

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED SPINAL ASSOCIATION, a nonprofit  
organization, DISABLED IN ACTION, a  
nonprofit organization,

Plaintiffs,

-against-

10 Civ. 5653 (DAB)  
ORDER

BOARD OF ELECTIONS IN THE CITY OF  
NEW YORK and JULIE DENT, in her  
official capacity as President of the  
Board of Elections in the City of New  
York,

Defendants.

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DEBORAH A. BATTIS, United States District Judge.

Plaintiffs United Spinal Association and Disabled in Action  
move this Court for a Preliminary Injunction requiring the Board  
of Elections in the City of New York (the "BOE") to designate a  
single poll worker responsible for coordinating issues relating  
to accessibility at each poll site. The Plaintiffs propose that  
the designated poll worker inspect the poll site three times on  
Election Day with the help of a four page "accessibility  
checklist" the Plaintiffs prepared based on the Department of  
Justice ("DOJ") poll site guidelines. The Court has considered  
the submissions of the parties and the evidence and legal  
arguments presented at the hearing held on October 20 and 27,  
2010. For the reasons stated herein, Plaintiffs' Motion for a  
Preliminary Injunction is DENIED.

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I. BACKGROUND

On July 26, 2010, Plaintiffs filed suit against the BOE and Julie Dent, in her official capacity as President of the BOE, alleging that Defendants engaged in "pervasive, ongoing, and inexcusable discrimination" against voters with disabilities (Compl. ¶ 1) in violation of Title II of the Americans With Disabilities Act (the "ADA"), 42 U.S.C. § 12132, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a). Through an Order to Show Cause, Plaintiffs moved for a Preliminary Injunction on September 28, 2010.

Plaintiffs claim that access barriers affecting voters with disabilities have been prevalent in New York City for years, and support their Motion for a Preliminary Injunction with data collected during the General Elections of November 2008 and 2009, as well as the Primary Election held on September 14, 2010. Plaintiffs elicited the help of an expert statistician, Andrew Schwarz, to generate a random sample of polling places in Manhattan and Queens. (Pls.' Mem., p. 2.) Mr. Schwarz selected 53 polling places for inspection, and therefore "could conclude, with at least 95 percent (95%) confidence, that the percentage of barrier-free polling places in all of Manhattan and Queens would not exceed 12 percentage points of the percentage of barrier-free polling places measured in the sample." (Pls.' Mem., p. 3)

(emphasis in original). Advocacy group The Center for Independence of the Disabled, New York ("CIDNY") inspected the 53 poll sites, finding some accessibility barriers at 43 of them.

According to Plaintiffs, the barriers CIDNY identified were "overwhelmingly obstacles that can be easily, quickly, and cheaply corrected," such as "failure to post signs indicating an accessible entrance, posted signs that fall down, signs posted incorrectly, objects left on ramps or in doorways, locked doors to accessible entrances, [and] failure to put a temporary ramp in place." (Pls.' Mem., p. 4.) These "transient" barriers to accessibility are the focus of Plaintiffs' Motion for a Preliminary Injunction. Designating one existing worker at each polling place to check for transient accessibility barriers, Plaintiffs posit,<sup>1</sup> will allow for the completion of an accessibility checklist three times per site on Election Day, and will "facilitate pre-emptive access barrier removal." (Pls.' Oct. 26 Ltr., p. 4.) Plaintiffs argue that self-reporting by disabled voters or removal of transient barriers when identified by the voters or other individuals is not sufficient. They argue

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<sup>1</sup> Apparently there are no statistical studies or analyses attempting to prove this hypothesis.

that the BOE must be pro-active and eliminate transient barriers so that disabled voters do not even encounter them.<sup>2</sup>

Defendants counter that for the 27 poll sites where the CIDNY surveyors identified "transient" barriers, poll workers corrected the accessibility problems when they were notified of them. (See generally, Defs.' Oct. 26 Ltr.) They argue further that the CIDNY surveys do not indicate how long a transient barrier had been present or how long it took to correct after a poll worker was notified of the problem. They also argue that the surveys frequently are not completed fully or contain evident internal inconsistencies, that the surveys are unclear, and that they reflect the opinion of the writer rather than an objective standard. (Defs.' Oct. 26 Ltr., p. 6.)

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<sup>2</sup> Plaintiffs write:

Relying on self reporting as a solution to barrier removal is also outside the scope of Plaintiffs claims at this point: Plaintiffs' claims of discrimination are not based on Defendants' failure to rectify barriers after they have been encountered by disabled voters but rather the failure to ensure that such barriers are remedied so that disabled voters may access their polling places just as other voters do. Plaintiffs do not seek post hoc solutions to accessibility barriers. They seek to ensure that Defendants consider, identify, and eliminate such barriers in advance, to the extent possible. . . . Defendants have a duty to ensure that voters with disabilities do not encounter polling place barriers in the first place.

(Pls. Oct. 26 Ltr., p. 5-6.)

## II. DISCUSSION

### A. Preliminary Injunction Standard

"A party seeking preliminary injunctive relief must establish (1) either (a) a likelihood of success on the merits of his case or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in its favor, and (2) a likelihood of irreparable harm if the requested relief is denied." Time Warner Cable, Inc. v. DIRECTV, Inc., 497 F.3d 144, 153 (2d Cir. 2007). Where the injunction would alter, rather than maintain, the status quo, an injunction should issue only upon a "clear or substantial showing of a likelihood of success on the merits." D.D. ex rel. V.D. v. New York City Bd. Of Educ., 465 F.3d 503, 510 (2d Cir. 2006).

Here, the injunction Plaintiffs seek would affirmatively require the BOE to designate a poll worker for accessibility issues, and would not simply maintain the status quo. A preliminary injunction, therefore, may only issue upon a "clear or substantial showing of a likelihood of success on the merits."

B. Likelihood of Success on the Merits

Title II of the ADA provides that "no 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, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Section 504 of the Rehabilitation Act provides that "no otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her 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." 29 U.S.C. § 705(20)(B). The standards for determining liability are the same under both laws. Henrietta D. v. Bloomberg, 331 F.3d 261, 272 (2d Cir. 2003). To prove discrimination and prevail on their Complaint, therefore, Plaintiffs must establish three things: (1) that they are qualified individuals with a disability, (2) that, by reason of their disability, they are excluded from participation in or denied the benefits of (3) a service, program or activity of a public entity. Lightbourn v. County of El Paso, 118 F.3d 421, 428 (5th Cir. 1997); Spitzer v. County of Delaware, 82 F. Supp. 2d 12, 17 (N.D.N.Y. 2000). For purposes of this Motion, neither

party disputes that the Plaintiffs are qualified individuals or that the Defendants are a public entity. To succeed on the merits, therefore, Plaintiffs must show that they were excluded from participation in or denied the benefits of the BOE's voting program on the basis of disability.

An election entity such as the BOE unquestionably violates the ADA when it chooses structurally inaccessible poll sites, forcing disabled voters to use absentee ballots or vote in alternative locations. See Westchester Disabled on the Move, Inc. v. County of Westchester, 346 F. Supp. 2d 473, 478 (S.D.N.Y. 2004) ("Failing to ensure that disabled individuals are able to vote in person and at their assigned polling places . . . could not reasonably be construed as consistent with providing 'meaningful access' to the voting process."); Kerrigan v. Philadelphia Bd. Of Election, No. 07-687, 2008 WL 3562521, at \*18 (E.D. Pa. Aug. 14, 2008) ("[F]ailing to ensure that mobility disabled voters are able to vote in their neighborhood polling places, to the extent Defendants can do so, is a failure to provide mobility disabled voters with an equal opportunity to access the program of voting and violates the program access mandate.")

For purposes of this Preliminary Injunction, however, Plaintiffs do not complain about the structural barriers the BOE must consider when making its poll site selections. Rather, Plaintiffs focus on the transient barriers to accessibility that naturally arise throughout the day during an election, whether by virtue of improper placement or assembly of voting equipment by poll workers, the dual-use 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).

Plaintiffs claim that the BOE's inattention to transient barriers denies people with disabilities "meaningful access" to the BOE's voting program. (Compl. ¶ 99.) One voter using a wheelchair reported that at her polling place, tables were set up in such a way that they blocked the accessible pathway.

(Prentiss Aff. ¶ 7.) The voter called her district leader, who remedied the situation. (Id. ¶ 9.) In another incident, a voter using a wheelchair arrived at her poll site to find that the wheelchair ramp was blocked by garbage bags "placed every few



feet perpendicular to the side of the ramp." (Halbert Aff. ¶ 6.)  
The voter's husband moved the bags. (Id. ¶ 7.)

While not claiming that they achieve perfection in ensuring accessibility on election day, the BOE points out that they provide manuals for each poll worker that instruct the workers to check accessibility signs and monitor that the route to the polling place is kept clear. (Board of Elections in the City of New York "2010 Poll Worker's Manual," p. 145-147.) They state that according to the CIDNY surveys, transient barriers were remedied whenever they were brought to the attention of BOE officials or poll workers. At P.S. 129, for example, a CIDNY surveyor advised a poll worker that a ballot marking device ("BMD") had been placed improperly against a wall, and the poll worker resolved the problem. (Defs.' Oct. 26 Ltr., p. 2.) At VFW Post 885, poll workers propped open a door that had an inaccessible doorknob and repositioned a BMD after being notified by a CIDNY surveyor. (Defs.' Oct. 26 Ltr., p. 4.) Furthermore, Assembly District Monitoring Teams visit each poll site during the course of an election day to survey the operation of the site, checking for problems with signage, wheelchair ramps, and improper setup of election equipment that may impede access. (See generally Assembly District Monitoring Surveys.)

The cases Plaintiffs cite speak only to the BOE's obligation to select accessible poll sites free of structural barriers. See Kerrigan, 2008 WL 3562521, at \*18; Westchester County Disabled on the Move, 346 F. Supp. 2d at 478; Spitzer, 82 F. Supp. 2d at 17. Plaintiffs do not cite any cases addressing the BOE's obligations concerning transient barriers only on election day. Similarly, the DOJ checklist for polling places,<sup>3</sup> which is meant to ensure that poll sites are ADA compliant, instructs election officials to check sidewalks and walkways for removable barriers when evaluating a potential poll site or an existing poll site in advance of an election, but provides no guidance as to any obligation to repeat such a check over the course of an Election Day. ("ADA Checklist for Polling Places" p. 1, 12-15.)

Plaintiffs' evidence clearly demonstrates that disabled voters may face transient barriers at poll sites that pose a danger or impede access unless remedied. Nevertheless, given the lack of guidance as to the BOE's obligations with respect to transient barriers, Plaintiffs have not shown a clear or substantial likelihood of success on the merits of their claim that the BOE must implement additional procedures to monitor poll sites for transient accessibility barriers. Although, as

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<sup>3</sup>Available at <http://www.ada.gov/votingck.htm> (last visited Oct. 27, 2010).

Plaintiffs argue, having to report an accessibility barrier to a poll worker is discouraging and inconvenient, (Pls.' Oct. 26 Ltr., p. 5), the burden of having to complain to a poll worker or a helpful voter about a transient barrier is hardly comparable to the burdens on disabled voters contemplated in Spitzer and Westchester County Disabled on the Move, where pervasive structural barriers meant that disabled voters had to cast absentee ballots rather than vote in person. The burden is more like those placed on employees complaining of ADA violations by employers, where an employee must notify his or her employer and request reasonable accommodation before a discrimination claim can be sustained. See Canales-Jacobs v. New York State Office of Court Admin., 640 F. Supp. 2d 482, 500 (S.D.N.Y. 2009).

Furthermore, Plaintiffs have not shown that the remedy they request will reduce barriers to accessibility in any substantial way. 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, residences, and places of worship during an Election Day, and are not under the complete control of the BOE, perfection is unlikely.

Plaintiffs rightly point out that checklists, such as the one the DOJ created for evaluating poll sites, can be effective at eliminating access barriers. (Pls.' Oct. 26 Ltr., p. 4.) Nevertheless, when dealing with transient barriers like the ones at issue here, such checklists are only effective as to the barriers in place at the time the poll worker completes the survey. If a voter or other member of the public secures a bike to the handrail of a wheelchair ramp two minutes after the survey was completed, that access barrier will impede disabled voters arriving at that time. Those voters would then still face the inconvenience and discouragement of having to locate and notify a poll worker about the barrier. (Pls.' Oct. 26 Ltr., p. 5.) The BOE faces the same dilemma in its current approach to addressing transient barriers. The Assembly District Monitoring Teams complete checklists addressing accessibility issues when they visit each poll site at least once during Election Day, and the Poll Worker's Manual includes checklists addressing accessibility issues. (See, e.g., Board of Elections in the City of New York "2010 Poll Worker's Manual," p. 145-147.) The Assembly District


Monitoring Reports and the CIDNY surveys indicate that the BOE and poll workers remove transient barriers when made aware of them, whether they were identified using the Assembly District Monitoring Team Checklist, or through being alerted by a voter or advocate. (See, Defs.' Oct. 26 Ltr., p. 2, 6.) Nevertheless, transient barriers continue to arise and voters or members of advocacy groups must occasionally call them to the attention of a poll worker.

III. CONCLUSION

At this stage of the proceeding, Plaintiffs have not met their burden of showing a substantial or clear likelihood of success on the merits. The Plaintiffs' Motion for a Preliminary Injunction must therefore be DENIED.

SO ORDERED.

Dated: New York, New York  
October 28, 2010

  
Deborah A. Batts  
United States District Judge