



The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

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BOSTON, MASSACHUSETTS 02108

A. JOSEPH DeNUCCI
AUDITOR

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July 25, 2008

Ms. Sally Hayden, President
Massachusetts Town Clerks' Association
Town Hall
250 Main Street
Rutland, Massachusetts 01543

RE: Cost of Programming Automark Voting Equipment for Local Elections

Dear Ms. Hayden:

Auditor DeNucci asked that I respond to your request, on behalf of the Massachusetts Town Clerks' Association, relative to the Local Mandate Law, G. L. c. 29, s. 27C, and costs associated with programming Automark voter assist terminals for local elections. After in-depth consideration of the circumstances surrounding your inquiry, the Division of Local Mandates (DLM) concludes that you have not identified a state law, regulation, or agency rule that can be reviewed under the Local Mandate Law. The following is an explanation and summary of the factors that lead to this conclusion.

As of January 1, 2006, Title III of the federal Help America Vote Act (HAVA) imposes various new requirements for conducting federal elections. 42 U.S.C. 15301 – 15545. Relevant to the question at issue, section 301(a)(3)(A) of HAVA requires that voting equipment used for the election of any federal officer shall be “accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.” The law goes on to provide that states may achieve compliance by using “at least one direct read electronic voting system [or similar equipment] at each polling place.” Section 301(a)(3)(B). Sources at the United States Department of Justice, Civil Rights Division clarify that the HAVA standards are limited to federal elections, and do not apply at non federal elections.

The Secretary of the Commonwealth has paid for the cost of obtaining voting equipment to meet HAVA accessibility standards for each polling place in Massachusetts (the Automark voter assist terminals) through federal funds allocated under HAVA. Additionally, the state has paid for the cost of programming this equipment for state primaries and elections. In your letter, you note that the Secretary also paid these programming costs for annual municipal elections in 2007, and is committed to paying these local costs for 2008, but not for subsequent local elections. Depending upon the number of strictly local elections that might be conducted in a given year, information from the Secretary of State's Office indicates that the statewide cost impact on cities and towns could approximate \$1.7 million. Recognizing that programming costs for local elections are not mandated by HAVA, you ask whether these costs are state mandates subject to the state funding standards of the Local Mandate Law.

After considerable research into this matter (including inquiries at the Office of the Secretary of State and the Massachusetts Office on Disability) the Division of Local Mandates (DLM) has been unable to document that use of the Automark voter assist terminals or any other direct read voting system is, in fact, required at local elections where no candidate for federal office appears on the ballot. As you know, the Local Mandate Law provides that post-1980 laws and regulations that impose additional costs upon cities and towns must either be fully funded by the Commonwealth, or subject to local acceptance. A community aggrieved by a state law, rule, or regulation adopted contrary to this standard may petition superior court for an exemption from compliance. G. L. c. 29, s. 27C (a), (c), and (e). In the case at hand, there is apparently no state law, regulation, or agency rule that requires use of this equipment at local elections, so there is nothing from which a court could grant a compliance exemption. Accordingly, there is no matter to warrant review under the Local Mandate Law.

In discussions with the Massachusetts Office on Disability, however, we learned that it is their position that the Automark voter assist terminals must be used at local elections to satisfy the protections guaranteed under Article 114 of the Amendments to the State Constitution, and Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. s. 12131, et seq. Article 114 provides:

No otherwise qualified handicapped individual shall, solely by reason of his handicap, be excluded from the participation in, denied the benefits of, or be subject to discrimination under any program or activity within the commonwealth.

Ms. Sally Hayden

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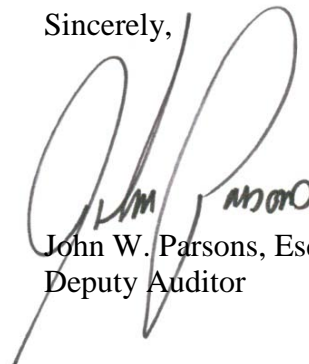
The state courts have not directly addressed the question of whether Automark or similar technology would be necessary under Article 114. Nonetheless, in view of the fact that cities and towns are in possession of machines that enable disabled persons to vote independently, staff at the Office on Disability believe that a failure to program and use the machines at local elections would be tantamount to excluding these individuals from election activities based solely upon their disabilities – in contravention of Article 114. It is DLM's opinion that the standards of the Local Mandate Law would not be applied to exempt cities and towns from complying with actions required of local governments by the State Constitution.

Similarly, the courts have not directly addressed this question in relation to the federal requirements under the ADA, a body of law that provides protections for disabled individuals independently of the federal HAVA guarantees. Staff at the Office on Disability report that their contacts at the Department of Justice Disability Rights Section share the opinion that various provisions of the ADA require that Automark or a similar direct recording electronic voting system must be used at all elections, including local elections. As you know, the state Local Mandate Law would not be applied to exempt cities and towns from complying with a federal mandate.

In summary, there appears to be no state law, regulation, or agency rule that requires use of this type of equipment at local elections. Accordingly, there is no state mandate subject to review under the Local Mandate Law. Nonetheless, the staff at the Massachusetts Office on Disability holds the opinion that the Automark voter assist terminals, or similar technology, must be used at all elections pursuant to the accessibility standards of Article 114, and the ADA.

We recognize the significant cost impact on cities and towns to make these machines available at local elections and are available to discuss the funding issue. We thank you for the opportunity to review this matter, and welcome further questions or comments you may have.

Sincerely,

A handwritten signature in black ink, appearing to be 'JWP', with a large, stylized flourish extending upwards and to the right.

John W. Parsons, Esq.
Deputy Auditor

cc: Michelle Tassinari, Esq., Director, Secretary of State's Elections Division
Myra Berloff, Director, Massachusetts Office on Disability