

ATTORNEYS AT LAW

Pioneers Pointe Plaza  
3800 VerMaas Place, Suite 100  
Lincoln, Nebraska 68502  
P: 402.438.1313  
F: 402.438.1654  
www.krbklaw.com



December 14, 2012

John A. Gale, Secretary of State  
State Capitol Building, Suite 2300  
Lincoln, NE 68509-4608

Dear Secretary of State Gale:

Enclosed please find my written findings and suggestions regarding the HAVA complaint which was filed by Mrs. Fatos Floyd on October 9, 2012. My thanks to you for providing me the opportunity to be of service to the State of Nebraska as the hearing officer for this important issue.

Respectfully Submitted,

A handwritten signature in blue ink that reads "Rob Kinsey". The signature is written in a cursive, flowing style.

Robert D. Kinsey, Jr.  
Hearing Officer  
Direct: (402) 434-9053  
rkinsey@krbklaw.com

RDK/aaj/tjb  
Enclosure

STATE OF NEBRASKA

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HELP AMERICA VOTE ACT  
IN RE: FATMA FATOS FLOYD

**WRITTEN FINDINGS AND  
SUGGESTIONS**

**I. Introduction**

On October 9, 2012, a complaint was filed by Mrs. Fatima (“Fatos”) Floyd alleging noncompliance by the Lancaster County Election Commission of the Help Americans Vote Act of 2002, Public Law 107-252, 42 U.S.C. 15301-15545 (“HAVA” or “Act”). Specifically, Mrs. Floyd alleged she was unable to bring several visually impaired voters to vote on October 4, 2012, as she was informed that the AutoMARK equipment would not be ready for use at that time. The AutoMARK machine is a ballot-marking device that allows visually impaired voters, and other voters in need of assistive technology, the ability to vote privately and independently. On November 16, 2012, a public hearing was held in response to Mrs. Floyd’s complaint. Testimony was heard from Mrs. Floyd, the Lancaster County Election Commissioner, election officials and vendors, and the public regarding the alleged noncompliance with HAVA.

The testimony provided by Mrs. Floyd indicated she contacted the Lancaster County Election Commissioner’s office on October 3, 2012, to ask whether documentation was needed to change voting precincts. She informed the staff person she was assisting a friend who would be voting as a blind person for the first time, and they would be coming in to vote the following day. She was informed by the staff person the AutoMARK would not be ready for use at that time and

would probably be ready for use on October 12. Mrs. Floyd did not show up to vote on October 4, nor did she go with a group of blind individuals to vote as she had planned on October 11. Mrs. Floyd voted on October 23, 2012.

Testimony from Kevin Kerrigan, Director of Election Services for Election Systems and Software [ES&S], the services provider for 92 of the 93 counties in Nebraska, indicated they request two weeks for each state to complete the ballot layout process and another two weeks to complete the programming for the AutoMARK and vote tabulation equipment. He further testified ES&S also builds an election milestone calendar. In a subsequent telephone conference with Mr. Kerrigan, he made it clear the election milestone calendar trumps the two week/two week requested schedule. The election milestone calendar included the date of October 15 as ES&S's deadline for machine coding the voting equipment, including the AutoMARK.

For the 2012 general election, the deadline provided to ES&S by the Secretary of State to ship the coding for machine programming was October 15, 2012. I presume the October 15 deadline was provided as part of the official election calendar required of the Secretary of State by Neb. Rev. Stat. § 32-206 stating the Secretary of State "shall publish an official election calendar by November 1 prior to the statewide primary election. Such calendar ... shall set forth the various election dates and other pertinent data as determined by the Secretary of State."

This year, the ballots were certified by the Lancaster County Election Commissioner on September 18, 2012, and the AutoMARK machine was programmed and available for use in Lancaster County on October 9, 2012, six days earlier than the statewide deadline for 2012. ES&S could, I believe, have completed the programming of AutoMARK equipment by October 1, 2012, but did not attempt to as its election milestone calendar showed October 15 as its deadline. This belief is further strengthened by Mr. Kerrigan advising me Lancaster County was

one of the first counties to advise ES&S its ballot was certified as ready. This is important as ES&S queues its counties based upon when ES&S receives certification from the county their ballot is final. Additionally, Lancaster County does some of the required programming in-house, further lightening the load for ES&S.

Testimony was also provided regarding Nebraska's in-person early voting period. Under current Nebraska statute, early voting starts 35 days prior to the election.<sup>1</sup> Testimony indicated that of the five states which have a longer in-person early voting period than Nebraska and which use the AutoMARK (Iowa, Idaho, Wyoming, and South Dakota), all of them have a significantly longer amount of time between the certification date and the date early voting begins. Thus, if HAVA is determined to be applicable in this instance, there would only be 15 days for the finalization of the ballot layout by each county and the programming for the AutoMARKs and vote tabulation equipment to meet the October 1 in-person early voting deadline. Notably, it is not possible for programming to begin until the ballot has been finalized.

## **II. Questions Presented**

The issues to be determined by the hearing officer include whether a violation of HAVA occurred when the AutoMARK was unavailable for use by Mrs. Floyd on October 1, 2012, the first day people could vote in-person early for the 2012 general election and whether Ms. Floyd was actually denied the opportunity to vote on the AutoMARK, as she never actually appeared at the in-person early voting site to cast her vote until the AutoMARK was available. The first issue requires determining whether HAVA contemplated early voting and whether the Lancaster County location for early voting constitutes a "polling place," as the Act requires every polling

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<sup>1</sup> Neb. Rev. Stat. § 32-808 states: "ballots for early voting and applications shall be ready for delivery to registered voters at least thirty-five days prior to each statewide primary or general election and at least fifteen days prior to all other elections."

place to have a voting system that allows individuals with disabilities the opportunity to vote privately and independently.

### **III. Relevant Law**

Title III of the Help Americans Vote Act requires each state's voting system "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." Section 301(a)(3)(A). This requirement shall be satisfied "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." Section 301(a)(3)(B).

The first determination which must be made is whether Title III of HAVA applies to in-person early voting. I believe it does. While HAVA does not specifically contemplate in-person early voting, nothing in the Act indicates the accessibility requirement *excludes* in-person early voting. Further, it is clear from the language in the Act that accessibility for the blind and visually impaired *shall* be satisfied through the use of a voting system equipped for individuals with disabilities. Such language indicates the availability of such voting system is mandatory, not discretionary. The AutoMARK is the voting system Nebraska decided to provide to individuals with disabilities. Thus, it is this voting system that also must be available for use during the in-person early voting period.

Another issue raised during the hearing is whether in-person early voting locations are "polling places," as HAVA only requires each state make available at least one voting system equipped for individuals with disabilities at each *polling place*. The term "polling place" is not defined by HAVA, however, Nebraska law is illuminative. Nebraska's Election Act (Neb. Rev. Stat. §§ 32-101 to 32-1551) defines precinct as a "defined area established by law within which

all registered voters cast their votes at one polling place. Precinct may include any ward or other division of territory in any city or village when created and designated by ordinance for election purposes.” Neb. Rev. Stat. § 32-114. The Election Act requires the election commissioner or county clerk to designate the polling places for each precinct and states “such polling places shall *be in addition to the office of the election commissioner* [emphasis added] or county clerk and the polling places otherwise established pursuant to this section.” Neb. Rev. Stat. § 32-904. Therefore, without a definition of “polling place” in HAVA indicating a contrary definition of the phrase, it is reasonable to conclude that the Lancaster County Election Office, where in-person early voting was conducted for Lancaster County, is a polling place. Further, this reading is consistent with the fact that early voting sites and polling places have the same characteristics, as the laws that regulate polling places also apply to in-person early voting locations, and is consistent with the vernacular used by the election officials who testified at the hearing.

Such reading of HAVA is consistent with Nebraska’s State Plan. The State Plan, as amended on June 21, 2004, recognized as a priority the need to allocate adequate funds to purchase equipment to implement HAVA’s disability voting requirements. Further, the State Plan recognized that at the time of HAVA’s enactment, the voting systems currently in place in Nebraska (hand count and central optical scan) did not meet the requirements of Section 301(a)(3)(A) or 301(a)(3)(B). The State Plan provided that “the Secretary of State will purchase equipment for use by the counties that meet the requirements of [voting system accessibility for individuals with disabilities]” and AutoMARK machines were purchased to meet this requirement. Exhibit 12, pg. 14.

Also mentioned during the hearing was the issue whether Mrs. Floyd was required to physically show up at the early voting location and attempt to vote prior to availability of the

AutoMARK machine to trigger the requirements of HAVA.<sup>2</sup> This requirement of appearing at the voting site should not be read into the Act. The Act requires the voting system to be accessible to individuals with disabilities and does not mention that the individual must appear at the voting site to attempt to cast a vote. Given the purpose of this section of the Act, which is increased accessibility for individuals with disabilities, I believe the failure of the AutoMARK to be available for use to be sufficient to trigger the requirements of Section 301.

#### **IV. Conclusions**

It is clear Nebraska has made voting accessibility a priority. Mr. Shively, the Lancaster County Election Commissioner, testified that prior to the accessibility requirements of the HAVA, his office provided Braille ballots for blind voters at polling locations, and that from 2002 to 2005 his office provided an electronic voting machine for visually impaired voters who voted early, neither of which was required by state or federal law. During the 2012 general election, his office met all of the deadlines outlined by the Secretary of State.

Additional testimony indicated each party involved in preparing and finalizing the ballot for the general election worked diligently to complete its task. The ballot PDF's were prepared by ES&S by the September 21 statewide deadline. The programming was mailed by ES&S and received by Lancaster County six days earlier than indicated on ES&S's election milestone calendar, on October 9, and the AutoMARK was available for use in Lancaster County that day. While I believe this does not comply with the Act, it demonstrates a commitment to allowing Nebraskans full access and opportunity to participate in the electoral process.

The statements provided by all testifiers indicate that the AutoMARK has aided persons in need of assistive technology when voting and provided them the ability to vote privately and

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<sup>2</sup> Mrs. Floyd was told by a Lancaster County Election Commissioner representative in a phone conversation that the AutoMARK was not available for her use. Further, she was advised not to come in. Transcript pg. 11, lines 1-4; pg. 41, lines 11-16.

independently. Mrs. Floyd stated that the first time she used the AutoMARK “was really a truly memorable occasion” as she was “able to cast [her] vote without asking somebody else or telling [them] what [her] secret vote was.” Transcript pg. 10, lines 2-5.

The issue, as indicated by the testimony provided, is one of timing. Nebraska has one of the longest early voting periods in the nation. The average number of days for in-person early voting, according to the National Conference of State Legislatures, is approximately 22 days; Nebraska’s in-person early voting is 35 days. Neb. Rev Stat. § 32-808.

Three issues were identified that make it difficult to change any date other than the starting date for in-person early voting. First, the national parties are certifying candidates later and later each year, which affects the date the Secretary of State can certify ballots to local officials. Additionally, initiative and referenda petitions may result in litigation, and a final decision from the courts is necessary before the ballot issue can be resolved. The requested timeframe to finalize ballot layout and printing is approximately two weeks, and the development of the media and programming for the AutoMARKs is up to two weeks following finalization. Given the nature of each respective task, the ballot finalization and programming for the AutoMARKs cannot happen concurrently. Each of these factors influence the recommendation described below.

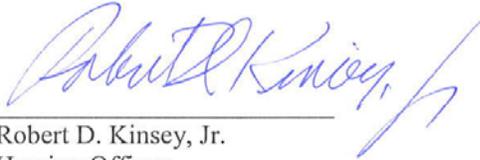
## **V. Recommendations**

Based upon the foregoing, it is my recommendation the time period for in-person voting be shortened from thirty-five days to twenty-five days and the official election calendar required by Neb. Rev. Stat. § 32-206 be modified in the future to include the early in-person voting date. A shortening of the time period for in-person early voting furthers Nebraska’s commitment to promoting voter accessibility for all individuals and provides adequate opportunity to vote early

in-person. It is my further recommendation that changes to the timeline for in-person early voting not impact the time in which voters are able to obtain absentee ballots. Shortening the time period to twenty-five days and modifying the official election calendar as set forth hereinabove, will, I believe, allow election officials and vendors the ability to ensure ballots contain the correct information and are properly formatted, while complying with the requirements of HAVA. My recommendation is based on my findings that the programming requirements of the current AutoMARK equipment, the certification of candidates by the national parties, and the initiative and referenda process are factors largely outside of the state's control when considering the time period for in-person voting. Upon further development of technology and changes in timing by national parties, it may later become possible to again alter this time period while still complying with the federal requirements set forth by HAVA.

Dated this 14th day of December, 2012.

Respectfully submitted,

A handwritten signature in blue ink, reading "Robert D. Kinsey, Jr.", written over a horizontal line.

Robert D. Kinsey, Jr.  
Hearing Officer