Jersey residents,¹ the Department of the Public Advocate (the “Department”) is conducting a Voting Rights Campaign, an initiative covering a wide range of voting rights issues in New Jersey. This initiative has included an investigation into whether senior citizens and voters with disabilities have access to the electoral process, and particularly physical access to polling places.

Federal and State law have long recognized that if citizens cannot get to polling places and use voting systems, they are denied their voting rights. Since 1984, federal law has required that polling places must be accessible to persons with disabilities. State and federal laws also require that all machinery used in the election system must be accessible to senior citizens and persons with disabilities.

In recent years and months, the State has made significant progress toward compliance with these legal requirements, but inaccessible polling places continue to impede the voting rights of senior citizens and voters with disabilities in New Jersey.

- Between May 2004 and November 2006, the New Jersey Division on Civil Rights (DCR) conducted studies of polling place accessibility, including 1,707 inspections of 1,120 polling places (out of a total of approximately 3,500 polling places in the State). The inspections targeted only those sites for which election officials had *not* sought waivers of compliance with the accessibility laws. In these inspections, 450 of the 1,120 places inspected (or 40%) failed at least once.² These data show that during the study period, more than 600,000 registered New Jersey voters were assigned to a polling place that was potentially inaccessible to senior citizens and persons with disabilities.

¹ N.J. Stat. Ann. § 52:27EE-2(a), (e), and (h) (2007).

² New Jersey Division on Civil Rights, *Final Report to the NJ Commission on Civil Rights Operation NJ-PAASS* (Feb. 13, 2007) (available at http://www.njcivilrights.org/downloads/polling_access_report_2004.pdf).

- Despite this discouraging overall failure rate, the DCR study signals an improving trend: The failure rate for first-time inspections by DCR dropped from 67% in May 2004 to 17% in May 2005.
- The failure rate on DCR's reinspections, in contrast, remained high, ranging from 35% to 81%. In its final investigation in November 2006, DCR inspected 21 polling places that it had already cited as inaccessible on three separate prior occasions. Seventeen of these places were found to be inaccessible for the fourth time.
- For many years, the State has issued waivers that permit county boards of election to operate inaccessible polling places, although as the Public Advocate interprets the law, such waivers have been ineffective under federal law since 1992. Since 2003, the State has issued 366 of these waivers permitting the use of inaccessible polling places, including 51 such waivers in the November 2006 election, many of them for places that were repeatedly inaccessible over the course of several elections over several years. The Attorney General has laudably taken recent steps to curtail these waivers, which in turn brings the promise of better compliance by the county boards.
- State law requires the establishment of Voting Accessibility Advisory Committees (VAACs) to monitor polling place accessibility and inspect proposed places for accessibility. While these committees hold great promise – indeed, there has been improvement in polling place accessibility since DCR's and the VAACs' work first began – the VAACs' investigative and reporting activities require improvement.
- The Public Advocate's investigation found many cases in which county election officials certified polling places as accessible, even though their own VAAC accessibility inspections indicated that polling places were either inaccessible or required modifications to allow access.³
- The State Division of Elections allows polling places to be certified as accessible when temporary measures, such as installing a ramp or propping open an entrance, may make the polling place accessible on election day; however, the State does not require

³ See *infra* notes 16 to 31 and accompanying text.

county officials or others to determine whether these temporary accessibility measures are actually implemented on election day.

- Because some polling places for school elections are not used for other elections, there are currently no mechanisms in place for the State to verify whether these polling places are accessible.

The Public Advocate makes the following recommendations to address these problems:

- County boards of election must comply with federal and state laws and stop operating polling places that are inaccessible to older voters and voters with disabilities.
- The Attorney General should stop issuing waivers for polling place accessibility and should inform the county boards, through a formal opinion, that such waivers will no longer be available.
- Each county should establish, fully staff, and train a VAAC to conduct thorough inspections of polling place accessibility as well as follow-up inspections for each election.
- County election officials and State-level reviewers must ensure that final accessibility determinations accurately reflect what is being reported by VAAC inspectors. Where a VAAC inspection checklist reveals an inaccessible polling place that cannot be made temporarily accessible, the polling place should not be certified as “accessible.” On the contrary, it should be cited as inaccessible and either remedied or relocated to an accessible site.
- Countywide accessibility reports should allow county election officials to choose the option of designating a polling place as “potentially accessible,” meaning temporary measures could make the polling place accessible. On election day, county boards should reinspect all or a random sample of “potentially accessible” places to ensure that the places have been made accessible while the polls are open.
- School election officials, under the oversight of the Department of Education, should select only those polling places that have previously been: a) designated as official polling places, as required by law, and b) certified as accessible through the VAAC process. The New Jersey Division of Elections should monitor compliance with these practices.

SCOPE OF WORK AND OUTREACH EFFORTS

To research this matter, the Department of the Public Advocate examined the relevant federal and State laws, studied reports on polling place accessibility prepared by the New Jersey Division on Civil Rights (DCR), examined materials prepared by county and State election officials, and reviewed materials available on the websites of the New Jersey Division of Elections (DOE) and various counties.

The Department also surveyed election officials in all 21 counties. Finally, it studied reports prepared by advocacy organizations, considered reliable news accounts, and interviewed elections officials, voters, and other persons with demonstrated interest in and knowledge of voting and election administration issues.

As part of its outreach efforts, the Department recruited pro bono attorneys to assist voters with disabilities in the 2006 general election. The Public Advocate also sent a detailed letter before that election to voters with disabilities and the advocacy organizations that represent them to ensure they were fully apprised of their rights.

I. STATE AND LOCAL COMPLIANCE WITH LAWS PROTECTING THE VOTING RIGHTS OF SENIOR CITIZENS AND VOTERS WITH DISABILITIES

The Public Advocate's study of the accessibility of the approximately 3,500 polling places⁴ used in New Jersey, which serve approximately 6,400 election districts, indicates that while some improvement has occurred regarding the accessibility of polling places in recent years, many polling places across New Jersey remain inaccessible and noncompliant with state and federal law.

⁴ This paper will use the term "polling place" to mean the entire building including parking and paths of travel to and through the parts of the building used by voters. Under New Jersey law, a "polling place" is the room or area within a building where the tables and voting machines are located, but not necessarily the building itself. See N.J. Stat. Ann. § 19:8-1 (2007). However, in the Department of Justice's guidance on accessibility, discussed *infra* at note 48, the term "polling place" means the building where voting takes place. In the interest of accounting for all barriers a voter may face, we use the more expansive definition in this context.

What is polling place accessibility?

The U.S. Department of Justice's "ADA [Americans with Disabilities Act] Checklist for Polling Places," and other sources (discussed further below) describe what it means for a polling place to be physically accessible.

- There must be appropriately sized parking spaces or drop-off areas for vehicles transporting voters with disabilities, located close to an accessible entrance.
- There must be a smooth, obstacle-free, and appropriately wide and sloped path of travel (i.e., curb cuts, sidewalks, walkways, and ramps) from parking areas to the accessible entrance.
- The entrance door must be easy for a person with a disability to open and wide enough for a wheelchair to pass through.
- Inside the building, the route from the door must also be smooth, obstacle-free, and appropriately wide and sloped.
- Any doors must be either open or easily opened.
- Any elevators or wheelchair lifts in use must be accessible.
- The polling place must adhere to similar requirements for mobility in and around the actual voting area.
- Appropriate signage must be provided, including signage directing voters to the appropriate entrance, bearing the International Symbol of Accessibility (reprinted to the right).
- To deter ineligible voters from using parking spaces reserved for voters with disabilities, a sign setting forth the current fines and penalties for violations must be present at those parking places.



Investigations by the Division on Civil Rights

Between 2004 and 2006, the New Jersey Division on Civil Rights (DCR) conducted Operation NJ-PAASS (Polling Accessibility for All Sites in our State) to investigate voting accessibility. As part of this project, DCR deployed personnel between May 2004 and November 2006 to inspect a sample of polling places for which county elections officials had *not* sought waivers of legal accessibility requirements.⁵

⁵ The discussion in this section entitled "Investigations by the Division on Civil Rights" and its subsections, is drawn from the Division on Civil Rights' (DCR) *Final Report to the NJ Commission on Civil Rights Operation NJ-PAASS* (Feb. 13, 2007) (available at http://www.njcivilrights.org/downloads/polling_access_report_2004.pdf); the DCR's *Report to the NJ Commission on Civil Rights Operation NJ-PAASS for Calendar Year 2004* (June 14, 2005) (on file with the author); the DCR's *Outreach* newsletter (Fall 2005) at pp. 2, 7; accessibility reports prepared by DCR personnel in furtherance of the NJ-PAASS investigations; and interviews with the DCR personnel who oversaw the investigations.

As shown in these tables, and as more fully explained below, DCR conducted 1,707 inspections at 1,120 polling sites. These investigations showed that 450 of the 1,120 polling sites failed at least one inspection, and many failed multiple inspections, even though DCR advised the responsible officials of the sites' noncompliance. The study's results showed a decrease between May 2004 and November 2005 in the failure rate of sites upon initial inspection. DCR attributed this progress to a commitment of Department of Law and Public Safety resources to ensuring polling places are accessible, and to efforts of county and local election officials. The percentage of sites failing a repeat inspection, however, remained high.

Table 1. Division on Civil Rights, Polling Site Inspection Data, 2004-2006	
Total Inspections	1,707
Total Failed Inspections	769 (45.0%)
Total Sites Inspected	1,120
Total Sites Failing at Least One Inspection	450 (40.2%)

Table 2. Division on Civil Rights, Polling Site Inspection Data by Election and First-Time vs. Repeat Inspections			
First-Time Inspections			
		#Failed	%Failed
May 2004	162	109	67%
June 2004	382	219	57%
November 2004	249	66	27%
May and June 2005	327	56	17%
Repeat Inspections (failed at least one prior inspection)			
		#Failed	%Failed
November 2004	80	28	35%
May and June 2005	272	186	68%
November 2005	214	89	42%
November 2006*	21	17	81%
*The November 2006 inspections included only polling sites that had failed inspections on three previous occasions.			

2004 Investigations

The NJ-PAASS project began in May 2004, with a study of polling places used in the May 2004 municipal elections. County election officials had reported all of these places as accessible.

The results of this investigation showed significant noncompliance with polling place accessibility requirements in New Jersey. In the May 2004 municipal elections, 67 percent of the places investigated (109 out of 162) did not comply with State and federal laws requiring that polling places be fully accessible to voters with disabilities. In the June 2004 primary election, 57 percent (219 out of 382) were in violation of the laws on accessibility. The study revealed these high rates of noncompliance more than a decade after the Americans with Disabilities Act of 1990 (ADA)⁶, which took effect in 1992, imposed a federal requirement that all polling places be accessible.

Most of the findings had to do with significant accessibility impediments, including abrupt changes in level of the path of travel that wheelchair users would have to navigate, abrupt changes in the elevation of the interior route (such as stairways), nonexistent or inadequate curb cuts from the parking area to the path of travel, or doorways that were too narrow. Other violations had a less direct impact on accessibility and were more easily remediated, including inadequate signage of otherwise accessible entranceways, or signage stating the incorrect penalty for unlawful parking in an accessible parking space.

After its inspections during the May municipal and June primary elections in 2004, DCR followed up with enforcement efforts. It sent letters to each of the county boards detailing the accessibility problems and requesting that they remediate these problems. DCR then scheduled both new inspections and reinspections for the general election scheduled for November 2004, thus alerting county boards that it would continue monitoring their compliance.

DCR's enforcement efforts yielded mixed results. By the November 2004 general (presidential) election, the DCR inspectors surveyed 329 polling places that county election authorities reported as accessible. They found that 93 of those places, or 28 percent, were out of compliance. Among the 329 places surveyed were 80 places that had failed a prior inspection. Of these 80 places, one-third failed inspection yet again.

⁶ 42 U.S.C.S §§ 12101-213 (2007).

As was true in the May and June elections, most of the places that failed inspections in November 2004 had serious impediments to access, not just technical ones. Once again, DCR served notices of noncompliance on the county boards whose chosen places had failed inspection, and scheduled further inspections for the 2005 election cycle.

2005 Investigations

The following year, DCR continued its inspection process, selecting a mix of polling places that had previously failed inspection, together with places examined for the first time. Once again, county election authorities had reported all of the places inspected as accessible. In these two rounds of inspections, conducted in the municipal (May) and primary (June) elections, DCR issued failing grades to 56 of 327 places inspected for the first time (17 percent) and to 186 of 272 places that had previously failed inspection (68 percent).

In August 2005, DCR shared this information with county officials, as it had done before. DCR sent noncompliance warnings regarding polling places that had failed for the first time, and continued noncompliance notices to places that had failed more than once before the 2005 primary election.

Despite repeated warnings about polling places that were not compliant with the law, the county boards continued to make only marginal improvements. For the 2005 general elections, DCR checked 214 polling places, all of which had previously failed one or more prior inspections. Of these, 30 failed inspection a third time, and 59 failed a second time.

2006 Investigations

In the 2006 cycle, DCR concentrated its efforts on the 30 polling places that had previously failed three times. Of these 30 places, one received a waiver from the New Jersey Attorney General (see discussion below on waivers) and eight had been discontinued as polling places. Of the remaining 21 places, 17 failed inspection a fourth time. Given the limited number of inspections performed in 2006, and the fact that these sites had repeatedly failed prior inspections, it is not possible to draw broad, let alone statewide, conclusions about compliance from the 2006 inspection data. Yet concurrent findings by special county committees charged by statute with making accessibility inspections (see discussion below of Voting Accessibility Advisory Committees), suggest that inaccessibility remained a problem in 2006 well beyond these 17 four-time failures. The 17 places were distributed as follows:

Atlantic County	3
Bergen County	5
Burlington County	2
Camden County	2
Cape May County	3
Somerset County	2

Recommendation: On the issue of polling place accessibility, the Public Advocate’s recommendation is straightforward: every polling place in New Jersey should be fully accessible to voters with disabilities and senior citizens at every election. Fourteen years have passed since the requirement of accessibility took effect; it is time for 100 percent compliance.

Waiving Accessibility Requirements

The DCR targeted for investigation only those polling places reported as accessible. The county boards themselves, however, have long relied on a State law to identify noncompliant polling places and to seek waivers to operate such places. The facts described in waiver applications represent additional violations of the accessibility laws.

A statute on the books in New Jersey authorizes the State’s chief election official, currently the Attorney General, to issue waivers purporting to permit the use of inaccessible polling places. In the legal opinion of the Public Advocate, however, federal law preempts this State waiver law and renders it invalid. The federal ADA and the 2002 Help America Vote Act (“HAVA”) require accessibility and do not permit the States to waive this requirement. Accordingly, the Department believes that the State may no longer validly issue waivers to county boards that designate inaccessible sites as polling places.

In the weeks leading up to the 2006 election in November, the Public Advocate worked closely with the Attorney General on this issue, and the Attorney General made a decision to issue only 30-day waivers, instead of the one-year waivers permitted under the statute. In granting those waivers, the Attorney General advised counties seeking their second waiver in 2006 that State law now allows no more than two waivers for a polling location, but left open the possibility that for polling sites that that have not reached this limit, counties might be able to obtain waivers in the future.⁷

⁷ For example, in a letter dated January 8, 2007, on behalf of the Attorney General, the Acting Director of the Division of Elections advised county election officials that “the

Since that time, the Public Advocate and the Attorney General have worked closely with counties to help them meet accessibility requirements by modifying existing polling places to make them accessible or relocating them to accessible locations.

Recent Waiver Applications

Analysis of the 366 waiver applications and grants since 2003 is instructive, because it provides an additional basis for assessing the degree of noncompliance with accessibility requirements. The following table and narrative show the trends on accessibility waivers.

2003	94
2004	127
2005	94
2006	51

In 2003, the State granted 94 waivers of polling place accessibility around the state. Specifically, 46 were granted to Essex County, 32 were granted to Hudson County, nine to Mercer County, and 13 to Passaic County.⁸

In 2004, the number of waivers increased to 127. The reason is unclear: it may be that the county boards sought to use more inaccessible polling places or it may be that the level of political interest surrounding the impending presidential election resulted in closer attention to the election

Attorney General may grant a waiver in certain cases where a polling place is determined to be inaccessible and cannot be made temporarily accessible prior to requesting a waiver,” up to two waivers per polling place. The letter also stipulates that further waivers will be good for one “year in duration” as opposed to the November 2006 practice, where the waivers expired after 30 days. *See* http://www.state.nj.us/lps/elections/Polling%20Place%20Accessibility/2007_polling_place_accessibility/Memo-2007_Polling_Place_Accessibility.pdf (last visited March 21, 2007).

⁸ Office of the Attorney General, NJ Dep’t of Law & Pub. Safety, 2005 Polling Place Accessibility Survey.

laws in general, including those governing accessibility. The number of waivers granted was as follows: ⁹

Atlantic County	2
Camden County	1
Essex County	23
Gloucester County	1
Hudson County	59
Mercer County	21
Passaic County	20

In 2005, the number of waivers fell, to either 94 or 89. One data set indicates that waivers were distributed as follows:¹⁰

Bergen County	4
Essex County	20
Hudson County	46
Mercer County	18
Passaic County	6

In 2006, the number of requested waivers fell to 51:

- Essex County applied for and received 18 waivers, covering 33 election districts. All 18 polling places had previously received at least one waiver.
- Hudson County sought 11 waivers covering 23 districts; nine of them had been previously received at least one waiver.
- Mercer County sought 16 waivers, covering 24 districts; all 16 were the subject of prior waiver requests.

⁹ *Id.* A different data set, the NJDOE 2004-06 Polling Place Accessibility Survey, indicated 126 waivers issued in 2004, with no indication that Camden County was issued a waiver.

¹⁰ *See supra* note 8. The other data set (the 2004-06 survey, *supra* note 9 indicates that the distribution was as follows:

Bergen County	4
Essex County	20
Gloucester County	20
Hudson County	21
Mercer County	18
Passaic County	6

It is not apparent which of these is accurate, but the point remains that these counties fell short of 100% accessibility.

- Passaic County sought six waivers, covering 10 districts, but it had not previously sought waivers for any of them.¹¹

Under the State law that purports to allow waivers of accessibility requirements, a county board of elections must prove three things to the chief election official in order to obtain a waiver: first, that a survey of potential polling places had been performed; second, that the polling place at issue was inaccessible and could not be made temporarily accessible for election day; and third, that there was no accessible or temporarily accessible place “in or near” the election district.¹²

Even if such waivers were effective under federal law, review of the relevant materials leaves doubt about whether many of the waiver requests met the second criterion, and whether any of the waiver applications met the third criterion.

Consider, for example, this statement in a waiver request for a polling place in Mercer County: “Portable ramps are broken, need additional parking spots.”¹³ It seems that the repair of an existing ramp and the designation of accessible parking places, with cones or otherwise, would have made this polling place “temporarily accessible;” the waiver application wholly failed to establish the necessary condition that achieving accessibility was impossible. Nevertheless, the county board used this inaccessible polling place in the 2005 election, after a successful waiver application, with no explanation of what efforts, if any, it could have undertaken to make it accessible or why such efforts were not possible.

Even if state law permitted waivers to be granted, they could not be granted in the absence of sufficient evidence. Our review of recent waiver applications found at least some of them based on unsubstantiated or conclusory statements that the polling place could not be made temporarily accessible. Several included insufficient photographic, cartographic, or other evidence to substantiate the claims of impossibility or the absence of nearby accessible alternatives. In some cases, the applications appear to be merely *pro forma*. In the case of Mercer County, for example, the 2006 waiver applications were photocopies of the 2005 applications, with no indication

¹¹ See letters from Hon. Stuart Rabner, Attorney General, to Bethany O’Toole, Daniel Migueli, and Maria Havasy (October 24, 2006), and letter from Stuart Rabner to Dominic Magnolo (November 2, 2006). In the letters to Magnolo and Migueli, the Attorney General aptly acknowledged that in light of the passage of P.L. 2005, c. 146, ¶ 3, State law barred the issuance of more than two waivers for any polling site from and after July 2005.

¹² N.J. Stat. Ann. § 19:8-3.1(b) (2007).

¹³ Addendum to 2005 Polling Place Accessibility Waiver for Alexander School, Hamilton Twp., Mercer County (dated September 6, 2005, filed October 23, 2006).

that any effort had been made in the intervening year to make the sites accessible or to relocate them to accessible locations.

The law requires all polling places to be accessible, and merely prefers (but does not mandate) that polling places be located within the boundaries of an election district. Thus, closing inaccessible polls and either moving them (even outside of the district) or consolidating them with nearby accessible ones is a necessary solution when existing polling places cannot be made accessible. Yet, county boards regularly overlooked these possibilities in waiver applications or failed to explain their infeasibility. At the very least, before rejecting this alternative, county boards must explain why consolidation of election districts is infeasible.

The Path Forward on Accessibility Waivers

The Public Advocate acknowledges that moving a familiar, nearby polling place to an unfamiliar site farther away may create dislocations. Accordingly, the government must comply with the requirements of federal and State law setting forth how polling places must be selected,¹⁴ while also striving to give voters the maximum opportunity to cast ballots in a nearby polling place. If an existing polling site truly cannot be made accessible, government agencies and owners of accessible private buildings should work in a spirit of urgent cooperation to locate an accessible location within the polling district. If there are no accessible polling places to be found, the cooperative exploration of private and public buildings in nearby areas should continue. The results of such a process will be beneficial to all voters: citizens will continue to enjoy the convenience of voting in a nearby polling place, while knowing that, as they engage in this important civic exercise, their fellow citizens with disabilities can vote alongside them.

The Public Advocate commends both the Attorney General and the county boards of elections for recent progress toward accessibility. Of the four counties that sought waivers in the 2006 election cycle, all have made substantial steps toward 100 percent compliance. Hudson and Essex Counties, in particular, have relocated or improved sites for which they previously sought waivers, with the objective of ensuring that all their polling places will be accessible by the April 2007 board of education elections. Passaic and Mercer counties have also found solutions to the access problems for many of the sites for which they previously sought waivers.¹⁵

¹⁴ See *infra* notes 57 to 60 and accompanying text.

¹⁵ This discussion is limited to sites for which waivers were sought. The Public Advocate, however, has not received any information about other counties' responses to DCR's findings about inaccessible sites discussed above, which are separate from waiver sites.

Recommendations: Based upon the Department’s legal opinion that waivers can no longer be issued as a matter of federal law, the Public Advocate recommends that the Attorney General issue a formal opinion that he will cease issuing waivers, share this opinion with the counties, and reaffirm that all polling places must now be made accessible. In addition, the Attorney General should continue efforts to identify and distribute the available federal or state funds to county boards to improve polling place accessibility.

Enforcing Accessibility through Voting Accessibility Advisory Committees

From 1991 to 1994, State law required each county to create and maintain a Voting Accessibility Advisory Committee (VAAC) to “assist and advise county election officers” regarding accessibility issues and to conduct “walking tour[s]” of each polling place.¹⁶ In 1994, however, these VAACs became optional,¹⁷ and in many counties, ceased to function.

As of 2005, however, VAACs again became mandatory for all counties, along with a specific requirement that each polling place be subject to a “physical inspection” performed with the participation of a voter with disabilities to determine compliance with the ADA.¹⁸

Under current law, the VAAC consists of the four members of the county board of elections¹⁹ plus three to seven additional persons, one of whom must be a person with a disability, and one of whom must be trained in ADA compliance.²⁰

The VAAC is required to “undertake a physical inspection of each polling place in the county” and to receive complaints regarding polling place accessibility that are filed by voters or others.²¹ In addition, by May 15 of

¹⁶ P.L. 1991, c. 429, ¶ 11.

¹⁷ *Id.*, at ¶ 11(c).

¹⁸ N.J. Stat. Ann. §§ 19:8-2 to -3.8 (2007).

¹⁹ A county board of elections consists of four persons, equally divided among Republicans and Democrats, commissioned by the Governor upon the recommendation of county party officials. N.J. Stat. Ann. §§ 19:6-17 and -18 (2007).

²⁰ N.J. Stat. Ann. § 19:8-3.7(a) (2007).

²¹ N.J. Stat. Ann. § 19:8-3.7(b), (c) (2007).

each year (or February 15 in a presidential election year²²), the VAAC is required to produce a report to the Attorney General about polling place accessibility. If any poll is found inaccessible, the VAAC is required to “indicate the reasons for inaccessibility. . . and shall consult with the county board of elections to determine the efforts made pursuant to [law] to locate alternative polling places or the actions needed to make the existing facilities accessible.”²³

The reestablishment of mandatory VAACs holds great promise for reaching the goal of compliance with accessibility laws at every polling place. However, the Department’s review of VAAC reports from the 2006 election cycle shows that additional steps are necessary to make VAACs as effective an enforcement mechanism as possible.

First, the VAAC must be kept fully staffed at all times, and notice of its membership must be publicly available. The current web page of the Division of Elections lists the membership of the VAACs for all 21 counties. The Division should update this listing regularly, as the current list of VAAC members is the kind of “information helpful for voters” that the Division of Elections must maintain on its “official Internet site.”²⁴

Second, the tools used by VAACs must be improved to allow them to assess more accurately the accessibility of polling places. Specifically, as part of the physical inspection requirement, VAAC inspectors are required to fill out a “Polling Place Accessibility Checklist” (hereinafter “checklist”) for each polling place.²⁵ This checklist attempts to measure compliance with physical accessibility requirements through 14 questions. While the checklist is accurate, it does not always allow inspectors to capture the true accessibility of a polling place. In its own accessibility inspections of polling places, the DCR supplemented the DOE questionnaire with a document that provided additional guidance and detail on the tests for a site’s accessibility. The DCR believes, and the Public Advocate agrees, that the VAAC checklist should be supplemented with interpretive guidance such as that used by DCR. This would improve the ability of VAAC inspectors to identify the precise obstacles to accessibility, if any.

²² The February 15 date remains unaltered despite recent legislation that rolled back the date of New Jersey’s presidential primary to an earlier day in February.

²³ N.J. Stat. Ann. § 19:8-3.4 (2007).

²⁴ N.J. Stat. Ann. § 19:12-10(b) (2007). The Division of Elections has not always kept this information updated; as late as October 19, 2006, nearly ten months after all VAAC operations had commenced, the website showed a partial list, including eight counties with functioning VAACs that were said to still be in formation.

²⁵ This form is prepared by the DOE. A sample of the checklist is appended to this report as Appendix A.

Third, final accessibility reports prepared by counties must accurately reflect the findings of the VAAC inspectors. In each county, two members of the board of elections must determine whether the polling place is accessible based on the VAAC checklist that inspectors prepare for each polling site. The two members of the board then complete a separate form that tallies the number of accessible and inaccessible sites. This summary form is known as the Polling Place Accessibility Report Form.²⁶

The Public Advocate's review of the Accessibility Report Forms shows that in some counties, there are substantial discrepancies between assertions in the inspectors' checklists and the claims of accessibility made in the Accessibility Report Form.

For example, in a certification dated May 11, 2006, Union County certified that all 189 of its polling places were accessible. This, however, cannot be reconciled with the Division of Elections' review of the polling place checklists from July 2006, which found that eight polling place checklists were missing, and that 58 polling places had actual deficiencies noted. One checklist had reported the following:

[Q.] Is the path of travel to the entrance of the polling place at least 36" wide, except doorways, and is the ground stable, firm, and slip resistant with no changes in elevation greater then [sic] ¼" or ½" including curbs? . . .

[A.] No²⁷

This and other similar evidence indicates that the county officials should never have reported all sites as accessible, but they did so nevertheless.

These shortcomings demonstrate that county election officials, as well as State-level reviewers, must give greater attention to the information reported by their inspectors. Only those sites that pass VAAC inspection merit certification as "accessible."

Fourth, the current inspection process should identify sites that are inaccessible unless temporary measures are taken to make them accessible,

²⁶ This form is also prepared by the DOE. A sample of the report form is appended to this report as Appendix B.

²⁷ 2006 Polling Place Accessibility Checklist for Presbyterian Church, Mountainside Borough, Union County (inspected May 1, 2006, and filed May 15, 2006).

and the VAACs should follow up to make sure those sites were, in fact, made accessible. On the current Accessibility Report Forms, the county officials must choose between designating a polling place as “accessible” or “inaccessible.” The officials are instructed to designate a site as “inaccessible” only where it “has not been or cannot be made either permanently or temporarily accessible.” There is no third category for the many sites that are potentially accessible, i.e., sites that are inaccessible unless temporary (and often minor) modifications are made. A sizeable number of sites fall into this category of potentially accessible.

A review of selected polling place checklists directly demonstrates the problem with not clearly identifying sites that can be made accessible with temporary modifications. A checklist for a Salem County site stated:

[Comment to Question 2:] Accessible parking will be made available near the entrance for handicapped – in rear of building – A sign will be put in front of building informing voters of accessible parking and entrance in rear of building.

[Comment to Question 5:] Handle is not accessible – door will be propped open or volunteer will open door as needed.²⁸

Another accessibility checklist, from Passaic County, included the following comments:

Cone off space next to handicap space [to deal with insufficiently wide lane next to accessible parking space]
Install penalty sign
Tempory [sic] ramp used on Election Day
Exterior door left unlocked.²⁹

A report from Monmouth County found:

[Question] 1. Sign wrong hieght [sic], no asiel [sic] between [accessible parking] space

²⁸ 2006 Polling Place Accessibility Checklist for 76 Main Street Auburn, District 2, Oldmans Twp, Salem County (inspected April 18, 2006, and filed May 16, 2006).

²⁹ 2006 Polling Place Accessibility Checklist for School 9, 25 Brighton Road, Clifton Twp., Passaic County (inspected May 11, 2006, and filed June 19, 2006).

[Question] 5. Door not wide enough (double door available for election day)

A letter was sent to school to improve these items

NOTE: A letter has been sent to this polling location for each checklist item to be corrected.

Temporary measures have been taken to make the polling location accessible for Election Day.³⁰

Each of these checklists showed that at least some modifications were necessary. But an interested party must individually interpret each checklist. Although county officials have followed the DOE form's instructions correctly in listing these sites as accessible, the Public Advocate recommends that the form be amended to require the county boards to identify those sites that are potentially accessible with modifications, in addition to the current categories for "accessible" and "inaccessible."

The Public Advocate also believes that follow-up is necessary to ensure that potentially accessible sites are made accessible on election day. At present, although completed checklists note that modifications must be made at certain polling places, it is not clear who is responsible for making these modifications, and there is no verification on election day that the changes were actually made. The Public Advocate recommends election-day reinspection of either all or a random sample of sites listed as "potentially accessible." Counties that reinspect only a random sample of such sites should ensure that election-day inspections are unannounced. Such inspections could be conducted by the three to seven members of each county's VAAC who are not members of the county board of elections, together with additional resources available from municipal, county, or State governments, or nongovernmental organizations. The long history of noncompliance with accessibility laws requires more than simply an assertion that a temporary accessibility plan is feasible, or that one may be put into place.

Next, in preparing statistical or other reports on accessibility, the DOE should refrain from listing as compliant those counties (or sites within those counties) that have not put the foregoing practices into effect. The present practice is to list a county (and sites within that county) as accessible, so long as the inspection revealed either a compliant site or a potentially compliant one. The DOE should instead list as noncompliant those counties that establish no system for election-day reinspection or where there is a substantiated complaint about an accessibility barrier.

³⁰ 2006 Polling Place Accessibility Checklist for Aldrich School, Districts 11 and 16, Howell Twp, Monmouth County (inspection date unlisted; filed May 17, 2006).

Finally, DOE should act well before an election to ensure compliance by county boards. It is appropriate for the DOE to grant extensions to counties that have not provided fully responsive information but are moving toward compliance. This Department's review of relevant documents reveals, however, that some counties have set aside the certifications provided by the State and have instead crafted their own certifications, on which county officials decline to swear or affirm to the facts cited in their own documents. Indeed, by July 13, 2006 (almost 60 days after the 2006 due date), only seven of the 21 counties had achieved full compliance with the VAAC reporting mandates. In another case, the DOE was forced to send multiple follow-up letters to a county that had not answered checklists, had filled them out incompletely, or had included inaccurate reference information. DOE sent these follow-up letters as late as October 13, 2006, five months after the deadline for sending in the materials, and less than a month before the election.³¹ When a county has been so dilatory in responding, stricter enforcement measures should be taken.

Recommendations: In sum, the Public Advocate makes the following recommendations with regard to VAACs and inspection and enforcement of accessibility requirements.

1. County boards of freeholders must fully staff the VAACs, and their membership must be publicly available on the counties' election websites, as well as on the website of the DOE.
2. The VAACs' inspection checklist should be supplemented with interpretive guidance. The DCR's materials should serve as the guidepost. This will improve the ability of VAAC inspectors to determine the accessibility of polling sites, and the precise obstacles to accessibility, if any.
3. County election officials and State-level reviewers must ensure that final accessibility determinations accurately reflect what the VAAC inspectors report. Sites that, from the face of inspectors' checklists, appear to be inaccessible and that cannot be made temporarily accessible, should be cited as inaccessible and remedied or relocated. Both checklists and countywide accessibility reports should require the officials completing the documents to attest that all statements made are true, and remind them of the penal consequences of false statements under N.J. Stat. Ann. §§ 2C:28-3 and 2C:28-7(a)(1) (2007).

³¹ See, e.g., Letter from Maria Del Valle-Koch to Sarah Crowley (October 13, 2006) (on file with the author).

DOE should reject forms with unsigned or altered acknowledgements as noncompliant.

4. Countywide accessibility reports should allow county officials to choose the option of designating a site as “potentially accessible” in addition to the current choices of “accessible” or “inaccessible.” For sites designated as “potentially accessible,” the county boards must identify individuals responsible for achieving accessibility on election day. And on that day, VAAC members other than county board of election members, with the help of other government officials or nongovernmental organizations, should reinspect all or a random sample of “potentially accessible” sites.
5. The DOE’s statistical and other reporting should not reflect that a county, or polling places within that county, were compliant with the accessibility laws, unless (1) the site was inspected and found accessible; (2) all or a random sample of potentially accessible sites were inspected and found compliant on election day; and (3) there is no other evidence, such as substantiated complaints, that polling locations were inaccessible.
6. Counties that, after reasonable extensions, fail to submit documentation of a working VAAC, and a plan of action to resolve inaccessible or potentially accessible sites, should be subject to prompt enforcement efforts.

School Elections

The Department has learned from its discussions with county officials and its review of relevant documents that in some counties, school elections are held at polling places that are not used for any other election.³² Since the Division of Elections does not require inspection reports for these sites, there

³² See, e.g., Memorandum from Betty Donegan (Administrator, Mercer Co. Bd. of Elections) to Maria Del Valle-Koch (July 31, 2006). Similar reports were obtained from telephone interviews with election personnel in Atlantic County.

This practice appears to be impermissible under N.J. Stat. Ann. § 19:8-2 (2007), which provides that any list of polling places prepared by the county board of elections is to be used “for *all* elections in the municipalities thereof” (emphasis added). While it is permissible to have multiple election districts that would otherwise vote elsewhere move into a single polling place for purposes of school elections, the law appears to require that the polling location must be selected from the list of (presumably accessible) existing polling places instead of sites that have never been verified by county election officials. N.J. Stat. Ann. § 19:60-3(b) (2007).

are no mechanisms currently in place to ensure that these school-election polling places are accessible.

The Public Advocate has reviewed some accessibility reports for sites used exclusively in school elections. For example, a report from Morris County found:

Both handicapped [sic] spaces have signs but are not painted on asphalt [sic]. Small ramp from driveway to walkway is not to code (1:12). Sidewalk has some voids. Alternate route for people with disabilities will not have door open. It would need signage. The distance from alternate route to voting area is too far. Not acceptable.³³

Another report, also from Morris County, found:

The Multi Purpose room is in the front of the school. There is [sic] no handicapped [sic] parking spaces there. If a temporary spot would be designated, there is no curb cut. There is one spot on the side parking area, however it is not to code from parking spot to entrance. Walkway has cracks and voids. . . . Door entrance is ramped and does not have a 5 ft. x 5 ft. level area. Door has more than 5 lb. of force to open. Not acceptable.³⁴

The use of such inaccessible sites violates the ADA.

Recommendation: The use of polling places for school elections that are not on the general list of acceptable polling places for other elections is not permissible under state law. School board elections must be held in approved, accessible sites. Consequently, the Public Advocate recommends that all school election officials, under the oversight of the Department of Education, use only those polling sites that have been previously (1) designated as official polling sites, as required by law; and (2) certified as accessible through the VAAC process. DOE should also monitor compliance with these practices.

³³ 2006 Polling Place Accessibility Checklist for Hillcrest School, Morris Twp., Morris County (inspected Jan. 23, 2006, and filed May 17, 2006).

³⁴ 2006 Polling Place Accessibility Checklist for Woodland School, Morris Twp., Morris County (inspected Jan. 20, 2006 and filed May 17, 2006).

II. THE LAW PROTECTING SENIOR CITIZENS AND VOTERS WITH DISABILITIES

The following section provides an overview of the history of federal and State law on the subject, and recommendations for improvement of the law.

The History of Federal Laws Mandating Polling Place Accessibility

Congressional recognition of the need to protect the voting rights of older Americans, or those with disabilities or language barriers, began as early as 1965 with the passage of the Voting Rights Act (VRA). In that legislation, Congress empowered certain categories of voters to bring an assistant with them when they enter polling places and voting machines to vote:

Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union.³⁵

This law entitles voters to enter the polling place and the voting booth with a person of their choosing (other than an employer or union officer).³⁶ It likewise requires that elections officials be able to assist, and in fact assist, voters protected by this section who choose to avail themselves of board worker assistance.³⁷ It further requires all jurisdictions ensure that voters

³⁵ 42 U.S.C. § 1973aa-6 (2007), 42 U.S.C. § 1973ee-6(2), (4) (2007). The statute does not define "disability"; however, the ADA provides a useful definition of disability for purposes of this federal statute, providing that "disability" means "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such impairment; or being regarded as having such an impairment." 42 U.S.C. § 12102(2) (2007). Therefore, voters with either physical, developmental, or other disabilities, are all protected by this section.

³⁶ Therefore, to the extent that state laws (*e.g.*, N.J. Stat. Ann. § 19:15-8 (2007)) purport to limit the rights of voters to bring a chosen assistant into the polling place or the voting booth, such laws are preempted by the federal statute. *See* U.S. Const., art. VI ("the Laws of the United States . . . shall be the supreme Law of the Land").

³⁷ *See, e.g., United States v. County of Passaic*, No. 99-2544 (D.N.J. June 4, 1999) (available at http://www.usdoj.gov/crt/voting/sec_2/passaic_cd699.htm (last visited Dec. 12, 2006)). Although this case dealt primarily with the rights of non-English speaking voters under the Voting Rights Act, the examples of mandatory assistance, poll worker deployment, poll worker training, and the "Board Member Rules of Etiquette and Procedure" provided for in the consent decree are a useful framework for understanding the rights of elderly voters and voters with disabilities.

are fully aware of their rights under this section, and able to exercise these rights.³⁸

In 1984, Congress took the next substantial step toward increasing polling place accessibility by passing the Voting Assistance for the Elderly and Handicapped Act (VAEH). The VAEH mandated polling place accessibility for “handicapped and elderly voters” unless an emergency existed or a waiver was granted.³⁹ This landmark legislation provided as follows:

(a) Accessibility to all polling places as responsibility of each political subdivision

Within each State, except as provided in subsection (b) of this section, each political subdivision responsible for conducting elections shall assure that all polling places for Federal elections are accessible to handicapped and elderly voters.

(b) Exception

Subsection (a) of this section shall not apply to a polling place—

- (1) in the case of an emergency, as determined by the chief election officer of the State; or
- (2) if the chief election officer of the State—

- (A) determines that all potential polling places have been surveyed and no such accessible place is available, nor is the political subdivision able to make one temporarily accessible, in the area involved; and
- (B) assures that any handicapped or elderly voter assigned to an inaccessible polling place, upon advance request of such voter (pursuant to procedures established by the chief election officer of the State)—

³⁸ See *id.*; see also Complaint in *United States v. City of Philadelphia*, No. 06-4592 (E.D.Pa. October 13, 2006) (available at http://www.usdoj.gov/crt/voting/sec_203/documents/philadelphia_comp.pdf (last visited December 12, 2006)).

³⁹ See 42 U.S.C. § 1973ee-1 (2007).

- (i) will be assigned to an accessible polling place, or
- (ii) will be provided with an alternative means for casting a ballot on the day of the election.⁴⁰

In sum, this statute requires that each and every polling place used for federal elections must be accessible for “elderly” and “handicapped” voters unless an exception applies.⁴¹ An “elderly” voter is one who is 65 years of age or older and a “handicapped” voter under this statute is a voter with “a temporary or permanent physical disability.”⁴² To protect the rights of such voters, “all” polling places used in federal elections must be “accessible to handicapped and elderly individuals for the purpose of voting or registration.”⁴³

Until 1992, it was possible for a county board of elections to request, and for the state chief elections official⁴⁴ to grant, waivers of the VAEH’s accessibility requirement for the reasons set forth above. The Public Advocate has concluded, however, that the passage of the ADA effectively repealed this statutory authorization. In order to obtain such waivers, the government agency seeking the waiver had to meet a heavy burden of proving that it had surveyed “all potential polling places” in the area and found none “in or near” the election district that were accessible or could be made accessible for elderly voters and voters with disabilities, even on a

⁴⁰ *See id.*

⁴¹ Although this statute, by its terms, applies only to “Federal elections,” i.e., those where Presidential electors, United States senators, or Members of Congress are chosen, New Jersey law, as discussed *infra*, has comparable protections. Moreover, although it would be theoretically lawful, in the absence of a state law on the subject, to have different requirements for federal and nonfederal elections, the reality is that the federal mandates will be applicable in all elections. *See, e.g.*, Richard L. Hasen, *Beyond the Margin of Litigation*, 62 WASH. & LEE L. REV. 937, 973 (2005) (“States would remain free to conduct elections for state and local offices using a separate [regulatory scheme] though it is hard to believe that any of them would go to the expense to do so”).

⁴² 42 U.S.C. § 1973ee-6(2) and (4) (2007). This statute does not contain a further definition of “disability.”

⁴³ 42 U.S.C. § 1973ee-6(1) (2007).

⁴⁴ Currently the Attorney General of New Jersey; however, before 1998, the Secretary of State of New Jersey was the State’s chief elections official. *See* Reorganization Plan No. 004-1998, 30 N.J. Reg. 1351(a) (Apr. 20, 1998), at ¶ 6 (transferring “[t]he functions, powers and duties and personnel of the Secretary of State under Title 19 of the New Jersey Statutes . . . to the Department of Law and Public Safety”); *see also* P.L. 2004, c. 188, § 11 (amending the statute designating the chief elections officer for purposes of the Voting Accessibility for the Elderly and Handicapped Act (VAEH)).

temporary basis.⁴⁵ Despite this strict standard, New Jersey counties sought waivers, and the State regularly granted them, even up until the current 2006 election (22 years after Congress passed the VAEH, and fourteen years after waivers could no longer be validly issued because of the ADA's passage). As discussed below, this misunderstanding of the applicable law has resulted in the official approval of dozens of inaccessible polling places over numerous elections.

In 1990, Congress passed the ADA, making it effective in February 1992. Title II of the ADA governs public entities, including states, counties and municipalities. The operative provision states:

Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.⁴⁶

Because conducting elections is a “service, program, or activity” of a public entity, the ADA covers the voting process. Indeed, implementing regulations issued by the Department of Justice indicate that the ADA requires (and has required since 1992) accessible polling places, accessible voting machines, and a voting process that is, taken as a whole, accessible to persons with disabilities.⁴⁷

⁴⁵ N.J. Stat. Ann. § 19:8-3.1(b) (2007). In addition, beginning in 2005, county election boards that received waivers were also obligated to “formulate a plan to establish an accessible location for the polling place in or near the election district. *Id.*

The Public Advocate has concluded that the government cannot meet such a burden simply by showing that there is no accessible polling place within the election district involved. Rather, the government would have to prove that there is no accessible building, public or private, that could serve as a polling place anywhere within a reasonable distance from the district. Inasmuch as the Americans with Disabilities Act's mandates of accessible buildings have been part of the law for over fourteen years now, it should be possible for every board of elections to find an accessible polling place in or near each election district.

⁴⁶ 42 U.S.C. § 12132 (2007); *see also* 42 U.S.C. § 12101(a)(3) (setting forth Congressional findings that “discrimination against individuals with disabilities persists in such critical areas such as . . . voting and access to public services”).

⁴⁷ *See* 28 C.F.R. § 35.160 (2007). Title II of the ADA has also been cited with approval in at least three significant federal cases involving polling place accessibility and accessible voting machines, *American Ass'n of People with Disabilities v. Hood*, 310 F. Supp. 2d 1226 (M.D. Fla. 2004); *People of the State of New York v. County of Schoharie*, 82 F. Supp. 2d 19 (N.D.N.Y. 2000); and *Lightbourn v. County of El Paso*, 904 F. Supp. 1429 (W.D. Tex. 1995).

Under the ADA, therefore, the polling place must meet certain guidelines addressing parking places, ramps, elimination of obstacles and other requirements, as recommended in a checklist promulgated by the United States Department of Justice.⁴⁸ It is also highly relevant that unlike the VAEH, the ADA does not provide an opportunity for governments to obtain waivers from its requirements. While this question has not been definitively resolved by the courts, the Public Advocate interprets these statutes as mandating that all polling places must be accessible.

Most recently, the protections afforded to elderly voters or voters with disabilities or language impairments were reiterated in the Help America Vote Act (HAVA), adopted in October 2002.⁴⁹ HAVA requires that the overall voting system (which is defined to include all equipment used to cast and count votes, paper ballots if used, and the practices used to give notices to voters and instruct them on how to vote),⁵⁰ must meet rigid requirements to promote the rights of voters with disabilities. Specifically, at least one voting system located at each polling place must be:

(A) accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.⁵¹

⁴⁸ See <http://www.usdoj.gov/crt/ada/votingck.htm> (last visited January 10, 2007).

⁴⁹ See 42 U.S.C. §§ 15301-15545 (2007). In addition to mandates on, and funding for, voting systems affecting voters with disabilities (e.g. 42 U.S.C. §§ 15421, 15481(a)(3) (2007)), the Help America Vote Act (HAVA) also contains a number of other protections for voters generally, including the reliability, accuracy, and security of voting machines, provisional ballot requirements, and provisions about the registration of voters and the statewide list of such voters. See, e.g., 42 U.S.C. §§ 15481-15483 (setting forth the minimum standards for voting systems, their audit capacity, provisional ballot rules, voter registration, and voter registration databases). States are expressly permitted to adopt more (but not less) stringent requirements than the federal ones. 42 U.S.C. § 15484 (2007).

⁵⁰ 42 U.S.C. § 15481(b) (2007).

⁵¹ See 42 U.S.C. § 15481(a)(3) (2007). The specific protections for privacy and independence have the effect of overruling certain case law interpreting the disability-rights provisions of the Voting Rights Act, 42 U.S.C. § 1973aa-6 (2007), and the VAEH, 42 U.S.C. § 1973ee-1 (2007), to the effect that elections officials could meet their legal obligations to blind voters by allowing or providing them the assistance of another person in casting their ballot. See, e.g., *Nelson v. Miller*, 950 F. Supp. 201 (W.D. Mich. 1996), *aff'd*, 170 F.3d 641 (6th Cir. 1999). Because this accommodation does not ensure privacy and independence, it is insufficient under HAVA. A person with visual impairment must be able to vote alone at a machine, although the voter may bring an assistant if he or she wants one.

The foregoing section took effect on January 1, 2006.⁵² The Department of Justice has interpreted this provision to mean that not only must the machinery used for elections be accessible, but the polling place must also be accessible.⁵³ Indeed, it would make little sense to require the voting machine to be accessible if a voter with a disability could not get to the machine. Thus, as of January 1, 2006, federal law required both voting machines and polling places to be accessible.

In the Public Advocate's view, the net effect of the passage of the ADA and HAVA is that the State may no longer grant waivers of accessibility requirements. HAVA includes a provision that was intended to preserve the substantive protections of various federal laws, including the Voting Assistance for the Elderly and Handicapped Act.⁵⁴ This provision cannot be read, however, to permit continuing State waivers under the authority of the VAEH. The VAEH states only that its own provisions may be waived. Neither the VAEH nor any other federal law says that a chief state election officer may waive "all federal laws on polling place accessibility." Therefore, even assuming that HAVA preserved the narrow exception of the VAEH, that narrow exception would not authorize waivers of the requirements of the ADA or HAVA. Federal courts have enforced the ADA as an independent source of rights guaranteeing polling place access to people with disabilities, and HAVA not only left the ADA intact, but added protections for voters with disabilities. Because the more recent federal statutes guarantee access to every polling place, they supersede both the VAEH's earlier provisions on waivers of accessibility requirements and state laws passed pursuant to VAEH.

New Jersey State Laws Governing Polling Place Accessibility

In light of the foregoing federal laws, New Jersey has adopted some provisions that are more stringent than the federal laws on polling place accessibility; however, some State provisions remain inconsistent with federal law.

Initially, the State's Law Against Discrimination (NJLAD) governs voter rights. The NJLAD declares that "[a]ll persons shall have the opportunity to . . . obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation . . . without discrimination

⁵² 42 U.S.C. § 15481(d) (2007).

⁵³ Letter from Hans von Spakovsky to John W. Eads (March 4, 2005), (*available at* <http://www.usdoj.gov/crt/voting/hava/msdisability.pdf> (last visited December 14, 2006)).

⁵⁴ 42 U.S.C. § 15545 (2007).

because of . . . disability . . . subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.”⁵⁵ Since voting processes as well as polling places themselves are “places of public accommodation,” the NJLAD’s requirements apply.⁵⁶

Title 19 of New Jersey’s statutes, which contains the State’s elections law, also provides for the rights of senior citizens, voters with disabilities, and those with language impairments.

With regard to the selection of polling places, there are only two requirements under New Jersey state law about the location of a polling place: first, it must be in the same county as the election district it serves,⁵⁷ and second, it must be accessible to individuals with disabilities and elderly voters and accessible under the ADA.⁵⁸ Another consideration used to determine the location of a polling place, but one that is clearly subordinate to the first two requirements, is its convenience to the district’s voters, as measured by how close to the district boundary the polling place is located.⁵⁹

⁵⁵ N.J. Stat. Ann. § 10:5-4 (2007); *see also* N.J. Stat. Ann. § 10:1-2 (2007). “Disability” is defined in the NJLAD as “physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness including epilepsy and other seizure disorders, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or any mental, psychological or developmental disability resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. Disability shall also mean AIDS or HIV infection.” N.J. Stat. Ann. § 10:5-5(q) (2007).

⁵⁶ The New Jersey Law Against Discrimination defines place of public accommodations, N.J. Stat. Ann. § 10:5-5(l) (2007); prohibits “acts of unlawful discrimination,” N.J. Stat. Ann. § 10:5-12(f), and includes disability as a protected category, N.J. Stat. Ann. § 10:5-4 (2007).

⁵⁷ N.J. Stat. Ann. § 19:8-3 (2007) (“The county board may select the schoolhouse or schoolhouses, public building or public buildings as the polling places in any municipality in the county whether or not such schoolhouses or public buildings are located within the election district for which the polling place is established.”)

⁵⁸ N.J. Stat. Ann. § 19:8-2 (2007) (“Each polling place selected shall be accessible to individuals with disabilities and the elderly”). and N.J. Stat. Ann. § 19:8-3.3 (2007) (“The Attorney General shall be responsible for ensuring that each polling place is in compliance with the federal ‘Americans with Disabilities Act of 1990’”) (internal citations omitted).

⁵⁹ N.J. Stat. Ann. § 19:8-2 (2007) (“The county board may select a polling place other than a schoolhouse or public building outside of the district but such polling place shall not be located more than 1,000 feet distant from the boundary line of the district” unless the Attorney General approves a greater distance because there are no accessible polls within the 1,000-foot boundary); N.J. Stat. Ann. § 19:8-3 (2007) (“The county board may select a polling place other than a schoolhouse or public building for an election district, when the

There is also a preference (but not a mandate) for public buildings over private ones.⁶⁰

Although one of the two mandates about polling place accessibility under State law is that the polling place (and whichever room(s) within it are actually used for voting) be accessible under the ADA, the current statute is deficient in two respects. First, the statute still purports to allow waivers of polling place accessibility.⁶¹ As outlined above, it is the Public Advocate's opinion that under the law, effective waivers could no longer be granted following the 1992 effective date of Title II of the ADA, and this was again confirmed with the 2002 passage of HAVA. These provisions of State law are preempted by federal law⁶² and should be repealed to avoid continued confusion. Second, to the extent that HAVA's rules about polling places exceed the protections of the ADA (because they expressly require "the same opportunities for access and participation (including privacy and independence) as for other voters"), State law should expressly incorporate these enhanced provisions, by stating clearly that polling sites must not only comply with ADA, but also with HAVA. By doing so, the State will allow the voting public and election officials to readily ascertain in one place the complete requirements for a voting system.

Recommendations: In the immediate term, the Attorney General should issue a formal opinion stating that counties will no longer have the opportunity to obtain any waivers for noncompliance with the laws on polling place accessibility. The Legislature should then repeal 19:8-3.1(b), regarding polling place accessibility waivers, to reflect that this statute is legally ineffective as preempted by federal law. Furthermore, the Legislature should adopt appropriate enhancements to the State's accessibility laws (N.J. Stat. Ann. §§ 19:8-2 to -3.8 (2007)), to expressly acknowledge the need for HAVA compliance.

location of the election district and of the schoolhouses and public buildings in the municipality in which the election district is located is such that inconvenience would be caused the voters of such election district."); *see also* N.J. Stat. Ann. § 19:8-3.1(b) (explaining the mandate to search for a polling place that is "in or near the election district involved").

⁶⁰ N.J. Stat. Ann. § 19:8-2 (2007) ("Preference in locations shall be given to schools and public buildings where space shall be made available by the authorities in charge . . .").

⁶¹ N.J. Stat. Ann. § 19:8-3.1(b) (2007). The Public Advocate takes no position on whether waiver in the case of a "state of emergency," as permitted by N.J. Stat. Ann. § 19:8-3.1(a) (2007), would be permissible. *See also* N.J. Stat. Ann. App. §§ A:9-33 to -35 (dealing with gubernatorially declared states of emergency).

⁶² *See* U.S. Const., art. VI ("the Laws of the United States . . . shall be the supreme Law of the Land") (capitalization in original).

Voting Machine Accessibility

As explained above, numerous federal laws require that voting machines be accessible to persons with disabilities, both physical and nonphysical. This means, for example, that machines must be accessible to the blind and visually impaired, through audio equipment or otherwise. Persons who use wheelchairs or who have limited mobility must be able to reach and operate buttons or touchscreens.⁶³

In at least one important respect, New Jersey law is even more protective of the rights of voters with disabilities than HAVA. In contrast to HAVA, which requires that one voting machine per polling *place* be accessible to persons with disabilities, the State law requires that by January 1, 2006, one voting system per *district* be “capable of permitting individuals with disabilities to vote.”⁶⁴ In New Jersey, the citizens of several districts typically vote at a single polling place.

The issue of voting machine accessibility, including poll workers’ mastery of the voting machines’ accessibility features, remains under study by the Public Advocate. To ensure that all voting equipment is accessible to voters with disabilities, the Public Advocate urges continuing study and evaluation of all voting systems used in New Jersey elections for compliance with accessibility standards.

Poll Worker Training and Public Education

As stated above, the federal Voting Rights Act mandates that voters who require assistance “by reason of blindness, disability, or inability to read or write” are entitled to assistance at the voting machine. This statute is *not* by its terms limited to voters with physical disabilities.⁶⁵

New Jersey law on the subject acknowledges the right of a voter with a disability to have in-the-booth assistance from a person of his or her own choosing (including but not limited to a relative, friend, driver, or assistant,

⁶³ See 42 U.S.C. § 15481(a)(3) (2007). The voting machines must be “accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.” *Id.*

⁶⁴ N.J. Stat. Ann. § 19:4-11(b) (2007). “Voting system” is not defined under state law, so it is appropriate to use the definition of voting system found in HAVA, 42 U.S.C. § 15481(b) (2007).

⁶⁵ See *supra* note 35 and accompanying text.

but excluding employers or union representatives).⁶⁶ However, the New Jersey statute is defective in one important respect. The statute provides that where a voter appears without an assistant and requests the assistance of the poll workers, poll workers may only assist where there is a “an inability to read or write, blindness or other *physical* disability.”⁶⁷ This statute might be read (incorrectly) to provide that a voter with a nonphysical disability, (e.g., a cognitive disability), is not entitled to assistance from board workers. The statute should be amended, as required by federal law, and clarified to provide that all voters with a qualifying “disability” are entitled to receive assistance from board workers.⁶⁸

Moreover, the mere legal right to assistance, or the mere existence of accessible polling places and polling machines, means little unless the voting public is educated about the capabilities of these machines. In addition, the presence of such machines will not mean much unless board workers are trained in their use and in the proper conduct respecting voters with disabilities.

⁶⁶ N.J. Stat. Ann. § 19:31A-8 (2007) (“Such voter, if blind, disabled, or unable to read or write, may, in lieu of the assistance of the board as above provided, have assistance of some person of his own selection in preparing his ballot.”); N.J. Stat. Ann. § 19:50-3 (2007) (same); N.J. Stat. Ann. § 19:12-7(b)(1)(E) (2007) (requiring that notices published in newspapers by county boards of election, regarding voter registration and upcoming elections set forth “[t]he availability of assistance to a person unable to vote due to blindness, disability, or inability to read or write”).

⁶⁷ N.J. Stat. Ann. § 19:50-3 (2007) (“If any voter, before entering the voting machine booth, declares under oath, and establishes to the satisfaction of a majority of all the members of the district board that by reason of an inability to read or write, blindness or other *physical* disability he is unable to cast his vote without assistance, he shall have the assistance of two members of the board of opposite political faith, to be assigned by the board. Such members shall retire with such voter to the booth and assist him.”) (emphasis added); *accord*, N.J. Stat. Ann. § 19:31A-8 (2007) (“inability to read or write, blindness or other *physical* disability”) (emphasis added).

⁶⁸ Discrimination against persons with developmental disabilities, including discrimination in the elections process, is expressly forbidden by state law:

No developmentally disabled person shall be presumed to be incompetent or shall be discriminated against or shall be deprived of any constitutional, civil or legal right solely by reason of admission to or residence at a facility or solely by reason of receipt of any service for developmentally disabled persons. No such admission, residence or receipt of services shall modify or vary any constitutional, civil or legal right of such person, including, but not necessarily limited to;

a. Register and vote at elections . . .

N.J. Stat. Ann. § 30:6D-4 (2007)

An example of generating public awareness about voting technology comes from Monmouth County. In 2006, the County acquired 950 touch-screen AVC Advantage machines from Sequoia Pacific Co. The county found the machines accessible because they tilt to allow people with disabilities to reach the screen, and contain audio, hand-held, and Braille features to accommodate blind or visually impaired voters.⁶⁹ The machines have been the subject of demonstrations throughout the county,⁷⁰ and both the machines and the education process have earned support from disability advocates in Monmouth County.⁷¹ Public demonstration of new machines as required by law remains an important aspect of voter education.

State law is also clear on the issue of training. The Attorney General is responsible for establishing guidelines for the design of training manuals for poll workers, and must “design, prepare and distribute training manuals for members of county boards of election, and county clerks.”⁷² The Attorney General is required to make training manuals available on the Internet site of the Division of Elections.⁷³

Although some materials are present on the Division of Elections’ website, it is not clear that such materials fully comply with existing State law. The site contains a “Voters’ Bill of Rights,” posters, an ADA training book, and a helpful manual on “Disability Etiquette,” but no State training manuals. Moreover, it is unclear whether the Attorney General has provided any materials directly to the board workers in the several counties, trained them on the relevant materials and law, or tested their mastery of these concepts.

In short, substantial steps remain in educating the voting public and poll workers on the rights of senior citizens and voters with disabilities to accessible polling places, accessible voting machines, privacy and

⁶⁹ See James Quirk, *High-tech voting for visually impaired*, Asbury Park Press, Oct. 18, 2006, at 1-B.

⁷⁰ Pursuant to N.J. Stat. Ann. § 19:50-2(a) (2007), public demonstrations of voting machines newly put in use are required for a period of four years after their use begins, for all voters regardless of disability status.

As it can take “up to 40 minutes,” see Quirk, *supra* note 69, for a voter to listen to all the instructions and cycle through the candidates and public questions, educating voters on the machines’ operation in advance is a sound public policy.

⁷¹ See *id.*

⁷² N.J. Stat. Ann. § 19:50-1(b) (2007).

⁷³ N.J. Stat. Ann. § 19:50-1(a) (2007). A review of the Division of Elections website conducted on March 20, 2007, did not reveal any such materials.

independence in casting a ballot, and assistance in casting a ballot if requested.

Recommendations: With regard to poll worker training and public education, the Public Advocate recommends that:

1. The training materials and the Voter's Bill of Rights booklet published by the Attorney General's Office should accurately reflect the state of federal law on the rights of all voters with disabilities to assistance from board workers.
2. The training materials and the Voter's Bill of Rights booklet should be posted on the Division of Elections' website as required by N.J. Stat. Ann. §§ 19:12-10(b) and 19:50-1 et seq. (2007).
3. The Legislature should amend N.J. Stat. Ann. §§ 19:31A-8 and 19:50-3 (2007), which purport to limit the right to in-booth assistance from a board worker to voters with "physical" disabilities, by deleting the word "physical."
4. To promote voter education, county boards should continue to hold public demonstrations of machines as required by N.J. Stat. Ann. § 19:50-2 (2007).
5. The State should continue to require the training of district board workers on the rights of voters with disabilities and the respect to be shown such voters, and consider testing district board workers on their mastery of these concepts and other election laws and procedures. A statewide training curriculum should be implemented to ensure uniformity in poll worker training.

III. FURTHER RECOMMENDATIONS AND FUTURE STUDY

In the course of completing this study on the rights of voters with disabilities, the Public Advocate has identified an additional area that warrants attention, namely, the rights of voters served by the Division of Developmental Disabilities and the Department of Human Services under the National Voter Registration Act.

The National Voter Registration Act ("NVRA"), passed by Congress in 1993, is grounded in the policy determination that federal, State, and local governments must promote and facilitate the exercise of citizens' right to vote

and must strive to increase the number of eligible citizens who vote.⁷⁴ The law provides, among other things, that all state-funded offices that are primarily engaged in serving people with disabilities must function as voter registration agencies.⁷⁵ A voter registration agency must provide voter registration and other forms to the people it serves and must assist people in completing voter registration forms.⁷⁶

Each State is required to designate voter registration agencies in elections for federal office.⁷⁷ New Jersey has designated, among others, “any public office of the Division of Developmental Disabilities” as a voter registration agency.⁷⁸ Because developmental centers are primarily engaged in providing services to people with disabilities and contain offices of the Division of Developmental Disabilities (DDD) on site, they are voter registration agencies under both federal and State law. The Public Advocate believes that State-funded psychiatric hospitals and nursing homes must also be designated voter registration agencies under federal and State law.

Significantly, the NVRA specifies that a voter registration agency that provides disability services at a person’s home must also provide voter registration services to that person at his or her home.⁷⁹

Recommendations: The Public Advocate recommends that the Division of Developmental Disabilities or the Attorney General, through regulations, or the Governor, through an Executive Order, direct that state-run residential facilities that serve individuals with disabilities and senior citizens immediately comply with their obligations under federal law and commence the voter registration activities required by the NVRA.

The Public Advocate further recommends that administrators of such facilities ensure that residents and participants have access to and assistance with registration forms and that voters who are not able to travel to polling places should have assistance in obtaining and delivering absentee ballots. Moreover, consistent with best practices and the spirit of the National Voter Registration Act, the Public Advocate urges the Department of Human Services to ensure that residential facilities encourage educational programs on voting and citizenship and provide residents with assistance and

⁷⁴ 42 U.S.C. § 1973gg (2007).

⁷⁵ 42 U.S.C. § 1973gg-5(B) (2007)

⁷⁶ 42 U.S.C. § 1973gg-5(a)(4)(A) (2007); 42 U.S.C. § 1973gg-5(a)(6)(C) (2007).

⁷⁷ 42 U.S.C. § 1973gg-5 (2007).

⁷⁸ N.J. Stat. Ann. § 19:31-6.11 (2007).

⁷⁹ 42 U.S.C. § 1973gg-5(a)(2)(B) (2007).

transportation to the polls on election day. Inasmuch as the Department has previously conducted outreach to these agencies, with positive results, the Public Advocate recommends continued cooperation with the Department's initiatives to facilitate compliance with federal and state elections laws, to prevent discrimination and to educate and support voters with disabilities.

APPENDIX A



County: _____
Municipality: _____
Polling Address: _____
Building Name: _____
Ward(s) & District(s): _____
Inspected By: _____
Date Inspected: _____

2007 POLLING PLACE ACCESSIBILITY Checklist

If any questions are checked off as "No" please provide a brief explanation on the comments section of the checklist.

- 1. If off-street parking is available to voters, will there be a sufficient number of spaces accessible for people with disabilities, and are they the proper size, on level ground that is stable, firm, slip resistant, properly identified, and is the shortest route to the closest entrance?** YES NO N/A
-

Parking spaces accessible for the disabled must be at least 8' wide, with adjacent striped access aisles at least 5' wide. At least one accessible parking space in each parking lot and one in every eight accessible spaces must be van accessible with an access aisle at least 8' wide. The parking spaces and access aisles must be painted to contrast with the pavement. Each parking space must have signage that includes the International Symbol of Accessibility, the language "Reserved Parking" with appropriate arrow marks below, and a Penalty Sign that includes the language required by N.J.S.A. 39:4-197(3)c, "Penalty, \$250 First Offense. Subsequent Offenses \$250 minimum and/or up to 90 days Community Service". The lowest edge of the signs must be 60" from the ground when the sign is parallel to the sidewalk or walkway and it must be 72" above the ground when the sign is perpendicular to the walkway. N.J.A.C. 5:23-7.9(f) 1. This is not a range; it is a requirement.

- 2. Will any special parking accommodations be made on a temporary basis on Election Day for the elderly and people with disabilities? (Please specify on back.)** YES NO N/A
-

For example, will an area and/or on-street parking be identified as "for use only for people with disabilities"?

- 3. Is the path of travel to the entrance of the polling location at least 36" wide, except doorways, and is the ground stable, firm, and slip resistant with no changes in elevation greater than 1/4" or 1/2", including curbs? A change in level greater than 1/4" can be beveled at 1:2 up to 1/2"; higher than 1/2" is a ramp and has to be constructed at 1:12. Refer to question six for ramps.** YES NO N/A
-

- 4. Will disabled voters be required to use an alternate entrance:** YES NO N/A
-
- a. *Will there be directional signage to the alternate entrance?*
- b. *Will the alternate entrance be identified with the international symbol of accessibility?*
- c. *Will the alternate entrance be left unlocked?*

- 5. Are all doorways leading to the voting area handicapped accessible?** YES NO N/A
-

Doors should be easy to open for those with limited hand/arm motion. Door hardware should be easy to grasp with one hand without tight grasping or twisting of the wrist to operate. Lever operated mechanism, push-type mechanism and U-shaped handles are acceptable designs. Doors should also provide a clear opening of 32" and have thresholds beveled with a slope not exceeding 1:2. Interior doors should not exceed 5lbs of force.

- 6. If ramps are used to gain access to the location, are they accessible to people with disabilities?** YES NO N/A
-

Ramp must be at least 36" wide, stable, firm, and slip resistant. Least possible slope should be used for any ramp. 1:12 is recommended. Ramps on existing buildings that have a slope of 1:10 to 1:12 are allowed for a rise up to 6". A slope of 1:8 to 1:10 is allowed for a raise up to 3". Handrails on both sides of the ramp must be used if there is a rise exceeding 6", and protected edges of a minimum of 2" in height must be used with drop-offs exceeding 6". The ramp should have a 5' by 5' landing at the top of the ramp, the bottom of the ramp and where the ramp changes direction.

APPENDIX B



OFFICE OF THE ATTORNEY GENERAL
NJ DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ELECTIONS



New Jersey
Division of
Elections

2007 POLLING PLACE ACCESSIBILITY REPORT FORM

Refer to N.J.A.C. 13:17-6.8 for Polling Place Accessibility Standards

("Inaccessible" refers to any polling place utilized for Primary, General, Municipal or School Elections which has not been or cannot be made either permanently or temporarily accessible.)

County: _____ Name of Person Completing Survey: _____

Title: _____ Telephone # _____ Fax # _____

1. The total number of Polling Places (not election districts) in county: _____

2. The total number of Polling Places to be utilized for **any Election** that have been found:

Accessible: _____ Inaccessible: _____

3. Does the county provide public notice of the accessibility or inaccessibility of their polling places? Yes No

By what methods? _____

4. Does the county provide public notice that if the polling place of an elderly or a physically disabled voter is inaccessible, he or she may be reassigned, upon request, to an accessible polling place that has a common ballot with the voter's election district? (pursuant to N.J.S.A. 19:8-3.2) Yes No

5. Does the county provide telecommunication devices for the deaf in order to convey registration and voting information? Yes No

If yes, please list number: _____

If no, does the county advertise the State "toll free" TTY Telephone Number? (1-800-292-0039) Yes No

6. Does the county provide display voting instructions in large type on election day? Yes No

7. Does the county currently have a Voting Accessibility Advisory Committee? Yes No

If yes, please identify the members of the Committee along with the offices or groups they represent:

8. Have inaccessible polling places been reduced from the previous year?

Number inaccessible in 2006: _____ Number inaccessible in 2007: _____

9. Have you had any specific pre-election inquiries for accommodations by a voter with disabilities? Yes No

If yes, please describe: _____

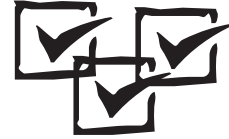
Please note if you were able to meet any special requests: _____

Return Completed Reports to:

NJ Division of Elections
44 South Clinton Avenue, 7th Floor
PO Box 304
Trenton, NJ 08625-0304



Office of the
Attorney General
NJ Department of Law & Public Safety



New Jersey
Division of
Elections

2007 POLLING PLACE ACCESSIBILITY Report Form Certification

We, _____, Chairperson and
_____, Secretary, of full age, do hereby certify
as follows:

1. The undersigned are the Chairperson and the Secretary of the
_____ County Board of Election.
2. The Board of Election has reviewed the 2007 Polling Place Accessibility Checklists submitted to the Board by those individuals designated by the Board to conduct a survey of each polling place in the County, and based upon the information contained in the survey, the Board has determined that those polling places deemed accessible meet the standards mandated by N.J.A.C. 13:17-6.8 for accessibility to elderly and physically disabled voters.

On behalf of the Board of Election, I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: _____ Chairperson of the County Board of Election

Dated: _____ Secretary of the County Board of Election