

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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EVA EASON, MEGHAN PARKER,	:
NATIONAL FEDERATION OF THE BLIND, and the	:
CENTER FOR INDEPENDENCE OF THE DISABLED,	:
NEW YORK	:
	:
Plaintiffs,	:
- against -	:
	:
NEW YORK STATE BOARD OF ELECTIONS, NEW	:
YORK STATE DEPARTMENT OF MOTOR VEHICLES,	:
TODD D. VALENTINE and ROBERT BREHM, in their	:
official capacities as Co-Executive Directors of the Board	:
of Elections, THERESA EGAN, in her official capacity as	:
Executive Deputy Commissioner of the Department of	:
Motor Vehicles, and GREGORY J. KLINE, in his official	:
capacity as Deputy Commissioner of Administration for	:
the Department of Motor Vehicles,	:
	:
Defendants.	:
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16-cv-4292 (JPO)

SETTLEMENT AGREEMENT AND STIPULATED ORDER OF DISMISSAL

WHEREAS, on June 9, 2016, Eva Eason, Meghan Parker, the National Federation of the Blind (“NFB”), and the Center for Independence of the Disabled, New York (“CIDNY”) (“collectively, Plaintiffs”), filed the above-captioned lawsuit against the New York State Board of Elections (“State Board” or “SBOE”) and the New York State Department of Motor Vehicles (“DMV”), later adding Todd D. Valentine, Robert Brehm, Theresa Egan, and Gregory Kline in their respective official capacities as defendants (collectively, “Defendants,” and together with Plaintiffs, the “Parties”) in an Amended Complaint;

WHEREAS, Plaintiffs’ Third Amended Complaint alleges that State Board’s and DMV’s websites (www.elections.ny.gov and <https://dmv.ny.gov>, respectively) contain barriers that prevent full and equal use by Blind persons, in violation of Title II of the ADA, 42 U.S.C. §§ 12101-12213 (“Title II”); and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (“Section 504”);

WHEREAS, Defendants do not admit any violation of Title II of the ADA or Section 504 and expressly deny any wrongful conduct or liability, or violation of any federal, state, or local statute, ordinance, law in this matter whatsoever;

WHEREAS, the Parties are entering into this Settlement Agreement and Stipulated Order of Dismissal (the “Final Settlement Agreement,” “Settlement,” “Settlement Agreement,” “Stipulation,” or “Agreement”) for the purpose of settling the disputes between them and to avoid further litigation;

WHEREAS, this Agreement is intended to wholly resolve the litigation, identified above, between the Parties without further expense, delays, and the risks and uncertainties of trial;

WHEREAS, the Parties intend this Agreement, in addition to obviating the need for further litigation, to further the shared goal of the Parties of providing and improving access to the Websites to Blind persons, and to the services and information provided on those Websites.

NOW, THEREFORE, in consideration of the mutual promises, covenants, representations, and other consideration contained in this Agreement, the Parties hereby stipulate and agree as follows:

I. DEFINITIONS

As used in this Agreement:

“Action” shall mean Eva Eason et al. v. New York State Board of Elections et al., No. 16-cv-04292 (JPO) (S.D.N.Y.).

“Accessible Alternative Format” shall mean a method of presenting information in a format that provides communication to Blind individuals that is as effective as communications with others (e.g., audio, Braille, large print, or digital navigable formats supported by computers or digital talking-book players).

“Archived Web Content” means Web Content that: (1) is maintained exclusively for reference, research, or recordkeeping; (2) is not altered or updated after the date of archiving; and (3) is organized and stored in a dedicated area or areas clearly identified as being archived.

“Blind” refers to persons with a visual impairment requiring the use of assistive technologies or alternative techniques when reviewing Web Content.

“Conformance” and “conform” have the same meaning as used in WCAG 2.0 AA (defined below).

“Database-Derived Functions” consist of the public-facing elements on the SBOE Website available to the general public that dynamically provide information generated from SBOE databases (e.g., a function that provides voter registration information). SBOE Database Derived Functions include, but are not limited to, functions such as CAPAS/FIDAS, voter lookup, representative lookup/district map, representative roster, unofficial election results, county board information, and the county board roster.

“Defendants” means all Defendants currently named in the above Action.

“Documents” refers to any electronic files posted on a Website that are available to the general public and are in the following electronic file formats: portable document file (PDF) formats, word processor file formats, presentation file formats, spreadsheet file formats, and database file formats.

The “Duration of Agreement” shall be three years from the Effective Date, subject to the provisions of Paragraph 30 below regarding a possible one-year extension of the date.

“Effective Date” refers to the date on which this Agreement, after being “so-ordered” by the Court, is electronically filed with the Clerk of Court for the Southern District of New York.

“ITS” means the New York State Office of Information Technology Services.

“ITS Accessibility Policy” means New York State Information Policy No. NYS-P08-005, currently available at <https://its.ny.gov/sites/default/files/documents/nys-p08-005.pdf>.

“Members/Constituents” refers to the members, constituents, and/or Blind persons who participate in the programs of the organizational Plaintiffs in this matter.

“Orphan Pages” means files found on the www.elections.ny.gov and <https://dmv.ny.gov> web servers that are no longer linked to the Websites and have been abandoned by Defendants’ web services/developers.

“Paragraph” refers to the numbered paragraphs of this Agreement.

“Plaintiffs” shall consist of the plaintiffs in the Action.

“Section” refers to the section of this Agreement, numbered with roman numerals.

“Substantial Non-Compliance” means material or repeated breaches of this Agreement of the nature described in Paragraph 28(c) that materially undermine the Parties’ shared goal of providing and improving access to the Websites to Blind persons, and to the services and information provided on those Websites. Minimal or isolated failures, noncompliance with mere technicalities, or failure to give “full consideration” to Plaintiffs’ input shall not, without more, constitute Substantial Non-Compliance. In no circumstances shall an allegation that services or information alleged not to be accessible on the Websites provide the basis for a claim of Substantial Non-Compliance if Plaintiffs failed to follow the procedures set out in Paragraph 28 of this Agreement. Failures of the entirety of the Websites, or of the whole of specific Website services or functions, rendering such Website, service, or function unusable by all members of the public, shall not be considered Substantial Non-Compliance.

“Transaction” means a function that can be performed online using a Website (e.g., change address).

“User Accessibility Testing” is defined in Section XI below.

“WCAG 2.0 AA” refers to Levels A and AA success criteria of the current Web Content Accessibility Guidelines 2.0, available at <https://www.w3.org/TR/2008/REC-WCAG20-20081211/>.

“Webpage” consists of: Web Content available on a Website that is not a Document.

“Website Accessibility Practices and Procedures” is defined in Paragraph 17 below.

Defendants' "Websites" consist of the DMV and SBOE websites, which are defined as:

a. "DMV Website": All webpages, web applications, resources, services, transactions, forms, and documents within the dmv.ny.gov domain and their subdomains that are available to the general public, but does not include Orphan Pages, nor non-DMV webpages and websites linked from the DMV Website, nor the New York State header nor other statewide content that New York State may in the future require DMV to post to its Website.

b. "SBOE Website": All webpages, web applications, resources, services, transactions, forms, and documents within the www.elections.ny.gov domain, and their subdomains that are available to the general public, but does not include Orphan Pages, nor non-SBOE webpages and websites linked from the SBOE Website.

"Web content" and "website content" include all textual, visual, and aural content encountered on SBOE's and DMV's Websites (as defined above). Materials not located on SBOE's or DMV's Websites are not "web content" or "website content" for the purposes of this Agreement, but instead shall be considered "Third Party Content." Third Party Content shall not be subject to this Agreement. Links to Third Party Content are discussed in Paragraphs 26-27 below.

II. PARTIES TO THIS AGREEMENT

1. The Parties to this Agreement shall consist of all Plaintiffs and Defendants currently named in the above-captioned Action.

III. DISMISSAL OF THE ACTION WITH PREJUDICE / RETENTION OF JURISDICTION

2. Upon signature of this Agreement by the Parties and the Court, and electronic filing of the Agreement with the Clerk of the Court, the Action and all claims that were or could have been asserted shall be and hereby are dismissed with prejudice pursuant to Fed. R. Civ. P. 41(a).
3. The Court shall retain jurisdiction solely to enforce the terms of this Agreement.

IV. WEBSITE TIMELINE

4. The following portions of DMV's Website, with the exception of the portions of that Website maintained and programmed by ITS, shall conform with WCAG 2.0 AA by December 31, 2018 and remain in conformance through the term of the Final Settlement Agreement:
 - a. Homepage, i.e., dmv.ny.gov (the general homepage shall conform with WCAG 2.0 AA without reliance on an alternative, text-only, "accessible" homepage);
 - b. Webpages and documents relating to voter registration;
 - c. MyDMV signup and login;
 - d. Webpages and documents relating to applications for non-driver ID;

- e. Webpages and documents relating to renewal of non-driver ID;
 - f. Webpages and documents relating to change of address;
 - g. Webpages and documents relating to organ donation;
 - h. Webpages and documents by which an individual submits requests for driving records and/or any requests under the New York Freedom of Information Law.
5. On or before December 31, 2019, DMV shall ensure that its entire Website, with the exception of Archived Web Content discussed in Paragraph 10 below, conforms with WCAG 2.0 AA and remains in conformance through the term of the Final Settlement Agreement.
6. On or before December 31, 2019, DMV's "Make a Reservation" system, currently available at <https://visit.dmv.ny.gov/onlineReserve/indexB.html>, ("Reservation Transaction") shall conform with WCAG 2.0 AA. This system shall remain in conformance from that date through the remaining term of the Final Settlement Agreement. From the effective date of the Final Settlement Agreement until the Reservation Transaction conforms with WCAG 2.0 AA, DMV shall (1) continue to maintain the "Make an Office Reservation" fillable form, available at <https://dmv.ny.gov/make-office-reservation> ("Reservation Form"), and maintain its compliance with WCAG 2.0 AA; and (2) continue to provide direct links to the Reservation Form on any webpage that provides direct links to the Reservation Transaction.
7. On or before December 31, 2018, the following portions of the SBOE Website shall conform with WCAG 2.0 AA and remain in conformance through the term of the Final Settlement Agreement:
 - a. Homepage, *i.e.*, <https://www.elections.ny.gov/>;
 - b. Webpages and documents relating to voter registration (with the exception of voter lookup);
 - c. Webpages and documents relating to requesting an absentee ballot;
 - d. Webpages and documents by which an individual submits requests for information under the New York Freedom of Information Law, including requests for public records or requests for voter registration data;
 - e. Webpages and documents on the SBOE "Help America Vote Act" (HAVA) pages, which currently consist of
 - (1) <https://www.elections.ny.gov/HAVA.html>; and
 - (2) <https://www.elections.ny.gov/HAVADeterminations.html>.
8. By December 31, 2019, SBOE shall ensure that its entire Website, with the exception of Archived Web Content discussed in Paragraph 10 below, conforms with WCAG 2.0 AA and remains in conformance through the term of the Final Settlement Agreement. SBOE Database-Derived Functions that are available to the general public are addressed by this Paragraph, and not Paragraph 7 above.
9. The Parties agree that all PDF forms on the websites, that is, PDF forms that are filled out by the user and submitted to DMV or SBOE, will, by the requisite date or dates, be WCAG

2.0 AA compliant fillable forms. Defendants may continue to require original, handwritten signatures on some forms.

10. Archived Web Content: Defendants may maintain content that does not conform to WCAG 2.0 AA on their Websites that is exclusively for reference, research, or recordkeeping, is not altered or updated after the date of archiving, and is organized and stored in a clearly identified, dedicated area or areas. Such dedicated areas must: prominently note that Accessible Alternative Formats for this Archived Web Content are available upon request; provide an e-mail address or online form for submitting such requests; and state that requests shall be honored within a specified number of days. Defendants agree not to link directly to Archived Web Content from other areas of Defendants' Websites (but may link to a "landing" page, or other accessible page listing or linking to Archived Web Content). During the term of the Final Settlement Agreement, if there is any Archived Web Content for which at least two requests for screen reader Accessible Alternative Formats have been made within a year, Defendants agree to make such content available on the Websites in a version that conforms with WCAG 2.0 AA within 60 days of the second request. Plaintiffs agree not make any such request or requests solely for the purposes of forcing Defendants to reformat material that would otherwise be archived and shall neither encourage nor support their members/constituents and/or Blind persons who participate in their programs to do so.
11. Nothing in the Final Settlement Agreement shall prevent the removal of any content on SBOE or DMV's Websites or require any pre-approval from Plaintiffs or any other party or entity for such removal.
12. In agreeing to the above, Defendants do not admit that any content on the Websites fails currently to comply with the ITS Website Accessibility Policy, Title II of the ADA, or the Rehabilitation Act, or any other state or federal law.

V. WEBSITE ACCESSIBILITY COORDINATOR / LEVEL ACCESS

13. Within sixty (60) days of the Effective Date, DMV and SBOE shall each designate an employee as the Website Accessibility Coordinator for its Website, and provide the Website Accessibility Coordinator's name to counsel for Plaintiffs. The Website Accessibility Coordinator shall be knowledgeable about the requirements of WCAG 2.0 AA, the Website Accessibility Practices and Procedures, the ITS Website Accessibility Policy, and website accessibility generally. The Website Accessibility Coordinator shall also be knowledgeable about the requirements of the Final Settlement Agreement and be responsible for overseeing, managing, and coordinating implementation of the Final Settlement Agreement. Nothing shall prevent Defendants over time from designating a different person as Website Accessibility Coordinator, and so informing Plaintiffs. With regard to the internal reporting requirements set out in Paragraph 15, the Website Accessibility Coordinators shall each report to the appropriate official or officials of the respective Defendant; an appropriate executive level official at DMV and SBOE will be kept informed of the overall efforts and results documented in the reports. Nothing in this Agreement shall prevent the Website Accessibility Coordinator from conferring with or

reporting to additional employees and officials, beyond those in his or her direct line of supervision, as appropriate to carry out his or her responsibilities under the Final Settlement Agreement.

14. Subject to Paragraph 25, below, Defendants shall hire Level Access to serve as a third-party web accessibility consultant, except that Defendants shall request that Level Access employee Jonathan Avila not be assigned to write, or consult on, the report described below in this Paragraph. Defendants shall make this request in recognition of the fact that Mr. Avila was previously utilized as a testimonial expert for purposes of this litigation. Beginning the later of (a) eight months after the Effective Date of the Final Settlement Agreement or (b) four months after Level Access is retained by Defendants, Level Access shall prepare a written evaluation for Defendants. Level Access shall prepare subsequent evaluations every eight months during the term of the Final Settlement Agreement. This evaluation shall: (1) describe whether the Websites are in conformance with the requirement of the Final Settlement Agreement that the Websites conform to WCAG 2.0 AA, and are doing so on the timeline set forth in Section IV above; and (2) shall make recommendations to improve the accessibility of the Websites. Level Access need not conduct a full website audit every eight months in preparing the written evaluation. Defendants shall require that Level Access determine the most economical method of reviewing the Websites for conformance with the Final Settlement Agreement, including, but not limited to, auditing only new or substantially changed content. Defendants shall incorporate the recommendations contained in Level Access's written evaluation, or otherwise resolve any issues raised there to the satisfaction of Level Access and Defendants, within ninety (90) days of receiving such recommendations. Defendants shall include a summary of this Level Access evaluation, and their response thereto, in their reports to Plaintiffs required under Paragraph 15.
15. Beginning the earlier of (a) three months after the first evaluation from Level Access, or (b) eight months after the Effective Date of the Final Settlement Agreement, through the end of the Final Settlement Agreement's term, SBOE's and DMV's Website's Accessibility Coordinators shall each produce a report to the appropriate employee(s) or official(s) at DMV and SBOE, as set out in Paragraph 13, with a copy to Plaintiffs. After submission of the first report, Defendants SBOE and DMV shall submit subsequent reports ninety (90) days after receipt of the evaluation from Level Access described in Paragraph 14 above. The report shall include a summary of the most recent evaluation received from Level Access required by Paragraph 14 of this Agreement, but need not include such information until ninety (90) days after the first date on which Level Access produces an evaluation to Defendants. SBOE and DMV shall include in their report, as separate items: (1) a summary of automated website testing results during the previous eight months; (2) a summary of results from any user accessibility testing in the previous eight months; (3) a summary of feedback and complaints received from visitors to the Website regarding the Website's accessibility to the Blind during the previous eight months; (4) a summary of the assessment and recommendations received from Level Access since the prior Level Access evaluation, if any; (5) with regard to any accessibility problems reported via (1)-(4), an indication of whether they were resolved; and (6) with regard to any complaints received directly from visitors to the Websites, a statement of

how long it took to address such complaint(s). Defendants' Website Accessibility Coordinators, with any assistance they require, will be responsible for compiling the information to be submitted by Defendants in these reports. These reports shall be considered public records and shall be provided to counsel for Plaintiffs within seven (7) business days after they are submitted internally at the relevant agency by the Website Accessibility Coordinator.

VI. WEBSITE ACCESSIBILITY CROSS-FUNCTIONAL COMMITTEE

16. Within ninety (90) days of the Effective Date, Defendants shall each appoint a cross-functional committee (comprised of employees across various departments or functions of each agency) charged with monitoring and maintaining conformance of each Defendant's Website with WCAG 2.0 AA, to the extent required in the Final Settlement Agreement, through the term of the Agreement. This committee will assist and report to the Web Accessibility Coordinator for each Defendant, as appropriate.

VII. WEBSITE ACCESSIBILITY PRACTICES AND PROCEDURES

17. Defendants agree to establish "Website Accessibility Practices and Procedures," which will be a statement of practices and procedures consistent with the requirements of the Final Settlement Agreement, and in furtherance of the requirements of the ITS Website Accessibility Policy. SBOE and DMV, if they so choose, may create separate or different Website Accessibility Practices and Procedures from each other. The agreed upon Website Accessibility Practices and Procedures will be posted as a link on the homepages of Defendants' Websites, made available to the public, and distributed on an annual basis through the term of the Settlement Agreement to all relevant personnel.

VIII. BUG FIXES

18. Defendants agree that any bugs that create nonconformance with WCAG 2.0 AA to Defendants' Websites will be remedied with the same level of priority (e.g., speed, resources used to remediate) as any equivalent loss of function for individuals without disabilities. If Defendants create any relevant written internal policies, practices and procedures regarding bug fixes generally during the term of the Final Settlement Agreement, they shall include the principle described in the first sentence of this Paragraph in any such written policy, practice, or procedure. The Website Accessibility Training described in Paragraph 24 will include a component explaining that any bugs that create nonconformance with WCAG 2.0 AA to Defendants' Websites will be remedied with the same level of priority (e.g., speed, resources used to remediate) as any equivalent loss of function for individuals without disabilities.

IX. ASSISTANCE FOR WEBSITE USERS WITH DISABILITIES

19. Personnel receiving customer inquiries from individuals with disabilities will continue to direct queries relating to website accessibility to relevant personnel (in DMV's case, the ADA coordinator; in SBOE's case, the Public Information Office).

20. SBOE and DMV shall continue to provide a notice directly linked from their respective homepages to their “accessibility” page. Their accessibility pages must continue to, at a minimum: (1) solicit feedback from visitors to their websites on how the accessibility of their Websites can be improved; and (2) provide several methods to provide feedback. The Website Accessibility Coordinator shall be responsible (directly or via his or her delegate(s)), for recording all feedback and responses to that feedback.

X. AUTOMATED WEBSITE ACCESSIBILITY TESTING

21. Beginning on the Effective Date of the Final Settlement Agreement, and at least once every month through the end of the Agreement’s term, Defendants shall conduct automated accessibility tests of their Websites for all content for which such testing is possible to evaluate conformance of web content with WCAG 2.0 AA. Defendants may continue to use the automated tools currently in their possession: Siteimprove (DMV); PowerMapper (SBOE).

XI. USER ACCESSIBILITY TESTING

22. Beginning on the Effective Date of the Final Settlement Agreement, and at least once annually through the end of the Agreement’s term, and whenever a substantial proposed change to their Websites is implemented, Defendants shall utilize Blind individuals (a “User Accessibility Testing Group”) to test the websites and identify any accessibility barriers not otherwise apparent through automated testing. If requested by Defendants, Plaintiffs may assist in identifying Blind participants for a User Accessibility Testing Group or Groups.
23. Defendants shall request that Level Access, hired as described in Paragraphs 14 and 25 herein, provide comments, guidance and recommendations relating to the design of testing methodology for User Accessibility Testing Groups, including recommendations relating to a variety of screen reader and screen magnification software, and tester selection, which Defendants shall implement consistent with Paragraph 14 of this Agreement. Level Access may also recommend, in their written reports, based on Defendants’ ability to implement this Agreement, a reduced frequency for user accessibility testing, which the Parties shall accept.

XII. WEBSITE ACCESSIBILITY TRAINING

24. Beginning no later than one year from the Effective Date, and continuing at least once annually from the Effective Date through the end of the Agreement’s term, Defendants shall each provide mandatory Website Accessibility Training to all of their relevant employees who write or develop programs or code for public-facing Website content, or who create or post final content to Defendants’ Websites (“Web Content Personnel”) on how to provide access to web content to Blind persons, consistent with WCAG 2.0 AA and the terms of the Final Settlement Agreement. Defendants shall request that Level Access assist Defendants in designing and conducting the Website Accessibility Training. Web Content Personnel shall receive the above training when they are hired into a position

that includes such a role. Defendants shall also require and take measures to assure that relevant contracting personnel and contractors are familiar with WCAG 2.0 AA and the requirements of the Final Settlement Agreement to the extent necessary to perform the duties under their contract.

XIII. RETENTION PROCESS FOR LEVEL ACCESS

25. Defendants' retention of Level Access is subject to obtaining all necessary approvals under the State Finance Law, which may include the approval of the non-party New York State Comptroller and the Contract Approval Unit of the New York State Office of the Attorney General. Defendants will make good faith efforts to ensure that required approvals for retention of Level Access are received. In the event that such approvals are not received, Defendants agree to retain another website accessibility consultant in order to fulfill their responsibilities under the Final Settlement Agreement. Defendants will disclose the name of such consultant to Plaintiffs prior to such retention. Plaintiffs may, if they so choose, make alternative or additional suggestions to Defendants about the expert to be retained, which Defendants agree to consider. In no circumstances, however, shall the Final Settlement Agreement or Defendants' agreement to consult with Plaintiffs be deemed to provide Plaintiffs a right to select or approve any expert to be retained or used by Defendants.

XIV. PROVISIONS FOR THIRD PARTY CONTENT

26. Where available, links found on the Websites to Third Party Content will be to HTML pages. For links to PDF pages and pages other than HTML pages, if it is not clear that the user is leaving the applicable Website, Defendants shall add informational text that, by clicking on such links, the user is leaving that Website.

27. With regard to the legislation enacted as New York Election Law § 14-107(5a), Defendant SBOE shall make best efforts to enact regulations requiring independent expenditure committees to provide copies of paid internet or digital advertising in a format that comports with WCAG 2.0 AA. To the extent that SBOE is required to post copies of paid internet or digital advertising on its Website that do not conform to WCAG 2.0 AA, such postings will be treated as Third Party Content, and SBOE shall include a message on the section of its Website where such content is posted informing users that such content is provided by independent expenditure committees and is accessible to the extent it was provided in an accessible format.

XV. DISPUTE RESOLUTION

28. The following dispute resolution process shall apply:

- a. Notice, Meet and Confer Obligations. During the term of the Final Settlement Agreement, in the event that Plaintiffs believe that SBOE and/or DMV have violated any portion of the agreement, Plaintiffs' counsel may provide such Defendant with a written statement describing the alleged breach ("Notice of

Breach”). The Notice must include information necessary to identify the alleged breach, and, with respect to any alleged breach of technical website standards, will, as applicable, include notice of who, if anyone, attempted the function, on what date, with what assistive technology, what the result was, and any suggestions for cure, and copies of any documents or data relied on by Plaintiffs that relate to or otherwise document the alleged breach. The Notice shall also state whether the Plaintiffs believe an alleged breach significantly interferes with the practical ability of a Blind individual to use a Website, and how it does so. Such Defendant shall provide a written statement responding to the Notice of Breach within thirty (30) calendar days from receipt of the Notice of Breach, including any measures being undertaken to cure such breach, or justification for the failure to cure such breach, and within thirty (30) calendar days of receipt of such Defendant’s written response, or sooner, counsel for the Parties shall meet and confer in a good faith effort to resolve their dispute informally. In no instance shall the Plaintiffs be permitted to seek mediation, or file an enforcement motion as permitted below in this Section, without first having provided the relevant Defendant with a Notice of Breach and time to cure or provide justification for any failure to cure. Requests for extensions of time in this regard shall not be unreasonably denied.

- b. Magistrate Judge Nonbinding Mediation. In the event that a Notice of Breach cannot be resolved informally, counsel for the Parties may notify the District Court of the dispute, in which case the Court will appoint a Magistrate Judge to mediate the dispute. The Parties agree to make a good faith effort to resolve any dispute through mediation. For purposes of nonbinding mediation, alleged violations of the technical website standards required under the Final Settlement Agreement shall only be deemed a breach of the Agreement if they significantly interfere with the practical ability of a Blind individual to use DMV’s or SBOE’s Websites. Minimal or isolated temporary failures to comply with the Agreement’s terms will not, without more, constitute a breach of the Agreement. The standard for breach shall not impose requirements on Defendants greater than those established under Title II of the ADA and Section 504 of the Rehabilitation Act.

Adjudication of Disputes Unresolved by Mediation. If the dispute has not been resolved through mediation in conformity with the Final Settlement Agreement within seventy-five (75) days of such appointment of a Magistrate Judge, Plaintiffs may file a motion with the Court seeking specific performance of the Final Settlement Agreement, or an extension of the duration of the Agreement by up to one additional year with regard to the relevant Defendant consistent with the provisions of Paragraph 28(d).

- c. It shall be Plaintiffs’ burden in making such a motion to demonstrate there has been a breach of the Final Settlement Agreement and/or substantial noncompliance. For purposes of Court enforcement, alleged violations of the technical website standards required under the Final Settlement Agreement

shall only be deemed a breach of the agreement if they significantly interfere with the practical ability of a Blind individual to use DMV's or SBOE's Websites. Minimal or isolated temporary failures to comply with the Agreement's terms will not, without more, constitute a breach of the Agreement. The standard for breach shall not impose requirements on Defendants greater than those established under Title II of the ADA and Section 504 of the Rehabilitation Act.

- d. Substantial Non-Compliance Proven. In the event the Court finds that SBOE or DMV have not substantially complied with the Final Settlement Agreement in accordance with the standard provided in the definitions section of this Agreement, the Court shall have the power to order specific performance of the Agreement, including ordering that the duration of the Final Settlement Agreement be extended for one additional year for the substantially non-compliant Defendant(s). In a remedial order directing specific performance, Plaintiffs shall not seek, and the Court shall not impose, any additional or different terms from those set forth in the Final Settlement Agreement provided, however, the Court may set new deadlines for specific performance consistent with Paragraph 30. Should the relevant Defendant(s) fail to comply with an order of the Court directing specific performance, nothing in the Final Settlement Agreement shall prevent Plaintiffs' counsel from making a motion seeking a finding of contempt, which motion may be granted or denied in accordance with controlling standards for such a finding. Any contempt finding shall be without prejudice to Defendants' rights of appellate review of such a finding as a final order under 28 U.S.C. § 1291.

29. Defendants agree to pay Plaintiffs reasonable attorneys' fees and costs for their work in connection with pursuing a motion to enforce the terms of this Agreement that is ultimately successful. The Court may award Plaintiffs reasonable attorneys' fees and costs consistent with this Paragraph, with the amount of such fees to be determined in accordance with the method for calculating reasonable attorneys' fees and costs pursuant to the Rehabilitation Act or any other applicable statute. Plaintiffs' agreement that they are not a prevailing party shall not act as a bar to such an application. Defendants will retain all rights to challenge the amount of such fees and costs.

XVI. TERM OF AGREEMENT

30. The term of the Final Settlement Agreement will be thirty-six (36) months, unless thirty (30) days prior to the end of this term, Plaintiffs have proven that either SBOE or DMV has not substantially complied with the Final Settlement Agreement during the final twelve (12) months of the agreement, in which case the term may be extended for one (1) year for the non-compliant Defendant(s). For the avoidance of doubt, there may be no more than a single one-year extension of the term of this Agreement unless the Parties agree to such an extension in writing.

XVII. CHANGE IN LAW

31. In the event of any change in any federal state or local law, statute, ordinance, rule or regulation that Defendants believe amends, changes or voids their responsibilities or makes those responsibilities not feasible within the terms of the Final Settlement Agreement, Defendants shall so notify Plaintiffs in writing and all Parties shall attempt to come to an agreement as to any modifications of the Final Settlement Agreement that are warranted by any such changes in federal, state or local law statute, ordinance, rule or regulation. If no resolution is reached within thirty (30) days following the written notice, Defendants may move this Court for an order for all appropriate relief pursuant to any applicable rule or procedure. Plaintiffs reserve their right to oppose such a motion filed by Defendants.

XVIII. ATTORNEYS' FEES AND COSTS

32. In full consideration of Plaintiffs' execution of this Settlement Agreement, Plaintiffs' agreement to be bound by its terms, and the undertakings as set forth herein, including the dismissal of the Action with prejudice and the agreement that neither party shall be deemed a prevailing party, and other good and valuable consideration, the sufficiency of which is hereby acknowledged, the State of New York agrees to pay Plaintiffs' attorneys' fees and costs in the aggregate amount of \$965,000, for which an I.R.S. Forms 1099 shall be issued, in full and complete satisfaction of any and all claims for attorneys' fees, costs, disbursements and expenses incurred by Plaintiffs for any and all counsel who have at any time represented Plaintiffs in the Action as well as in connection with any other proceeding, administrative, judicial or otherwise, and any other claim or action alleging any of the acts, transactions, occurrences or omissions asserted in the Action brought by Plaintiffs. The payment referred to in this Paragraph shall be made payable by check and delivered to Disability Rights Advocates, 655 Third Avenue, 14th Floor, New York, NY 10017.

33. **State Approval of Payments.** The payment referenced in Paragraph 32 above is subject to the approval of all appropriate state officials in accordance with Section 17 of the New York Public Officers Law. Plaintiffs and their attorneys agree to execute and deliver all necessary or appropriate vouchers and other documents requested with respect to such payments. In the event such approval is denied, counsel for Defendants shall so notify counsel for Plaintiffs within five (5) business days of the disapproval. In the event of such disapproval, Plaintiffs shall have ninety (90) days from such notice within which to make a motion to the Court seeking attorneys' fees, costs, and disbursements from Defendants.

34. **Accrual of Interest.** In the event that the payments referenced in Paragraph 32 of this Final Settlement Agreement have not been made by the hundredth day after receipt by the Office of the Attorney General of a "So Ordered" copy of this Agreement, endorsed by a judge and entered into the record by the clerk of the court, and subject to the Plaintiffs' prompt execution and delivery to counsel for the Defendants of all necessary and appropriate documentation required under Paragraph 33 of this Agreement, interest shall accrue on the outstanding principal balance at the statutory rate pursuant to 28 U.S.C. § 1961, beginning on the one-hundred-and-first day after receipt by the Office of the

Attorney General of the fully-executed So-ordered Agreement.

35. **Liability for Taxes.** Plaintiffs and Plaintiffs' attorneys agree that any taxes on the payments, and/or interest or penalties on taxes on the payments referenced in Paragraph 32 shall be their sole and complete responsibility. Plaintiffs and their attorneys shall have no claim, right, or cause of action against Defendants, the State of New York (including but not limited to any and all agencies, departments, or subdivisions thereof) or any of their officials, employees, or agents, whether in their individual or official capacities, on account of such taxes, interest or penalties. Plaintiffs agree that they will defend, indemnify and hold harmless Defendants, the State of New York (including but not limited to any and all agencies, departments, or subdivisions thereof), and any of their officials, employees, or agents, whether in their individual or official capacities, for the satisfaction of any such taxes, interest, or penalties.
36. **Waiver of Attorneys' Lien.** The undersigned attorneys for Plaintiffs do hereby release and waive any attorneys' lien they may have on the settlement proceeds in the Action pursuant to N.Y. Judiciary Law §§ 475 and 475-a or any other state or federal law, statute, contract, or otherwise.
37. **No Other Attorney.** Plaintiffs represent and warrant that besides the undersigned attorneys for Plaintiffs, there are no other attorneys that have a lien on the settlement proceeds in the Action pursuant to the provisions of N.Y. Judiciary Law §§ 475 and 475-a or any other state or federal law, statute, contract, or otherwise for services rendered to Plaintiffs in the Action.
38. **Other Liens.** Plaintiffs and Plaintiffs' undersigned attorneys agree that neither Defendants, the State of New York (including, but not limited to, any and all agencies, departments, and subdivisions thereof), nor any of their officials, employees or agents, whether in their individual or official capacities, shall be responsible for any liens, setoffs, or claims of any kind, whether known or unknown, that may attach to the payments set forth in this Final Settlement Agreement. Plaintiffs and Plaintiffs' attorneys shall have no claim, right, or cause of action against Defendants, the State of New York (including, but not limited to, any and all agencies, departments and subdivisions thereof), and any of their officials, employees or agents, whether in their individual or official capacities, on account of such liens, setoffs, or claims.
39. **NFB.** Defendants collectively will pay the NFB up to \$15,000 each year, in the aggregate, for the term of the Final Settlement Agreement to compensate the NFB for its work monitoring both Defendants' compliance with the Final Settlement Agreement. The NFB will provide Defendants with an annual invoice for its work monitoring the Agreement, which shall be based on NFB employees' hourly rates. The Parties shall agree, if Defendants so request, that such invoice include hourly figures such that the hours spent on monitoring for each Defendant is separately indicated. Defendants shall compensate the NFB for the fees actually incurred monitoring, which may be less than, but no greater than, the aggregate amount of \$15,000 per year.

XIX. RELEASES AND COVENANT NOT TO SUE NEW YORK STATE

40. Plaintiffs, on behalf of themselves, their heirs, executors, administrators, successors and assigns (the “Releasing Parties”) hereby release and forever discharge Defendants and New York State and all of their present and former principals, officers, directors, members, trustees, affiliates, employees, agents, attorneys, insurers, subdivisions, subsidiaries, heirs, administrators and assigns (collectively, “the Released Parties”), from all manner of actions, injuries, proceedings, causes of action, grievances, suits, debts, obligations, dues, sums of money, accounts, contracts, controversies, agreements, promises, damages, judgments, claims, and demands whatsoever, direct or indirect, known or unknown, discovered or undiscovered, that the Releasing Parties ever had, now have, or shall or may have in the future against some, any or all of the Released Parties for or by reason of any act, transaction, occurrence, omission, cause, matter or thing whatsoever related to the accessibility of the Websites to Blind persons up to and including the end of the term of the Final Settlement Agreement, including, but not limited to, any and all claims regarding or arising out of the acts, transactions, occurrences or omissions that are described, alleged or contained in the Third Amended Complaint in this Action.
41. In no instance during the term of the Final Settlement Agreement shall Plaintiffs file any new lawsuit relating to the accessibility to Blind persons of any aspect of the Websites. Plaintiffs agree not to sue the Released Parties on any and all manner of actions, injuries, proceedings, causes of action, grievances, suits, debts, obligations, dues, sums of money, accounts, contracts, controversies, agreements, promises, damages, judgments, claims, and demands whatsoever, direct or indirect, known or unknown, discovered or undiscovered, that the Releasing Parties ever had, now have, or shall or may have in the future against some, any or all of the Released Parties for or by reason of any act, transaction, occurrence, omission, cause, matter or thing whatsoever related to the accessibility of the Websites to Blind persons up to and including the end of the term of the Final Settlement Agreement, including, but not limited to, any and all claims regarding or arising out of the acts, transactions, occurrences or omissions that are described, alleged or contained in the Third Amended Complaint in this Action. Plaintiffs CIDNY and NFB, and their counsel in this litigation, agree not to encourage or support NFB and CIDNY’s members/constituents and/or Blind persons who participate in their programs who may seek to file such a lawsuit during the Final Settlement Agreement’s term.

XX. DEADLINES AND UNFORESEEN DELAY

42. The timeframes included in Section IV above memorialize the projected timetable for implementation reflected throughout the Final Settlement Agreement. In the event an unforeseen circumstance occurs that causes Defendants to fail to timely fulfill any material requirement of the Final Settlement Agreement, Defendants shall notify Plaintiffs’ counsel in writing within thirty (30) days after Defendants become aware of the unforeseen circumstance, its anticipated impact on Defendants’ ability to perform the material terms of the Final Settlement Agreement and the measures taken to prevent or minimize the failure, and, as appropriate, a proposed new timeline for completion.

Requests by Defendants to amend deadlines due to unforeseen circumstances shall not be unreasonably withheld by Plaintiffs.

XXI. FUNDING / UNFORESEEN CIRCUMSTANCES

43. **Agreement Terms Contingent on Funding.** Defendants will use their best efforts to seek approval of the funding necessary to implement activities described in Sections IV-XIV of this Agreement, including seeking sufficient spending authority in the Executive budget appropriation bills to be submitted to the New York State Legislature in each fiscal year for the term of the Agreement.
44. **Obligations if Funding Not Appropriated or Unforeseen Circumstances Arise.** If at any time Defendants believe that they cannot fully implement one or more of the material provisions of this Agreement in light of either (a) the Legislature's failure to provide adequate funding for one or more of the Sections enumerated above and/or (b) unforeseen circumstances, such as a legislative change, Defendants shall promptly notify Plaintiffs in writing, and the Parties shall meet and confer to discuss whether the affected terms can nevertheless be implemented with modifications agreed upon by the Parties. Plaintiffs shall not unreasonably deny a modification. If an agreement is reached, the Parties shall modify this Agreement accordingly in writing. If an agreement is not reached, the issue will be resolved by application to the Magistrate and then the Court, using the dispute resolution process in Section XV above. In connection with the resolution of any such dispute, as long as DMV or SBOE, as relevant, can establish that it used its best efforts to seek adequate funding or to otherwise respond to the applicable unforeseen circumstance, the Magistrate and Court shall not order DMV or SBOE to take any measures that would impose an undue burden or fundamental alteration, which shall be DMV or SBOE's burden to prove, consistent with applicable law governing the defenses of undue burden and fundamental alteration.

XXII. NO ADMISSIONS OR PRECEDENTIAL EFFECT

45. Nothing in this Agreement, or the actions taken pursuant to this Agreement, shall be construed as an admission or acknowledgment by any of the Defendants of liability or wrongdoing, or of the violation of any right or obligation contained in the statutes, regulations, Constitutions or other applicable law of the United States or the State of New York. Neither Plaintiffs nor Defendants shall be deemed a prevailing party in this action. This Agreement shall not be used in any administrative or judicial proceeding, with the exception of an action or proceeding relating to its enforcement, as explicitly provided for in this Agreement. In addition, this Agreement shall not bind or collaterally estop Defendants or the State of New York (including, but not limited to, any and all agencies, departments, and subdivisions thereof, or any of their officials, employees, or agents, whether in their individual or official capacities) from raising any and all claims and advancing any and all defenses in any pending or future actions or proceedings in which the same or similar legal issues as raised in this Action are raised. Nothing contained in this Agreement shall be deemed to constitute a policy, practice, or custom of Defendants or of New York State (including, but not limited to, any and all agencies, departments,

and subdivisions thereof), and their officials, employees, or agents, whether in their individual or official capacities, except as expressly provided in Paragraph 17 of this Agreement.

46. **No Third-Party Beneficiaries.** No person or entity other than the parties hereto (a “third party”) is intended to be a third-party beneficiary of the provisions of this Agreement for purposes of any civil, criminal, or administrative action, and accordingly, no such third party may assert any claim or right as a beneficiary or protected class under this Agreement. This Agreement is not intended to impair or expand the rights of any third party to seek relief against the State, any County, or their officials, employees, or agents for their conduct; accordingly, this Agreement does not alter legal standards governing any such claims, including those under New York law.

XXIII. ENTIRE AGREEMENT / MODIFICATION PROVISIONS

47. This Agreement embodies the entire agreement of the Parties in this matter, and no oral agreement entered into at any time nor any written agreement entered into prior to the execution of this Agreement regarding the subject matter of the instant proceedings, shall be deemed to exist, or to bind the Parties hereto, or to vary the terms and conditions contained herein. Captions or Headings are included in this Agreement solely for convenience of reference, are not part of this Agreement, and shall not be used to limit or otherwise interpret the terms hereof.
48. No modification of this Final Settlement Agreement shall be effective unless approved in writing by all Parties. No provision of this Final Settlement Agreement may be severed unless such severance is approved in writing by all Parties.
49. If any non-material provision of this Final Settlement Agreement is held by a court of competent jurisdiction to be invalid or unenforceable, such holding shall not impair or invalidate the remainder of this Settlement Agreement and the effect thereof shall be confined to the provisions held unenforceable.
50. In the event the entire Final Settlement Agreement is invalid for any reason, or any material provision of that Agreement is found invalid, void, or unenforceable in whole or in part by a court of competent jurisdiction, or the Action is not dismissed upon the filing of the Final Settlement Agreement, the Final Settlement Agreement shall be null and void.

XXIV. NO ADJUDICATION ON THE MERITS / NO WAIVER OF SOVEREIGN IMMUNITY

51. The Final Settlement Agreement shall not constitute a consent decree or an adjudication on the merits. Neither this Agreement, nor any policies or procedures established thereunder, shall define any state or federal constitutional or statutory rights or be deemed an admission or a waiver of sovereign immunity or Eleventh Amendment protection. Nothing in this Agreement, or any practices or procedures established thereunder, shall be construed as a waiver of any rights or defenses in any other litigation. Moreover, none of

the Parties will contend that any of the provisions, practices, procedures, and goals stated in the Final Settlement Agreement create any private right of action against Defendants, the State of New York, its agents, employees or representatives except as expressly provided in the Agreement.

XXV. NOTICES

52. All notices under this Agreement shall be in writing and shall be sent by both U.S. Mail and electronic mail to the recipient or recipients at the address or addresses specified below. Notices to the Parties, and communications required, under this Agreement shall not be provided except through such counsel.

DMV:

Christine M. Legorius, Esq.
First Assistant Counsel
New York State Department of Motor Vehicles
Counsel's Office
Room 522A
6 Empire State Plaza
Albany, New York 12228

dmv.sm.legal@dmv.ny.gov

SBOE:

William J. McCann, Jr., Esq., Deputy Counsel
Brian L. Quail, Esq., Co-Counsel
New York State Board of Elections
40 North Pearl Street, Suite 5
Albany, NY 12207-2109

Brian.quail@elections.ny.gov
william.mccann@elections.ny.gov

Plaintiffs:

Monica Porter
Stuart Seaborn
Disability Rights Advocates
2001 Center Street, Fourth Floor
Berkeley, CA 94704
(510) 665-8644

mporter@dralegal.org
sseaborn@dralegal.org

Jessica P. Weber
Brown, Goldstein & Levy, LLP
120 E. Baltimore St., Suite 1700
Baltimore, MD 21202
(410) 962-1030
jweber@browngold.com

Susan Mizner
Claudia Center
American Civil Liberties Union Foundation
39 Drumm Street
San Francisco, CA 94111
(415) 343-0762
smizner@aclu.org
ccenter@aclu.org

XXVI. MISCELLANEOUS PROVISIONS


53. Rule 6 of the Federal Rules of Civil Procedure shall govern the computation of any time period specified by the Final Settlement Agreement unless expressly stated otherwise.
54. The Parties to the Final Settlement Agreement acknowledge that each party has cooperated in the drafting and preparation of this Agreement. The language in all parts of the Final Settlement Agreement shall be in all cases construed according to its fair meaning and not strictly for or against any party.
55. The Parties warrant and represent that the persons executing the Final Settlement Agreement are duly authorized to do so.
56. In this Final Settlement Agreement, SBOE does not make any representations, warranties, or undertakings as to any of the activities of DMV or content of the DMV Website. The Parties agree that any breach, default, or substantial noncompliance of DMV under the Final Settlement Agreement shall not affect the rights and obligations of SBOE and shall have no effect on the termination date of the agreement for SBOE.
57. In this Final Settlement Agreement, DMV does not make any representations, warranties, or undertakings as to any of the activities of SBOE or content of the SBOE Website. The Parties agree that any breach, default, or substantial noncompliance of SBOE under the Final Settlement Agreement shall not affect the rights and obligations of DMV and shall have no effect on the termination date of the agreement for DMV.
58. This Final Settlement Agreement will be construed in accordance with the laws of the State of New York.

59. Other than the action being settled, Plaintiffs and their counsel each represent and warrant that it has not commenced, maintained, or prosecuted any other action, charge, complaint, grievance, or proceeding of any kind against Defendants, the State of New York (including, but not limited to, any agencies, departments, and subdivisions thereof), and/or their officials, employees, or agents, whether in their individual or official capacities, on its own behalf and/or on behalf of any other person and/or on behalf of or as a member of any alleged class of persons, relating to the accessibility of the Websites to Blind persons, and that none of the foregoing is currently pending in any court or before any administrative or investigative body or agency, and acknowledges that this representation constitutes a material inducement for Defendants to enter into the Final Settlement Agreement.

60. This Agreement may be signed in counterparts; a faxed or PDF signature shall be treated as an original.

IN WITNESS WHEREOF, the Parties hereto, being duly authorized, have executed this Final Settlement Agreement:

FOR THE PLAINTIFFS:

 _____ Dated 2/13/2019

Monica Porter
Stuart Seaborn
Disability Rights Advocates
2001 Center Street, Fourth Floor
Berkeley, CA 94704
(510) 665-8644
mporter@dralegal.org
sseaborn@dralegal.org

Jessica P. Weber
Brown, Goldstein & Levy, LLP
120 E. Baltimore St., Suite 1700
Baltimore, MD 21202
(410) 962-1030
jweber@browngold.com

Susan Mizner
Claudia Center
American Civil Liberties Union Foundation
39 Drumm Street
San Francisco, CA 94111

(415) 343-0762
smizner@aclu.org
ccenter@aclu.org

FOR THE DEFENDANTS:

Noam Lerer

Dated:

2/12/19

Elizabeth A. Forman
Noam Lerer
Assistant Attorneys General
New York State Office of the Attorney General
28 Liberty Street
New York, New York 10005
(212) 416-8538

FOR DEFENDANT NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES, as to its obligations and agreement only:

Dated: _____

Gregory J. Kline,
Deputy Commissioner for Administration
New York State Department of Motor Vehicles
6 Empire State Plaza
Albany, New York 12228

FOR DEFENDANT NEW YORK STATE BOARD OF ELECTIONS, as to its obligations and agreement only:

Dated: _____

Dated: _____

Todd D. Valentine
Co-Executive Director
Robert A. Brehm
Co-Executive Director
New York State Board of Elections
40 North Pearl Street – Floor 5
Albany, New York 12207
(518) 474-6367

FOR THE DEFENDANTS:

_____ Dated: _____

Elizabeth A. Forman
Noam Lerer
Assistant Attorneys General
New York State Office of the Attorney General
28 Liberty Street
New York, New York 10005
(212) 416-8538

FOR DEFENDANT NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES, as to its obligations and agreement only:



_____ Dated: 2/12/2019

Gregory J. Kline,
Deputy Commissioner for Administration
New York State Department of Motor Vehicles
6 Empire State Plaza
Albany, New York 12228

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Todd D. Valentine
Co-Executive Director
Robert A. Brehm
Co-Executive Director
New York State Board of Elections
40 North Pearl Street – Floor 5
Albany, New York 12207
(518) 474-6367

FOR THE DEFENDANTS:

_____ Dated: _____
Elizabeth A. Forman
Noam Lerer
Assistant Attorneys General
New York State Office of the Attorney General
28 Liberty Street
New York, New York 10005
(212) 416-8538

FOR DEFENDANT NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES, as to its obligations and agreement only:

_____ Dated: _____
Gregory J. Kline,
Deputy Commissioner for Administration
New York State Department of Motor Vehicles
6 Empire State Plaza
Albany, New York 12228

FOR DEFENDANT NEW YORK STATE BOARD OF ELECTIONS, as to its obligations and agreement only:

 _____ Dated: 2-11-2019

 _____ Dated: 2/11/19

Todd D. Valentine
Co-Executive Director
Robert A. Brehm
Co-Executive Director
New York State Board of Elections
40 North Pearl Street – Floor 5
Albany, New York 12207
(518) 474-6367

SO ORDERED:



J. PAUL OETKEN
United States District Judge

Dated: February 15, 2019