



FLORIDA DEPARTMENT OF STATE

CHARLIE CRIST
Governor

KURT S. BROWNING
Secretary of State

August 21, 2008

The Honorable Jerry Holland
Duval County Supervisor of Elections
105 East Monroe Street
Jacksonville, Florida 32202

RE: DE 08-09
Voting; Voting Equipment – Persons with
Disabilities
§§ 97.021(24) and 101.56075, Florida Statutes

Dear Mr. Holland:

This letter responds to your request for an advisory opinion. You are the Supervisor of Elections for Duval County; therefore, the Division has the authority to issue you an opinion pursuant to section 106.23(2), Florida Statutes (2007).

You ask essentially the following questions:

- (1) If a voter does not show an outward sign of a disability, or something that would qualify or allow the voter to vote on a voter interface device (e.g., a touchscreen voting machine), as described in section 101.56075, Florida Statutes (2007), which meets the accessibility requirements for individuals with disabilities pursuant to Section 301 of the Help America Vote Act of 2002 and section 101.56062, Florida Statutes (2007), should a poll worker be instructed not to allow the voter to use the accessible voter interface device?
- (2) If the voter expresses a desire to use the touchscreen voting machine, should the poll worker expect him or her to acknowledge or affirm the presence of some disability?

The short answer to both of your questions is "No." As of July 1, 2008, all voting must be by marksense ballots while persons with disabilities still have the option of voting on a touch screen voting system without marksense ballot capability. Since the definition of "persons with disabilities" potentially encompasses persons with mental or physical disabilities that may not be readily apparent, and neither federal nor state law expressly require an individual to acknowledge or affirm his or her disability, procedures must be established to avoid the potentially unlawful screening of persons who are otherwise entitled to vote on the touch screen voting system or other accessible ballot marking device.

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In 2007, the Florida Legislature enacted section 101.56075, Florida Statutes, relating to voting methods.¹ This provision became effective July 1, 2008. It requires all voting in an election to be done on a voting system that uses marksense ballots (i.e., optical scan voting system) with one exception:

101.56075 Voting methods.--

(1) Except as provided in subsection (2), all voting shall be by marksense ballot utilizing a marking device for the purpose of designating ballot selections.

(2) Persons with disabilities may vote on a voter interface device that meets the voting system accessibility requirements for individuals with disabilities pursuant to s. 301 of the federal Help America Vote Act of 2002 and s. 101.56062.

(3) By 2012, persons with disabilities shall vote on a voter interface device that meets the voter accessibility requirements for individuals with disabilities under s. 301 of the federal Help America Vote Act of 2002 and s. 101.56062 which are consistent with subsection (1) of this section. (*Emphasis supplied.*)

The one exception in subsection (2) gives persons with disabilities the option to continue to cast a vote using a voter interface device (e.g., touch screen voting systems) that meets the voter accessibility requirements under Section 301 of the Help America Vote Act but that does not otherwise provide for voting by marksense ballots.² However, by 2012, such accessible voting systems must provide voting by marksense ballots as an option for voters with disabilities.

This 2007 legislation affected 15 of Florida's 67 counties³ who had been exclusively using touch screen voting system technology since 2003. These counties have since purchased and converted to precinct-count optical scan voting systems within the last year. All other counties were already using precinct-count optical scan voting systems and were not affected by the change. However, each county in Florida is still required under section 101.56062, Florida Statutes, and Section 301 of the Help America Vote Act, to place and make available at least one accessible voter interface device in each polling place. Therefore, the issue of who may vote on an accessible voter interface device and how to ensure that only those who are entitled to vote on such device is one that all counties continue to face.

Section 97.012(24), Florida Statutes (2007) defines "persons with disabilities" as:

¹ s.6, chapter 2007-30, Laws of Florida

² See as secondary reference source, Senate Staff Analysis by the Committee on Transportation and Economic Development Appropriations Committee (April 24, 2007) for the Senate Bill 960 (companion bill to the House Bill 537 which became the underlying bill for the legislation). Available staff analyses for HB 537 did not address this provision.

³ Broward, Charlotte, Collier, Hillsborough, Indian River, Lake, Lee, Martin, Miami-Dade, Nassau, Palm Beach, Pasco, Pinellas, Sarasota, and Sumter Counties.

“ . . . individuals who have a *physical or mental* impairment that substantially limits one or more major life activities.” [italics added for emphasis]

Notwithstanding the requirement that the impairment “substantially limits one or more major life activities,” such disability may still not be one that manifests physically or is readily apparent to an observer.

In addition, federal laws such as Section 208 of the Voting Rights Act of 1965, Section 504 of the Rehabilitation Act of 1973, the Voting Accessibility for the Elderly and Handicapped Act of 1984, Title II of the Americans with Disabilities Act (ADA) of 1990, and Section 301 of the Help America Vote Act of 2002 are all aimed at ensuring persons with disabilities have equal opportunity for access and participation while protecting their privacy and minimizing undue or unwanted attention to their disability. These laws do not require persons with disabilities to notarize medically certify or otherwise disclose their disability in order to request or receive assistance in voting or to use an accessible voter interface device.

In March 2008, the Division of Elections contacted a number of states to determine how they have implemented or construed federal law regarding the use of accessible voting systems by persons with disabilities and other voters.⁴ None of the queried states screened voters for disabilities prior to use of the accessible voting system nor otherwise limited voters from voting on such systems.

While the Division of Elections has previously opined that the federal voting laws do not necessarily prohibit a supervisor of elections from asking a person if he or she is disabled in order to tailor the assistance to the voter’s needs or request, it has been long-standing practice not to ask the voter “why” he or she needs help but only “how” he or she may be assisted. *Division of Elections Opinion 92-15* (July 20, 1992); see also *Florida State Poll Workers Training Manual* (September 2006).

Therefore, in consideration of section 101.56075, Florida Statutes, the Division of Elections recently amended Rule 1S-2.034, which incorporates the Polling Place Procedures Manual, DS-DE #11, eff. 08/08, to address this issue. The Division developed these procedures to ensure that persons with disabilities have the same opportunity for access and participation in the election process in accordance with federal and state law while protecting their privacy and minimizing undue or unwanted attention to their disability. The procedures are as follows:

- If a voter at the polls during the early voting period or on Election Day requests assistance, the poll worker should inform the voter that if he or she has a disability, the voter has the option of voting on a touch screen machine or other accessible ballot marking device that will allow him or her to vote without the assistance of another person. The poll worker should then ask the voter, without delving into or confirming further the existence, nature or

⁴ Arkansas, Delaware, Illinois, Kansas, Kentucky, Maryland, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Tennessee, Texas, Washington, and Wisconsin.

extent of someone's disability, whether the voter would like to vote on the device or would rather have the assistance of a person. See pages 7 and 13 of the Polling Place Procedures Manual, DS-DE #11 (eff. 08/08). If the voter chooses to have someone assist him or her, the poll worker should check the precinct register or electronic database for a notation on assistance to determine if the voter will need to complete a Declaration to Secure Assistance as required in section 101.051, Florida Statutes. If there is no notation, the voter must first complete the required form prior to being assisted in voting. See pages 13-14 of the Polling Place Procedures Manual, DS-DE #11 (eff. 08/08).

- If a voter at the polls during the early voting period or on Election Day specifically requests to use a touch screen machine outside the context of a request for assistance, the poll worker should inform the voter that only persons with disabilities have the option of voting on the touch screen voting system or other accessible ballot marking device. If the voter at that point says he or she wants to vote on the touch screen, the poll worker should accept the voter's implicit representation that he or she is a person with disability who is entitled to vote on the touch screen voting system. The poll worker should not delve into or seek further confirmation of the existence, nature or extent of someone's disability at that point and should direct the voter to the touch screen voting system or other accessible ballot marking device. See pages 7 and 13 of the Polling Place Procedures Manual, DS-DE #11 (eff. 08/08).

In answer to your questions, these are the procedures that your poll workers should follow for purposes of facilitating access to and voting on touch screen voting systems or other accessible ballot marking device.

SUMMARY

As of July 1, 2008, all voting in an election must be done by marksense ballots. There is one exception. Persons with disabilities have the option until the year 2012 to cast their votes on accessible voting systems such as a touch screen voting system or other voter interface device that meets state and federal accessibility requirements. The term "persons with disabilities" encompasses a range of disabilities that may not be physically manifested or readily apparent to an observer. Therefore to ensure that persons with disabilities have the same opportunity for access and participation in the election process while protecting their privacy and minimizing undue or unwanted attention to their disability, poll workers are to follow the procedures recently adopted and set forth in Rule 1S-2.034, entitled the Polling Place Procedures Manual, and DS-DE #11 (eff. 08/08) which is incorporated into this opinion by reference. Essentially, a person with disability who requests assistance in voting should be informed that he or she has the option to vote on a touch screen or other accessible ballot marking device. The person should then be asked whether he or she wants to vote on the touch screen or device or receive personal assistance. If the person indicates that he or she wants to vote on the touch screen or device, the poll worker should direct the person to the device without asking any further questions regarding the existence, nature or extent of the person's disability. However, the pollworker may, upon

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request, provide assistance or guidance on use of accessible voting equipment. A person who requests to use the touch screen or other accessible ballot marking device outside the scope of a request for assistance in voting should be told that only persons with disabilities are allowed to vote on such devices. If the person then says he or she wants to vote on such device, the poll worker should assume that the person is a person with a disability and direct the person to the device without questioning the person further about the existence, nature or extent of his or her disability.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Palmer', with a long horizontal stroke extending to the right.

Donald L. Palmer

Director, Division of Elections

Prepared by:

Maria I. Matthews

Assistant General Counsel