

By Cheryl R. Jansen

The Power of **Democracy**

Ensuring that People with Disabilities Can Exercise Their Right to Vote



Imagine you are excited about casting your ballot on Election Day and are turned away simply because of who you are. Or imagine having to cast your ballot where other voters can see exactly how you vote.

Cynthia, a voter with a disability, was unable to use the accessible electronic voting machine at her polling place because the election judges did not know how to operate it. She was forced to cast her ballot sitting at a table in plain view of other

voters with absolutely no privacy. Her only other option was to not vote at all. Cynthia's experience illustrates the type of barriers people with disabilities routinely face when they seek to vote but are denied access to the election process.

It is hardly surprising that people with disabilities historically have been underrepresented at the polls. Although federal laws exist to ensure that people with disabilities are able to fully and equally participate in the election process, they continue to face obstacles to exercising their right to vote. In 2016, 62.7 million eligible voters reported having a disability or having a household member with a disability. However, only 16 million people with disabilities reported voting in the 2016 General Election. During that same election, the voter turnout rate of people with disabilities was 6 percentage points lower than people without disabilities. The potential impact of this disparity on the election process is significant. If people with disabilities had voted at the same rate as people without disabilities in the 2016 General Election, there would have been an additional 2.2 million voters.

This article will review the federal laws protecting the voting rights of people with disabilities, litigation that has been filed to enforce those rights, current initiatives to remove voting barriers, and an upcoming pro bono opportunity for Chicago attorneys to make voting accessible to all.

The Americans with Disabilities Act of 1990 (ADA)

In 1990, Congress passed the Americans with Disabilities Act (ADA), a comprehensive civil rights statute that prohibits discrimination on the basis of disability. 42 U.S.C. §§ 12101-12213 (1990). The ADA is predicated upon Congress' findings that... "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination...;...historically, society has tended to isolate and segregate individuals with disabilities, and, despite some

The Chicago Bar Association and Chicago Bar Foundation will sponsor Chicago's 14th Annual Pro Bono Week from October 22-26, 2018. In 2005, the CBA and the CBF launched our annual Pro Bono Week with the twin goals of honoring lawyers' pro bono efforts and educating the public and the legal community about how these lawyers are improving the lives of the less fortunate.

In 2018, Chicago will be joined by communities across the country for the tenth time in the American Bar Association's National Pro Bono Celebration, commemorating the vitally important contributions of America's lawyers and to recruit and train volunteers to meet the growing demand.

A complete list of Pro Bono Week events appears in this issue of the CBA Record on page 7. Lawyers, law students, and other legal professionals from all backgrounds are welcome to join us. All events are complimentary and open to the legal community.

improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;...the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." 42 U.S.C. § 12101(a)(1990).

Title II of the ADA prohibits discrimination on the basis of disability in programs provided by state and local governments. Voting is specifically identified as such a program under Title II, among others. State and local governments are thus prohibited from choosing facilities to be used as polling places that have the effect of excluding people with disabilities from or denying them the benefits of the voting program. 28 C.F.R. § 35.130(b)(4). To ensure that people with disabilities have meaningful access to voting, polling places must comply with ADA standards regarding the space and other physical access elements required to allow people with disabilities to approach, enter and navigate through the polling place, i.e., the width of parking spaces, paths of travel

and doorways, the slope of walkways and ramps, the posting of directional signage to the accessible entrance, and the set up and placement of voting equipment within the voting area. 28 C.F.R. § 35.15.

The Help America Vote Act of 2002 (HAVA)

In 2002, Congress further clarified and expanded the voting rights of people with disabilities with the passage of the Help America Vote Act (HAVA), 42 U.S.C. §§ 15301-15545 (2002). While HAVA is intended to improve access to the electoral process for all voters and increase voter education and turnout, it specifically recognizes and addresses the barriers encountered by voters with disabilities. HAVA requires voting systems to be accessible for individuals with disabilities, including those who are blind and visually impaired, so that they are afforded the same opportunity for access and participation as other voters—including privacy and independence. To satisfy this requirement, there must be an accessible electronic voting system (or other voting system) for individuals with disabilities at each polling place. 42 U.S.C. § 15481(a)(3) (2002).

The federally-mandated Protection and Advocacy (P&A) System, which is Equip for Equality in Illinois, has a special role under HAVA to ensure that people with disabilities are able to fully participate in the electoral process, which includes registering to vote, casting a vote and accessing polling places. 42 U.S.C. § 15461 (a).

Litigation to Uphold the Voting Rights of People with Disabilities

The Courts and the U.S. Department of Justice (DOJ) have subsequently clarified and fortified the voting rights of people with disabilities under the ADA and HAVA. In one case arising in California, the Court examined whether voters with disabilities have a right to vote independently and privately and whether Alameda County satisfied its obligations under the ADA by having third-parties assist those voters. The Court held that the protections provided by the ADA and Section 504 of the Rehabilitation Act of 1973 include meaningful access to private and independent voting. Noting that voters with disabilities should be given equal opportunity, the Court found that being forced to rely on third parties to cast ballots takes away the right to vote independently and privately, and thus, creates an inferior voting experience. Therefore, to be effective, auxiliary aids and services must be provided in a way “to protect the privacy and independence of the individual with a disability.” *California Council of the Blind v. Cty. of Alameda*, 985 F.Supp.2d 1229, 1244 (N.D. Cal. 2013).

In another case, the Plaintiffs challenged the City of New York’s failure to provide

accessible polling places. 80% of its polling places were inaccessible preventing people with disabilities from voting independently and privately. The City maintained that no alternative accessible facilities existed and that as long as people with disabilities could cast a ballot with the assistance of others, that was sufficient. The District Court rejected that argument and held that the City had violated both the ADA and Section 504 of the Rehabilitation Act of 1973, necessitating implementation of a remedial plan. On appeal the Second Circuit affirmed, holding that the City failed to fulfill its duty to provide meaningful access to voters with disabilities. Citing DOJ regulations, the Court held that “inaccessibility of existing facilities is not an excuse, but rather, a circumstance that requires a public entity to take reasonable active steps to ensure compliance with its obligations under Section 504 and Title II.” *Disabled in Action v. Bd. of Elections in the City of NY*, 752 F.3d 189, 200-201 (2d. Cir. 2014).

National Voting Rights Initiative

As part of its nationwide voting rights initiative, the U.S. Department of Justice (DOJ) has conducted ADA compliance reviews of polling places in dozens of cities and counties across the country. Findings of non-compliance with ADA accessibility requirements by DOJ have resulted in numerous settlement agreements to address and remediate the polling place accessibility barriers identified.

In Illinois, three election authorities have entered into settlement agreements with DOJ: Champaign County (in 2015), Chicago Board of Election Commissioners (in 2017) and, most recently, Monroe County (in 2018). The Champaign County agreement relates to accessibility of various public facilities, including polling places. The agreements with the Chicago

Board of Election Commissioners and Monroe County relate only to accessibility of polling places.

Voting Access Chicago Initiative

Following DOJ’s compliance reviews and findings regarding the accessibility of Chicago polling places, the Illinois P&A system, Equip for Equality, in collaboration with the Chicago Board of Election Commissioners, launched a multi-year initiative aimed at making all polling places in the City of Chicago fully accessible to people with diverse disabilities (Voting Access Chicago).

For the 2016 General Election, Equip for Equality recruited and trained 220 pro bono attorneys and law students to join its staff in conducting ADA accessibility surveys of the vast majority of Chicago’s nearly 2,000 polling places. Based on the information obtained from those surveys, Equip for Equality made recommendations to the Chicago Board of Election Commissioners regarding temporary and permanent remedies to address the accessibility barriers identified. A group of Equip for Equality’s staff and trained volunteers returned to Chicago’s polling places in March 2018 for the Primary Election to gauge progress on the recommendations.

The harsh reality of the barriers faced by people with disabilities when they go to vote was aptly described by one of the project’s volunteers: “It thrust me into the world of physical challenges that many (people with disabilities), and supposedly protected citizens, face on a daily basis. A lack of ramps for those in wheelchairs, the requirement to use the loading dock rather than have to climb several flights of stairs, the total and complete lack of privacy because the polling center lacked wheelchair capable voting booths so these folks had to sit at desks whereby one and all could see how they voted.”

To participate in this non-partisan pro bono activity, contact Bebe Novich, Manager of Voting Access Chicago at 312/895-7262 or bebe@equipforequality.org.

For the November 6, 2018 General Election, the Chicago Board of Election Commissioners will begin phasing in remedies to make polling places and early voting sites accessible. To ensure the progress and success of the implementation process, Equip for Equality will again conduct accessibility surveys of a majority of the polling sites on November 6th, utilizing its own staff and volunteers. Volunteers receive a short training (with CLE credit available), have a half day time commitment on Election Day, and are

VOTING ACCESS CHICAGO

Monday, October 22, 3:00-5:00 pm

The Chicago Bar Association, 321 S. Plymouth Court, Chicago

The right to vote is fundamental to a healthy democracy. Equip for Equality's Voting Access Chicago is a non-partisan initiative to ensure that all of Chicago's polling places are fully accessible to voters with disabilities and older adults who want to exercise their right to vote. Learn more about volunteering on Election Day, November 6, in 4-hour shifts as part of a team identifying barriers and conducting accessibility surveys of Chicago's polling places. 1.5 hours of CLE credit subject to approval.

Learn more/register at chicagobarfoundation.org/probonoweek



I remember how my breath caught when we learned our death row client had been pardoned, on the ground of actual innocence. It had taken years of work to prove his confession had been obtained by torture and that he hadn't committed the crime for which he had been sentenced to die. I deeply enjoy my civil law firm practice, but nothing has been more rewarding than saving an innocent life by correcting this injustice.



Paul E. Dengel
Schiff Hardin

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even equipped with a toolkit. This can be a meaningful and fun partnership opportunity for law firms and their corporate clients or even law firm partner/associate pairings. Together you can assess the accessibility of polling sites in Chicago to ensure that people with disabilities have an opportunity to vote just like everyone else.

While some strides have been made in improving accessibility of the voting process for people with disabilities since the ADA and HAVA were enacted, barriers for people with disabilities to be able to fully exercise their right to vote remain. National and local efforts to address accessibility barriers for voters with disabilities are ongoing and present a prime pro bono opportunity to positively impact the voting rights of people with disabilities. ■

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