



**VIA ELECTRONIC DELIVERY ONLY**

April 11, 2020

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**RE: Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and the Helping America Vote Act and the United States Constitution Require the State Board of Elections include Accessible Polling Centers with Accessible Voting Machines for the April 28, 2020 Special General Election**

Mr. Trento:

Please accept this letter on behalf of Disability Rights Maryland to the State Board of Elections (SBE). Disability Rights Maryland is the federally mandated Protection and Advocacy agency for the State of Maryland. Our mission is to advance the civil rights of persons with disabilities. We work to ensure that people with disabilities are able to fully participate in civic life, including the electoral process.

The purpose of this letter is to advise the SBE that a failure to provide an option for accessible voting machines at accessible polling locations for the April 28, 2020 Special General Election would constitute a violation of federal civil rights law protecting the voting rights of persons with disabilities. The SBE plan to use solely mail in voting will deprive some voters with disabilities the opportunity for access and participation in the special election that is provided to other voters. Therefore, the SBE must create a system that would allow for accessible voting machines at accessible for the April 28, 2020 Special General Election.

Clients and constituents of Disability Rights Maryland are some of the most vulnerable to exposure and the worst symptoms of COVID-19, including persons with disabilities who are elderly, have pre-existing conditions, and are African-Americans. Many of our clients identify as all three. Therefore, we understand the serious nature of the public health threat COVID-19 and appreciate this extraordinary situation. **However, central to the civil rights movement that guides our work is the full participation, independence, and choice for persons with disabilities. These principals are undermined without securing the right of people with disabilities to vote privately and independently, which for some individuals with disabilities, can only be achieved through provision of accessible voting machines at accessible polling locations.**

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On March 5, 2020, Governor Hogan declared a State of Emergency because of the threat the spread of Covid-19 spread to the health of residents of Maryland. On March 17, Governor

Hogan issued a Proclamation delaying the April 28, 2020 Primary Election to June 2, 2020 and ordering the Special General Election to continue and directing that the State Board of Elections “shall utilize, as an alternate voting system, voting by mail.”<sup>1</sup>

Following a meeting on March 25, 2020, the State Board of Elections decided that there would be no in person voting centers for the April 28, 2020 Special General Election. A week later on April 2, 2020, the SBE adopted a Comprehensive Voting Plan the Primary Elections that there would be voting by mail available to all voters, and also in person voting centers available. Thus the SBE adopted different procedures affecting the same voters for different elections. With such actions, the SBE has acted to disenfranchise individuals who wish to exercise their right to vote in the special election affecting the Baltimore metropolitan area; while offering access to accessible voting machines to those individuals who wish to vote during the primary election, to be held statewide a mere five weeks later.

The Governor’s proclamation of April 10, 2020 approved the State Board of Elections Comprehensive Voting Plan for the June 2, 2020 Election, but further ordered the SBE to carry out a vote by mail only election **if** a written determination is submitted to the Governor: “1) substantiating the findings that it is not possible to utilize voting centers in a manner that mitigates and reduces a substantial threat to public safety or health posed by COVID-19; and 2) that conducting the Special General Election without voting centers will comply with the constitutions of Maryland and the United States, and any other federal law.”<sup>2</sup>

### **A Vote by Mail Only Election Would Violate Federal Law and the United States Constitution**

A vote by mail only election denies persons with disabilities the ability to vote privately and independently in violation of federal law and the Fourteenth Amendment of the United States Constitution. There are persons who are blind, low-vision, had restricted motor or joint skills to manipulate a paper ballot and pen, and persons with intellectual or developmental disabilities, who would indisputably be denied the right to vote independently and privately with a vote by mail only election in violation of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, the Helping America Vote Act, and the Fourteenth Amendment of the United States Constitution. Because a vote by mail only election does not comply with these federal laws, the SBE may not make the written determination as required by the Governor and must provide accessible voting machines at accessible voting locations similar to those required for the June 2, 2020 Primary. We do not suggest that polling places cannot be limited, but they must be offered in a manner that provides equal access to those who cannot use the mail process.

#### **I. The Absence of In-Person Polling Centers Violates the Americans with Disabilities Act and Section 504 of the Rehabilitation Act**

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<sup>1</sup> Proclamation of March 17, 2020, available at <https://governor.maryland.gov/wp-content/uploads/2020/03/Renewal-of-State-of-Emergency.pdf> (last accessed April 11, 2020).

<sup>2</sup> Proclamation of April 10, 2020, available at <https://governor.maryland.gov/wp-content/uploads/2020/04/Proclamation-Renewed-4.10.20.pdf> (last accessed April 11, 2020).

Under Section 504 of the Rehabilitation and Title II of the Americans with Disabilities Act, State and Local governments may not discriminate against persons with disabilities in their programs and services, this includes voting. 24 U.S.C. § 794, 42 U.S.C. § 12132 (“[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity [i.e., voting], or be subjected to discrimination by any such entity.”)

A vote by mail only election would indisputably deny persons with disabilities from equal access and participation in exercising their most fundamental right in a democracy. *See Nat’l Fed. Of the Blind v Lamone*, 813 F. 3d 494 (D. Md. 2016) (holding that an electronic ballot marking device was a reasonable modification to allow access for Maryland’s SBE absentee voter program). As explained above and in a number of written submissions to the SBE for the April 2, 2020 hearing,<sup>3</sup> persons with many disabilities would be denied access and privacy in their right to vote. On this point, there appears to be agreement among SBE and the community that a paper mail-in ballot alone would be *prima facie* discriminatory.

Because a paper only mail ballot would be facially discriminatory, the SBE is required to provide a reasonable modification to this policy.<sup>4</sup> The SBE’s proposed alternative for persons who cannot access a paper mail-in ballot requires residents to affirmatively request an electronic ballot from their local board of elections. This electronic ballot will then be e-mailed to the person, and the person will then need to print and mail-off the ballot.

This process has the practical effect of imposing additional eligibility criteria on voters with disabilities who cannot access paper ballots, specifically that they be able to communicate via e-mail a need for an electronic ballot, that they have access to e-mail, that they have access to a computer, and that they have access to a printer.<sup>5</sup> The SBE’s proposal cannot reasonably be seen as a cure to a discriminatory process. Persons with disabilities, unfortunately, are more likely to experience poverty than their non-disabled peers and tend to lack access to the requisite

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<sup>3</sup> E-mail from Laurie Feinberg to SBE (March 30, 2020); Letter from Katie Collins-Ihrke to SBE c/o Linda Lamone (April 1, 2020); Letter from William C. Ferguson IV, President of Maryland Senate and Adrienne Jones, Speaker of the Maryland House of Delegates to Lawrence J. Hogan, Governor State of Maryland (March 31, 2020); Letter from Common Cause-MD, ACLU of Maryland, League of Women Voters-Maryland, Maryland PIRG, and Disability Rights Maryland to SBE (April 1, 2020); Letter from Ronza Othman to SBE (April 1, 2020) in Meeting Material from April 2, 2020 Meeting, available at [https://elections.maryland.gov/about/meeting\\_materials/April\\_2\\_2020.pdf](https://elections.maryland.gov/about/meeting_materials/April_2_2020.pdf) (last accessed April 11, 2020)

<sup>4</sup> 28 C.F.R. 35.130(b)(7)(i) (“Public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”)

<sup>5</sup> 28 C.F.R. 35.130(b)(8) (“A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.”) Unlike the previous litigation in *National Federation of Blind v. Lamone*, 813 F. 3d 494 (D. Md. 2016) that challenged the lack of modifications to the SBE’s *absentee* voting program, at issue in this matter is SBE’s entire voting system. There the requirements of computer hardware were necessary to provide the modification. Here, the hardware requirements are necessary to exercise the right to vote.

hardware to complete an electronic ballot.<sup>6</sup> This is undoubtedly true for the Baltimore area whose poverty rates exceed the state average.

The only manner of providing equal access and security to persons with disabilities is accessible voting machines at accessible polling places. Every jurisdiction that allows for “vote-by-mail,” does so in conjunction with in-person polling locations.<sup>7</sup> This is not an undue financial and administrative burden or a fundamental alteration of elections in Maryland. In fact, Maryland’s “vote-by-mail” statute specifically contemplates use of polling places. MD. ANN. CODE, ELECTIONS, § 9-503.<sup>8</sup>

The U.S. Election Assistance Commission has specifically authorized HAVA money to assist in the conducting of in-person voting centers for the April 28, 2020 Special General Election.<sup>9</sup> The threat posed by COVID-19 can be mitigated by adhering to the Center for Disease Control (CDC) guidance for the safe administration of in-person voting.<sup>10</sup>

Because accessible polling places with accessible voting machines will allow persons with disabilities to vote securely and independently and can be done with adherence to CDC guidelines, the SBE must modify its proposed voting plan to have in person polling centers for the April 28, 2020 Special General Election. The failure to modify this proposed voting system would violate federal law. Therefore, the SBE cannot issue the determination required by the Governor to conduct a vote by mail only election.

## **II. The Absence of In-Person Polling Centers Violates the Helping America Vote Act.**

Helping American Vote Act (HAVA) explicitly requires in-person voting centers and locations and specifically requires accessible voting machines. *See Am. Ass’n of People with Disabilities v. Harris*, 647 F. 3d 1093 (2011) (noting that HAVA requires accessible voting machines). Specifically, HAVA states:

“The voting system *shall*:

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<sup>6</sup> Institute on Disability at University of New Hampshire, 2019 Annual Disability Statistics Compendium, pg. 62 (2020), available at [https://disabilitycompendium.org/sites/default/files/iod/reports/2019-annual-disability-statistics-compendium-pdfs/2019 Annual Disability Statistics Compendium ALL.pdf?ts=1580831674](https://disabilitycompendium.org/sites/default/files/iod/reports/2019-annual-disability-statistics-compendium-pdfs/2019%20Annual%20Disability%20Statistics%20Compendium%20ALL.pdf?ts=1580831674).

<sup>7</sup> For a survey of State and local legislation for “Vote-by-Mail” see National Conference of State Legislatures, All-Mail Elections, <https://www.ncsl.org/research/elections-and-campaigns/all-mail-elections.aspx> (last accessed April 11, 2020) (“While “all-mail elections” means that every registered voter receives a ballot by mail, this does not preclude in-person voting opportunities on and/or before Election Day.”)

<sup>8</sup> Whether the SBE has the legal authority to administer an election contrary to the Maryland Code during the present emergency also raises a significant legal question.

<sup>9</sup> Electoral Assistance Commission, Guidance on Use of HAVA Funds for Expenses Related to COVID-19, <https://www.eac.gov/election-officials/guidance-use-hava-funds-expenses-related-covid-19> (last accessed April 11, 2020).

<sup>10</sup> Center for Disease Control, Recommendations for Election Polling Locations, <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (last accessed April 11, 2020).

- (A) 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;
- (B) satisfy the requirement of subparagraph (A) through the use of at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place.” 52 U.S.C. § 21081(a)(3)(A-B)

The U.S. Election Assistance Commission guidance on voting accessibility states that persons with disabilities have the right to “Have an accessible polling location with voting machines accessible for persons with disabilities.”<sup>11</sup> The United State Department of Justice has similarly written that:

“While absentee balloting can be offered to voters with disabilities, it cannot take the place of in-person voting for those who prefer to vote at the polls on Election Day. Any alternative method of voting must offer voters with disabilities an equally effective opportunity to cast their votes in person.”<sup>12</sup>

While these may be extraordinary times, the Governor’s order requires that the April 28, 2020 Special General Election adhere to federal law. HAVA requires an accessible voting machine at an accessible polling location. Failure to provide such an option violates the federal Helping America Vote Act. Therefore, the SBE cannot conduct a vote by mail only election without violating HAVA and cannot issue the determination required by the Governor.

### **III. Voting is a Fundamental Right and States Must Ensure Non-Discriminatory Access**

In *Tennessee v. Lane*, 541 U.S. 509 (2006), United States Supreme Court held that a State could be liable if they denied access to persons with disabilities from exercising fundamental rights.<sup>13</sup> Additionally, the Fourteenth Amendment prohibits irrational discrimination against persons with disabilities. See *City of Cleburne v. Cleburne Living Center, Inc.* 473 U.S. 432 (1985). The ability to exercise the vote is fundamental to the history and tradition of the Nation. For all the reasons set forth above, a vote by mail only election would deny access to certain people with disabilities their fundamental rights. The CDC has issued guidance for the safe administration of in person voting that would mitigate and reduce the threat to public safety posed by COVID-19. The SBE’s decision to deny the modification of accessible voting machines at accessible locations on March 25, 2020 appears to be rooted more in false assumptions about persons with disabilities rather than the scientific guidance issued by the

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<sup>11</sup> U.S. Election Assistance Commission, Voting Accessibility, [https://www.eac.gov/about\\_the\\_eac/help\\_america\\_vote\\_act.aspx](https://www.eac.gov/about_the_eac/help_america_vote_act.aspx) (last accessed April 11, 2020).

<sup>12</sup> United States Department of Justice - Civil Rights Division: Disability Rights Section, The Americans with Disabilities Act and other Federal Laws Protecting Voters with Disabilities, [https://www.ada.gov/ada\\_voting/ada\\_voting\\_ta.htm](https://www.ada.gov/ada_voting/ada_voting_ta.htm) (Last access April 11, 2020).

<sup>13</sup> The Court also noted the routine discrimination against persons with disabilities in voting.

CDC.<sup>14</sup> Therefore, the SBE's decision on March 25, 2020 to have a vote by mail only election violated the Fourteenth Amendment of the United States Constitution.<sup>15</sup>

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Thank you for carefully considering the significant legal issues involved in this election. While these are extraordinary circumstances, civil rights and the fundamental right to vote of should not be so easily curtailed and eliminated. Disability Rights Maryland is firmly committed to ensuring the voting rights of persons with disability to vote. Because the absence of accessible voting machines at accessible polling places violate federal laws, specifically the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and the Helping American Vote Act, as well as the United States Constitution, the SBE written submission to the Governor may not approve a vote by mail only voting system for the April 28, 2020 Special General Election.

Please do not hesitate to contact me at the information below with any questions regarding this matter.

Sincerely,

/s/

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<sup>14</sup> At the March 25, 2020 Meeting of the SBE, a one Commissioner noted that most persons with disabilities would have someone living with them to assist them in completing the form. Such a comment appeared rooted in a notion that people with disabilities could not live independently.

<sup>15</sup> The Maryland Court of Appeals has interpreted the Maryland Corollary of the Fourteenth Amendment, Article 24 of the Declaration of Rights to be read *in parti material* in general apply in the same manner and to the same extent.