12-4412-cv

To Be Argued By:
Stuart Seaborn

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellees,

v.

BOARD OF ELECTIONS IN THE CITY OF NEW YORK, JULIA DENT, in her official capacity as President of the BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York (New York City)

BRIEF FOR PLAINTIFFS-APPELLEES

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I. INTRODUCTION

Defendants' appeal fails because it ignores the overwhelming evidence, uncontroverted by Defendants, that the Board of Elections of the City of New York (the "BOE") violates Title II of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act of 1973 by failing to eliminate accessibility barriers at its poll sites on Election Day year after year. These barriers deny voters with mobility and vision impairments meaningful access to the BOE's voting program.

The undisputed evidence of such barriers at Defendants' poll-sites on Election Day includes:

- Statistically significant surveys from the last General Election[1] demonstrating one or more significant physical access barriers at eighty-four percent (84%) of poll sites surveyed in New York City.

- Data from prior surveys demonstrating that more than seventy percent (70%) of poll sites surveyed in each election from 2008 through 2011 contained one or more such barriers.

- Undisputed fact witness testimony from poll-site accessibility surveyors and voters with disabilities documenting barriers they observed or experienced in each of the last five elections. These barriers include dangerously steep or missing ramps, locked or heavy

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[1] The surveys reflect barriers at poll sites in New York City during the November 2011 General Election, which was the last General Election prior to the District Court's August 8, 2012 Order finding Defendants liable for violating Title II of the ADA and Section 504.

doors at accessible entrances, and improper placement of equipment and furniture leading to blocked pathways.

- Defendants' own "call incident" logs documenting barriers at their poll sites on Election Day.

- Defendants' admissions that the BOE has failed to remedy accessibility barriers at its poll sites on Election Day, even after receiving notice of such barriers.

- Defendants' admission in their instructional materials reaffirming that year after year, the Center for Independence of the Disabled, New York (CIDNY) finds barriers at their poll sites on Election Day.

These barriers are not mere technical violations. Instead, they impact the ability of voters who have vision or mobility disabilities to cast a ballot at their designated poll sites and likely contribute to the documented lower turnout of voters with disabilities on Election Day.

In light of such overwhelming evidence of widespread and pervasive barriers at Defendants' poll sites year after year and Defendants' failure produce any evidence to the contrary, there is no legal or factual basis to vacate the decision of the District Court. Indeed, Defendants admit that, despite having received notice of barriers at their poll sites and copies of CIDNY's survey data since 2003, they have yet to complete any comprehensive survey of poll-site accessibility in New York City. Defendants have provided literally nothing to the Court that even purports to be a comprehensive survey.

Even after Plaintiffs filed this lawsuit in 2010, Defendants took a head-in-the-sand approach. Defendants continued to have no ADA coordinator or any other staff person tasked with overseeing the accessibility of BOE poll sites. Nor did they prepare an ADA transition plan, despite being required to do so by the implementing regulations. Defendants produced no admissible evidence that they have identified even a single alternate, accessible poll site to replace sites deemed to be inaccessible, nor any evidence documenting what sites, if any, they have investigated as alternate, accessible poll sites. In fact, Defendants' own documents demonstrate that, even when they have identified barriers at their poll sites, they continue to use those locations as poll sites in subsequent elections.

Rather than present any admissible evidence refuting Plaintiffs' showing of the widespread inaccessibility of the BOE's poll sites, Defendants argue points of law that are incorrect and entirely unsupported. Akin to blaming the victim, Defendants argue that unless voters with disabilities somehow manage to identify and report barriers Defendants fail to prevent at City poll sites on Election Day, Defendants have no duty to remedy such barriers. This argument ignores the well-established standards for claims involving poll-site accessibility under Title II of the ADA and Section 504. To prevail, Plaintiffs need to only show that Defendants have failed to comply with their affirmative obligation to ensure that their poll

sites are accessible so that voters with disabilities are able to vote in-person at their designated poll sites on Election Day. The widespread evidence of unremedied barriers facing voters with mobility and vision impairments at poll sites throughout the City on Election Day more than satisfies Plaintiffs' burden.

Faced with the copious amount of evidence submitted by Plaintiffs and Defendants' contrasting lack of evidence, the District Court had no choice but to grant summary judgment for Plaintiffs on Defendants' liability under Title II of the ADA and Section 504.

The District Court then gave Defendants multiple opportunities and nearly two months to develop their own comprehensive remedial plan to remedy the barriers at their poll sites. Defendants failed to do so. The District Court even gave Defendants a chance to test possible remedies during the September 2012 Primary Election, informing Defendants in advance which 35 of the BOE's approximately 1,300 poll sites would be reviewed during the primary to assess their accessibility. Despite such advance warning, the BOE failed this test -- the BOE's own records documented accessibility barriers at the majority of the sites reviewed.

Finally, after considering input from both parties and the Department of Justice ("DOJ") at a series of hearings on possible remedial solutions, the District Court ordered a comprehensive remedial plan based on techniques

proven to be effective at remedying poll-site barriers in other large cities with older, urban centers such as Philadelphia.

The District Court's remedial plan is therefore an appropriate use of its discretion and necessary to ensure that voters with vision and mobility impairments will be able to vote in-person at poll sites in New York City in future elections.

II. THE PRESENT POSTURE OF THE CASE

Defendants did not seek a stay of the District Court's Order granting injunctive relief, and the parties are nearly ten months into its implementation, making Defendants' appeal of the injunction largely moot. Defendants have completed the short-term relief the Court ordered, including contracting with CIDNY to provide poll-site accessibility training to BOE staff and appointing poll-site accessibility coordinators at each poll site on Election Day. Magistrate Pitman has already appointed a third-party accessibility expert, who has begun to visit BOE poll sites and provide recommendations as contemplated by the Order. Stopping this process mid-stream, after significant time and expense has already been expended, is illogical and would only serve to deprive voters with disabilities the benefits of the Court's long-term plan to improve poll-site accessibility in New York City.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in determining that there was no genuine issue of material fact that the Board of Elections in the City of New York failed to provide voters with mobility and vision disabilities meaningful access to its voting program as required by the Americans with Disabilities Act and the Rehabilitation Act.

2. Whether the District Court abused its discretion in directing the Board of Elections to comply with a plan to remedy its widespread failure to provide voters with mobility and vision impairments meaningful access to its poll sites on Election Day.

IV. STATEMENT OF RELEVANT FACTS

A. Defendants Do Not Dispute the Widespread Inaccessibility of Poll Sites Throughout New York City.

The material facts in this case – the existence of widespread access barriers at poll sites throughout the BOE's voting program – are not in dispute. The BOE admits that more than 30% of its approximately 1,300 poll sites are not ADA-compliant prior to each election. (A1436).[2] The

[2] Numbers in parentheses preceded by "A" refer to pages of the Joint Appendix. Numbers in parentheses preceded by "SPA" refer to the Special Appendix. Numbers in parentheses preceded by "SA" refer to the Supplemental Appendix.

undisputed survey data demonstrates that the situation is much worse on Election Day, itself. Over 70% of the poll sites surveyed from 2008 through 2011 contained one or more significant barriers to access for voters with mobility and vision impairments. (A88 ¶ 27; A1412 ¶ 27). The BOE also admits that it is aware that poll sites contain dangerous and non-compliant barriers yet continues to use such sites in subsequent elections. (A94 ¶¶ 57-61; A1424 ¶ 57-61; A1158-1159).

1. Uncontroverted Survey Data Demonstrates Widespread Accessibility Barriers at BOE Poll Sites Year After Year.

Since 2003, CIDNY, the entity authorized by the State of New York to train and certify poll-site accessibility surveyors, has conducted inspections of the poll sites under the BOE's jurisdiction on Election Day. (A84-85 ¶¶ 5, 9, 12; A1405-06 ¶ 5). CIDNY trains its surveyors on the United States Department of Justice's (DOJ) poll-site accessibility guidelines, and the surveyors utilize survey forms based on those guidelines to assess the BOE's poll-sites on Election Day. (A86 ¶¶ 11-12; A87 ¶¶ 16-18; A1407 ¶ 11-12; A1408-09 ¶ 16-18).

CIDNY's survey results are staggering. For example, during the 2011 General Election, eighty-four percent (84%) of poll sites survey contained at least one significant access barrier for voters with mobility and vision impairments. (A329 ¶ 55). Of the 55 poll sites surveyed, 17 poll sites had

barriers relating to missing or misplaced exterior signage, making it significantly more difficult for voters with mobility impairments to locate accessible entrances at their designated poll sites. (A89 ¶ 33; A90 ¶ 37; A91 ¶ 45; A92 ¶ 51; A941 ¶ 11; A1413 ¶ 33; A1415 ¶ 37; A1418 ¶ 45; A1421 ¶ 51). Nine poll sites had barriers relating to ramps at accessible entrances, including ramps that were too steep, ramps that lacked proper handrails, and ramps that were nothing more than a piece of wood, making it dangerous for voters with mobility disabilities to enter their poll sites. (A89 ¶ 33; A90 ¶ 36; A93 ¶¶ 53-54; A94 ¶¶ 59-60; A941 ¶ 12, A1413 ¶ 33; A1414-15 ¶ 36; A1422 ¶¶ 53-54; A1424 ¶¶ 59-60). Eighteen poll sites had barriers relating to entryways or accessible pathways, preventing voters with vision and mobility disabilities from being able to enter their poll sites. (A89 ¶ 33; A91 ¶¶ 41, 44, 46; A92-93 ¶¶ 49-51; A941 ¶ 13; A1413 ¶ 33; A1417-19 ¶¶ 41, 44, 46; A1420-21 ¶¶ 49-51). Thirty-nine poll sites had barriers concerning the accessibility of the interior space, such as pathways being too narrow for wheelchair users and accessible voting machines being configured in ways that blocked voters with mobility disabilities from accessing them. (A89 ¶ 33; A90 ¶¶ 38-39; A91 ¶¶ 40, 42; A92 ¶¶ 47-48; A93 ¶¶ 53, 55; A94 ¶ 56; A941-42 ¶ 14; A1413 ¶ 33; A1415-17 ¶¶ 38-40, 42; A1419-20 ¶¶ 47-48; A1422 ¶ 53; A1423 ¶¶ 55-56).

The disenfranchising effect of such barriers is profound. As Rima

McCoy, former Voting Rights Coordinator for CIDNY, explained:

> "[w]hat appears to be a small barrier to the untrained eye, may actually be prohibitively embarrassing, uncomfortable, or arduous for a person with a disability to overcome. For example, where there is no signage to an accessible entrance, a person in a wheelchair may find themselves stranded and wandering down back alleys, searching for an accessible way inside. If there is rain, the situation is uncomfortable. If it is night time, this may not be safe. If the person's disability causes them to be fatigued quickly, this may be arduous at best. When a person is forced to cast a ballot on the sidewalk, it is humiliating and deeply alienating. These barriers not only impede access in the moment someone is voting, but also cast a chill on people with disabilities' willingness to participate in future elections and confront the same kind of discrimination and humiliating treatment." (A320 ¶ 19).

2. The Undisputed Testimony of Individual Surveyors and Voters with Disabilities Overwhelmingly Confirms the Widespread Presence of Barriers That Prevent Persons with Mobility and Vision Disabilities from Voting In-Person at the BOE's Poll Sites.

In addition to survey data, individual surveyors and voters with disabilities provided undisputed, first-hand observations of barriers they observed at the BOE's poll sites. The following are just a few examples of significant access barriers observed on Election Day:

During the November 2011 General Election, Ramon Santos, a surveyor for CIDNY who uses a wheelchair, found the ramp at Taiwan Center in Queens to be extremely steep without level landings or handrails. The door to the accessible entrance was also closed and heavy. Mr. Santos "had a difficult time opening the door while balancing [himself] on the

ramp" and found "[t]he steepness of the ramp and lack of landing makes it dangerous for a wheelchair user to enter the center because there is the risk of rolling backwards" into a very busy street. (A93 ¶ 54; A859 ¶ 8; A1422 ¶ 54).

During the September 2010 Primary Election, Mr. Santos experienced a similarly dangerous ramp while surveying poll sites at VFW Post 2477 in Queens. He observed that the ramp was actually "two ramps put together" and that it was dangerously steep. Ramon described his experience as follows: "I have to stress that this ramp is dangerous. I almost flipped backward. I did flip but I held on in time and people came to grab here." (A96 ¶ 68; A929-932; A1427-28 ¶ 68).

Rima McCoy observed the following barriers while surveying poll sites for CIDNY in the November 2011, September 2010, and November 2010 elections:

- At P.S. 51 in Queens, the ramp was too narrow and did not comply with DOJ guidelines. Furthermore, there was no sign at the inaccessible main entrance indicating the location of the accessible entrance, making it difficult, if not impossible, for voters to locate the accessible entrance. (A90 ¶¶ 35-37; A330 ¶ 57; A1414-15 ¶¶ 37).

- At P.S. 99 in Queens, the voting area was crowded and did not have the 36-inch pathway needed for wheelchair users in many places. The

ADA privacy booth was also placed in an inaccessible position. (A91 ¶ 40; A330 ¶ 59; A1416-17 ¶ 40).

- At P.S. 190 and P.S. 144, both in Queens, the doors to the entrances were closed and heavy. At P.S. 190, the automatic door opener did not work. (A91 ¶ 41; A1417 ¶ 41). At P.S. 144, there was no window on the door for the monitor to see if someone needed help and the site did not have any door bells. (A91 ¶ 44; A331 ¶ 62; A1418 ¶ 44).

- At P.S. 175 in Queens, there was only one accessible BMD machine, but it was placed three feet away from the wall, much too narrow a space for someone to access it. The site did not receive an ADA privacy booth. (A95 ¶ 65; A326 ¶ 45; A1426 ¶ 65).

- At P.S. 13 in Manhattan, there was no sign at the inaccessible main entrance to direct voters to the accessible entrance. The door to the accessible entrance was locked and the bell did not work. Once inside, there was no signage from the accessible entrance to direct voters to take the elevator up to the voting area. There was also no signage to inform voters of which floor the voting area was located on. Once inside the voting area, the placement of the ADA privacy booth made it inaccessible. (A95-96 ¶ 66; A1426-27 ¶ 66).

Denise McQuade is a voter who experienced access barriers during

the September 2010 election at her poll site located at P.S. 102 in Queens.[3] Ms. McQuade, who uses a wheelchair, attempted to enter the poll site at the accessible entrance but encountered an "extremely steep" ramp – "like a ski slope." (A728 ¶¶ 6-7). It appeared to be made of concrete and "was so steep . . . that [they] didn't believe this could be the accessible entrance." (A728 ¶ 7). Ms. McQuade was also very frightened to use the ramp because there was no landing at the top of the ramp "and this would make [it] impossible for [them] to exit safely without assistance." (A728 ¶ 8). Ms. McQuade had to rely on the assistance of her husband to go up the ramp and "[i]mmediately upon crossing the threshold of the entrance, [her] husband had to pull back on the handles of [her] wheelchair to keep [her] wheelchair from plunging down the ramp at break-neck speed." (*Id*.) When Ms. McQuade left the poll site, she asked a policeman to open the door because it would have been impossible for her husband to hold her wheelchair in place on the ramp and open the door. There was also no poll monitor at this door. (A728 ¶ 9). After this frightening experience, Ms. McQuade decided it would be safer for her to use an absentee ballot, though she prefers to vote alongside her neighbors and her community at her designated poll site.

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[3] Contrary to Defendants' assertion, Plaintiffs identified Ms. McQuade a number of times prior to the close of discovery and offered the BOE an opportunity to depose her. (A1490, A1493, A1529-30, A1538-40). Defendants rejected Plaintiffs' offer. (*See* A1496-98).

(A729 ¶¶ 10-12; A1428-30 ¶¶ 69-74).

Paula Wolff, President of Plaintiff Disabled in Action, also encountered access barriers at her assigned poll site, Selis Manor in Manhattan. (A723 ¶ 9). Around 90% of Selis Manor residents are blind and 10% are mobility impaired. (A723 ¶ 9). Though Selis Manor is required to have two Ballot Marking Device ("BMD") machines for voters with disabilities, during the November 2011 election, there was only one BMD machine and it was not working. (A723 ¶ 9). Despite calls by poll workers to the BOE regarding the malfunctioning machine, the BOE never responded. (A272; A280:9-18; A723 ¶ 9). As a result, voters with visual impairments had to tell poll workers who they were voting for, denying them a private, independent vote. (A723 ¶ 9). Similarly, during a prior election in 2010, Ms. Wolff observed voters with visual impairments encountering broken BMD machines and leaving without casting a ballot. (A285:6-21; A1444-46 ¶ 121).

3. Defendants Do Not Contest the Presence of Significant Access Barriers at Their Poll Sites on Election Day.

Defendants do not contest the existence of any of the barriers Plaintiffs identified at poll sites on Election Day.[4] In their 2011 Poll

[4] Rather than contest the presence of any of barriers identified at BOE poll sites, Defendants attempt to argue that the BOE was not on notice of certain

Workers Manual, Defendants admit that "[e]ach year CIDNY . . . finds large objects obstructing pathways at Poll Sites." (A180).

Indeed, Defendants' appellate brief reaffirms the presence of barriers at the following poll sites during the November 2011 General Election: P.S. 51 (narrow ramp), P.S. 175 (improper BMD placement denying a privacy for blind voters), P.S. 99 (pathway not wide enough for wheelchair users), P.S. 190 (heavy door without a door opener and improper BMD placement), as well as barriers at Los Tres Unidos HUD residence in Manhattan, P.S. 19 in Queens, P.S. 127 in Queens, the Taiwan Center in Queens, and Flushing House in Queens. Appellants' Brief at 7-9.

Defendants' appellate brief also reaffirms the presence of barriers at P.S. 146 (steep ramp) and Sarasota Gold (improper BMD placement making it difficult for wheelchair users to access the machine) during the November 2010 General Election. Appellants' Brief at 10. Additionally, during the September 2010 Election, Defendants not only acknowledge that Ms. McQuade experienced an extremely steep ramp at P.S. 102, but also admit that, although the slope of the ramp was measured to be significantly steeper than what the ADA requires, P.S. 102 was again used as a polling place

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barriers and, in some cases, that Plaintiffs did not identify alternate accessible poll sites. As demonstrated in Sections VII.B.2-3, such arguments misstate the law and fail to refute Defendants' liability under Title II and Section 504.

during the November 2011 Election. Appellants' Brief at 10.

Though Defendants have not completed assessing their poll sites for accessibility, the limited assessments Defendants have done demonstrate significant and dangerous access barriers at poll sites the BOE continues to use on Election Day. For example, BOE staff identified poll sites at 1591 Metropolitan Store Room and 2051 St. Raymond's Avenue in the Bronx as having dangerous, non-ADA compliant ramps – yet that did not stop the BOE from using both of those locations as poll sites during the November 2011 General Election. (A187; A204; A215; A1423-24 ¶¶ 57-61; A1158-59). Furthermore, Defendants admit that two of their poll sites are fully inaccessible and that other unnamed sites within their jurisdiction do not fully meet accessibility standards. (A1230 ¶¶ 5-6).

4. Defendants' Failure to Remedy Accessibility Barriers at Their Poll Sites Even When They Receive Notice of Such Barriers Is Well Established.

Defendants' Call Incident Logs demonstrate that the BOE fails to adequately address many of the complaints it receives regarding access barriers that arise at poll sites on Election Day. For example:

- The Call Incident Logs from the November 2010 Election indicate that:
    - P.S. 196 in Queens was reported as "[n]ot handicap accessible," though the logs contain no indication that the BOE took any

action to address the concern. (A264; A1440-41 ¶ 105).

- P.S. 164 in Queens needed a ramp, and no action was taken to provide a ramp. (A265; A1441 ¶ 106).
- P.S. 153 in Manhattan was reported as "No ramps[,] only steps . . . No accessibility for Senior citizens" and again no action was taken in response to this complaint. (A263; A1441 ¶ 108).

- During the election on November 4, 2008, the logs note that:
  - P.S. 40 in Manhattan needed a ramp, platform, and handrails and that, "[t]he BOE did not have the equipment to accommodate site." (A269; A1442 ¶ 111).
- During the election on November 6, 2007, the logs note that:
  - At St. Francis Church in Brooklyn, "[r]amp is at site but not assembled, missing parts and no platform." The log entry states, ". . . spoke with Danny had no ramps available to send out." (A267; A1441-42 ¶ 109).
  - P.S. 40 in Manhattan needed a handrail for a ramp and that there were "[n]o more handrails" available to make that poll site accessible. (A268; A1442 ¶ 110).

The BOE Fleet Reports also demonstrate that Defendants have not addressed complaints about access barriers at poll sites in a timely manner, if at all. Though Selis Manor should have two BMD machines, the BOE Fleet

Reports indicate that a second call regarding the malfunctioning BMD machine came in at 2:46 p.m., that no one from the BOE was dispatched to repair the machine, and that the machine was never repaired. (A272; A1445 ¶ 119). In 2010, Selis Manor had similar access issues and Paula Wolff observed some voters leaving the poll site without voting -- saying they would come back later to see if the machine was working. (A106 ¶ 121; A1446 ¶ 121).

Testimony from fact witnesses further indicates that the BOE fails to respond to concerns about accessibility barriers at its poll sites on Election Day. Rima McCoy stated that, during the November 2011 election, poll workers informed her that the key to the BMD machine at P.S. 175 was never delivered, despite the fact that they had called the BOE more than once, starting at 6:15 in the morning, to notify the BOE about the missing key. (A330 ¶ 58). At P.S. 19, CIDNY surveyor Celine Perez observed that the accessible entrance doors were locked and that there was no poll site monitor available to let in voters with mobility disabilities. Ms. Perez spoke the to the poll worker, who informed her that he had called the BOE at around 7:00 a.m. to report the problem and that nothing had been done by the time CIDNY arrived at around 1:45 p.m. The poll worker noted that this had also been a problem in 2010. (A797 ¶ 9; A813).

Lastly, Defendants' email correspondence indicates that Rima McCoy

reported to Defendants the existence of poll-site barriers as well as possible replacement sites, but that Defendants ignored her suggestions. (A149:7-A150:14; A150:18-A151:19; A226; A1430-31 ¶¶ 76-77; A1443 ¶¶ 113-14).

B. Defendants' Policies Have Failed to Seriously Consider the Needs of Voters with Disabilities.

Despite Defendants' admission that they are the entity responsible for ensuring the accessibility of elections throughout New York City and the fact that Defendants receive federal funds to carry out this responsibility, Defendants have failed, at the most basic level, to maintain and implement policies that will ensure the accessibility of their poll sites. (A1404-05, ¶¶ 2-3). For instance, Defendants do not have an ADA coordinator or Section 504 coordinator as required by federal regulations, or any other individual working exclusively to ensure compliance with federal disability laws. (A1434-35 ¶¶ 84, 85, 87). Nor do Defendants have an accessibility transition plan or any other written plan to improve the accessibility of their poll sites, despite being required to do so as a public entity subject to Title II and Section 504. (A1434-35 ¶ 86).

Additionally, although Defendants have been on notice of barriers at BOE poll sites since 2003, Defendants have yet to complete their own accessibility surveys of the BOE's poll sites – and have presented no evidence of any poll-site accessibility surveys they have completed. (A1230

¶¶ 5-6). Defendants also failed to produce evidence of any investigations or assessments of alternate, accessible locations for poll sites. (A1229-43). Indeed, Defendants admit that they maintain no program to systemically look for alternate private or public voting sites to replace sites that are not accessible. (A133:8-134:16).

C. To the Extent Defendants Respond at All to Plaintiffs' Showing of Widespread Accessibility Barriers at BOE Poll Sites, Defendants Rely on Conclusory Assertions Rather Than Admissible Evidence.

Rather than presenting admissible evidence to refute their liability for failing to provide meaningful access to their voting program, Defendants rely on conclusory statements that are unsupported by the record and vague descriptions of work that they purport to have undertaken without underlying documents or other evidence supporting such descriptions. (SPA29-30). For example:

- The BOE claims that its surveyors have "surveyed the majority of poll sites in the City" and found that "[f]urther surveying has revealed other sites that do not fully meet the accessibility standards." (A1230 ¶¶ 5-6). But the BOE produced no documentation of such surveys or any descriptions of which poll sites the BOE has actually surveyed or any evidence of which poll sites currently meet accessibility standards and which do not. (*See* A1236 ¶ 7).

- The BOE claims that is "in the process [of] surveying the remaining poll sites." (A1230 ¶ 5). However, the BOE failed to submit any evidence or documentation of which sites have not been surveyed or the schedule for surveying remaining sites. (*See* A1236 ¶ 6).

- The BOE asserts that it is "currently searching for alternative solutions" to remedy the other sites the BOE has found that do not meet accessibility standards. (A1230 ¶ 6). However, the BOE produced no evidence indicating which poll sites it is referring to, what work has been done to search for alternative solutions, or any written plans to remedy specific barriers at these sites. (*See* A1236 ¶¶ 7-8).

- The BOE submits no evidence to support its claim that its AD Monitors actually visit poll sites twice a day to assess poll sites for accessibility as "expected." (A1232 ¶ 18; A1240 ¶ 6). In fact, the BOE's AD monitoring reports from the September 2010 election showed that the AD monitors did not visit a number of poll sites. (A289; A291-92; A294-95; A297-98; A300-01; A303-04; A306).

D. Defendants' Failure to Ensure the Accessibility of Their Poll Sites Affects Hundreds of Thousands of Voters with Disabilities in New York City.

According to the United States Census Bureau's 2010 American Community Survey, approximately 289,000 non-institutionalized New York

City residents ages 18 to 64 have vision or ambulatory disabilities. (A1097-98; A1449-50 ¶¶ 132-33). The same survey indicates that approximately 346,000 non-institutionalized New York City residents ages 65 and over have vision or ambulatory disabilities. (*Id.*) Even assuming only half of such individuals are registered voters, Defendants' system-wide failure to prevent and remedy barriers at poll sites in New York City affects and potentially disenfranchises over 300,000 voters.

This disenfranchising effect is particularly concerning as people with disabilities typically have lower levels of turnout for elections than people without disabilities. (A943 ¶ 17). For instance, the 2000 National Organization on Disability/Harris Survey found that voter registration is lower for people with disabilities than for people without disabilities (62% v. 78%, respectively). (*Id.*) Nationally recognized voting accessibility expert, Professor Michael Waterstone, concluded that barriers to accessibility at polling places contribute to this depressed turnout. (A944 ¶¶ 17-23, A946-A952).

Indeed, as discussed above, Denise McQuade, a long-time disability rights advocate, was discouraged from voting at her assigned poll site at P.S. 102 in New York City after encountering an extremely steep and dangerous ramp during the September 2010 election. (A728 ¶¶ 6-12). Ms. McQuade used an absentee ballot during the November 2011 election because of the

barriers she encountered and will continue to do so until the barriers are remedied at her polling place. (A729 ¶¶ 10-12).

E. Defendants Ignored the Multiple Opportunities the District Court Gave Them to Develop Their Own Comprehensive Remedial Plan.

The District Court gave Defendants numerous opportunities over the course of two months and three separate hearings on remedies to develop their own comprehensive remedial plan to address the long-standing and widespread barriers at poll sites throughout New York City. Despite these opportunities, Defendants simply failed to develop a comprehensive plan and left the District Court with no choice but to issue its own remedial order.

Following its August 8, 2012 Order finding Defendants liable under Title II of the ADA and Section 504, the Court issued a minute order requiring the parties to meet and confer regarding remedies and setting a hearing for August 27, 2012 to discuss possible relief, the first of three such hearings. (A1666). In the wake of this order, Plaintiffs consulted experts and CIDNY to identify potential solutions to remedy the accessibility barriers at the BOE's poll sites. (SA10:21-SA11:10). Plaintiffs then attempted to meet and confer with Defendants by telephone. (SA3:6-16). Plaintiffs also provided Defendants a proposed framework for remedial relief for Defendants' review. (*Id.*) Defendants provided little feedback on

these proposals and did not offer a remedial plan of their own. (SA3:6-SA4:13; SA11:11-SA12:6). Instead, at the August 27 hearing, Defendants mentioned a few vague solutions they claimed to be in the process of implementing, such as providing poll workers a revised Poll-Site Coordinator Journal, a measuring chain, and a sign with an accessibility directional arrow. (SA5:14-SA6:17; SA18:17-SA19:7; A1743-44). Defendants also mentioned plans for "tablet computer pilot program," which was untested and would monitor only 20 poll sites. (SA21:1-SA24:12).

At the end of the August 27 hearing, the Court again gave Defendants an opportunity to craft a proposed remedy and ordered the parties to meet and confer regarding possible short-term relief for the November 2012 General Election. (SA45:5-SA46:4). The Court scheduled a second hearing for September 10, 2012 to consider the parties' proposals and to determine whether a "more formal relationship imposed by the Court is the only alternative." (*Id.*) The Court also requested a list of BOE's poll sites that had contained accessibility barriers during elections in the last three years. (SA48:9-SA49:23; SA57:10-SA58:10). Prior to the September 10 hearing, Plaintiffs provided Defendants and the Court with detailed proposals regarding short and long-term relief, as well as a 109-page chart containing the poll-site data requested by the District Court. (SA48:9-SA49:23; SA51:25-SA52:24; SA57:10-SA58:10). Defendants, however, failed to

provide any of the poll-site information the Court requested or respond to either of Plaintiffs' proposals. (SA48:9-SA49:23; SA51:25-SA52:24).

During the September 10 hearing, Defendants repeated their proposal to simply use the revised Poll-Site Coordinator Journal, a sign with a directional arrow, and a 5-foot measuring chain, instead of creating a comprehensive plan. (SA68:12-SA73:25). Despite such minimal efforts by Defendants, the District Court again offered Defendants an opportunity to develop and test their own remedial solutions. This time the District Court ordered the parties to utilize Defendants' materials during the September 2012 Primary Election and report back regarding the status of approximately 35 of the poll sites previously determined to be the most problematic. (SA93:15-101:16).

Despite the fact the District Court gave Defendants notice of which 35 of Defendants' approximately 1,300 poll sites would be reviewed for accessibility during the September Primary -- the equivalent of a teacher telling students the exact day they will have a "pop" quiz -- Defendants failed to remedy poll-site accessibility barriers at the majority of the sites reviewed. Of the 35 poll-sites reviewed during the September 2012 primary, 18 contained at least one serious accessibility barrier for voters with mobility and vision impairments. (A2480-85). The BOE's own AD Monitoring Reports and ADA Journals demonstrated the existence of the following

access barriers during the September 2012 Primary Election, among others:

- Barriers involving locked or closed doors at the accessible entrance at the following poll sites: P.S. 27, P.S. 89, the Pelham Fritz Rec. Center, Baruch College Campus High School, P.S. 128, the Taiwan Center, P.S. 40, and P.S. 202 JHS. (*Id.*)
- Barriers involving missing or improperly installed temporary wheelchair ramps at the following poll-sites: Powell Jr. State Building and P.S. 40. (*Id.*)
- Barriers involving missing or inadequate signage to indicate the location of accessible entrances at the following poll-sites: P.S. 84, P.S. 296, P.S. 145, Village View Housing, P.S. 40, P.S. 43/P.S. 172, P.S. 128, P.S. 188, and I.S. 59. (*Id.*)
- Barriers involving poorly placed furniture, insufficient interior space, and poor placement of BMD machines blocking interior access for voters using wheelchairs at the following poll-sites: Tiemann Apartments, NYU Brittany Hall, P.S. 128, P.S. 40, P.S. 202 JHS, and the Taiwan Center. (*Id.*)

Furthermore, despite repeated attempts by poll workers to notify the BOE of barriers, many access barriers at BOE poll sites remained throughout the day. For example, the BOE's own AD monitoring reports

indicate that, at P.S. 40, the poll worker called the BOE at 5 a.m. and 8 a.m. regarding an accessible entrance that was not open. At 10 a.m., the entrance remained closed. (A2483-84).

In addition, as it has done in prior elections, CIDNY surveyed a sample of the BOE's poll sites during the September Primary. (A1692; A1677-78 ¶¶ 8-9). The results of CIDNY's survey are striking. Eighty-four percent (84%) of the poll sites CIDNY surveyed during the September Primary had one or more barriers to accessibility for voters with mobility impairments. (A1692). Thirty-two percent (32%) of sites surveyed had barriers involving missing or dangerous exterior ramps. (*Id.*) Forty-seven percent (47%) had access barriers at entryways or pathways. (*Id.*) Thirty-seven percent (37%) of sites surveyed had barriers involving inadequate exterior signage identifying accessible entrances. Finally, fifty-eight percent (58%) of sites surveyed had interior access barriers, such as inadequate turning/maneuvering space for wheelchair users. (*Id.*)

The photographs taken by CIDNY surveyors document the dangerous and significant barriers that impeded access during the 2012 Primary Election. For instance, photographs show a ladder completely blocking access to the wheelchair ramp at 265 Bergen Street in Brooklyn as well as the BMD machine placed at the top of a raised platform with no handrails for wheelchair users at the New York City Planning Department. (A1693-

94).

After the Primary Election and prior to the October 15 hearing, Plaintiffs and the DOJ submitted detailed proposals for a remedial plan that required the BOE to work with CIDNY to provide accessibility training to BOE staff before the November General Election and to work with a third-party accessibility expert to survey and provide recommendations for all of the BOE's poll sites in the long-term. (SA107:19-23). Defendants did not submit anything beyond the piecemeal proposals they had provided earlier. (*See* A1668-69).

During the hearing, the District Court discussed the failure of Defendants' proposed remedies to address the widespread accessibility problems at BOE poll sites and the remedial plans proposed by Plaintiffs and the DOJ. (SA108:12-SA112:20; SA120:17-SA122:9; SA134:23-SA136:10; SA145:18-SA146:1). The Court also gave Defendants an opportunity to object and provide comments. (*Id*.) The Court then ordered the parties and the DOJ to meet and confer to develop and propose a joint remedial plan for the Court to consider, stating that the Court was "giving [Defendants] an opportunity to talk with the Department of Justice, to talk with the Plaintiffs, to put in any specific concerns and things that you feel need to be changed." (SA151:15-152:6). The parties then met and conferred, exchanging comments on the proposal submitted by Plaintiffs and the DOJ. Following

these discussions, Plaintiffs and the DOJ submitted a revised plan for the Court's review, and the Court issued its remedial order on October 18, 2012. (SPA34-47).

Thus, prior to the District Court's Order regarding remedy, the Court gave Defendants numerous opportunities to create their own comprehensive remedial plan, but they only suggested piecemeal solutions, which proved to be ineffective during the Primary Election.

V. SUMMARY OF ARGUMENT

The District Court correctly found Defendants liable for failing to provide voters with mobility and vision disabilities meaningful access to Defendants' elections as required by Title II and Section 504. Plaintiffs provided evidence, which was both overwhelming and undisputed, of multiple accessibility barriers at BOE poll sites year after year on Election Day. This evidence more than satisfies the requirements of Title II of the ADA and Section 504, which impose liability where plaintiffs demonstrate that a public entity fails to ensure that its poll sites are accessible so voters with disabilities can vote in-person at their designated poll sites on Election Day. *See Westchester Disabled on the Move, Inc. v. County of Westchester*, 346 F. Supp. 2d 473, 477-78 (S.D.N.Y. 2004). Plaintiffs do not, as Defendants incorrectly assert, have to demonstrate that a disabled voter was completely unable to cast a ballot in an election or give Defendants notice

and an opportunity to cure any access barriers encountered on Election Day. Nor do Plaintiffs have the burden of identifying alternative, accessible poll sites to replace sites deemed to be inaccessible.

Furthermore, the District Court did not abuse its discretion in ordering a remedial plan to provide relief for the pervasive access barriers at BOE poll sites. Indeed, the Court erred on the side of caution, offering Defendants numerous opportunities to propose their own remedial plan. Defendants, however, repeatedly failed to propose a comprehensive plan and instead offered vague, piecemeal solutions that proved to be ineffective.

Therefore, the Court should affirm the District Court's August 8, 2012 Order finding Defendants liable for violating Title II and Section 504 and the District Court's October 18, 2012 Order regarding remedial relief.

VI. STANDARD OF REVIEW

A. The District Court's Order Finding Defendants Liable for Violating Title II of the ADA and Section 504

The Court of Appeals reviews *de novo* the district's court grant of summary judgment to determine whether there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *D'Amico v. City of New York*, 132 F.3d 145, 149 (2d. Cir. 1998). However, "the non-movant must establish the existence of a genuine issue of material fact for reversal on appeal." *Trans-Orient Marine Corporation v. Star*

Trading and Marine, Inc., 925 F.2d 566, 572 (2d. Cir. 1991). The party opposing summary judgment must present specific facts from evidence in the record and cannot rely on conclusory statements or mere contentions that the affidavits supporting the motion are not credible. *Yin Jing Gan v. City of New York*, 996 F.2d 522, 532 (2d. Cir. 1993). "'[M]ere conclusory allegations or denials'" in legal memoranda or oral argument are not evidence and cannot by themselves create a genuine issue of material fact where none would otherwise exist." *Lipton v. Nature Co*., 71 F.3d 464, 469 (2d. Cir. 1995) (quoting *SEC v. Research Automation Corp*., 585 F.2d 31, 33 (2d. Cir. 1978)).

B. The District Court's Issuance of an Order for Injunctive Relief

"The standard for reviewing the scope and type of injunctive relief issued by a district court is whether the relief amounts to an abuse of the court's equitable remedial discretion." *Eng v. Smith*, 849 F.2d 80, 82 (2d. Cir. 1988). The district courts have broad discretion in deciding whether to award injunctive relief. *See, e.g., Etuk v. Slattery*, 936 F.2d 1433, 1443 (2d. Cir.1991); *see also* 11 *Federal Practice & Procedure* § 2962, at 633 ("trial court has considerable discretion in determining whether the situation requires the issuance of ... a permanent injunction"). Specifically, where there is a history of legal violations before the district court, that court has

significant discretion to conclude that future violations of the same kind are likely. *See Henrietta D. v. Bloomberg*, 331 F.3d 261, 290 (2d. Cir. 2003); *Kapps v. Wing*, 404 F.3d 105, 112, 123 (2d. Cir. 2005) (court noted ample evidence of prior due process violations as rationale for upholding district court's injunctive relief order).

VII. THE DISTRICT COURT CORRECTLY FOUND NO GENUINE ISSUE OF MATERIAL FACT THAT DEFENDANTS FAILED TO PROVIDE MEANINGFUL ACCESS TO THEIR VOTING PROGRAM TO VOTERS WITH MOBILITY AND VISION IMPAIRMENTS

A. In Light of the Overwhelming Evidence Demonstrating Defendants' Failure to Ensure the Accessibility of Their Poll Sites, the District Court Had No Choice But to Find Defendants Liable Under Title II and Section 504.

1. Plaintiffs Need Only Show Defendants Fail to Make Their Poll Sites Accessible to Voters with Disabilities on Election Day to Establish a Violation of the ADA and Section 504.

Plaintiffs establish a violation of Title II and Section 504 by showing that (1) plaintiffs are "qualified individuals" with disabilities; (2) defendants are subject to the ADA; and 3) plaintiffs are denied the opportunity either to participate in or to benefit from defendants' services, programs or activities, or are otherwise discriminated against by defendants, by reason of plaintiffs' disabilities. *Henrietta D.*, 331 F.3d at 272; *see also Doe v. Pfrommer*, 148

F.3d 73, 82 (2d. Cir. 1998).[5]

It is undisputed that Plaintiffs are qualified individuals with disabilities and that the BOE is a public entity receiving federal funding under Title II and Section 504. (A1405 ¶ 3; A1450-52 ¶¶ 134-142). Therefore, the only remaining legal issue is whether Defendants deny voters with mobility and vision disabilities the opportunity to participate in or benefit from their services or otherwise discriminate on the basis of disability.

In the Second Circuit, a public entity discriminates on the basis of disability by failing to provide persons with disabilities meaningful access to its services, programs, or activities. *See Civic Association of the Deaf of New York City v. City of New York, et al.*, 2011 WL 5995182, *9 (S.D.N.Y. Nov. 29, 2011) (citing *Henrietta D.*, 331 F.3d at 275). In the context of voting, meaningful access means that a public entity must ensure that persons with disabilities are able to vote in-person at their designated poll sites. *Westchester Disabled on the Move*, 346 F. Supp. 2d at 477-78 ("Failing to ensure that disabled individuals are able to vote in-person and at their assigned polling places-presumably the most commonly used method of voting-could not reasonably be construed as consistent with providing

[5] For the purposes of Section 504, Plaintiffs must also establish that Defendants are recipients of federal funds. *Henrietta D.*, 331 F.3d at 272.

'meaningful access' to the voting process . . . ."); *Kerrigan, et al. v. Philadelphia Board of Election, et al*., 2008 WL 3562521, *18 (E.D. Pa. Aug. 14, 2008). Alternative methods of voting, such as an absentee ballot, are not sufficient. To provide meaningful access, public entities must eliminate barriers so that voters with disabilities can vote in-person at their designated poll sites. *Westchester Disabled on the Move*, 346 F. Supp. 2d at 477-478; *Kerrigan*, 2008 WL 3562521 at *17.

In determining whether people with disabilities are able to vote in-person at their designated poll sites, courts routinely look to surveys assessing poll-site accessibility conducted by independent living centers, such as CIDNY, and state agencies that utilize survey instruments based on the DOJ's guidelines. *New York v. County of Delaware*, 82 F. Supp. 2d 12, 14-18 (N.D.N.Y. 2000) (court relied on poll-site accessibility surveys conducted by the Catskill Center for Independence and the Office of the Attorney General to find that plaintiffs had a substantial likelihood of prevailing on the merits of their ADA Title II claims); *New York v. County of Schoharie*, 82 F. Supp. 2d 19, 21-25 (N.D.N.Y. 2000); *Westchester Disabled on the Move*, 346 F. Supp. 2d at 476-78.

Courts do not require plaintiffs to show that a person with a disability was actually denied the opportunity to cast a ballot in order to find liability. *See County of Delaware*, 82 F. Supp. 2d at 14-17 (plaintiffs had shown

irreparable harm though neither defendants nor attorney general had actually received any complaints about accessibility); *County of Schoharie*, 82 F. Supp. 2d at 19, 21-25; *Westchester Disabled on the Move*, 346 F. Supp. 2d at 477-78 (rejecting defendants' argument that voters are not irreparably harmed unless they are actually disenfranchised); *Kerrigan*, 2008 WL 3562521 at *17-18 (rejecting defendants' argument that the program of voting consists of only casting a ballot); *see also American Council of the Blind v. Paulson*, 463 F.Supp.2d 51, 59 (D.D.C. 2006) (aff'd at 525 F.3d 1256 (D.C. Cir. 2008) ("plaintiffs do not need to prove 'no access' to prevail" on a Section 504 claim); *Shotz v. Cates*, 256 F.3d 1077, 1080 (11th Cir. 2001) (a "violation of Title II . . . does not occur only when a disabled person is completely prevented from enjoying a service, program, or activity."). Indeed, Defendants have failed to cite a decision from any court in any jurisdiction that has ever required such a showing. (SPA21) ("This interpretation, which would demand that an individual was actually deprived of the right to cast a ballot, is overly broad and unsupported by any precedent.").

2. The Court's Finding of Liability Is Supported by Undisputed Evidence That Defendants Fail to Make Their Poll Sites Accessible to Voters with Disabilities on Election Day.

Plaintiffs provided copious amounts of uncontroverted evidence of

Defendants' failure to provide meaningful access for voters with mobility and vision disabilities to their poll sites on Election Day. CIDNY's statistically significant surveys demonstrated widespread access barriers at BOE's poll sites year after year. During the November 2011 Election, 46 of the 66 poll sites (or 84%) surveyed contained at least one access barrier that could prevent a person with a disability from accessing the polling place. (A329 ¶55). The types of barriers identified in the surveys violate the DOJ guidelines for the accessibility of polling places. (*See* A348-A372). Such barriers include dangerous ramps at entrances designated by Defendants to be "accessible," inadequate signage, uneven or blocked entryways or pathways, and inaccessible interior spaces inside the voting area. Courts have found that the presence of these types of barriers identified in surveys similar to those conducted by CIDNY deny voters with disabilities meaningful access to a public entity's voting program. *See County of Scoharie*, 82 F. Supp. 2d at 21-25; *Westchester Disabled on the Move*, 346 F. Supp. 2d at 476-78; *County of Delaware*, 82 F. Supp. 2d at 14, 16-18.

Most importantly, the barriers documented by CIDNY are the kind that, in practice, prevent voters from entering and accessing their poll sites as well as casting their votes independently once inside. (A940-41 ¶¶ 10-14). Signage problems, inadequate or unsafe ramps, and other entrance barriers like lips or cracks in the pavement can mean that many voters with

mobility and vision disabilities never enter their poll sites on Election Day. (A941 ¶¶ 11, 13). If voters with disabilities are able to enter into their poll sites, barriers in the interior voting area can prevent them from being able to vote privately and independently once inside. (A941-42 ¶ 14). These barriers not only prevent voters from disabilities from voting on Election Day, but also cast a chill on their willingness to participate in future elections. (A320 ¶ 19). It is also likely that such barriers contribute to the low voter turnout among voters with disabilities. (A943 ¶ 17).

First-hand observations from CIDNY surveyors and voters with disabilities confirm CIDNY's findings of widespread barriers at Defendants' poll sites on Election Day, including dangerously steep or missing ramps, locked or heavy doors at accessible entrances, and improper placement of equipment and furniture leading to blocked pathways. (*See supra* at Section IV.A.2).

Defendants produced no evidence to dispute the existence of barriers found by CIDNY each year. (A1414-23 ¶¶ 34-56; A1424-28 ¶¶ 64-68). Moreover, Defendants' own documents indicate that they are aware of the continued existence of access barriers but fail to remedy them. (A180; A226; A263-69; A272; A1423-24 ¶¶ 57-61; A1440-42 ¶ 105-111).

3. Defendants' Policy Deficiencies Further Support the Court's Findings.

At nearly every level, Defendants' policies and procedures regarding poll-site accessibility are either nonexistent or insufficient, and the implementation of such policies and procedures is haphazard at best. Defendants do not have a Section 504 or ADA coordinator and do not have an ADA or Section 504 Transition Plan or any other written accessibility improvement plan pursuant to the ADA or Section 504 (A1434-35 ¶¶ 84-86), thereby violating the regulatory requirements of Section 504 and Title II. *See* 28 C.F.R. 25.150(d); 28 C.F.R. 35.107; 28 C.F.R. 42.505. The lack of an adequate transition plan and failure to designate an ADA or Section 504 coordinator, even if not separate, privately enforceable violations, are relevant evidence to show systemic violations of an underlying program access obligation. *See Wood v. Town of Falmouth*, 419 F. Supp. 2d 3, 5 (D. Mass. 2006).

Also, in spite of being on notice of access barriers year after year, Defendants have failed to implement system-wide policies to ensure that barriers are remedied. For example, Defendants maintain no systemic program to search for alternative, accessible poll sites to replace those that are inaccessible. (A133:8-124:16; A1437 ¶¶ 93-94). Defendants fail to respond to and remedy access barrier complaints they receive, (A263-69;

A272; A330 ¶ 58; A797; A813), fail to deliver and install temporary access features on Election Day, (A263-69), fail to adequately train poll workers and BOE staff on accessibility issues, (A723 ¶ 9), and fail to properly monitor and maintain poll sites on Election Day. (A289; A291-92; A294-95; A297-98; A300-01; A303-04; A306). Even where Defendants' own records indicate they have notice of accessibility barriers at their poll sites on Election Day, the evidence demonstrates that Defendants have failed to adequately remedy such barriers. (A226; A263-69; A272; A330 ¶ 58; A797; A813).

4. Defendants' Vague Assertions of Projects That They Have Planned or Have in Progress Are Insufficient to Evade Liability Under Title II and Section 504.

Defendants claim that they are taking some steps to ensure the accessibility of poll sites and cite to plans that will be completed sometime in the future, yet provide no evidence of work that has actually been completed, despite being on notice of barriers at their poll sites since 2003. For example, Defendants claim that they are "searching for alternative solutions" to remedy sites that have found to be inaccessible, yet they have not implemented any such solutions at any poll sites. (A1230 ¶ 6). With respect to the two sites Defendants have deemed to be "Inaccessible Sites," Defendants assert that it is expected that the sites would be accessible at the

end of 2012. (A1231 ¶ 11). However, Defendants submitted no evidence that they actually completed any renovations at those sites or any other sites where accessibility barriers exist. (*See* A1237 ¶ 10).

In any event, regardless of Defendants' purported efforts and future plans, the law requires that Defendants provide meaningful access now. Claims of future improvements or proposed changes are therefore irrelevant. *See Civic Association of the Deaf v. Giuliani*, 915 F.Supp. 622, 638 (S.D.N.Y. 1996) (rejecting claim that new emergency reporting system met requirements of the ADA because "although [d]efendants alluded to a proposed protocol, no evidence has been offered that one has been effected."); *see also Kerrigan*, 2008 WL 3562521 at n.19 (court refused to rely on defendant BOE's assertion that it would correct the majority of accessibility problems at poll sites for the next election.)

5. Rather Than Submit Admissible Evidence, Defendants Rely on Conclusory Assertions that Fail to Establish a Genuine Issue of Material Fact.

Instead of providing admissible evidence to support their alleged defenses, Defendants rely on conclusory, contradictory, and unsupported assertions that are insufficient to defeat a motion for summary judgment. *See Lipton*, 71 F.3d at 469; *see also* SPA28-31. Even viewing the evidence in a light most favorable to Defendants, they provided insufficient support

for their assertions to create a genuine issue of material fact.

For example, Defendants repeatedly claim that only two of their poll sites are inaccessible. (A1230 ¶ 6). However, Defendants have offered no admissible evidence in support of this assertion, such as survey data, copies of the accessibility guidelines used to assess the accessibility of their poll sites or specific examples of poll sites that actually meet accessibility standards. (*See* A1236 ¶¶ 6-8). At the same time, Defendants admit that they have identified other poll sites that do not meet accessibility standards and that they have not yet surveyed all of their sites to determine whether additional sites are inaccessible. (A1230 ¶¶ 5-6). Indeed, Defendants acknowledge that many other poll sites are not accessible, including P.S. 102, 1591 Metropolitan Store Room, 2051 St. Raymonds Avenue, and other poll sites identified by CIDNY in its surveys. (A185-87; A204; A211-15; A226; A1423-1424 ¶ 57-61; A1158-59; A1430-31 ¶¶ 76-77).

Defendants then assert that they accommodate voters with disabilities because they give voters assigned to vote at the two "Inaccessible Sites" the opportunity to have their registration transferred to a nearby accessible poll site. (A1231 ¶ 10). However, Defendants provided no evidence in support of this alleged accommodation, such as documents confirming that such transfers occurred or documents demonstrating that the BOE actually informed voters of the possibility of a transfer. (*See* A1236 ¶ 9). More

importantly, Defendants failed to offer any evidence that they provided offers to transfer registration or provide accommodations of any kind to voters at any other poll sites where Defendants have received notice of accessibility barriers. (*See id.*)

Defendants also claim that their AD monitors are expected to visit poll sites twice on Election Day to review them for accessibility. (A1231 ¶¶ 17-18). However, Defendants' own documents indicate that AD Monitors do not visit all poll sites on Election Day. (A289; A291-92; A294-95; A297-98; A300-01; A303-04; A306).

Moreover, Defendants' bald assertion that they remedy barriers at their poll sites on Election Day when they receive notice of barriers is entirely unsupported and contradicted by the evidence in the record. Plaintiffs provided numerous examples of Defendants' failure to remedy accessibility barriers at their poll sites on Election Day, despite receiving notice of such barriers. (A226; A263-69; A272; A1423-24 ¶¶ 57-60; A1440-42 ¶ 105-111). Indeed, many of those examples are contained in Defendants' own records. (A263-69; A272; A1423-24 ¶¶ 57-60; A1440-42 ¶ 105-111).

B. Defendants Rely on Incorrect Legal Standards.

1. Defendants Are Liable Regardless of Whether Any Voters Were Actually Denied the Opportunity to Cast A Ballot.

Contrary to Defendants' claims, Title II and Section 504 do not require Plaintiffs to show that a voter with a disability was denied the opportunity to cast a ballot in an election in order to establish the BOE's liability. *See County of Delaware*, 82 F. Supp. 2d at 14-17; *Westchester Disabled on the Move*, 346 F. Supp. 2d at 477-78; *Kerrigan*, 2008 WL 2008 WL 3562521 at *17-18; *see also American Council of Blind*, 525 F. Supp. 2d at 59; *Shotz v. Cates*, 256 F.3d 1077, 1080 (a violation of Title II does not occur only when a disabled person is completely prevented from enjoying a service, program, or activity). Defendants provide no authority to the contrary. (SPA21).

In *Westchester Disabled on the Move*, defendants argued that because they provided alternative poll sites and absentee ballots that would allow plaintiffs facing barriers at their poll sites to nevertheless cast a ballot, that plaintiffs did not suffer irreparable harm. 346 F. Supp. 2d at 477. The court rejected defendants' argument and conducted a detailed analysis of the harm faced by voters with disabilities:

> "[A] disabled voter who arrives at an inaccessible polling place on Election Day may have great difficulty finding an accessible voting location in time. Disabled voters may not know before

> leaving home to vote which alternative locations would actually be accessible to voters with their specific disabilities and, faced with the prospect of finding themselves at an inaccessible voting booth, may be dissuaded from attempting to vote at all . . . ." *Id.* at 477-48.

Relying on surveys conducted by non-profit disability organizations similar to CIDNY, the *Westchester Disabled on the Move* court found that the mere presence of access barriers, such as doors that were difficult to open and inadequate signage, demonstrated the failure to provide meaningful access to the voting process. *Id.* at 476-78.

Here, CIDNY's surveys indicate that Plaintiffs and hundreds of thousands of voters with disabilities are subjected to systemic and pervasive discrimination because of Defendants' failure to make their poll sites accessible. Voters with disabilities cannot be certain whether their polling place will be accessible and may not able to find an alternate accessible poll site in time to cast a ballot. As a result, voters with disabilities are forced to either leave their poll site without voting or attempt to vote by overcoming access barriers with great difficulty. Many such voters, including United Spinal member Denise McQuade, will be deterred from voting again at their poll sites. Although Ms. McQuade was able to overcome a steep and dangerous ramp at her poll site during the September 2010 election with the assistance of her husband and a police officer, she was deterred from voting in-person at her polling place in the November 2011 General Election for

fear of encountering such barriers again. (A728-29 ¶¶ 6-12).

2. Plaintiffs Have No Duty to Put Defendants on Notice of Barriers at Poll Sites Selected and Operated by Defendants.

Contrary to Defendants' assertions, Title II and Section 504 place no requirement on Plaintiffs to notify Defendants of so-called "transient" barriers at their poll sites. Indeed, nothing in the ADA or Section 504 requires Plaintiffs to provide Defendants with notice of and an opportunity to cure access barriers at their poll sites in order to prevail. Rather, the BOE, as the public entity responsible for New York City's election program, has an affirmative obligation to ensure that its poll sites are accessible to voters with mobility and vision impairments on Election Day regardless of whether any voter has notified the BOE of possible barriers. *See, e.g., Delano-Pyle v. Victoria County, Texas*, 302 F.3d 567, 575 (5th Cir. 2002) ("Congress intended to impose an affirmative duty on public entities to create policies or procedures to prevent discrimination based on disability."); *Communities Actively Living Independent and Free, et al. v. City of Los Angeles, et al.*, 2011 WL 4595993, * 14 (C.D.Cal. Feb. 10, 2011) (public entities are required to affirmatively anticipate the needs of persons with disabilities in planning and implementing their programs and services, rather than relying on *ad hoc* solutions).

In the context of a one-day event such as an election, *ad hoc* responses to access barriers are impractical. Under Defendants' theory, voters with disabilities would somehow have to find and identify any access barriers at their poll sites either before or during an election, provide notice to Defendants of such barriers and viable alternatives or modifications that could remedy such barriers, and then hope Defendants remedy the barriers with enough time left on Election Day so that these voters can cast ballots before the polls close. The practical result of Defendants' policy of responding to complaints in an *ad hoc* manner is the continued existence of barriers at poll sites throughout the City and the continued disenfranchisement of New Yorkers with disabilities. (See A728-29 ¶¶ 6-12; A320 ¶ 19).

Furthermore, the concept of a "transient" barrier has no legal meaning. It is not mentioned in the ADA, Section 504, the implementing regulations or any of the cases interpreting the statutes. Rather, a barrier is a barrier. For the purposes of both Title II and Section 504, any barrier that limits the access of a person with a disability at her poll site is an unlawful barrier that denies that individual meaningful access to Defendants' voting

program.[6]

Defendants' attempt to argue that the language from the District Court's order discussing Plaintiffs' burden in the context of a request for preliminary relief is the "law of the case" for the purpose of a dispositive ruling on Defendants' liability is also misplaced. The "law of the case" is simply not applicable here. The Second Circuit has explained that "[a] preliminary determination of likelihood of success on the merits in a ruling on a motion for preliminary injunction is ordinarily tentative, pending a trial or motion for summary judgment . . . It would therefore be anomalous . . . to regard the initial ruling as foreclosing the subsequent, more thorough consideration of the merits that the preliminary injunction expressly envisions." *Goodheart Clothing Co., Inc. v. Laura Goodman Enterprises, Inc.*, 962 F.2d 268, 274 (2d. Cir. 1992); *see also University of Texas v. Camenish*, 451 U.S. 390, 395 (1981); *Garten v. Hochman*, 2010 WL 2465479, *3 fn.1 (S.D.N.Y. June 16, 2010).

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[6] The relevant barriers for assessing poll site accessibility are those identified by the DOJ in its ADA Checklist for Polling Places. (*See* A334-A372). CIDNY's surveys are based on this checklist and the surveys are exactly the type of evidence courts look to when assessing a public entity's failure to provide meaningful access to its voting program. *See Westchester Disabled on the Move*, 346 F. Supp. 2d at 477-78 (survey results included inadequate signage and obstructed walkways, indicating a denial of meaningful access to county's voting program).

In any event, though not required to, Plaintiffs have provided substantial evidence that Defendants received notice of barriers at BOE poll sites on Election Day and that, despite such notice, Defendants failed to remedy such barriers. (A226; A263-69; A272; A1423-24 ¶¶ 57-61; A1440-42 ¶ 105-111).

3. Plaintiffs Have No Legal Obligation to Identify Alternate Poll Sites to Replace Those That Are Inaccessible.

Plaintiffs need not identify alternative accessible poll sites to replace those with barriers to prevail on meaningful access claims under Title II and Section 504 as Defendants claim.[7] The law contains no such requirement. Defendants appear to have misappropriated this standard from Title I of the ADA, which applies to employment discrimination and reasonable accommodations for employees with disabilities. *See Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131 (2d. Cir. 1995). However, Title I has no bearing on a public entity's affirmative obligation under Title II and Section 504 to provide persons with disabilities meaningful access to its programs and services. *See American Council of the Blind*, 525 F.3d at 1266-67 (Where plaintiffs identify an obstacle that impedes access to a government

[7] Despite not needing to do so, Plaintiffs and CIDNY did present Defendants with options for alternate poll sites to replace inaccessible poll sites. Despite these suggestions, Defendants continued to use the inaccessible locations as poll sites. (A150:18-A151:19; A226; A1430-31 ¶¶ 76-77).

program, they have likely established that they lack meaningful access to that program.);[8] *see also Bacon v. City of Richmond*, 386 F. Supp. 2d. 700, 707 (E.D. Va. 2005) ("The burden is not on the disabled to create accommodation solutions, but on those that provide services or facilities which hinder their participation."); To establish liability, Plaintiffs need only to show that Defendants fail to provide Plaintiffs meaningful access to Defendants' services, programs, or activities. *See Civic Association of the Deaf*, 2011 WL 5995182, *8-9 (S.D.N.Y. Nov. 29, 2011) (citing *Henrietta D.*, 331 F.3d at 275).[9]

Requiring voters with disabilities to search for and identify alternate accessible locations is illogical and ignores Defendants' admitted responsibility to identify and designate accessible poll sites. (A1404 ¶¶ 1-2). Individual voters with disabilities do not have the resources to assess prospective locations for poll sites and do not have the ability to contract

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[8] In *American Council of the Blind*, the court noted that the burden shifting approach under Title I of the ADA does not strictly govern program access claims under Section 504. *See id*. at 1266.

[9] Defendants misread the Court's approach in *Henrietta D.*, which only applied a burden shifting analysis when assessing the plaintiffs' specific claims for reasonable accommodation in that case, but does not require such a showing for claims generally alleging a denial of meaningful access to a public entity's programs and services under Section 504 and Title II. *See Henrietta D.*, 331 F.3d at 273, 280-282.

with potential public and private locations that could serve as poll sites. Defendants have both duty and authority to do so and also received approximately $1.6 million in federal funds dedicated specifically to improvement of poll site accessibility. (A1405 ¶ 3).

Furthermore, even if the Court were to require Plaintiffs to propose some form of accommodation to remedy barriers at Defendants poll sites under a Title I analysis, Plaintiffs have more than met this requirement. (SPA27) ("This burden, however, is hardly insurmountable."); *Henrietta D.*, 331 F.3d at 280 (plaintiffs' prima facie burden is "not a heavy one."). Plaintiffs identified plausible modifications to Defendants' voting program that include identifying an individual at each poll site to assess and monitor accessibility, maintaining temporary access features that meet the standards set by the DOJ guidelines, and developing a system to assess and identify alternate accessible poll sites, among others. (SPA31).

VIII. THE DISTRICT COURT'S REMEDIAL PLAN IS AN APPROPRIATE USE OF ITS DISCRETION IN LIGHT OF THE SIGNIFICANT BARRIERS FACING VOTERS WITH DISABILITIES YEAR AFTER YEAR AT DEFENDANTS' POLL SITES.

A. The District Court Did Not Abuse Its Discretion By Ordering a Comprehensive Remedial Plan.

In claiming that the District Court failed to give Defendants an opportunity to formulate their own plan, Defendants ignore the numerous

opportunities afforded by the District Court to do just that. Defendants also ignore well-established precedent giving the District Court broad discretion to order injunctive relief to remedy continuing violations of law.

1. The District Court Has Broad Discretion to Award Injunctive Relief To Remedy Long-Standing Violations of Law by Municipal Entities Such As the Board of Elections.

The district courts have broad discretion in deciding whether to award injunctive relief. *See*, *e.g.*, *Etuk v. Slattery*, 936 F.2d 1433, 1443 (2d. Cir.1991); *see also* 11 *Federal Practice & Procedure* § 2962, at 633 ("trial court has considerable discretion in determining whether the situation requires the issuance of ... a permanent injunction"). Specifically, where there is a history of legal violations before the district court, that court has significant discretion to conclude that future violations of the same kind are likely. *See Henrietta D.*, 331 F.3d at 290; *Kapps v. Wing*, 404 F.3d 105, 112, 123 (2d. Cir. 2005).

In *LeBlanc-Sternberg v. Fletcher*, after finding the Village of Airmont liable for constitutional violations, the district court ordered a mandatory injunction requiring the Village to revise its zoning code and make detailed specific additions to the code. 1996 WL 699648 (2d. Cir. Dec. 6, 1996). On appeal, the Second Circuit rejected the Village's argument that the mandatory injunction violated the principles of federalism, stating that "[t]he

district court has first-hand experience with the parties and is best qualified to deal with the flinty, intractable realities of day-to-day implementation of constitutional commands, and must be given great flexibility and broad discretion in choosing a remedy best suited to curing the violation." *Id.* at *3. The Court noted that there was no indication that the Village was going to make the changes necessary to guarantee that no constitutional violations occurred in the future and that violations were "likely." *Id.* at *4-5.

Similarly, in *U.S. v. Yonkers Board of Education*, after finding that the City of Yonkers had unconstitutionally segregated its housing and public schools, the district court issued a remedial order that mostly rejected the City's plan. 29 F.3d 40 (2d. Cir. 1994). The Second Circuit found no abuse of discretion, noting that, while respect must be given to the principles of federalism, it did not require courts to adopt wholesale the local government's choice of remedies. *Id.* at 43. The Court emphasized that defendant cannot merely come forward with a plan but must "come forward with a plan that promises realistically to work, and promises realistically to work now." *Id.*

2. The District Court's Order Was Necessary to Remedy the Widespread and Long-Standing Accessibility Barriers at Defendants' Poll-Sites.

Here, the District Court acted well-within its discretion, in light of the

well-documented history of barriers at Defendants' poll sites and Defendants' failure to develop a comprehensive remedy to address those barriers, despite being given numerous opportunities to do so. Indeed, in an abundance of caution after issuing its order on liability, the District Court held three hearings to address possible remedies over a span of nearly two months while repeatedly seeking proposals from both parties and encouraging the parties to meet and confer about possible poll-site solutions. (*See generally* SA1-SA152). The District Court even offered Defendants a chance to test their proposed solutions during the September 2012 Primary Election before issuing a final order. Despite these opportunities, Defendants failed to submit a comprehensive plan capable of addressing the widespread nature of the barriers at poll sites in New York City. (SA48:9-23; A1668-69; SA108:12-19). Instead, Defendants proposed vague, piecemeal steps that, in practice, were incomplete and insufficient to remedy the pervasive and ongoing violations that the District Court had found. (SA68:12-SA73:25; A1668-69; SA108:12-19; A1692; A2480-85).

The overwhelming evidence from the 2012 Primary Election confirmed that the piecemeal steps Defendants proposed were ineffective. Of the 35 poll sites scrutinized, 18 contained at least one serious accessibility barrier for voters with mobility and vision impairments. (*See* A2480-85). Additionally, Defendants' own reports showed that many

barriers remained throughout the day, in spite of repeated attempts by poll workers to notify the BOE of such barriers. (*Id.*).

Thus, after Defendants' own attempts at remedial solutions failed, the District Court had no choice but to issue its own remedial order. Strikingly, Defendants have not quibbled with the substance of the District Court's remedial plan, which is largely based on methods to achieve poll-site accessibility that have proven successful in other large cities with older, urban centers such as Philadelphia. (*See* A1216-A1224). Rather, Defendants have attempted to attack the District Court's use of its discretion in ordering Defendants to implement a plan Defendants did not develop on their own, while ignoring the fact that the District Court only acted after giving Defendants numerous opportunities to do just that.

B. There Is No Practical Basis for the Appeal Because Defendants Have Already Substantially Agreed to and Implemented the District Court's Remedial Plan.

Finally, Defendants' appeal should be rejected because Defendants have already implemented major portions of the District Court's remedial order. It has been nearly 10 months since the remedial order was issued and a year since the District Court's finding of liability. Defendants did not seek an expedited appeal or a stay of the remedial order. Instead, Defendants proceeded to implement the plan ordered by the District Court. Indeed,

Defendants have already completed the short-term measures the District Court ordered, including contracting with CIDNY to provide training for BOE staff. Additionally, Magistrate Pitman has already appointed a third-party accessibility expert, Evan Terry Associates, P.C. ("ETA"), and ETA has begun its on-site visits to Defendants' poll-sites.

Given that Defendants have not contested the substance of the remedial solutions in the Order and the fact that the parties have invested significant time and resources in the enforcement of the Order, it would be illogical to turn back the clock now. Doing so would only prolong the disenfranchising of voters with disabilities in New York City and do so at taxpayer's expense.

IX. CONCLUSION

The overwhelming evidence submitted by Plaintiffs shows that voters with disabilities do not have and have not had meaningful access to voting in New York City because Defendants have failed to ensure the accessibility of their poll sites for such voters, thereby violating Title II and Section 504. The District Court's remedial order is an appropriate use of its discretion in light of the widespread nature and long history of barriers at Defendants' poll sites and Defendants' failure to develop an adequate remedial plan on their own. This Court should therefore deny Defendants' appeal of both orders.

DATED: August 7, 2013

Respectfully submitted,

DISABILITY RIGHTS ADVOCATES

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B), because it was prepared in a proportionally spaced typeface, Times New Roman 14-point font, and according to the word count of the word processing system used to prepare this brief, Microsoft Word 2003, it contains no more than 12,113 words, excluding items permitted to be excluded by Federal Rule of Appellate Procedure 32(a)(7)(B)(ii).

Stuart Seaborn