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July 16, 2021

Kevin Mangold
National Institute for Standards and Technology

Re: Promoting Access to Voting, Docket Number: 210608–0123

Dear Mr. Mangold:

The Bazelon Center for Mental Health Law submits these comments in response to the above-captioned Request for Information. Founded in 1972 as the Mental Health Law Project, the Bazelon Center is a national non-profit legal advocacy organization that advances the rights of individuals with mental disabilities in all aspects of life, including community living, voting, health care, employment, education, housing, parental and family rights, and other areas. The Bazelon Center has litigated cases concerning the voting rights of people with mental disabilities and has conducted legislative and administrative advocacy as well as public education to advance these rights.

Background

A large number of individuals with disabilities who are competent to form political opinions, have candidate preferences, and vote are being denied their fundamental right to participate in the political process, solely because they are under guardianship, a status often imposed for family or financial convenience.

A majority of states either deny the right to vote to individuals under guardianship or impose voter capacity requirements that unfairly target such individuals or subject them to a higher standard than others.

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Voters without disabilities are not typically subjected to a “voter competence” test, probing their understanding of the political process or the issues of the day. Neither should people with disabilities be subjected to such tests, whether or not they have been placed under guardianship. People with or without disabilities should be permitted to vote if they have the basic competence to show up at the polls and cast a vote or obtain and execute an absentee ballot. If a universal voter competence test were to be imposed, it should be no more than that the individual understand what it means to cast a vote, namely, to communicate (with or without accommodations) a choice whether to participate in the voting process.

Capacity Requirements that Discriminate Against People with Disabilities

Some states deny the right to vote to anyone adjudicated “mentally incompetent” or placed under guardianship, regardless of whether the person is able to make choices among candidates and issues. *See, e.g.*, Ariz. Const. art. 7, § 2(C), Ariz. Rev. Stat. § 16-101(A)(6); New York Election Law § 5-106(6); South Carolina Code § 7-5-120(B)(1). A determination of mental incompetence (which generally results in placement under guardianship) involves the inability to meet basic health and safety needs, and has little relevance to a person’s ability to understand the voting process.¹

Other states deny the right to vote to individuals adjudicated mentally incompetent or placed under guardianship if they lack the capacity to vote. *See, e.g.*, Conn. Gen. Stat. §§ 9-12(a), 45a-703; 15 Del. Code Ann. § 1701; Iowa Code Ann. §§ 48A.6(2), 633.556; Kentucky Rev. Stat. §§ 387.580(3)(c), 387.590(10). In these states, individuals under guardianship are typically required to demonstrate their capacity to vote by answering questions not required of other voters—such as questions requiring them to name particular elected officials. Voters without disabilities are not required to answer questions or demonstrate capacity in any other way.

In addition, regardless of state law requirements, election officials have sometimes imposed higher voter capacity requirements on people with disabilities, or denied them the right to vote. *See, e.g.*, *In the Matter of Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hospital*, 750 A.2d 790 (N.J. Super. App. Div. 2000) (election officials segregated ballots submitted by residents of state psychiatric hospital and refused to count them unless residents could prove that they were competent to vote); *Boyd v. Board of Registrars of Voters of Belchertown*, 224 N.E.2d 629 (Mass. 1975) (election officials refused to permit residents of institution to register).

¹ *See, e.g.*, *Doe v. Rowe*, 156 F. Supp.2d 35 (D. Me. 2001); Paul S. Appelbaum, *I Vote, I Count: Mental Disability and the Right to Vote*, 51 *Psychiatric Services* 849 (2000).

Disability service providers have sometimes made their own capacity judgments and refused to permit individuals with disabilities to vote. A number of studies found that long-term care facility staff routinely screened residents for voting capacity before permitting them to vote or helping them vote—including in states with no voter capacity requirement.²

The Law

The National Voter Registration Act (NVRA) permits states to impose voter capacity requirements if they choose to do so.³ The requirements that states impose must, however, comply with the ADA. The ADA imposes separate and different obligations than those imposed by the NVRA.

Among other things, Title II of the ADA requires states to afford people with disabilities equal opportunity to participate in public programs, services and activities, including voting systems. *See, e.g., Disabled in Action v. Board of Elections in the City of New York*, 752 F.3d 189 (2d Cir. 2014). To ensure that people with disabilities are provided equal opportunity to participate in voting, states must not subject them to higher hurdles than others to demonstrate the capacity to vote. Title II also prohibits states from imposing eligibility criteria (including voter capacity criteria) that tend to screen out classes of people with disabilities unless they are necessary. *See, e.g., Doe v. Rowe*, 156 F. Supp.2d 35 (D. Me. 2001) (state statutory and constitutional provisions barring voting by individuals under guardianship by reason of mental illness violated ADA because they screened out people with disabilities from voting and were not necessary).

² *See, e.g.,* Jason Karlawish et al., *Addressing the Ethical, Legal, and Social Issues Raised by Voting by Persons with Dementia*, 292 J. Amer. Med. Ass’n 1345 (2004) (surveying 84 Philadelphia area nursing homes and assisted living facilities); Richard Bonnie et al., *Interview: How Does Voting Occur in Long-Term Care: Interview Script and Responses* (Spring 2005) (surveying 30 long-term care facilities in Virginia); Joan L. O’Sullivan, *Voting and Nursing Home Residents: A Survey of Practices and Policies*, 4 J. Health Care Law & Pol’y 325 (2002) (surveying 10 nursing homes in Maryland).

³ 42 U.S.C. § 1973gg-6(a)(3)(B). Eleven states have chosen not to impose any voter capacity requirement. These states are Colorado, Idaho, Illinois, Indiana, Kansas, Michigan, Maine (where voter capacity requirement was invalidated by a court), New Hampshire, North Carolina, Pennsylvania, and Vermont.

Title III of the ADA bars places of public accommodation from discriminating based on disability in the full and equal enjoyment of their services, facilities, privileges, and advantages. Disability service providers are typically covered entities under Title III.

Efforts to enforce the ADA's requirements in this area have proven difficult for a number of reasons. Individuals under guardianship, who have already lost many basic rights, tend to seek legal help infrequently and are often discouraged by guardians from doing so. Moreover, voter capacity standards are often enforced haphazardly, making it difficult to obtain systemic injunctive relief. *See, e.g., Missouri Protection and Advocacy Services v. Carnahan*, 499 F.3d 803 (8th Cir. 2007) (upholding statutory and constitutional provisions barring voting by individuals under guardianship based on state's assurance that individuals under guardianship could vote if they demonstrated the capacity to vote, despite evidence that many individuals lost voting rights by default upon imposition of guardianship and received no opportunity to retain or restore their voting rights).⁴

Recommendations:

1. The Department of Justice should clarify that:
 - Title II of the ADA bars public entities from subjecting people with disabilities or classes of people with disabilities to a higher standard for demonstrating the capacity to vote than the standard imposed on people without disabilities. For example, voter capacity requirements that are specific to individuals under guardianship or are implemented by requiring only individuals with disabilities to demonstrate capacity violate Title II. If a state chooses to impose a voter capacity requirement, it must be applied in the same manner for all individuals seeking to vote. For example, all individuals seeking to vote must be asked to demonstrate capacity by answering the same questions; individuals under guardianship or other individuals with disabilities may not be required to answer questions not asked of others.
 - Title II of the ADA bars public entities from imposing voter capacity standards that tend to screen out people with disabilities or classes of people with disabilities unless they are

⁴ Ironically, following the Eighth Circuit's decision, a Missouri appellate court held that Missouri law bars courts from affording individuals under guardianship the right to vote. *Estate of Posey v. Bergin*, 299 S.W.3d 6 (Mo App ED 2009).

necessary. Voter capacity standards that bar registration or voting by individuals under guardianship violate the ADA because they tend to screen out a class of people with disabilities and are not necessary.

- Title III of the ADA bars places of public accommodation from discriminating based on disability in the full and equal enjoyment of services, privileges, or advantages of the place of public accommodation. Accordingly, disability service providers violate the ADA by interfering with the ability of qualified individuals with disabilities⁵ to register or vote based on their own determinations that individuals are not capable of voting.
2. NIST, the Department of Justice, and the Election Assistance Commission should recommend to states that poll workers, election officials, and disability service providers should be trained concerning:
 - (a) federal and state law requirements concerning voter competence (including the Voting Rights Act provision described above);
 - (b) types of voter assistance that are and are not permitted under federal law; and
 - (c) other types of reasonable modifications required by the ADA and Section 504 of the Rehabilitation Act (including, for example, helping residents of nursing homes and other service settings to register, get to the polling place, or apply for and complete an absentee ballot if the resident chooses to vote by absentee ballot).
 3. NIST, the Department of Justice, and the Election Assistance Commission should recommend that the following principles be included in any training of poll workers, election officials, and service providers with respect to the voting rights of individuals with mental disabilities:
 - A state need not require a voter to demonstrate competence, and some states don't.

⁵ Individuals who meet voter qualification criteria—including voter capacity criteria imposed by state law consistent with the ADA—are qualified individuals for purposes of voting.

- If a state chooses to impose a voter-competence requirement, that requirement cannot be so broad that it takes away the right to vote of people who are capable of voting. For example, a state generally may not have laws that impose a blanket ban on voting by anyone under guardianship.
- If a state chooses to impose a voter-competence requirement, that requirement must be applied to all voters. It cannot single out a particular group of voters, such as people who are the subject of guardianship proceedings.
- In virtually all states, only a court can find that a person is not competent to vote. In fact, it would present serious constitutional concerns for election officials or anyone else to make such a determination without the procedural safeguards of a court proceeding.
- Service providers, such as nursing homes, hospitals, assisted living facilities and group homes, cannot bar residents from voting based on staff or administrators' decisions that residents are not competent to vote.
- Questions about a voter's competence can form the basis for a voter challenge only under very limited circumstances, if at all. Most states' laws restrict the grounds on which a voter may be challenged, the people who may bring a challenge and the types of evidence that can form the basis for a challenge.
- People with disabilities have the right to get help with voting and to decide who will help them vote.
- A person with a disability can get help from a friend, family member, caregiver, residential service provider or almost anyone else of his or her choosing except an employer or union member. The person can also ask a poll worker for assistance with voting.
- A person helping a voter with a disability should ask the voter what choice he or she wants to make, if any. It is the voter who makes the choice whether to vote and how to vote, not the person providing help.
- The person providing help should not mark a ballot to reflect any choice other than the choice expressed by the voter.

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- The person providing help must respect the voter's privacy at all times during the voting process.
4. NIST should conduct research on the following topics, which would aid state and federal efforts to identify and address practices that may violate the law:
- numbers of people who have lost the right to vote in each state based on guardianship status or otherwise based on a mental disability;
 - the number of those for which a specific finding made by a court that the person specifically lacked the capacity to vote;
 - the extent to which nursing homes, hospitals, assisted living facilities, board and care homes, group homes, and other residential service providers are making determinations concerning whether clients with disabilities should be allowed to vote;
 - the extent to which such residential facilities assist individuals with disabilities to register and vote;
 - what if any questions are asked in each state and/or locality by probate courts, election officials, poll workers, or others to determine whether an individual has the capacity to vote.

Thank you for the opportunity to comment on these important issues.

Jennifer Mathis
Director of Policy and Legal Advocacy