



WASHINGTON LAWYERS' COMMITTEE

FOR CIVIL RIGHTS AND URBAN AFFAIRS

ACCESSIBLE ABSENTEE VOTING

To complete an absentee paper ballot a voter must be able to read standard print, physically mark ballot choices, seal and certify the ballot via a signature on the envelope, and mail or return the ballot back to the appropriate voting official. Each of these requirements may be a barrier to accessibility for voters with disabilities, depriving the voter of the right to mark, verify and cast his or her ballot privately and independently.

Title II of the Americans with Disabilities Act (ADA)¹ and Section 504 of the Rehabilitation Act² prohibit state and local government from discriminating against individuals with disabilities by depriving them of the right to vote privately and independently. When courts have considered if paper ballot absentee voting discriminates against voters with disabilities they have examined the following factors:

- (1) Are people with disabilities able to vote privately and independently when they have to use hand-marked paper ballots?
- (2) Is there an accessible, available and reasonably secure alternative to hand-marked paper ballots, e.g. online ballot marking tool (OBMT) or mobile application?
- (3) Would implementing an accessible alternative to hand-marked paper ballots be an undue burden on the voting jurisdiction?
- (4) Does using an accessible alternative to hand-marked paper ballots require a fundamental alternation to the voting jurisdiction's voting rules and regulations?

Claims against state and local governments for discriminatory paper ballots have been generally successful. In the 2014 4th Circuit decision, *National Federation of the Blind v. Lamone*,³ the Court held that Maryland was required to offer an online ballot-marking tool (OBMT) for use by voters with disabilities in mail-in elections. In the 2017 6th Circuit decision, *Hindel, et al. v. Husted*,⁴ the Court said that whether or not an OBMT causes a fundamental alteration to state voting regulations is a fact-specific inquiry and the claims survived a motion to dismiss. The parties completed successful settlement negotiations and Ohio certified an OBMT.⁵ Most recently, Michigan⁶ agreed to provide an accessible absentee balloting option and Pennsylvania⁷ was ordered to make an Accessible Write-In Ballot available to voters with disabilities. State and local advocacy using this legal framework has been successful in West Virginia, Colorado, New Jersey, Delaware, and the District of Columbia, which will each offer accessible absentee voting options for voters with disabilities in the upcoming 2020 elections.

¹ 42 U.S.C.S. §12132. Title II of the ADA prohibits public entities from excluding from participation or denying the benefits of the services, programs, or activities of that entity, or subjecting individuals to discrimination by any such entity, on the basis of his/her disability.

² 29 U.S.C. § 794(a). Section 504 mandates that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

³ *National Federation of the Blind, et al. v. Lamone, et al.*, 813 F.3d 494, 503 (4th Cir. 2016).

⁴ *Hindel v. Husted*, 875 F.3d 344, 345 (6th Cir. 2017), 2017 U.S. App. LEXIS 22651, 2017 FED App. 0257P (6th Cir.).

⁵ Stip. Of Dismissal. 2:15-cv-03061-JLG-KAJ, ECF No. 75.

⁶ Stip. and Consent Order Resolving Plaintiffs' Motion for TRO. Case 2:20-cv-11023-GAD-MJH, ECF # 16.

⁷ Order. Case 1:20-cv-00829-JPW, ECF # 32.