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VOTING IN OHIO: A Disability Rights Perspective

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Prepared for: Ohio Advisory Committee to the U.S. Commission on Civil Rights

Disability Rights Ohio is a non-profit corporation with a mission to advocate for the human, civil and legal rights of people with disabilities in Ohio. Disability Rights Ohio is also Ohio's Protection and Advocacy System (P&A) and Client Assistance Program (CAP).

Disability Rights Ohio is governed by a nonprofit board that guides the organization's programmatic priorities. Disability Rights Ohio receives funding from federal grants to advocate for Ohioans with disabilities in a wide range of issues, including employment, mental illness, developmental disabilities, assistive technology, traumatic brain injury, victims of crime, and voting. Voting rights for people with disabilities is an important aspect of Disability Rights Ohio's work, and is reflected in the organization's priorities.

Disability Rights Ohio's voting activities

Disability Rights Ohio receives federal funding through the Help American Vote Act to support voting advocacy on behalf of Ohioans with disabilities. This work includes education and outreach to voters with disabilities and professionals in the disability field, direct and systemic voter advocacy, and operating a voter hotline every Election Day. Disability Rights Ohio also engages in voting-related litigation.

How voting impacts disability rights

Title II of the Americans with Disabilities Act (ADA) not only prohibits discrimination based on an individual's disability; it also seeks to ensure full participation of people with disabilities in society by removing barriers to access.¹ The ADA embodies in the

¹ See 42 U.S.C. § 12131 *et seq.*

law the key elements of the independent living movement: nondiscrimination, integration, and full inclusion of people with disabilities as members of society. People must be treated as individuals, not as stereotypes or caricatures. Full participation in the political process is a central value of the disability movement. Broad protections, both constitutional and statutory, exist to ensure that people with disabilities have full access to the ballot. While both HAVA and the ADA provide broad protections to ensure voting access by people with disabilities, implementation in practice is not always smooth, and antiquated notions about people with disabilities persist.

Barriers to voting

Disability Rights Ohio focuses its work on the voting barriers faced by people with disabilities. Several issues have emerged over the last decade. The following are examples of barriers experienced by Ohioans with disabilities and the advocacy efforts engaged in by Disability Rights Ohio to increase voting access.

STEREOTYPES AND DISCRIMINATION

The Ohio Constitution provides that any U.S. citizen who is a resident of the state is a qualified “elector” or voter.² But the Constitution also contains antiquated and discriminatory language that “No idiot, or insane person, shall be entitled to the privileges of an elector.”³ This class of voters is the only one that is conclusively disqualified in Ohio’s constitution. These terms are offensive relics of an 1851 constitution.

Disability Rights Ohio advocated to have these offensive terms removed from the Ohio Constitution before the recent Ohio Constitutional Modernization Commission, noting the conflict with federal law protecting the right to vote for people with disabilities and the illusory nature of capacity to vote. Despite Disability Rights Ohio’s efforts, no changes to update this language were made through the modernization process. Fortunately, these antiquated terms are not used in current Ohio statutory or administrative law, and this provision is essentially not being implemented in Ohio law.

In fact, the only relevant statutory section regarding competency to vote allows for probate court judges to “adjudicate” as “incompetent for the purpose of voting” individuals subject to another statute regulating involuntary hospitalization.⁴ This provision adjudicating an individual incompetent for voting purposes does not appear to be widely utilized in Ohio.

However, some probate guardianship application forms do have a check box question as to competency to vote. Disability Rights Ohio is concerned that someone might argue that checking this box on the application (an action taken by the applicant, not the court) supports a finding of incompetency for voting purposes if the guardianship is granted, even where no hearing or examination of this issue ever occurred. While Disability Rights Ohio is unaware of this problem having surfaced, if it did it would be a significant violation of an individual’s due process rights.

2 Ohio Const. Art. V, § 1.

3 Ohio Const. Art. V, § 6.

4 See Ohio Rev. Code §§ 5122.301, 5122.11-15; 3503.18.

STEREOTYPES AND MISINFORMATION

While great strides have been made in accessibility, many common misconceptions remain about disability voting rights. These misconceptions often arise from paternalistic views of people with disabilities, lack of understanding about the capabilities and communication methods of people with disabilities, and lack of knowledge about technology available to voters with disabilities. Disability Rights Ohio has released publications and conducted extensive outreach efforts to help educate the public about these misconceptions, several of which are outlined below.

First misconception: “You can’t vote if you have a guardian.”

While in some states, guardianship may limit or even prohibit an individual’s voting rights,⁵ people with guardians in Ohio can still vote in Ohio elections. The only exception to this rule is where an individual has been specifically adjudicated incompetent for voting purposes, and this type of finding is very rare. Indeed, as outlined in the *Glancy* Consent Order signed by the Ohio Secretary of State, registration to vote creates a presumption of capacity to vote.⁶

Second misconception: “How can you understand enough to vote if you can’t verbally communicate?”

Voting eligibility criteria in Ohio involves residence, citizenship, and age.⁷ There is no requirement that a voter be able to communicate verbally. Assistive technology also exists to help people with disabilities communicate by other means. In addition, Ohioans who wish to register to vote who cannot sign their name on the registration form can still register to vote with the assistance of another who attests that the voter indicated a desire to register.⁸ Finally, capacity is not a valid challenge to a person’s ability to vote at the polls.⁹

Third misconception: “If you are blind, how can you independently complete a ballot?”

Under both state and federal law, voters with disabilities—including those who are blind or visually impaired—must be given the same opportunity for access and participation as others. The Help American Vote Act (HAVA) requires access to private and independent voting, and accessible voting machines.¹⁰ The ADA also requires accessible

5 See State Provisions Regarding Voting: Constitutions, Election Laws, and Guardianship Statutes, *American Bar Assn.*, available at: https://www.americanbar.org/content/dam/aba/administrative/law_aging/State_Provisions_Regarding_Voting.authcheckdam.pdf; Thousands Lose Right to Vote Under ‘Incompetence’ Laws, *Stateline*, The Pew Charitable Trusts, available at: <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/03/21/thousands-lose-right-to-vote-under-incompetence-laws>.

6 *Glancy* Consent Order at <http://www.disabilityrightsohio.org/voting-glancy-consent-order>.

7 To be eligible, voters also cannot be currently incarcerated for a felony, be found incompetent for voting purposes, or have lost voting privileges for election law violations.

8 Ohio Rev. Code § 3503.14(C).

9 See Ohio Rev. Code §§ 3503.24, 3513.19; *Glancy* Consent Order n. 6.

10 52 U.S.C. § 20901 *et seq.*

voting procedures, routes of travel at the polling location, and voting machines. State law requires poll workers to assist voters with disabilities at the poll if requested.¹¹

ACCESSIBILITY BARRIERS

While laws such as HAVA and the ADA require equal access to the voting process, voting access issues for people with disabilities do persist. Below are some of the major advocacy successes and remaining shortcomings in voting access for people with disabilities in Ohio.

Polling locations

In recent years, there has been a considerable push to ensure that polling locations are physically accessible for people with disabilities. While overall polling place accessibility has improved dramatically, voters with disabilities still run into problems at the polls. For instance, a 2017 voter survey conducted by Self Advocates Becoming Empowered (SABE) found that some voters who use wheelchairs have difficulty navigating around the voting machines (e.g. voting machines too close together, loose cords), problems with an accessible route of travel to the voting area or entrance, problems with accessible parking, and problems with inoperable wheelchair ramps or elevators.¹²

Poll workers

Disability Rights Ohio also conducted an informal survey in March 2016 asking individuals to identify barriers to voting. The most prevalent issue identified was problems interacting with poll workers.¹³ These results suggest that additional training for poll workers on topics such as how to set up the polling location to be physically accessible, how to use all available equipment including accessible machines, and how to communicate effectively with voters who may have difficulties speaking, hearing, or writing would be beneficial. The Franklin County Board of Elections, for example, has begun training that seeks to specialize certain staff on different topics in the hopes of creating more positive and accessible voter experiences.

Accessible voting information and registration

People with disabilities must also have access to voter resources such as registration or change of address forms and other voting materials. Today, this information is frequently accessed on the internet, so it is critical that these materials be made available in accessible formats.¹⁴

In December 2015, the Ohio Secretary of State's website had many accessibility problems

11 Ohio Rev. Code § 3505.24.

12 Voters with Disabilities Election Report, July 2017, *Self Advocates Becoming Empowered*, available at: <http://www.sabeusa.org/wp-content/uploads/2017/03/2016-Voter-Survey-Final-Report-28229.pdf>.

13 See also SABE Report n. 12, which also identified poll worker training as a need to increase voter access.

14 See Web Content Accessibility Guidelines 2.0 AA, available at: <https://www.w3.org/TR/WCAG21/>.

for people who are blind or have print disabilities. After attempts to resolve the issue informally, Disability Rights Ohio filed a federal lawsuit under Title II of the ADA as co-counsel on behalf of individual plaintiffs and the National Federation of the Blind seeking remediation by the Secretary's office.¹⁵ The federal court issued an injunction in February 2017 ordering the Secretary of State to make his website accessible by September 2017. Recent testing showed that much of the website is now accessible, including online registration and change of address functions. The Secretary of State's office is currently working to fix remaining problems, which include inaccessible PDFs.

In addition, Ohio recently implemented new electronic poll books, and is also in the process of working with boards of elections to replace outdated voting machines. These new technologies must be accessible for people with disabilities under the ADA. In addition, voters with disabilities often utilize a myriad of assistive technology devices for communication or mobility. Ongoing poll worker and board of elections staff training is critical to ensure that these workers know how to operate the technology, and provide accommodations as modifications as needed to ensure equal access to voting services.

Accessible absentee ballots

In the same ADA lawsuit on behalf of the National Federation of the Blind, plaintiffs challenged the accessibility of Ohio's absentee ballot marking system. Under the current paper absentee ballot system, voters who are blind or who have print disabilities could not submit a ballot privately and independently, thus denying them equal access to the absentee ballot program. After a ruling in the United States Court of Appeals for the Sixth Circuit, the Ohio Secretary of State recently issued a directive ordering all county boards of elections to adopt and implement accessible electronic ballot marking tools by the November 2018 election.¹⁶ Now for the first time, voters who are blind or who have print disabilities will be able to absentee vote privately and independently.

Accessible signature options

Some voters with disabilities cannot physically sign their name on a voter registration or poll book, and need alternative options to affirm intent to vote. Ohio law does provide a process through which a voter can sign with an "X" or have someone sign applicable forms affirming under penalty of elections fraud that the voter wishes to submit the form. Confusion with this process occasionally resurfaces during election season, and additional training on the law for both board or elections staff and poll workers may be warranted.

Inadequate accessible transportation options

Disability Rights Ohio's March 2016 survey identified transportation as the second most prevalent issue for people with disabilities to access in-person voting. While some voters with disabilities can utilize their own vehicle, the 2017 SABE report found that many voters

¹⁵ *Hindel v. Husted*, Case No.: 2:15-cv-3061 (S.D. Ohio).

¹⁶ *Hindel v. Husted*, 875 F.3d 344 (6th Cir. 2017); Ohio Secretary of State Directive 2018-03, available at: <https://www.sos.state.oh.us/globalassets/elections/directives/2018/dir2018-03.pdf>.

with disabilities rely on family, friends, or service providers to provide transportation. Some use public transportation, but service availability to polling places can limit this option.¹⁷

Institutional isolation

Ohio houses tens of thousands of people with disabilities in institutional settings such as intermediate care facilities, nursing homes, and psychiatric hospitals. Lengths of stay vary widely based on a number of factors, including available resources, needs, and caregivers' decision making. A stay can be for just a few days, causing only a short-term disruption to an individual's daily life, but for many the stay in institutionalized settings may last many years and can result in long-term isolation from the community. When individuals are isolated from the community, they might not have ready access to or know about their fundamental right to vote. Disability Rights Ohio conducts annual outreach efforts to speak with residents and staff in institutional settings to educate them on voting rights and resources.

Unexpectedly hospitalized voters

Disability Rights Ohio has also focused efforts on one type of institutionalized setting where voter access is particularly susceptible to falling through the cracks. Existing Ohio law provides a special process for voters to obtain an absentee ballot if they are unexpectedly hospitalized on or shortly before Election Day.¹⁸ While the law applies to all unexpectedly hospitalized voters as well as those whose children are unexpectedly hospitalized, it has proven to particularly impact voters with mental illness who are admitted to psychiatric hospitals shortly before Election Day.

The law provides that when a voter is hospitalized within their county of residence, the voter can make a request up until 3 p.m. on Election Day for two elections officials or an eligible family member to deliver the ballot to the voter personally, and then return the completed ballot to the board of elections. This process has worked in the past and helped voters exercise their voting rights despite extenuating circumstances.

However, for voters who are not hospitalized in their county of residence, there is no option for board of elections in-person delivery. As a consequence, out-of-county hospitalized voters must either have an eligible family member pick up, deliver, and return the ballot for them, or they must mail the ballot to the board of elections themselves. But under Ohio law, absentee ballots must be postmarked prior to Election Day,¹⁹ so as a practical matter, returning by mail is not an option for day of Election requests.

Disability Rights Ohio first encountered this problem in 2012 when a young woman hospitalized in a psychiatric hospital outside of her county of residence did not receive her requested absentee ballot, and neither the county board of elections nor the Secretary of State's office would agree to ensure her access to a ballot. Under the ADA, a public entity must modify its usual policies and procedures when necessary to ensure equal access to individuals with disabilities. After trying to resolve the issue through

¹⁷ *Id.* n. 12.

¹⁸ Ohio Rev. Code § 3509.08(B).

¹⁹ Ohio Rev. Code § 3509.05.

negotiation, Disability Rights Ohio filed a lawsuit to require the county board of election and the Secretary of State to make the necessary modifications so this young woman could vote. The Court agreed with Disability Rights Ohio.²⁰

Despite subsequent attempts by Disability Rights Ohio to work with the Secretary of State to address future similar problems, no meaningful steps were taken by the Secretary's office until the November 2016 election.

In 2016, after additional negotiations with Disability Rights Ohio, the Secretary did issue a very narrow temporary directive and accompanying forms. However, the new forms are complicated and the directive severely limits applicability of the process. Now, hospitalized voters can only request an emergency ballot if they were hospitalized after the regular deadline for requesting an absentee ballot (noon the Saturday before Election Day). This new limitation is narrower than the Ohio Revised Code language on emergency hospitalization, which does not limit its application to only those admitted to the hospital after the regular absentee ballot request deadline.

In the 2016 general election, Disability Rights Ohio received calls from more than 20 psychiatric hospitals, and gave advice to more than 50 voters about how to get a ballot on Election Day while hospitalized. Many of these voters had been admitted to the hospital during the week prior to the election but were in no condition to request an absentee ballot within the Saturday deadline. Some did not have an eligible family member to pick up and submit their ballots. While many voters were able to vote with limited assistance, Disability Rights Ohio had to directly intervene and contact the Secretary of State's office to help 13 of them exercise their rights to vote. Many other hospitalized voters likely did not get to vote at all because they were admitted prior to the Saturday cutoff and did not obtain assistance from Disability Rights Ohio.

After the 2016 general election, the Ohio Secretary of State issued a permanent directive and modified the applicable forms, creating a new form through which voters must "declare, under penalty of election falsification, that [they are] a qualified elector with a qualifying disability under the [ADA]."²¹ The same narrow limitations, however, still apply, and hospitalized voters will continue to face barriers to voting until addressed more thoroughly.

HARMFUL IMPACT OF POVERTY AND OHIO VOTING POLICIES

Disproportionate impact of poverty

Voters with disabilities disproportionately experience poverty and thus the barriers to voting commonly experienced by voters with limited incomes. This includes limited voting hours, erratic job schedules, child care needs, homelessness or lack of permanent housing, inadequate or inaccessible transportation, and the costs associated with obtaining a photo identification, to name a few.

²⁰ *Mooneyhan v. Husted*, 2012 WL 5834232 (S.D. Ohio Nov. 16, 2012).

²¹ Directive 2017-06, available here: <https://www.sos.state.oh.us/globalassets/elections/directives/2017/dir2017-06.pdf>; Form 11-B (non-ADA form) available at: <https://www.sos.state.oh.us/globalassets/elections/forms/11-b.pdf>; Form 11-B-2 (ADA form) available at: <https://www.sos.state.oh.us/globalassets/elections/forms/11-b.pdf>.

Removal of voters from voter rolls

Current Ohio law includes a “supplemental process” which allows the Secretary of State to target voters who fail to vote in a designated period for removal from the voter rolls on the presumption that such voters have moved.²² As a direct result of this process, voters who remain otherwise fully eligible to vote are stripped from the registration rolls and denied their right to vote. Registrants are targeted for removal from the voter rolls after failing to vote in one election and could ultimately be removed if they do not vote in the following four-year period.

In 2015 alone, hundreds of thousands of voters were removed under Ohio’s purge practice. This means that many eligible voters are unable to cast ballots on Election Day, despite registering where necessary, being motivated to vote in the particular election, and in some cases, even arriving at the correct polling place and waiting in line.

In 2016, the A. Phillip Randolph Institute and other plaintiffs filed a lawsuit against Ohio’s Secretary of State challenging this practice and claiming that the National Voter Registration Act (NVRA) does not allow states to initiate the voter purge process based solely on their failure to vote.²³ Plaintiffs argued that allowing states to disenfranchise voters on this basis is contrary to the NVRA’s general purpose of broadening participation of the electorate and the Act’s specific goal of expanding access for historically disenfranchised groups. It would also unnecessarily and unjustifiably tread on the fundamental right to vote of many Americans already facing significant obstacles to political participation.

This lawsuit is now awaiting a decision by the Supreme Court of the United States. Disability Rights Ohio, its national affiliate the National Disability Rights Network, and other disability and civil rights organizations filed an *amicus curiae* brief to advocate for the removal of access barriers and enforcement of rights to participate in Ohio’s electoral process.

Conclusion and Recommendations

While state and federal laws provide protections for equal access to voting for Ohioans with disabilities, barriers to access still persist. Ohio has made progress in removing these barriers, but in many instances such progress occurred only after focused advocacy by Disability Rights Ohio or others. Ohio should make accessibility a priority. This must include effective policies for procuring and implementing accessible information technology in all aspects of the voting process, and effective training for election officials and poll workers about the rights of people with disabilities and how to provide an accessible voting experience.

We thank the Ohio Advisory Committee for undertaking these important issues and for considering the experiences of Ohioans with disabilities in their report and recommendations to the U.S. Commission on Civil Rights.

²² See Ohio Rev. Code § 3503.21

²³ *Husted v. A. Philip Randolph Institute, et al.*, 137 S.Ct. 2188 (2017) (Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit granted).