



DISABILITY RIGHTS
PENNSYLVANIA

2020 Election Access Report

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Executive Summary

Through its work helping voters with disabilities during the 2020 Primary and General Elections, DRP identified barriers to people with disabilities successfully casting a ballot. All of these hurdles are fixable, but it will take collaboration between the Commonwealth, the counties, and people with disabilities. DRP stands ready to offer our assistance in this effort. In order to have elections that are fully accessible to all, the Commonwealth must implement policies that are mindful of the challenges people with disabilities encounter when trying to vote and create training materials that educate election and poll workers about accessibility.

Barriers to Voting Through the Mail:

- **DOS led voters with disabilities who wished to vote through the mail to believe they had to use absentee ballots, *even though they were eligible to use mail-in ballots*.** DOS must make clear that *anyone* can use a mail-in ballot so that voters with disabilities do not unnecessarily use an absentee ballot, which forces them to divulge private health information to DOS.
- **The Election Code does not contain a procedure for how voters should indicate they had assistance filling in and/or signing their mail-in ballot, and its procedure for absentee voters is flawed.** Both the lack of a mail-in ballot procedure and the existing absentee ballot procedure causes confusion; reform of the Code is needed to alleviate this.
- **Only 28 counties used drop boxes in the 2020 General Election, and only 14 counties did more than place a single drop box outside the county election office.** Widespread use of drop boxes is important to people with disabilities because it makes voting through the mail as accessible as possible.
- **The Election Code does not contain pre-canvassing provisions, which allow counties to begin processing mail-in and absentee ballots before Election Day, or notice and cure procedures.** In order to ensure the votes of people with disabilities are not discarded due to harmless error, these provisions and procedures are needed, as people with disabilities are more likely to vote through the mail and are often subject to more rules when doing so.
- **Provisional ballots are not accessible to people with certain disabilities, and some disabled people may be unable to go to the polls to use a provisional ballot.** There must be an accessible voting option for people who must vote provisionally.

- **Many counties did not understand nor promote the use of designated agents.** Clarity is needed about the use of designated agents.
- **DOS guidance about the definition of “household” makes it more difficult for people in long-term care facilities to vote.** Because DOS did not allow long-term care facility staff to serve as designated agents for multiple residents, many people in these facilities were unable to vote. Thus, DOS needs to rethink its definition of household.
- **Long-term care facilities did not always understand how to help their residents vote, which led to many people who wanted to do so being unable to vote.** DOS, in partnership with the Department of Health and the Department of Human Services, must work to remedy this and provide staff with training about how to assist residents in voting.
- **Counties and voters alike did not know what to do if they received a mail in or absentee ballot with a damaged outer envelope.** Guidance is needed from DOS about whether counties should accept ballots with damaged outer envelopes.
- **The implementation of OmniBallot, the accessible vote by mail system, was flawed. Both the application for the OmniBallot and the return process were inaccessible, and counties did not understand their responsibilities related to the OmniBallot. DOS also failed to publicize the OmniBallot.** Multiple reforms of the OmniBallot application and return process are needed, as well as better guidance for counties, and a robust publicity campaign from DOS.

Barriers to Voting in Person:

- **The Commonwealth is still relying on inaccessible polling places, and not all drop boxes or election offices are fully accessible to people with disabilities.** DOS must take a more proactive role in this area and provide the counties with training and materials to help them meet their obligations under federal and state law.
- **The ballot scanners in use in many counties are not accessible to blind or low-vision voters.** Counties must either modify their scanners or invest in new ones in order to ensure they are using a fully accessible voting system.
- **Privacy sleeves, used to cover a ballot when transporting it from a ballot marking device to a scanner, were not available or in use, which compromised the privacy of the ballot.** Moving forward, counties must comply with DOS guidance and provide privacy sleeves, as voters with disabilities are more likely to need assistance when voting, and they should not be concerned that poll workers will see their candidate selections when helping them

I. Introduction

Voting is one of our nation’s most fundamental rights, and a hallmark of our democracy. In Pennsylvania, the state Constitution requires that “all aspects of the electoral process, to the greatest degree possible, be kept *open and unrestricted* to the voters of” the Commonwealth, and be “conducted in a manner which guarantees, to the greatest degree possible, a *voter’s right to equal participation in the electoral process* for the selection of his or her representatives in government.”¹ While Pennsylvania has made strides in complying with this mandate by increasing access to the vote, it has not yet reached a point where individuals with disabilities have equal and full access to the franchise. In order to get there, state and local officials and the disability community must collaborate to identify the issues that remain and address the ways in which they make it more difficult, and sometimes impossible, for people with disabilities to vote.

In 2019 and 2020, the General Assembly reformed Pennsylvania’s Election Code and introduced universal mail-in voting to the Commonwealth. While these changes were a step in the right direction, the reforms did not address many of the challenges faced by disabled voters, and also introduced some new barriers to voting.

Approximately 12% percent of adults in Pennsylvania have a disability.² In the past, these individuals—especially those with the most severe disabilities—were largely invisible, confined to state institutions or kept in family homes with little or no contact with their communities. Legal rights, public policy, social attitudes, and individual and family values have changed over the decades. Now, individuals with disabilities have the right to self-determination, personal dignity, and services to achieve independence, and when voting, they have the same

¹ *League of Woman Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018) (emphasis added).

² *Selected Social Characteristics in the United States*, AM. CMTY. SURVEY, <https://data.census.gov/cedsci/table?g=0400000US42&tid=ACSDP5Y2019.DP02> (last visited Feb. 10, 2020).

right to mark, verify, and cast their ballot privately and independently as do voters without disabilities.

Disability Rights Pennsylvania (DRP) is the federally mandated, state designated Protection and Advocacy (P&A) system for people with disabilities in Pennsylvania, and it has been providing legal and advocacy services to Pennsylvanians with disabilities for over 40 years. DRP receives federal funding under the Help America Vote Act (HAVA) “to ensure full participation in the electoral process for individuals with disabilities, including registering to vote, casting a vote and accessing polling places.”³

DRP has prepared this report as part of its HAVA mandate, and in hopes of educating all stakeholders in the election process, including voters, the Department of State, the General Assembly, and county boards of election, about the ways in which disabled Pennsylvanians still struggle to exercise their right to vote. In addition, DRP will offer suggestions for reform to improve the election process for all Pennsylvanians. In so doing, DRP draws upon its work during the 2020 Primary and General Elections. Specifically, our feedback is based on what we heard from voters with disabilities who called our intake line, as well as those we engaged through our voter outreach efforts. In addition, we also included information we learned through our participation in election protection, various state and national coalitions, and federal litigation.

We hope the information in this paper is the beginning of an ongoing conversation with the Commonwealth, and we welcome the opportunity to work together to remove the remaining obstacles to voting and one day hold elections that are truly accessible to all.

³ 52 U.S.C. § 21061(a).

II. Voting Laws

The right to vote is protected by both federal and state law. While federal law provides broad protections against discrimination and mandates the use of accessible polling places and voting systems, state law governs voting procedures and delineates the responsibilities of state and local officials in carrying out elections.

A. Federal Civil Rights Laws

There are multiple federal laws that serve to protect all Americans' fundamental right to vote, including people with disabilities. Many state and local choices regarding election procedure are made against the backdrop of these federal laws, as state and local governments must ensure their decisions comply with federal law. Nevertheless, the experiences of voters with disabilities indicate there is still much work to be done to bring states' voting systems in full compliance with federal civil rights law. This is the case in Pennsylvania.

1. The Voter Accessibility for the Elderly and Handicapped Act

In 1984, Congress enacted the Voter Accessibility for the Elderly and Handicapped (VAEH) Act, which requires that all polling places used for federal elections be accessible to voters with mobility disabilities and those age 65 and older.⁴ If a state certifies that a polling place cannot be made accessible or relocated to an accessible location, the VAEH Act allows counties to give disabled and elderly voters the opportunity to vote by an "alternative ballot" up until the polls close.⁵ Although the VAEH Act only applies to elections for federal office, the Secretary of the Commonwealth has instructed election officials to "follow the policies and

⁴ *Id.* § 20102(a).

⁵ *Id.* § 20102(b)(2)(B)(ii).

procedures adopted under the Act for *all* elections[.]”⁶ This means that in Pennsylvania, all polling places, whether they are used for a federal, state, or municipal election, are expected to be accessible.

2. *The Americans with Disabilities Act and Section 504 of the Rehabilitation Act*

In 1990, Congress enacted the Americans with Disabilities Act (ADA). Title II of the ADA applies to state and local government programs and services, including elections.⁷ Title II has been interpreted to require that all newly selected polling places be accessible, and election officials maximize the accessibility of existing polling places by relocating sites to accessible locations or by using temporary modifications (such as portable ramps or threshold mats) on Election Day.⁸ Title II also requires that election officials offer accessible absentee and mail-in voting systems and procedures.⁹

⁶ *Procedures to Assure Compliance with the Voting Accessibility for the Elderly and Handicapped Act and Other Laws Assuring the Voting Rights of Individuals with Disabilities and Language Needs*, PA DEP’T OF STATE, 1, 3
<https://www.dos.pa.gov/VotingElections/Documents/Elections%20Division/Administration/Voting%20Procedures%20for%20the%20Elderly%20and%20Handicapped.pdf>.

⁷ 42 U.S.C. § 12131(1).

⁸ See, e.g., *Kerrigan v. Phila. Bd. of Election*, No. 07-687, 2008 WL 3562521, at *8 (E.D. Pa. Aug. 14, 2008).

⁹ See, e.g., *Drenth v. Boockvar*, No. 1:20-CV-00829, 2020 WL 2745729, at *5 (M.D. Pa. May 27, 2020) (ordering the implementation of an accessible vote by mail option on the grounds that “[p]laintiffs have also been denied the benefits of a public program—in this case the ability to vote privately and independently without being physically present at a polling location—because of their disability.”); *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F.Supp.3d 158, 232 (M.D.N.C. 2020) (enjoining, under the ADA and RA, the North Carolina Board of Elections from enforcing a state law that forbid nursing home staff from assisting absentee voters in marking their ballots because it did not constitute “meaningful access” to voting during the COVID-19 pandemic, and “[t]hough the statute preventing the employees of the nursing home in which [Plaintiff] resides from helping him is not based on his disability, that statute has the effect of depriving Plaintiff Hutchins of ‘meaningful access’ to absentee voting due to his disability.”).

Section 504 of the Rehabilitation Act (Section 504) preceded the ADA, and similarly prohibits programs or activities which receive federal funding from discriminating against qualified individuals with disabilities;¹⁰ this includes county boards of elections.

3. *The Voting Rights Act*

The Voting Rights Act of 1965 (VRA) provides protections for groups whose voting rights have historically been violated, with a particular emphasis on voters of color. Section 208 of the VRA explicitly provides that voters who need assistance to vote by reason of blindness, disability, or inability to read or write have a statutory right to such assistance.¹¹ Under the VRA, any such voter “may be given assistance by a person of the voter’s choice, other than the voter’s employer or agent of the employer or officer or agent of the voter’s union.”¹²

4. *The Help America Vote Act*

The Help America Vote Act of 2002 (HAVA) is the most recent, and in regard to voting procedures, most specific, federal statute that governs elections. HAVA requires that voting systems be accessible for people with disabilities in a manner that provides them the same opportunity for access and participation as voters without disabilities, and that each polling place have at least one such accessible voting machine.¹³ According to the Department of Justice, which is tasked with implementing HAVA, HAVA also requires that polling places themselves be accessible to voters with disabilities, as “logically, persons with disabilities must be able to gain access to the polling place in order to be able to use the accessible voting system[,] [and]

¹⁰ 29 U.S.C. § 794(a).

¹¹ 52 U.S.C. § 10508.

¹² *Id.*

¹³ *Id.* § 21081(a)(3).

[h]aving an accessible voting system does little good if voters cannot enter the polling place to use it.”¹⁴

HAVA also established the U.S. Election Assistance Commission (EAC), in part to develop voting system guidelines and serve as an information clearinghouse for election administration.¹⁵ EAC operates a voting system testing and certification program that assesses the accessibility of voting systems.¹⁶ While states are not required to participate in the program, Pennsylvania law mandates that counties use EAC certified voting machines.¹⁷

B. Pennsylvania Election Law

Election law is traditionally a state, rather than federal, responsibility, and states have “broad authority to regulate the conduct of elections, including federal ones.”¹⁸ In Pennsylvania, elections are decentralized, and the Commonwealth’s 67 counties are responsible for election administration.¹⁹ As a result, each county implements its own procedures for collecting ballots and counting votes, though these local decisions are constrained by both federal and state law. Pennsylvania election law is codified in the Pennsylvania Election Code.²⁰ The Code is

¹⁴ *Kerrigan*, 2008 WL 3562521, at *8 (quoting Letter from Hans A. von Spakovsky, Counsel to the Assistant Attorney General, Dep’t of Justice, at 2 (Mar. 4, 2005) <https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/msdisability.pdf>).

¹⁵ 52 U.S.C. § 20921; see also *About the EAC*, U.S. ELECTION ASSISTANCE COMM’N, <https://www.eac.gov/about-the-useac> (last visited Dec. 2, 2020).

¹⁶ 52 U.S.C. § 20922(2).

¹⁷ 25 P.S. § 3031.5.

¹⁸ *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979).

¹⁹ 25 P.S. § 2641(a) (“There shall be a county board of elections in and for each county of this Commonwealth, which shall have jurisdiction over the conduct of primaries and elections in such county, in accordance with the provisions of [the Election Code].”).

²⁰ *Id.* § 2600 *et. seq.*

comprehensive, and it establishes, among other things: election districts and polling places;²¹ requirements for voting machines²² and ballots;²³ and absentee voting procedures.²⁴

Within Article II of the Code, the legislature delegates power to the Secretary of the Commonwealth to implement it. Specifically, the Secretary is tasked with: creating forms, examining voting machines, certifying candidates for primary and general elections, and issuing guidance to counties to help them carry out the Code.²⁵ The Secretary is appointed by the governor, and leads the Department of State (DOS), the administrative agency that oversees the Commonwealth's elections.



On October 31,
2019, Governor
Tom Wolf Signed
Act 77 increasing
access to vote-by-
mail for
Pennsylvanians
ahead of the
2020 Primary and
General Elections.

²¹ *Id.* §§ 2701-2750.

²² *Id.* §§ 3001-3018.

²³ *Id.* §§ 2961-2971.

²⁴ *Id.* §§ 3146.1-3146.9.

²⁵ *See generally id.* §§ 2621-2628.

III. Accessibility Issues in the 2020 Primary and General Elections

In October 2019, the General Assembly passed Act 77, which expanded the use of vote by mail to all electors, other than those who were eligible to vote by absentee ballot.²⁶ In March 2020, this was followed by the passage of Act 12, which further expanded eligibility for vote by mail by eliminating the absentee voter exclusion; as a result, *all* eligible voters, including those who could otherwise qualify as absentee voters, could now vote by mail-in ballot.²⁷ Prior to this change, Pennsylvanians could only vote by mail using absentee ballots, which are reserved for voters who are either unable to vote at the polls because of a disability or illness or who will be out of the area on Election Day.²⁸ Thus, before Act 77, if they wished to vote, the vast majority of Pennsylvanians had to do so in person at the polls. Act 77 also introduced the concept of early in person voting by mail, which permits Pennsylvanians to both apply for and cast a mail-in ballot in-person at a county election office.²⁹

Act 77 was enacted prior to the COVID-19 pandemic.³⁰ As it has with so many other facets of life, COVID-19 had major implications for the 2020 Primary and General Elections. Counties were not prepared for the number of mail-in ballot requests they received as a result of voters' hesitancy to go to the polls.³¹ According to the County Commissioners Association of Pennsylvania, the counties found it difficult to both implement a brand-new voting system and

²⁶ Pennsylvania Election Code, Pub. L. 552, No. 77, § 102(z.6) (2019).

²⁷ 25 P.S. § 3150.11.

²⁸ *Id.* § 3146.1.

²⁹ *Id.* § 3146.5(b)(2).

³⁰ See *generally* Pennsylvania Election Code, Pub. L. 552, No. 77 (2019).

³¹ *CCAP Election Reform Preliminary Report*, CNTY. COMMISSIONERS ASSOC. OF PA, 1, 1 (2021) <https://www.pacounties.org/GR/Documents/CCAPElectionsReformReportJanuary2021.pdf>.

process tens of thousands of mail ballot applications in a timely manner.³² In addition, many voters were confused about the new rules for how to vote by mail.³³

In the aftermath of the 2020 Primary and General Elections, state and local officials, as well as other stakeholders, now have the opportunity to work together to address the challenges voters and election officials experienced. Through our collaboration with other voting rights organizations and with input from our clients and community, DRP was able to track these challenges throughout 2020.

This year, due to the pandemic, voters had more trouble voting than in previous elections. However, for voters with disabilities, the pandemic itself was not responsible for the majority of obstacles they faced when trying to vote. Many of these barriers to voting have existed for decades and persist despite the protections provided under federal and state law. They present an opportunity for the Commonwealth to make additional improvements to its Election Code and DOS's election administration guidance.

This paper will examine these barriers to voting and set forth proposed solutions. While this paper will primarily focus on issues with Pennsylvania's vote by mail system, it will also discuss Election Day issues, including the accessibility of polling locations and voting machines. It is DRP's hope that all stakeholders involved in creating and implementing Pennsylvania's Election Code will give consideration to these recommendations and make needed changes to protect the rights of voters with disabilities and comply with the law.

³² *Id.* ("In 2020, th[e] task [of carrying out the election] was complicated greatly by a perfect storm of factors. First, counties had to implement the provisions of Act 77 of 2019, including expansion of absentee ballots to all eligible voters, and like many other significant legislative changes, they discovered a number of areas of the Election Code that would need further clarification. Then, election directors, county commissioners and other county officials confronted the unprecedented responsibility of considering risk to public health in holding an election during a global pandemic, as well as the resulting explosion in demand for mail-in ballots.").

³³ *See id.* at 7.

A. Issues with Pennsylvania’s Vote by Mail System

Pennsylvania’s General Assembly made historic changes to the state’s Election Code with the passage of Acts 12 and 77; chief among them was the introduction of mail-in voting for all registered voters. While DRP supports the General Assembly’s decision to expand mail-in voting, it overlooked areas where further legislative action is needed. In addition, DOS must establish better procedures to implement voting by mail and to help eliminate voter confusion and error.

1. DOS Incorrectly Leads Voters with Disabilities to Believe they Must Use Absentee Ballots to Vote Through the Mail

With Act 12’s reform of the Election Code, it is no longer necessary for people with disabilities who cannot vote in person to use an absentee ballot, as they are now eligible to vote via a mail-in ballot.³⁴ Although absentee and mail-in ballots are functionally the same, the steps to apply and qualify for an absentee ballot are different than those for a mail-in ballot. The Code defines “qualified absentee electors” as “qualified electors” who cannot vote in person either by reason of disability or illness or because they will be out of their election district on Election Day.³⁵ Unlike disabled mail-in electors, when disabled absentee electors apply for a ballot, they must “include a declaration stating the nature of their disability or illness, and the name, office address and office telephone number of their attending physician[.]”³⁶ Thus, they are forced to divulge private information that they would not have to share if they had instead applied to vote by a mail-in ballot.

³⁴ 25 P.S. § 3150.11.

³⁵ *Id.* § 3146.1; see also *id.* § 2602(w).

³⁶ *Id.* § 3146.2(e)(2).

Act 77, as amended by Act 12, established universal voting by mail, meaning that any voter registered in Pennsylvania is now eligible to vote via a mail-in ballot.³⁷ Because the Code states that anyone who is a “qualified elector” is by definition a “qualified mail-in elector,”³⁸ people who were once only “qualified absentee electors” now have another option in addition to voting at the polls: voting by mail-in ballot.

Though there is no requirement to use absentee ballots, the guidance found on DOS’s website leads voters with disabilities to believe they *must* vote via an absentee ballot. Worse yet, DOS’s online portal for applying to vote through the mail asks three screening questions, one of which automatically funnels voters with disabilities to the absentee ballot application if they indicate they need to vote through the mail because of their disability. The question asks, “Are you applying for a ballot for the upcoming election because you cannot appear at your polling place due to an illness or physical disability?”³⁹ If voters respond in the affirmative, they will automatically be required to submit an application for an absentee ballot and cannot apply online for a mail-in ballot.⁴⁰

This results in a discriminatory, two-tier vote by mail system. The website, which is likely to be voters’ primary source of information about voting through the mail, must be changed so that disabled voters understand that they need not vote via an absentee ballot, and are instead

³⁷ *Id.* § 3150.11; see also *id.* § 2602(t) (defining a “qualified elector” as “any person who shall possess all of the qualifications for voting now or hereafter prescribed by the Constitution of this Commonwealth, or who, being otherwise qualified by continued residence in his election district, shall obtain such qualifications before the next ensuing election.”) and *id.* § 2602(z.6) (defining a “qualified mail-in elector” . . . [as] a qualified elector.”).

³⁸ Notwithstanding eligible voters who currently reside in a penal or mental institution, as provided for in Section 2602(z.6) of the Code.

³⁹ *Ballot Request Application*, PA DEP’T OF STATE, <https://www.pavoterservices.pa.gov/OnlineAbsenteeApplication/#/OnlineAbsenteeBegin> (last visited Mar. 31, 2021).

⁴⁰ *Id.*

free to use a mail-in ballot. It should also not be foreclosing people with disabilities from applying for mail-in ballots through the online portal.

When voters go to DOS's website seeking information about applying to vote through the mail, under the heading "How do I request a mail-in or absentee ballot?" they are first told that "[a]ll registered voters may request a mail-in ballot for any or no reason."⁴¹ However, that is immediately followed by an instruction directing voters with a disability to request an absentee ballot.⁴² Voters are then met with three options for how they may apply for a mail ballot: (1) online, (2) through the mail, or (3) in person at a county election office.⁴³ In the instructions under options one and two, applying online or through the mail, DOS again directs voters with disabilities to apply for an absentee ballot, *even though* they are eligible to vote with a mail-in ballot.⁴⁴ As mentioned above, the online application also forecloses their ability to even apply for a mail-in ballot if they respond that they have a disability which impedes their ability to appear at the polls.⁴⁵

The DOS webpage for voting by mail steers disabled voters towards a method of mail voting that requires them to submit an application which includes: a statement that they are physically unable to go to the polls; a declaration stating the nature of their disability; and the name, address and telephone number of their treating physician.⁴⁶ If they choose to apply for their ballot online, this morphs from mere "bad advice" into a *requirement* based on their answers to the screening questions. In practice, there is one system for people with disabilities,

⁴¹ *Mail-in and Absentee Ballots*, PAVOTES, <https://www.votespa.com/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx> (last visited Dec. 2, 2020).

⁴² *Id.* ("Absentee ballots should be requested by voters with disabilities, an illness, or who will be absent from their municipality on election day.")

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Ballot Request Application*, *supra* note 39.

⁴⁶ 25 P.S. § 3146.2(e)(2).

where they are asked to give information about their disability in order to vote through the mail, and another for voters without disabilities, who need only to show they are a registered voter to use a mail-in ballot.

With the advent of mail-in ballots, there is no reason for voters with disabilities to divulge, nor DOS to collect, this information, nor is there *any* reason for DOS to steer them towards using an absentee ballot. There is likewise no reason for the online portal to funnel people with disabilities into the absentee application; after the screening questions determine they are eligible for both an absentee and a mail-in ballot, they should be presented with *both* options and be allowed to choose which type of ballot they would like.

DOS's message, both on its website and its online application, should be that *everyone* is eligible to vote via a mail-in ballot. When the website mentions who is permitted to vote using an absentee ballot, DOS should say something to the effect of: "while voters with a disability *may* vote using an absentee ballot, they need not do so. *All* eligible voters in Pennsylvania can use a mail-in ballot." This simple change, coupled with giving disabled voters the option to choose between applying for an absentee or a mail in ballot, would prevent voters with disabilities from being relegated to an unequal mail voting system, that requires more of them than it does of voters without disabilities. DOS must change its website and voter education materials so that they do not lead disabled voters to believe they are ineligible to vote using a mail-in ballot. It must also update its online portal for applications.

2. *The Code Does Not Contain a Procedure for How Voters Should Indicate They Had Assistance Filling in and/or Signing Their Mail-in Ballot, and its Procedure for Absentee Voters to Indicate the Use of Assistance is Flawed and Needs Reform*

People with disabilities have the right to assistance when voting both in person and through the mail. This right to assistance is protected under the VRA,⁴⁷ the ADA,⁴⁸ and Section 504.⁴⁹ As written, the Code is silent as to how *mail-in* voters with disabilities should signify their need for assistance,⁵⁰ but it does provide a procedure for absentee voters to indicate they had help filling out their ballot or its return envelope.⁵¹ Despite this oversight, it is reasonable to conclude that mail in voters who received the same help would need to indicate as such when they return their ballots, and that if they fail to do so, their county election office might reject the ballot on this basis.

Section 3146.6a of the Code,⁵² which establishes how absentee electors who received assistance marking or signing their absentee ballot so indicate, is ambiguous and overly burdensome. As drafted, it is unclear whether absentee electors who require assistance voting must *either* have their need for assistance indicated on their registration, or provide a notarized declaration indicating their need for help, or if they are required to satisfy *both* conditions.⁵³ It is

⁴⁷ 52 U.S.C. § 10508 (“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.”).

⁴⁸ 42 U.S.C. § 12132.

⁴⁹ 29 U.S.C. § 794(a).

⁵⁰ See *generally* 25 P.S. §§ 3150.11-3150.18.

⁵¹ *Id.* § 3146.6a.

⁵² *Id.*

⁵³ *Id.* (“Any elector qualified to vote an official absentee ballot in accordance with the provisions of section 1301, subsection (k), may receive assistance in voting (1) if there is recorded on his registration card his declaration that he has a physical disability which renders him unable to see or mark the official absentee ballot, the exact nature of such disability being recorded on such registration card; (2) if such elector requiring assistance submits with his application for an

DRP's belief that an "or" should be read into the statute between subsections (1) and (2), but it is possible the General Assembly intended a different result.

This lack of clarity notwithstanding, the Code remains problematic. First, it assumes that any absentee elector who needs assistance will have "recorded on his registration card his declaration that he has a physical disability which renders him unable to see or mark the official absentee ballot," as well as a description of his disability.⁵⁴ Some voters acquire physical disabilities that necessitate assistance long after they register to vote, so the need for assistance would not be recorded on their registration card. Voters who have been voting for decades may not recall what they indicated on their registration card.

In addition, people who usually vote in person may not require assistance when doing so because of the use of accessible voting machines, so their registration would not reflect such a need. However, if such voters need to vote via an absentee ballot, they may require assistance to do so because the absentee voting process involves a paper ballot; no voting machine is involved. For any of these scenarios, it is not clear how voters are to verify or update the information on their registration cards.

Second, the Code requires that people who use assistance in marking or signing their absentee ballots submit a *notarized* declaration wherein they indicate their disability, as well as a signed declaration from the person who assists them.⁵⁵ This notary requirement is particularly burdensome for people with disabilities, who are more likely to lack access to reliable

official absentee ballot, a statement setting forth the precise nature of the disability which renders him unable to see or mark the official absentee ballot and that to the best of his knowledge and belief he will still suffer from the said physical disability at the time of voting his official absentee ballot. He shall acknowledge the same before an officer qualified to take acknowledgement of deeds.").

⁵⁴ *Id.*

⁵⁵ *Id.* ("He shall acknowledge the [nature of his disability] before an officer qualified to take acknowledgement of deeds. . . . The person rendering the assistance in voting shall complete, date and sign the declaration[.]").

transportation,⁵⁶ and thus would be unable to get to a notary, and who are also more likely to lack reliable internet access, making it more difficult to use a remote notary service.⁵⁷ It is also in contrast to the Code's procedures for in person voting, which require only that a voter has a declaration stating his need for assistance on his registration card; it does not need to be notarized.⁵⁸ Thus, the notarization requirement likely disenfranchises some voters with disabilities.

The General Assembly should amend the absentee ballot assistance section of the Code *and* create a corresponding section of the statute that speaks to the procedures for getting assistance when completing a mail-in ballot. These changes should result in a streamlined procedure that allows voters who require help marking or signing a mail-in or absentee ballot to include a signed declaration stating and explaining their need for assistance in the outer envelope of their ballot. DOS already created a simple, user friendly form where voters who use a designated agent⁵⁹ (a person to return their absentee or mail-in ballots)⁶⁰ can document their need. After the General Assembly amends the Code, DOS could create a similar form to

⁵⁶ *Equity in Transportation for People with Disabilities*, AM. ASSOC. OF PEOPLE WITH DISABILITIES, 1, 1, <https://www.aapd.com/wp-content/uploads/2016/03/transportation-disabilities.pdf> (“[A]dults with disabilities are twice as likely as those without disabilities to have inadequate transportation (31 percent vs. 13 percent). Of the nearly 2 million people with disabilities who never leave their homes, 560,000 never leave home because of transportation difficulties.”).

⁵⁷ *Disabled Americans are less likely to use technology*, PEW RESEARCH CTR., <https://www.pewresearch.org/fact-tank/2017/04/07/disabled-americans-are-less-likely-to-use-technology/> (last visited Feb. 10, 2021) (“Disabled Americans are about three times as likely as those without a disability to say they never go online (23% vs. 8%)[.] . . . When compared with those who do not have a disability, disabled adults are roughly 20 percentage points less likely to say they subscribe to home broadband and own a traditional computer, a smartphone or a tablet.”).

⁵⁸ 25 P.S. § 3058(a) (noting that a voter can only receive assistance voting at his polling place if “there is recorded upon his registration card his declaration that, by reason of blindness, disability, or inability to read or write,” he is unable to vote independently).

⁵⁹ *Authorize a Designated Agent to Help You Obtain and/or Return Your Mail-In or Absentee Ballot*, PA DEP'T OF STATE, <https://www.votespa.com/Resources/Documents/Authorize-Designated-Agent-for-Mail-in-or-Absentee-Ballot.pdf>.

⁶⁰ See *infra* section III.A.6 for further discussion of designated agents.

effectuate the newly established procedure. No such form need be required for electors whose registration already indicates their need for assistance.

If the General Assembly and DOS were to take these steps, they would alleviate one of disabled voters' primary points of confusion in 2020. DRP received a large number of questions about this issue, and we did not have a clear answer to give voters. Pennsylvanians who require assistance when voting through the mail, as well as the election officials who process their ballots, would benefit if the Commonwealth were to streamline procedures for indicating the need.

3. *The Use of Drop Boxes Must be Expanded*

The Election Code does not mandate nor forbid counties from using drop boxes for mail-in and absentee ballots; instead, it is silent as to the use of drop boxes, and provides only that electors may “deliver [their ballots] in person to [their] county board of election.”⁶¹ The Pennsylvania Supreme Court held this portion of the Code ambiguous as written, and interpreted it to “permit[] county boards of election to accept hand-delivered mail-in ballots at locations other than their office addresses including drop-boxes.”⁶² The Court noted its interpretation was “largely the result of the clear legislative intent underlying Act 77 . . . [which was] to provide electors with options to vote outside of traditional polling places.”⁶³

In the 2020 General Election, only 28 of Pennsylvania's counties used drop boxes.⁶⁴ Of these 28 counties, only 14 of them utilized drop boxes at a location *other than* at the board of election's office; the other 14 counties only had one drop box a piece, which was placed directly

⁶¹ 25 P.S. § 3150.16(a).

⁶² *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 361 (Pa. 2020).

⁶³ *Id.*

⁶⁴ *Where do I return my ballot or vote in person?*, VOTESPA, <https://www.votespa.com/voting-in-pa/pages/drop-box.aspx> (last visited Dec. 2, 2020).

outside the county election office.⁶⁵ Therefore, only 14 out of Pennsylvania's 67 counties succeeded in providing voters with more than one place to return their mail-in or absentee ballot in person.

This election proved that voters cannot always depend on the United States Postal Service to quickly and safely get their ballots to and from the county; many voters were forced to seek replacement ballots after an absentee or mail-in ballot for which they had timely applied never arrived.⁶⁶ At the point in the election cycle at which many voters sought replacement ballots, it was too close to the November 6 "return by" date to put them in the mail.⁶⁷

Others received their ballots without issue, but they were delayed, and arrived very close to Election Day, thus creating a risk that if the ballots were returned through the mail, they might not get to the county on time. The COVID-19 pandemic has shown us that normally well-functioning systems we take for granted, such as the Postal Service, are not infallible.

Drop boxes and satellite election offices make it easier for voters in larger, more remote counties to vote by mail. In Pennsylvania, "ten counties . . . cover more than 1,000 square miles' and 'two-thirds' of counties 'cover more than 500 square miles,' [so without the use of drop boxes] many Pennsylvania voters 'could be required to drive dozens of miles (and perhaps in excess of 100 miles) if [they] wished to deposit [their] mail-in ballot in person at the main county board of elections office.'"⁶⁸

⁶⁵ *Id.*

⁶⁶ See, e.g., Jamie Martines, *Potentially thousands of requested mail ballots lost in Pa. county, official says*, THE PHILA. INQUIRER (Oct. 28, 2020) <https://www.inquirer.com/politics/election/spl/pa-butler-county-mail-ballots-missing-official-20201028.html>.

⁶⁷ There were also fears that litigation might result in ballots received after 8 p.m. on November 3 being discarded, which likely caused more voters to avoid using the mail.

⁶⁸ *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966, 2020 WL 5997680, at *14 (W.D. Pa. Oct. 10, 2020) (quoting an affidavit from the Secretary of the Commonwealth) (internal citation omitted).

In addition, many voters with disabilities cannot return their own ballots either through the mail or in-person and thus use a designated agent to perform this task on their behalf. Because this involves relying on, and potentially inconveniencing another person, voters with disabilities who cannot return their own ballots and did not wish to put it in the mail would be more likely to vote if they knew their agent would not have to travel a significant distance to return their ballot.

The Commonwealth should require that counties adopt drop boxes and/or satellite election offices and place them in accessible locations. Doing so would make it easier for all Pennsylvanians, but particularly those with disabilities, to ensure their absentee and mail in ballots get to the county election office in a timely manner.

4. *The Code Needs Provisions Establishing Pre-canvassing and Notice and Cure Procedures*

The Election Code must be amended to allow counties to pre-canvass mail-in and absentee ballots. Pre-canvassing allows counties to begin processing mail-in and absentee ballots before election day.⁶⁹ Pre-canvassing is needed both because it is necessary to combat disinformation and frivolous legal challenges and because it enables the curing of defective ballots.

If counties were able to pre-canvass mail-in and absentee ballots, the legitimacy of these votes would be less likely to be questioned, and this would benefit mail-in and absentee voters, who are disproportionately disabled. Without pre-canvassing, in elections where a large number of voters cast a ballot through the mail, election results may be delayed and “[i]n the absence of a timely result . . . misinformation about the election’s integrity and a proliferation of lawsuits . . .

⁶⁹ Jamie Martines, *Top Pa. election official says ‘overwhelming majority’ of votes will be counted by Friday after Election Day*, SPOTLIGHT PA (OCT. 19, 2020) <https://www.spotlightpa.org/news/2020/10/pa-kathy-boockvar-election-results-timely-tom-wolf-republicans-precanvassing/>.

lead[s] to chaos.”⁷⁰ Pennsylvanians have seen this first-hand, after a delayed result in the 2020 Presidential election led to baseless allegations of fraud and demands to “stop the count.”⁷¹

Without the introduction of pre-canvassing, public distrust of voting through the mail might increase, which would only serve to harm disabled voters. Voters should feel confident that their ballot will be counted, regardless of how they chose to vote. By adopting pre-canvassing, the General Assembly will take a needed step to help restore faith in the Commonwealth’s election system.

Pre-canvassing is also needed because it enables county election officials “to identify ballots that were not submitted properly and potentially notify a voter about the problem,” thereby giving voters the option to cure a defective ballot.⁷² The Election Code should both allow for pre-canvassing *and* codify a mail-in or absentee elector’s right to cure a defective ballot, as doing so decreases the likelihood that mail in and absentee voters’ ballots will be discarded due to a minor error, such as a failure to place the ballot inside two envelopes.

As written, the Code neither allows nor prohibits the curing of defective mail ballots; instead, it is silent as to a voter’s right to cure. The counties therefore used a myriad of different approaches in how they treated defective mail ballots. While DOS directed counties “to mark ballots as canceled if they ha[d] clear flaws, such as missing voters’ signatures, or [were] ‘naked ballots’ without the required inner secrecy envelopes . . . [it] left it to counties to decide how

⁷⁰ *Id.*

⁷¹ See, e.g., The Associated Press, *Trump Team Says It’s Suing to Stop Pennsylvania Vote Count*, NBC10 PHILA. (Nov. 4, 2020) <https://www.nbcphiladelphia.com/news/politics/decision-2020/trump-team-says-its-suing-to-stop-pennsylvania-vote-count/2584988/>; Jonathan Lai et al., *Philly’s counting of mail ballots has been slowed by a Trump legal challenge*, THE PHILA. INQUIRER (Nov. 5, 2020) <https://www.inquirer.com/politics/election/philadelphia-counting-mail-ballots-20201105.html>.

⁷² Martines, *supra* note 69.

aggressive to be in trying to contact voters to help them fix their ballots[.]”⁷³ Some counties therefore marked ballots as cancelled, which triggered a notification to voters that their ballots would not be counted, and that they could vote by provisional ballot on election day, while others contacted voters and offered them the option to come to the election office to cure the defect, while still others did nothing.⁷⁴

This multitude of approaches is problematic for three reasons. First, voters with disabilities who live in counties that notified them of defects and gave them the option of using a provisional ballot may not be able to do so. They are more likely than non-disabled voters to be physically unable to go to the polls to vote via provisional ballot. In addition, provisional paper ballots are not accessible to all voters, such as those who are blind or who cannot hold a pen, and who may have planned to use an accessible remote ballot to vote through the mail. Second, for counties that did nothing, these voters were unaware of the flaws with their ballots, as their ballot status showed as “vote recorded” on DOS’s online ballot tracking system, and they were disenfranchised as a result.⁷⁵ Third, it leads to confusion, as counties remain free to use new and different procedures for each election.

The Pennsylvania Supreme Court was asked to address this issue and mandate that county boards of election “contact qualified electors whose mail-in or absentee ballots contain minor facial defects resulting from their failure to comply with the statutory requirements for voting by mail and provide them with an opportunity to cure those defects.”⁷⁶ The Court refrained from so doing, holding that

although the Election Code provides the procedures for casting and counting a vote by mail, it does not provide for the “notice and opportunity to cure” procedure

⁷³ Jonathan Lai, *Pennsylvania struggles with how—or if—to help voters fix their mail ballots*, THE PHILA. INQUIRER (Oct. 29, 2020) <https://www.inquirer.com/politics/election/pennsylvania-flawed-mail-ballots-cure-20201029.html>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Pa. Democratic Party*, 238 A.3d at 372.

sought by Petitioner. To the extent that a voter is at risk for having his or her ballot rejected due to minor errors made in contravention of those requirements, we agree that the decision to provide a “notice and opportunity to cure” procedure to alleviate that risk is one best suited for the Legislature.⁷⁷

The Commonwealth must establish such a “notice and cure” procedure to help protect the rights of voters with disabilities, many of whom risk losing the franchise if their only option to cure a defective ballot is to go on Election Day and vote via provisional ballot. Indeed, given that disabled voters often must comply with more rules than nondisabled voters when voting through the mail (e.g. they must follow regulations regarding the use of designated agents and/or getting assistance marking or signing a ballot), there are also more ways for their ballots to be deemed defective. Creating a “notice and cure” procedure would further ensure that disabled Pennsylvanians have the same opportunity to vote as do those without disabilities. Such a procedure should accommodate those who cannot go in-person to cure their ballots; therefore, replacement ballots should either be automatically sent to voters, or voters should be allowed to use an agent to facilitate an in-person pick up.

5. *There Must be Accessible Voting Options for People Who Cannot Use Paper Provisional Ballots*

As mentioned above, voting via provisional ballot is often not possible for voters with a disability. Some voters cannot physically get to the polls to make use of a provisional ballot. Others might be able to go to the polls, but they cannot use a paper provisional ballot due to blindness or the inability to operate a pen. The Commonwealth must establish accessible procedures that allow disabled voters who must vote provisionally, but cannot use provisional ballots, to vote.

In the 2020 General Election, DOS advised voters who applied for but never received a mail-in or absentee ballot to “vote by provisional ballot at your polling place.”⁷⁸ While many

⁷⁷ *Id.* at 374.

⁷⁸ *Mail-in and Absentee Ballots*, *supra* note 41.

counties allowed voters to go in-person to the election office and pick up a replacement ballot, (either the voter him/herself or a designated agent), it is DRP's understanding that not all counties were willing to issue replacement ballots. This is discriminatory against voters with disabilities who may not be able to go to the polls to vote via a provisional ballot, or for whom provisional ballots may be inaccessible.

Voters in this situation must be provided with an accessible procedure for voting; without one, a county violates the ADA⁷⁹ and Section 504⁸⁰ and its obligation to provide reasonable accommodations to voters with disabilities.⁸¹ Thus, DOS must provide guidance to counties that explains the need to provide an in-person option for obtaining a replacement ballot for voters with disabilities who cannot go to the polls and vote in person. The counties that do not already provide such an accessible procedure must implement one. For example, counties could issue disabled voters in-person replacement ballots, or, if time allows, send out replacement ballots through the mail.

Other voters had always intended to vote in-person at the polls, but discovered they had to use a provisional ballot because of issues determining their eligibility to vote.⁸² If a voter in this position could not use a paper provisional ballot by reason of their disability, he lost his right to vote privately and independently, in violation of HAVA.⁸³ In the 64 counties that use scanners or ballot boxes, there is a simple way to address this: the counties could allow voters in this situation to use an accessible ballot marking device to make their candidate selections, enabling

⁷⁹ 42 U.S.C. § 12132.

⁸⁰ 29 U.S.C. § 794(a).

⁸¹ 28 C.F.R. § 35.130(b)(7)(i).

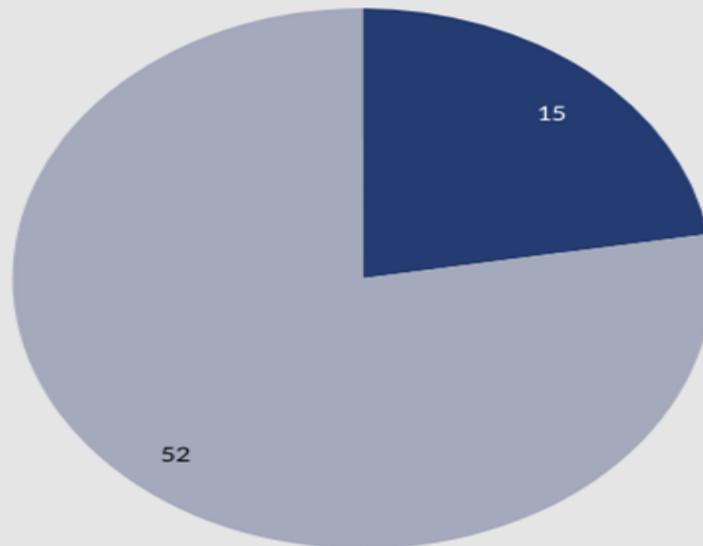
⁸² *Voting by Provisional Ballot*, VOTESPA, <https://www.votespa.com/Voting-in-PA/Pages/Voting-by-Provisional-Ballot.aspx> (last visited Mar. 31, 2021).

⁸³ 52 U.S.C. § 21081(a)(3)(A).

them to vote privately and independently.⁸⁴ Once printed, their ballot could be placed in a provisional envelope, rather than scanned in or placed in the ballot box.

Counties and Ballot Drop Off Locations

- Counties with >1 Drop Off Location (22.39%)
- Counties without >1 Drop Off Location (77.61%)



“

...Only **15** out of Pennsylvania's **67** counties succeeded in providing voters with more than one place to return their mail-in or absentee ballot in person.

”

⁸⁴ All counties except Cumberland, Northampton, and Philadelphia use scanners or ballot boxes. Those counties use the ES&S ExpressVote XL, an all-in-one system without a separate scanner/ballot box. See <https://www.votespa.com/readytovote/Pages/default.aspx#inperson> for information about each county's voting system.

6. *Clarity is Needed About the Use of Designated Agents*

Concerns about contracting COVID-19 led many more Pennsylvanians to vote through the mail in the 2020 Primary and General Elections than would have normally. COVID-19 also caused many people with disabilities that do not normally impact their ability to go out in public to refrain from doing so for fear of contracting the virus. As a result, they could not return their own mail-in or absentee ballots either through the mail or in-person. These factors taken together meant that for the first time, large numbers of voters needed to utilize a “designated agent” to help them vote through the mail.

The origin of designated agents is federal law. In 1995, the Commonwealth Court affirmed their usage for voters with disabilities using absentee ballots, stating that the ADA imposed a duty on election officials to ensure that all persons with disabilities could exercise their right to vote, and that the VRA entitled them to get help from whomever they choose.⁸⁵ The court therefore held that disabled absentee voters could “select agents to assist them in exercising their right to vote via the absentee ballot process.”⁸⁶

Subsequently, many county boards of election adopted their own designated agent procedures for absentee voters, and in October 2020 DOS issued a designated agent form.⁸⁷ It did not, however, appear to provide counties with any guidance about the use of designated agents.⁸⁸ As of mid-October, only 15 of the 67 counties’ websites contained information about

⁸⁵ See *DiPietrae v. City of Philadelphia*, 666 A.2d 1132, 1135 (Commonwealth Ct. 1995), *aff’d* 673 A.2d 905 (Pa. 1996) (citing 42 U.S.C. § 12132 and 52 U.S.C. § 10508).

⁸⁶ *Id.* at 1136.

⁸⁷ *Authorize a Designated Agent to Help You Obtain and/or Return Your Mail-In or Absentee Ballot*, *supra* note 59.

⁸⁸ See generally *Pennsylvania Absentee and Mail-in Ballot Return Guidance*, PA DEP’T. OF STATE, Aug. 19, 2020, https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS_BallotReturn_Guidance_1.0.pdf (failing to mention designated agents as a possible means of returning ballots).

designated agents, seven of which linked to DOS's designated agent form.⁸⁹ Ten of the counties explicitly said voters *could not* drop off another person's ballot and provided no exception to the general rule for disabled voters, and 41 counties did not provide any information about this option.

Anecdotally, some counties did not fully understand the concept of designated agents and when they were permitted to assist voters. For example, DRP received a request for assistance from a mother acting on behalf of her son, a disabled voter, who attempted to go in person to return his mail-in ballot but did not have a designated agent form with her. In response, the county told her that it was illegal for her to return someone else's ballot, rather than educate her about the need for a designated agent form. This and other examples like it, coupled with the lack of information about agents on many county websites, suggests that DOS needs to issue further guidance to election officials about this required accommodation.

In addition, DOS should require that counties have hard copies of the designated agent form available in their election office. Voters who do not have access to a printer, the means or ability to get to a location that does, or someone who can handle the printing for them, are not able to use a designated agent, and therefore, may not be able to vote. Alternatively, DOS could change the ballot application process so that there is a way for voters to indicate that they would like a copy of the designated agent form sent to them along with their mail-in or absentee ballot. By increasing voters' access to the form, DOS would effectuate its responsibility to uphold the Pennsylvania Constitution, which provides that "[e]lections shall be free and equal[.]"⁹⁰ and is "intended to *equalize* the power of [all] voters in [the] Commonwealth's election process[.]"⁹¹

⁸⁹ During the second week of October, DRP conducted a review of all 67 counties' websites; this data and what immediately follows comes from that review.

⁹⁰ Pa. Const. art. I, § 5

⁹¹ *League of Woman Voters*, 178 A.3d at 812.

The county boards of election must also better train their staffs about designated agents and who may use their assistance, as well publicize information about them. County websites should reflect the fact that voters with a disability may use a designated agent to help them apply for, pick up, or return their absentee or mail-in ballots. They should also provide a direct link to DOS's designated agent form. With these changes, there will be far less confusion amongst both voters and election workers about designated agents. In turn, the vote by mail process will be simpler for voters with disabilities.

7. *DOS Guidance About the Definition of "Household" Makes it More Difficult for People in Long-term Care Facilities to Vote and it Must be Changed*

In 2020, designated agents were particularly important to voters living in congregate care settings, such as nursing homes and personal care homes, but the way DOS chose to define the term "household" led to an unnecessarily complicated voting process for these voters. DOS should therefore reconsider how it defines this term.

When DOS issued its designated agent form in October 2020, the instructions provided that "[t]he person you designate as your agent is only allowed to serve as a designated agent for ONE voter, unless the additional voter(s) live in the same household as you (the voter named in this form)."⁹² The guidance DOS then issued to long term care facilities (LTCFs) stated: "[a] 'household' for the purpose of designating an agent does not include a long-term care facility. . . . This means that *each* resident who is unable to return their own voted ballot due to a disability must designate a *different* agent."⁹³ As a result of this guidance, LTCFs and other congregate care settings, the majority of whom did not allow their residents to vote or return

⁹² *Authorize a Designated Agent to Help You Obtain and/or Return Your Mail-In or Absentee Ballot*, *supra* note 59.

⁹³ *2020 Voting Fact Sheet for Long Term Care Facilities*, PA DEP'T OF STATE, 1, 2 (Oct. 2020) <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/Fact-Sheet-for-Voters-in-Long-Term-Care-Facilities.pdf> (emphasis added).

their ballots in person because of concerns related to COVID-19, were left scrambling, trying to figure out how to return their residents' ballots to the county when they did not have enough staff to serve as agents.

It is DRP's understanding that when defining "household," DOS relied on the Commonwealth Court's opinion in *DiPietrae v. City of Philadelphia*, wherein the court said that any interpretation of the term "household," as it relates to "places such as nursing homes or hospitals[,] must be left initially to the administrative discretion of the election officials or the trial court."⁹⁴

This case does not support any particular interpretation of the term household, but rather that the task of interpreting the term should be left to DOS's discretion. Given this, DOS can easily redefine the term to include nursing facilities, hospitals, and other congregate living settings. Indeed, it *must* do so in order to ensure that people with disabilities have equal access to the ballot box. Given the uncertainty around how long COVID-19 will be with us and what its lasting impacts will be, DOS must define the term "household" so that it includes any congregate living setting so that the people living in them do not face discriminatory barriers to voting.

Under Section 208 of the VRA, "[a]ny 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."⁹⁵ This entitlement to "assistance by a person of the voter's choice" also applies to the ballot return process, as the VRA's definition of voting is inclusive of "*all* action necessary to make a vote effective in any primary, special, or general election[.]"⁹⁶

⁹⁴ *DiPietrae*, 666 A.2d at 1136 n.9.

⁹⁵ 52 U.S.C. § 10508 (emphasis added).

⁹⁶ *Id.* § 10310(c)(1) (emphasis added); see also *Democracy N.C.*, 476 F.Supp.3d at 234-35 ("The court further finds that 'voting' includes the delivery of an absentee ballot to a county board of elections as an action 'necessary to make a vote effective'—an absentee ballot must be delivered in order to be counted.").

DOS's decision to define household as excluding LTCFs, as applied to voters living within LTCFs and other congregate care settings *during a pandemic*, may violate the VRA. The definition impermissibly limits who voters can select as their designated agent, and effectively leaves them without any viable options. Given that "[i]n the present circumstances, many nursing homes are locked down and will likely continue to have restricted access for the foreseeable future; [disabled] voters in these type[s] of . . . facilities may only come into contact with . . . [a staff member] of their residence and therefore may not have any [other] options for assistance."⁹⁷ Thus, DOS must, at a minimum, redefine "household" to include congregate care settings until the pandemic has ended.

However, it should make this change permanent because many residents of congregate care settings do not have friends or family members who can serve as agents. While it is possible that volunteers from outside the facility could serve as agents, a person's ability to vote should not be dependent on the availability of a volunteer.

During the pandemic, any program that relies on volunteers is also complicated to implement due to concerns about infection. For example, in the 2020 General Election, DRP worked with a group of volunteers in Philadelphia trying to assist voters in LTCFs. It was incredibly difficult for facilities to coordinate between their staff and volunteers, as staff had to transport the paperwork to and from multiple individual volunteers waiting outside the facility and voters on the inside, who were not all available at the same times. As a result of the administrative burden of matching voters up with volunteer agents, many residents were unable to vote; LTCFs simply lacked the manpower to coordinate this process.

If DOS wants to place limits on the amount of people in a congregate setting that an individual agent can assist, it might consider doing so by defining household to encompass

⁹⁷ *Democracy N.C.*, 476 F.Supp.3d at 235.

floors or units of facilities, rather than the *entire* building. This simple change would make it far easier for people living in these facilities to vote.

DOS should strive to maximize the chances that people who live in a hospital, LTCF, or other congregate setting and who want to vote can do so. We urge DOS to rethink its guidance that LTCFs do not constitute households and redefine the term so that it includes congregate living settings or the subsections within them, and to make this change permanent rather than one that stands only until the end of the COVID-19 pandemic.

8. *DOS Must Provide Training for Long-term Care Facilities*

Recognizing that the COVID-19 pandemic has made everything about voting more complicated, particularly for voters in facilities, DRP nonetheless believes facility administrators need comprehensive training about voting best practices; even during “normal” times, facilities make errors when trying to help their residents vote that can and do lead to their disenfranchisement. Voters in facilities have the right to vote, to have assistance in voting, and to decide whether to vote in person or by mail-in or absentee ballot, and LTCF staff have a duty to help facilitate the voting process.⁹⁸ They can only do this effectively, however, if they are properly educated about the Election Code and the procedures DOS has established to implement it. Thus, DOS, the Pennsylvania Department of Health (DOH), and the Pennsylvania Department of Human Services (DHS) must collaborate to develop training materials for staff of skilled nursing facilities, personal care homes, assisted living residences, and intermediate care facilities.

Apart from the challenges created by COVID-19, which caused voters in LTCFs to rely almost exclusively on mail voting, and the problems with the new vote by mail system, many voters in LTCFs lost their right to vote in the 2020 General Election because of errors made by

⁹⁸ See generally *Compliance with Residents’ Rights Requirement related to Nursing Home Residents’ Right to Vote*, CTR. FOR MEDICARE & MEDICAID SERVICES, <https://www.cms.gov/files/document/qso-21-02-nh.pdf>.

LTCF staff. Staff, in their efforts to help facilitate residents voting, made mistakes which were fatal to the endeavor, as they were often discovered once it was too late to fix them.

Based on the requests for assistance that DRP received, registration errors seemed to be the most common problem. Many LTCFs applied for mail-in ballots for their residents en masse, sometimes without first confirming *where* the residents were registered to vote. As a result, many mail-in ballot applications were rejected on the basis that the voters were not registered in the county in which they applied for the ballot, and/or at the address listed on their ballot application. If LTCF staff were provided with materials and training that spelled out a step-by-step process to follow when helping residents vote—from confirming the registration to marking, verifying, and casting a ballot—this would decrease the likelihood that residents would be disenfranchised.

DOH, who is responsible for regulating nursing homes, and DHS, which is responsible for personal care homes, assisted living residences, and intermediate care facilities, should collaborate with DOS to ensure that facility staff are adequately trained and able to address the unique challenges residents living in LTCFs experience when trying to vote.

As DOS develops comprehensive training materials for LTCFs, it should consult the EAC's "Quick Start Management Guide to Serving Voters in Long-Term Care Facilities,"⁹⁹ which contains many ideas for how state and local officials can work together with LTCF staff and residents to ensure that anyone who wants to can vote. LTCF residents' ability to vote is often dependent on whether their staff have *properly* assisted them. These residents should not lose their opportunity to exercise the franchise because of staff errors, and DOS has a responsibility to ensure that LTCF staff understand Pennsylvania voting procedures.

⁹⁹ Available online at: https://www.eac.gov/sites/default/files/document_library/files/Quick_Start-Serving_Voters_in_Long-Term_Care_Facilities.pdf.

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As it has with so many other facets of life, COVID-19 had major implications for the 2020 Primary and General Elections. Counties were not prepared for the number of mail-in ballot requests they received as a result of voters hesitancy to go to the polls.

”



9. *DOS Must Issue Guidance to Counties About Whether to Accept Ballots with Damaged Outer Envelopes*

DOS should issue guidance about what voters should do if they receive a ballot packet that is damaged in some way. Specifically, guidance is needed regarding whether county boards of election will accept mail-in or absentee ballots with damaged outer envelopes. DRP received multiple inquiries from voters in different counties seeking information about whether their ballot would be counted if its outer envelope was damaged. We also received questions about whether county board of elections would issue replacement envelopes. While this is information that voters could conceivably get by contacting their local board of election, many election offices were busy and did not answer the phone when contacted, or did not respond to emails.

Thus, DOS should include information on its website about what voters should do if they receive a damaged mail-in or absentee ballot, as well as issue guidance to counties regarding the same. For example, it would eliminate voter stress and confusion if they could simply visit DOS's website and confirm one way or the other whether counties would accept a ballot placed inside an outer envelope that had been sealed with tape. If the counties had also received guidance that was in line with the information voters found on DOS's website, there would not be any risk of voters getting conflicting information at the local level. Therefore, DRP encourages DOS to develop guidance for both voters and counties about whether damaged envelopes may be used. Because disabled voters are more likely to vote through the mail, they would benefit from such guidance.

10. *Reforms of the OmniBallot Application and Return Process are Needed, as Well as Better Guidance for Counties*¹⁰⁰

In 2020, DOS implemented a remote accessible vote by mail system for voters with disabilities, Democracy Live's OmniBallot.¹⁰¹ The OmniBallot enables a voter who cannot mark a paper ballot to mark the ballot online privately and independently with the use of screen reading technology.¹⁰² While the OmniBallot has a variety of accessible features and is clearly a strong step in the right direction, there is more that must be done to ensure that all voters with disabilities have equal access to voting by mail.

Voters that used the OmniBallot experienced problems with both the ballot application and return processes, particularly the requirement that they print out the ballot. In addition, the accessible ballot was not widely publicized, and information about the option of accessible voting by mail was buried on DOS's website, making it difficult to locate. The county boards of election also appeared to lack effective guidance about how they were to carry out their role in implementing the OmniBallot voting system.

a.) Inaccessible Application

Blind voters who use screen-readers did not find the application for the accessible mail-in ballot user friendly, and in some instances, it was not accessible to them. Because of certain design and coding decisions made at the time of the application's creation, screen-readers' output of text-to-speech was confusing, and it caused applicants to enter their information in the wrong area of the application. Both the online and fillable PDF versions of the application were

¹⁰⁰ Much of the information in this section was gathered from interviews DRP conducted with blind voters who used the OmniBallot in the 2020 General Election.

¹⁰¹ Madasyn Lee, *Pa. implements OmniBallot tool for blind voters in November election*, TRIBLIVE, (Aug. 30, 2020)

<https://triblive.com/news/pennsylvania/state-implements-omniballot-tool-for-blind-voters-in-november-election/>

¹⁰² *OmniBallot Online*, DEMOCRACY LIVE, <https://democracylive.com/omniballot-online/> (last visited Mar. 31, 2021).

printed with the prompts to the left of the boxes wherein users were to input their information.¹⁰³ Thus, based on how the applications appeared visually, one would assume that a screen-reader would first read the prompt, then instruct applicants that the box for entering the corresponding information was directly to its right. In actuality, this is not how screen-readers translated the text-to-speech.

Screen-readers read the text back to applicants in a way that made it seem as though the boxes in which they were to type in their identifying information, such as their name and address, were located *above* the text describing what should be written in those boxes. For example, if there was a box to list the applicant's first name, as well as a box to list their address, the screen-reader would read out "first name." Then, it would move to the box wherein the applicant's address should be entered, leading him to believe his name belonged in said box, even though that box was *actually* where the applicant's address was to be entered. As a result, some blind voters needed assistance from sighted individuals in order to successfully complete the application, or they were forced to delete their entries and start the application over once they realized how it was actually set-up.

The application also failed to alert applicants that certain areas of it represented a "required" edit field, wherein information had to be entered in order to proceed and submit the application (e.g. first and last name, county). The developers of the application did not seem to take into consideration the fact that blind voters cannot see an asterisk that denotes a required field. In order to be accessible, the application must be coded so that screen-readers will verbally indicate that a field is "required." The version of the application used in the 2020 Election was not coded this way.

¹⁰³ *Accessible Remote Ballot Request*, PA DEP'T OF STATE, <https://expressforms.pa.gov/apps/pa/DOS/Remote-Access-Ballot-Request> (last visited Dec. 23, 2020); *Request for Accessible Remote Ballot for November 3, 2020 Pennsylvania General Election*, PA DEP'T OF STATE, <https://www.votespa.com/Voting-in-PA/Documents/Accessible-Remote-Ballot-Request.pdf> (last visited Dec. 23, 2020).

The reason that there were so many problems with the application is because DOS opted to develop its own application, rather than utilize Democracy Live's accessible ballot application. In contrast to the application which Pennsylvania voters used to apply for the OmniBallot, the OmniBallot itself was accessible to them, and was coded in such a manner that their screen-readers could easily flow through the page and convert the text-to-speech. Given this, and the fact that Democracy Live offers an accessible ballot application, DOS should consider using Democracy Live's ballot application in all future elections.

One blind Pennsylvania voter we spoke with was able to test Democracy Live's ballot application and compare using it to her experience using Pennsylvania's application. This voter noted that Democracy Live's application used clear headings at the top of each page that announced the page's purpose (e.g. "Voter Look Up," "Verification," "Absentee Ballot Request Form"). Likewise, the instructions were clearly marked by numbers and headings, rather than an indistinct block of text, as was the case on Pennsylvania's application. Each of the required edit boxes on Democracy Live's application read as "required edit" or "required combo box" with a screen-reader, and all checkboxes on Democracy Live's application announced the associated question and whether or not the check box was checked or unchecked. In contrast, on the Pennsylvania application, certain versions of screen-reading software could not even identify any prompts associated with the checkboxes. Since most of these checkboxes were required, some voters were unable to complete their accessible absentee ballot request for this reason. While Democracy Live's application was uniform throughout, every page of the Pennsylvania application was a bit different in its overall layout and composition.

In order to make use of the accessible mail-in ballot, blind voters first need to clear the hurdle of applying for said ballot; if this process is not fully accessible to them, or if it is unnecessarily confusing, it means that Pennsylvania has fallen short of offering "accessible" mail-in voting. All steps of the mail-in voting process, from the application to casting and returning the ballot, should be fully accessible to voters. DRP urges DOS to adopt Democracy

Live's accessible mail-in application for future elections. However, if it chooses not to do so, DOS must create an application that is fully accessible to voters who use screen-readers.

b.) Inaccessible Return Process

When it adopted the OmniBallot for Pennsylvanians with disabilities, DOS failed to establish an accessible ballot *return* process. DOS either needs to provide blind mail voters with a reasonable modification to the return process in the form of electronic return, or it must modify the current procedure to make it fully accessible.

Currently, blind voters who wish to vote through the mail must: (1) print out their marked ballot; (2) locate a package of materials sent to them by their county board of election, containing a secrecy and return envelope; (3) insert their marked ballot into the secrecy envelope; (4) insert the secrecy envelope into a return envelope; (5) read and sign the declaration on the return envelope; and (6) mail or hand-deliver the return envelope to the county board of election.

This process raises three main accessibility concerns, that voters must: print their ballot, use multiple return envelopes, and sign a printed declaration that is inaccessible to them. Unlike blind voters, sighted voters need not print their absentee and mail-in ballots; they simply mark and return a paper ballot. Moreover, many blind people do not have printers. To print their ballots, such voters would need to seek assistance from a sighted person or deliver an electronic copy of the ballot to a third party or public terminal for printing, which undermines their right to vote privately and independently.

Once printed, blind voters are required to fold and package their ballots into first the secrecy envelope and then the return envelope, and if they want to maintain the secrecy of their ballot, do it without sighted assistance. Blind voters may have difficulty identifying the package containing the secrecy and return envelopes that the county sent to them in the mail. Nor are they able to read the declaration printed on the return envelope, which they are supposed to sign.

DOS had “resolved to issue guidance to county boards of elections in time for the November 2020 election . . . that would instruct [them] to accept the return envelopes as long as the voter’s signature appeared anywhere on the envelope.”¹⁰⁴ It is not clear whether this guidance ever went out or whether some counties did not comply with it. Voters from Philadelphia, Allegheny, and Cumberland counties reported that they were given an outer envelope for the accessible ballot that instructed them to print their name and address and sign their name on a designated signature line. This was not accessible, and the voters all needed sighted assistance to fill it out. These voters were not provided with any instructions that indicated to them that they could sign the envelope in *any* location.

DOS must give further consideration to the idea of developing e-return as an option for voters using the OmniBallot. It is the most accessible option, and the only one that eliminates the very real concern that voters’ right to a private and independent ballot return process will be compromised. DOS should explore Democracy Live’s established e-return process and the measures it has in place to ensure candidate selections remain secure, such as by generating a paper ballot for tabulation.¹⁰⁵

West Virginia also used the OmniBallot in the 2020 General Election, but unlike Pennsylvania, it allowed electronic return.¹⁰⁶ In January 2020, the West Virginia legislature passed Senate Bill 94, which extended the franchise to voters who could not access a polling place or vote from home without assistance, and allowed them to securely return their ballots online.¹⁰⁷ As a result, the Secretary of State of West Virginia won a prestigious Clearinghouse Award from the EAC, in recognition of how the OmniBallot and the option of electronic return

¹⁰⁴ *Drenth v. Boockvar*, No. 1:20-CV-00829, 2020 WL 4805621, at *4 (M.D. Pa. Aug. 18, 2020).

¹⁰⁵ *OmniBallot Online*, *supra* note 102.

¹⁰⁶ W. Va. Code § 3-3-5(f)(2).

¹⁰⁷ *West Virginia Secretary of State (WV) 2020 Clearinghouse Award Winner*, U.S. ELECTION ASSISTANCE COMM’N, <https://www.eac.gov/election-officials/west-virginia-secretary-state-wv-2020-clearinghouse-award-winner> (last visited March 15, 2021).

improved election accessibility in the state.¹⁰⁸ Pennsylvania should consider reaching out to West Virginia to learn more about how it was able to maintain election security while simultaneously increasing election accessibility.

However, if DOS intends to continue using mail return moving forward, it must provide voters with instructions that specifically indicate that they may sign the envelope anywhere. Without such instructions, voters are led to believe that they *must* sign the envelope in a specific location, thereby necessitating that they get assistance from a sighted individual. Or, better still, DOS should instruct counties to issue outer envelopes to accessible mail-in ballot voters that do not require them to fill-in their mailing address and provide their signature in a designated spot. This is the most accessible and least confusing option if an e-return option is not to be adopted.

c.) Lack of Publicity

Based on feedback from blind Pennsylvania voters who used the OmniBallot, and who are actively involved in local organizations for the blind, the Commonwealth failed to adequately publicize the accessible mail-in ballot. As a result of this lack of publicity, only about 50 Pennsylvanians used the OmniBallot in the 2020 General Election.¹⁰⁹ Moving forward, DOS must prioritize publicizing the ballot, as well as educate blind voters about the process of applying for, filling out, and returning it.

Much like Pennsylvania, Michigan also used the OmniBallot for the first time in the 2020 General Election.¹¹⁰ In contrast to Pennsylvania, where approximately 50 voters used the OmniBallot, in Michigan, 7,000 to 8,000 voters did. This difference in numbers is likely due to Michigan's use of an effective publicity campaign. Near the end of June, Michigan's Secretary of

¹⁰⁸ *See id.*

¹⁰⁹ Juliette Rihl, *Why did only 50 voters sign up for PA's accessible vote-by-mail system?*, PUBLICSOURCE (Oct. 31, 2020) <https://www.publicsource.org/pennsylvania-vote-by-mail-disability-access-omniballot/>.

¹¹⁰ *See Notice of Contract*, STATE OF MICH. PROCUREMENT, https://www.michigan.gov/documents/dtmb/200000001305_697483_7.pdf.

State issued a press release announcing the availability of an accessible mail-in ballot application, which would enable blind voters to apply for an accessible absentee ballot.¹¹¹ The link to the application was also promoted by the Department of State's social media accounts.¹¹² Prior to election day, Michigan issued another four press releases about accessible absentee voting, as well as corresponding posts on social media.¹¹³ The Secretary of State also participated in numerous town halls and other discussions wherein she discussed all manner of issues related to the upcoming election, including accessibility.¹¹⁴

West Virginia also excelled in this area. It did so by partnering with Disability Rights of West Virginia to help educate the public about its new accessible method of absentee voting.¹¹⁵ Their coordinated public education strategy included developing flyers, rack cards, and online materials, which they then distributed across the state.¹¹⁶ As a result, West Virginia, a state with

¹¹¹ *Accessible absent voter ballot application now available*, THE OFFICE OF SEC'Y OF STATE JOCELYN BENSON, <https://www.michigan.gov/sos/0,4670,7-127--533105--,00.html> (last visited Dec. 23, 2020).

¹¹² See, e.g., @MichSoS, TWITTER, (June 26, 2020, 4:59 P.M.) <https://twitter.com/MichSoS/status/1276621052123189249>.

¹¹³ See, e.g., *Voters have multiple digital options to apply for accessible absentee ballot*, THE OFFICE OF SEC'Y OF STATE JOCELYN BENSON https://www.michigan.gov/sos/0,4670,7-127-1640_9150-534006--,00.html (last visited Dec. 23, 2020); *Voters with disabilities have many ways to participate in 2020 elections*, THE OFFICE OF SEC'Y OF STATE JOCELYN BENSON https://www.michigan.gov/sos/0,4670,7-127-1640_9150-534263--,00.html (last visited Dec. 23, 2020); @MichSoS, TWITTER, (Oct. 5, 2020, 2:52 P.M.) <https://twitter.com/MichSoS/status/1313190392662290435>; @MichSoS, TWITTER, (July 24, 2020, 12:38 P.M.) <https://twitter.com/MichSoS/status/1286702377781919746>.

¹¹⁴ See, e.g., <https://www.wilx.com/content/news/MIs-Secretary-of-State-to-participate-in-a-virtual-town-hall-569848261.html>; <https://www.wkar.org/post/mi-secretary-state-informs-non-english-speaking-voters-virtual-town-hall>

¹¹⁵ *In West Virginia, Every Voter Counts—Electronic absentee voting for some citizens living with physical disabilities*, U.S. ELECTION ASSISTANCE COMM'N, 1, 1 https://www.eac.gov/sites/default/files/clearinghouseawards/2020/WV_SOS_Accessibility.pdf.

¹¹⁶ *Id.*

a small percentage of Pennsylvania's population, had nearly five and a half times as many OmniBallot voters in the 2020 General Election than did the Commonwealth.¹¹⁷

In contrast to Michigan and West Virginia, Pennsylvania only issued a press release to announce its use of the temporary accessible mail-in ballot for the June 2 Primary Election;¹¹⁸ no press release was issued once Pennsylvania decided to use the OmniBallot as its permanent solution moving forward. A review of DOS's Twitter account similarly revealed that the Department failed to share *any* information about the OmniBallot on its social media accounts.¹¹⁹ Perhaps most problematic was the placement of OmniBallot information on DOS's VOTESPA website. Instead of appearing on the VOTESPA homepage, information about the OmniBallot was instead buried near the bottom of the "Mail-in and Absentee Ballot" page.¹²⁰

Moving forward, DOS must put information about the option of accessible mail-in voting on the main VOTESPA page, where it will be readily found by people who might need or want this information. It must also make use of its social media accounts to publicize the availability of the OmniBallot, as well as release materials explaining the OmniBallot voting process, and Department staff should regularly hold briefings with the media wherein they discuss the accessible vote by mail option. These steps will improve voter awareness and will result in more people using the OmniBallot.

¹¹⁷ See *id.* (noting that in West Virginia, "271 voters with qualifying physical disabilities participated [in the 2020 General Election] using" the OmniBallot.)

¹¹⁸ *Pennsylvania Offers Accessible Write-In Ballots for Voters with Disabilities for June 2 Primary*, PA MEDIA, <https://www.media.pa.gov/pages/state-details.aspx?newsid=385> (last visited Mar. 31, 2021).

¹¹⁹ See *generally* @PAStateDept, TWITTER, <https://twitter.com/PAStateDept> (showing no posts about accessible mail-in voting).

¹²⁰ *Mail-in and Absentee Ballots*, *supra* note 41.

B. Issues with In-Person Voting

Pennsylvania's 67 counties are responsible for carrying out elections. They largely have freedom to make decisions about how an election will run, though they are somewhat constrained by both state and federal law. Nonetheless, most of the "on the ground" decisions that directly impact voters' experiences when casting a ballot, whether in person or through the mail, are made on the local level. Thus, it is vitally important that the county boards of election consider the needs of disabled voters when establishing election procedures.

1. The Use of Inaccessible Polling Places, Drop Boxes, and Election Offices Must End

Inaccessible polling places continue to be a problem in certain areas of Pennsylvania. In addition, this year, with the introduction of a no excuse mail-in voting program, inaccessible drop boxes and election offices were also an issue for some voters. Counties must meet their obligations under the VAEH Act, ADA, and Section 504, and ensure that *all* locations voters use to either vote at the polls or to apply for, pick up, and return a mail ballot are accessible.

Specifically, when choosing polling places or locations for drop boxes, the counties should refer to the ADA Checklist for Polling Places¹²¹ and the 2010 ADA Standards for Accessible Design.¹²² Because many of the new voting systems involve the use of two separate machines to mark and cast ballots, county election workers must ensure machines are set up in such a way that voters with disabilities, such as those who use wheelchairs or other assistive devices to ambulate, can easily move between the ballot marking device and the scanner. Counties must remind election workers of the need for an accessible route between machines when they undergo training. In addition, they must remind workers that any portable devices, such as ramps, should be in place prior to polls opening.

¹²¹ Available online at: <https://www.ada.gov/votingchecklist.pdf>.

¹²² Available online at: https://www.ada.gov/2010ADAstandards_index.htm.

DOS could help counties in their efforts to increase the accessibility of polling places by creating and providing election workers with standardized materials that could be used to easily “double check” for accessibility. For example, the Iowa Secretary of State, in conjunction with Disability Rights Iowa, created a guide, “The Voting Accessibility Quick Check: How Accessible is Your Polling Place?”¹²³ This guide allows Iowa’s poll workers to double check their polling location for accessibility outside, inside, and at entrances, and includes information about parking, width of doorways, thresholds, and the content and placement of signage.¹²⁴

In addition, the guide unfolds to a length of three feet and its bottom edge has pre-marked measurements that can be used to check the: maximum height of an unbeveled threshold or pavement defect; maximum height of a beveled threshold and all rugs and mats; distance an object can protrude from the wall before it must be marked with a cone; amount of clear space next to a door handle; and minimum width of ramps, doorways, and paths of travel.¹²⁵ This simple, inexpensive tool puts information directly into the hands of the people in a position to ensure there are no accessibility problems on election day: the county workers who set up the polls. DOS should consider creating a similar tool for Pennsylvania and distribute it to the counties.

To make the process of returning mail-in and absentee ballots as accessible as possible, counties should consider placing drop boxes and opening satellite election offices near locations where there are likely to be large numbers of people with disabilities (e.g. outside a LTCF). They should also consider stationing a “pop-up” election office near the entrance to the county government complex. Voters who may not be able to stand or walk for long distances might not

¹²³ *The Voting Accessibility Quick Check: How Accessible is Your Polling Place?*, DISABILITY RIGHTS IOWA, <https://drivoting.org/wp/wp-content/uploads/2020/10/Quick-Check-FINAL-Print.pdf>.

¹²⁴ *Id.*

¹²⁵ *Id.*

be able to get to an office located inside a large building. Because counties should be doing everything they can to make the voting process accessible to *all* voters, they need to consider the different ways various disabilities can impact whether someone can access a particular space. These considerations should shape decisions about where ballot drop off and retrieval locations, as well as polling places, are located.

2. *Ballot Scanners are Not Fully Accessible to Blind or Low-Vision Voters*

Many of the scanners in use for casting ballots are not fully accessible to blind voters. They do not play audio instructions, and inserting a ballot for scanning can be tricky, as some of the scanners require that the ballot be oriented in a particular manner. Counties have a responsibility under HAVA to provide blind voters with an accessible voting system that allows them to privately and independently mark, verify, *and* cast their ballots.¹²⁶ The ADA and Section 504 impose similar requirements.¹²⁷ In order to meet their obligations, in the counties that use scanners, the boards of election must make changes to the scanning process so that it provides blind voters “the same opportunity for access and participation (including privacy and independence) as for other voters.”¹²⁸

Under HAVA, a “voting system” is the combination of machines and software that allow a voter to both mark and cast her ballot.¹²⁹ Thus, for the counties in which scanners are used, a ballot marking device and the scanner taken together comprise the county’s voting system, and *both* machines must be accessible to voters who are blind.¹³⁰

¹²⁶ 52 U.S.C. § 21081(a)(3)(A) (“The voting system shall . . . 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.”).

¹²⁷ 52 U.S.C. § 10508; 29 U.S.C. § 794(a).

¹²⁸ 52 U.S.C. § 21081(a)(3)(A).

¹²⁹ See *id.* § 21081(b)(1)(A)-(D).

¹³⁰ *Id.* § 21081(a)(3)(A).

A voting system where one of the components *requires* that blind voters get assistance from a poll worker in order to cast their ballot does not provide them the “same opportunity for access . . . as for other voters.”¹³¹ Counties must ensure that *all* components of their voting systems are accessible and allow voters to complete *every* step of the voting process privately and independently, including that of casting their votes.

Counties might accomplish this by using scanners that have audio accessibility, thereby allowing blind voters to independently scan their ballot without getting assistance from poll workers. Using the scanner involves both loading the ballot into the tray and responding to prompts which may appear on the screen, such as those indicating an “under” or “over” vote. A person who cannot see the screen or the tray he must feed his ballot into cannot cast his ballot independently. If there is no scanner with audio accessibility on the market (meaning there is no scanner with integrated audio instructions, similar to the accessible ballot marking devices already in use in the Commonwealth) then counties must create their own audio instructions and use them in conjunction with the most accessible scanner available.

For example, the ES&S DS200 ballot scanning device, already in use in 31 counties in the Commonwealth, plays a tone when a ballot is successfully scanned, as well as when there are issues with the ballot, such as an overvote.¹³² While the ES&S DS200 does not have audio instructions, counties could create their own recording that explains the meaning of each of the different tones (one for “ballot cast” and another for “overvote”). In addition, the instructions could explain where the buttons for “return” and “cast” are in the event of a problem with the ballot, as after an error is detected, the voter can either hit “return” so that he can fix the problem, or he can override the error message by pressing “cast.”

¹³¹ *Id.*

¹³² *DS200, VERIFIED VOTING*, <https://verifiedvoting.org/election-system/ess-ds200/> (last visited Feb. 27, 2021).

In addition to using scanners that play tones and creating audio instructions, counties need to create adaptable ballots so that voters can independently confirm their ballot is properly oriented and loaded into the scanner’s tray. One possible adaptation might be to use a ballot with a clipped corner or a punched-out hole, which would help blind voters to properly orient their ballot. For example, the audio instructions could verbally prompt the voter to “insert your ballot so the side with the punched hole is facing you.”

“ Counties must remind election workers of the need for an accessible route between machines when they undergo training. In addition, they must remind workers that any portable devices, such as ramps, should be in place prior to polls opening. ”

3. *Privacy Sleeves Were Not Available or in Use*

With the introduction of new voting systems for the 2020 election cycle, 64 counties now rely on paper ballots which are cast by either depositing them in a ballot box or inserting them in a scanner.¹³³ According to guidance issued by DOS, “[f]or counties issuing hand-marked paper ballots or [ballot marking device]-marked ballots that require a voter to carry her marked ballot to

¹³³ Five counties use ballot boxes, 59 use scanners separate from the ballot marking device, and three counties use all-in-one machines, where voters can both mark and scan their ballots.

another location, voters *must* be provided with privacy sleeves, envelopes or folders of the appropriate size to carry marked ballots in the polling place[.]”¹³⁴

Many polling places did not make use of privacy sleeves. Without the use of a privacy sleeve, voters who need help putting their ballot into the scanner or ballot box, such as those who are blind, would not be able to get assistance without potentially revealing their ballot choices. Counties must comply with DOS’s guidance, and have privacy sleeves available at *all* polling places, and train poll workers on their proper usage.¹³⁵

IV. Conclusion

The General Assembly, DOS, and the county boards of election all share the same goals: for *all* voters to have equal access to voting, and for the Commonwealth to use voting processes that are simple for both voters and election officials to understand. Through collaboration with people with disabilities, and the willingness to listen and consider their feedback about the challenges they experienced when voting, we believe Pennsylvania can further improve its voting system and eliminate the remaining discriminatory aspects. DRP welcomes the opportunity to discuss these issues further and work together with the Commonwealth to address them.

¹³⁴ *Guidance Concerning Voter Privacy at the Polling Place*, PA DEP’T OF STATE 1, 3 (Mar. 11, 2020) https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS_Guidance%20Concerning%20Voter%20Privacy%20at%20the%20Polling%20Place_1.0.pdf (emphasis added).

¹³⁵ *Id.* (“Poll workers must hand out the sleeve to the voters at check-in and instruct voters on its purpose and usage. The privacy sleeves, whether supplied by a voting system manufacturer or by the county boards of elections, must completely cover the ballot.”).