

**COMPLIANCE WITH
CHAPTER 505
OF THE
LAWS OF 2010**

REMARKS
as delivered

by
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I want to thank the officers and the Program Committee for inviting me to talk about Compliance with Chapter 505 of the Laws of 2010, an Act to amend the Election Law in relation to requiring polling places to be accessible to physically disabled voters.

THE ROAD TO ENACTMENT OF CHAPTER 505 OF THE LAWS OF 2010

Last year, the State of New York finally enacted a comprehensive revision to the statutory framework governing the selection and use of facilities as poll sites. It reflects the continuing efforts to make voting more inclusive for all eligible citizens who register to vote. It also creates new mandates and obligations on County Boards of Elections as well as the State Board.

The road to enacting Chapter 505 was a long one. Some version of this bill was introduced in almost every session for the past decade, beginning in 2001. Between 2003 and 2008, a variation of the bill passed the Assembly but would ultimately die in the Senate. In 2009, it passed both houses but was vetoed by Governor Paterson, largely at the urging of New York City Mayor Michael Bloomberg who expressed concerns about the costs of making poll sites fully accessible. In the veto message, Governor Paterson directed that the State and local governments work together to resolve their differences. Jeffrey Pearlman, then Assistant Counsel to Governor Paterson convened a working group of staff from the Executive Chamber, Division of the Budget, the State Board of Elections, the Senate and the Assembly, as well as the Mayor's Office and the City Board of Elections.

Following extended discussions, all of the participants concluded that they would be able to implement in a reasonable and cost effective manner the requirements created by this legislation.

A slightly revised version of the poll site accessibility bill was introduced on May 4, 2010 with the stated purpose to provide for the accessibility of polling places and to establish basic accessibility guidelines to ensure consistency and encourage substantial compliance at poll sites. It moved quickly through the legislative process, it cleared the Assembly's Election Law, Ways and Means and Rules Committees in two weeks. The bill passed the Assembly on May 17th by a vote of 140 in favor and none opposed. It was sent to the State Senate where it moved through its entire Committee and floor process in just under three weeks and passed the State Senate on June 10th by a vote of 55 in favor and 6 opposed. It was signed into law by Governor Paterson on September 17, 2010 with an effective date of December 15, 2010.

I hope that my brief review of the new law, along with a recent federal court order will be of interest to all. I have put together some of the relevant materials in the package that has been distributed and trust that these materials will be of some assistance to you following my presentation and our discussion today. Included is a copy of Chapter 505 of the Laws of 2010 and its supporting materials, the new text of Section 4-104 of the Election Law as revised by Chapter 505, a copy of the federal court order in United Spinal Association v. Board of Elections and a copy of the Civil Rights Division of the U.S. Justice Department's February 2004 publication entitled "ADA Checklist for Polling Places."

SECTION 4-104 PRIOR TO ENACTMENT OF CHAPTER 505

As many of you know, Section 4-104 of the Election Law has governed the selection and designation of sites to be used both as polling places and voter registration sites.

Prior to the enactment of Chapter 505, it required that each poll site have at least one entrance that provides access, by ramp or otherwise, to physically disabled voters. It had also authorized County BOEs to waive that requirement for a specific poll site, if

the county board undertook efforts to find alternative accessible polling places for the persons with disabilities and were unsuccessful and that compliance with the accessibility requirements would require unreasonable expenses and that “substantial efforts” would be taken to achieve compliance at some point thereafter.

It was this ability to give a waiver for an inaccessible site that led to many disability rights groups to push the State of New York to change the process and mandate accessible poll sites. You may recall during the State Legislature’s deliberations on the statutory framework for a new voting system, disability advocates and their supporters held the Election Law Committee “hostage” for several hours demanding changes to make all poll sites accessible.

CHANGES MADE BY CHAPTER 505

As enacted, Chapter 505 adds three new provisions to Section 4-104.

First, it modifies the language in Section 4-104(1-a) by deleting the entire waiver process. It adds an explicit requirement that each poll site shall be accessible to citizens with disabilities and shall comply with the accessibility guidelines of the Americans with Disabilities Act of 1990.

It also mandates that the State Board of Elections shall publish and distribute to each board of elections with the power to designate poll sites a “concise, non-technical” guide describing standards for poll site accessibility including a poll site access survey instrument, in accordance with the ADA accessibility guidelines and methods to comply with such standards. It also directs that in developing such a guide and procedures the State Board shall consult with persons, groups or entities with knowledge about public access.

Second, Chapter 505 adds a new subsection (1-b) to Section 4-104 which directs the County Boards of Elections to conduct or

cause to be conducted an access survey of each and every poll site used to “verify substantial compliance” with the accessibility guidelines added by this Chapter in the new Section 4-104 (1-a). This new subsection also mandates the completed surveys have to be submitted to the State Board of Elections and the County BOE shall keep a copy for public inspection at its office.

The new language also requires that each poll site be evaluated as to its compliance with these new requirements prior to its designation or upon changes to the facility. A poll site that has been designated prior to the effective date of Chapter 505 shall be evaluated before December 15, 2012 by an individual qualified to determine whether the site meets the existing state and federal accessibility standards. For any poll site deemed not to meet those standards the County BOE must insure that the necessary changes and/or modifications are made or the poll site must be moved to a verified accessible poll site within six months.

The final new addition to Section 4-104 is subdivision (1-3) which directs the State Board of Elections to promulgate any rules and regulations necessary to implement the provisions of this new statutory framework.

THE IMPACT OF CHAPTER 505

The new statutory language clearly makes it the stated policy of the State of New York that every poll site must be accessible and that accessibility is to be determined by a specific reliance on the Americans with Disabilities Act Accessibility Guidelines issued by the United States Department of Justice. That is the last section of my handout.

It also requires the State Board of Elections to create and publish for use by the County Boards of Elections, a State BOE guide, which is to be a concise non-technical document, based on the ADA Accessibility Guidelines and after consultation with such persons, groups or entities with knowledge of public

access as determined by the SBOE. Chapter 505 expressly provided that any rule or regulation that needed to be added or changed so implementation of this new Chapter could have been done prior to the December 15th effective date of the other provisions.

As of today, more than a month after the effective date of Chapter 505, we all still await the publication and distribution by the State Board of Elections of the mandated “concise, non-technical guide describing standards for poll site accessibility” and a polling site survey instrument.

In addition, we should expect that the SBOE will adopt a rule to clearly define who is “an individual qualified to determine whether the site meets the existing state and federal accessibility standards”.

Chapter 505 also imposes specific new obligations on County Boards of Elections. County Boards are now required to conduct access surveys at each of our current poll sites within two years using the guide/standards that are to be established by the State Board of Elections and conducted by qualified individuals, the definition of which also, hopefully, will be clearly stated. Then once these surveys are completed, the County Boards have to file a copy of each with the State Board of Elections as well as make a copy available as public records at each County BOE. If a site is surveyed and found not to meet the new standards, then within six months of that finding, the County Board must insure that either the necessary changes are made to bring the site into compliance with the new standards or a new, compliant alternative poll site is selected.

If there is any modification made to a current poll site or a new poll site is needed to be established, Chapter 505 now requires that the County Board conduct a new access survey as a prerequisite for the use of this new or modified location as a poll site.

THE CITY BOE'S ON-GOING LITIGATION **CONCERNING POLL SITE ACCESSIBILITY**

The City Board of Elections was sued prior to the November 2010 General Election by two nonprofit disability advocacy groups the UNITED SPINAL ASSOCIATION and DISABLED IN ACTION. They alleged that the City Board had not properly addressed on-going instances of not providing fully accessible poll sites within the City of New York. The plaintiffs sought to force the City Board to designate a single poll worker at each poll site to coordinate issues relating to accessibility. After two full days of hearings, we were successful in persuading the U.S. District Court for the Southern District of New York to deny their motion for preliminary injunction.

I have included Judge Deborah A. Batts's October 28, 2010 Order in that proceeding. I think it is a useful summary that may help you as you deal with issues of poll site accessibility as well as their advocates.

In our case, the disability groups argued that self-reporting by disabled voters or the removal of these transient barriers when identified by disabled voters or other individuals are not sufficient. They argued that the BOE must be pro-active and eliminate transient barriers so that disabled voters do not even encounter them.

In Court, we responded that when and where the City Board either observed or was notified of such transient barriers we acted promptly to remedy the problem. We also pointed out that we had limited control over the locations used as poll sites and that not one of the more than 1,300 poll sites in the City of New York was controlled, owned or permanently occupied by the City Board.

The Court clearly understood the facts and circumstances presented to it. Judge Batts wrote:

“An election entity such as the BOE unquestionably violates the ADA when it chooses structurally inaccessible poll sites, forcing disable voters to use absentee ballots or vote in alternative locations”.

In this instance she wrote, the “Plaintiffs focus on transient barriers to accessibility that naturally arise throughout the day during the election, whether by virtue of improper placement or assembly of voting equipment by poll workers, the dual-used nature of many poll sites (e.g. – building management props open a door or places trash in a place that blocks an accessible entrance, or students leave backpacks in a place where wheelchair access may be impeded), or other contingencies (e.g. - a voter or member of the public at large locks a bicycle to a wheelchair ramp, blocking access).

The Board was able to demonstrate to the satisfaction of the Court that when matters such as these were brought to our attention, corrective action was taken. We demonstrated that we take our responsibilities in this area seriously, providing the Court with copies of our training materials which emphasize the need for all election day personnel to be mindful of accessibility issues, our three-tiered monitoring system of using poll site coordinators (Level 1), multiple monitoring and oversight teams in each Assembly District (Level 2) and the Commissioners and permanent BOE staff (Level 3) visiting poll sites and responding to reported problems and complaints on each Election Day.

The Court went on to say:

“Unlike structural barriers, which can be evaluated in the months and even years leading up to an election, transient barriers must be recognized and corrected as they arise on election day. The BOE can train and remind poll workers to monitor the poll site for transient barriers, check for transient barriers during site visits and correct transient barriers when notified of them by a voter or advocacy group. Given that many poll sites operate as schools, residence and places of worship during an Election Day,

and are not under the complete control of the BOE, perfection is unlikely.”

In that proceeding, since the plaintiffs did not meet their burden of showing a substantial or clear likelihood of success on the merits of their claims, the Court denied the Preliminary Injunction and the City Board successfully conducted our operations on November 2, 2010 in the standard professional and competent manner that is characteristic of the Board of Elections in the City of New York.

CONCLUSION

The enactment of Chapter 505 makes it explicitly clear that New York State now requires all poll sites to be fully accessible in accordance with the DOJ/SBOE prescribed ADA accessibility guidelines for poll sites.

While we await the State Board of Elections to complete its assigned tasks, County Boards must immediately commence their planning to insure compliance with these new requirements.

As the City Board's recent and on-going experience demonstrate, this area is fertile ground for litigation and now that any ambiguity has been removed, no more waivers, no designation of alternate poll sites for persons with disabilities, County Boards of Elections will have to refocus their efforts to assure full compliance with Chapter 505, both at their poll sites on Election Day and in all the steps leading up to that day, including meeting the new survey and record keeping requirements.

I want to thank you for this opportunity to share this information with you and would invite and indeed welcome your questions and comments.