

### **ELECTRONIC VOTING EQUIPMENT**

Since the appointment of a New York State Temporary Commission on Voting Machine Equipment in 1984, the League has favored legislation that would allow local governments the option of using electronic voting equipment. After a year of study and equipment testing, the Commission recommended changes in the state law allowing the use of electronic voting machines. The New York State Board of Elections developed a comprehensive set of regulations and guidelines for the machines' certification, testing and management; the machines would be purchased and maintained by individual counties, cities or towns. In 1986 legislation was passed enabling localities to replace their antiquated, failing equipment with electronic machines. They are being used, selectively, in many areas across the state. Since 1984 the LWVNYS has favored government action to advance the evaluation of electronic voting systems and has favored legislation that would allow local governments the option of using electronic voting equipment.

In 2001, the League supported bipartisan legislation which would allow the State Board of Elections to authorize a county board of elections to use a voting system (i.e., machine) not previously approved by the State Board. By giving this discretionary power to the State Board, county boards would be able to test newer machines before purchasing. With the passage of the Help America Vote Act in October 2002, which will require the replacement of all lever voting machines in the state by 2006, this recommendation became moot.

On October 29, 2002, President Bush signed the Help America Vote Act (HAVA). The bill authorized \$3.86 billion dollars over three years to improve elections as a response to the problems which occurred in the 2000 presidential election. The intent of the legislation is to modernize and standardize the election process nationwide and to ensure that every eligible voter is enfranchised and every legitimate vote is counted.

New York State is slated to receive over \$200 million dollars. It is estimated that \$140 million dollars will be used to replace New York's aging lever machines. The remaining \$60 million dollars will be used to create a statewide voter registration list at the NYS Board of Elections, provide voter education, poll worker training, and improved accessibility of polling places. To obtain federal funds, HAVA required that each state submit a State Plan documenting how it would meet the requirements of the law. A HAVA Task Force was appointed (LWVNYS Off-Board Elections Specialist, Aimee Allaud, was one of two citizen representatives appointed to the Task Force) which met five times during February and March, 2003. The highly partisan Task Force did not have binding power; ultimately the HAVA State Plan was written by the staff of the State Board of Elections. After public hearings around the state, the Plan was submitted to the Federal Election Commission in September, 2003. The Plan calls for replacement of nearly 20,000 lever machines in New York by the first federal election in 2006. HAVA also requires that all states have in place by January 2006 a statewide voter registration database which becomes the official list of registered voters.

Both the State Assembly and Senate introduced legislation in June 2003 to implement HAVA, but no action was taken. A joint conference committee process was initiated in April-May 2004 but failed to resolve the major differences between the bills. New York State did obtain a waiver for the establishment of a statewide voter registration database and for replacement of lever voting machines

until 2006. Stopgap legislation to implement the new ID requirements was passed in August, 2004, and went into effect for the primary and general election in 2004. This legislation, while it met the federal mandate, did not go far enough in naming a wide variety of IDs which would be acceptable for first-time voters registering by mail who are required to provide ID. Also, a noncontroversial bill which would meet a HAVA requirement to provide a voters' bill of rights, and sample ballot in polling places was signed into law effective for the November 2004 election.

### **Major HAVA Requirements**

The primary impact of HAVA will be on the voter registration system and election administration:

- Each state must establish a statewide computerized voter registration list.
- New ID requirements – a) first-time voters who register by mail must show ID at time of registration or when they first vote, unless identifying numbers described below are matched in an existing state database, b) all new applicants must provide a driver's license number or the last four digits of their social security number unless the applicant has neither number.
- A provisional ballot (affidavit ballot in NYS) must be provided to any person who declares they are (1) registered to vote and (2) eligible to vote in a federal election.
- States must put training systems in place for poll workers and other election officials.
- States must develop a uniform and nondiscriminatory administrative procedure that allows the filing of complaints.
- Voter education information, such as sample ballots, must be posted in every polling place on Election Day after January 1, 2004.

The League has been a major player in a statewide voting coalition, NYS Citizens Coalition on HAVA Implementation. The Coalition, composed of some thirty statewide organizations, has produced position papers on all aspects of HAVA implementation to demonstrate the impact of proposed legislation on the future of voting in New York State, testified at hearings, and met with legislative staff and members since 2003. The Coalition presented testimony before the Assembly Elections Committee at a hearing in NYC on December 20, 2004, reiterating the broad positions adopted by the Coalition for implementation. In addition, the NYS League has initiated Action Alerts through Citizen Action ToolKit (CATT) on some specific HAVA related issues. Through updates in the State Board Report (SBR) and the website we have encouraged members and local Leagues to keep pressure on the Legislature to enact legislation in a timely fashion which would ensure that state and local elections officials and New York voters are well prepared for the implementation date of 2006.

In 2005, the Senate appointed a new Elections Committee chair, Senator John Flanagan (R), Suffolk County. The Senate passed their package of HAVA bills in mid- February, 2005, paving the way for a HAVA conference committee. The Assembly had passed their slightly modified 2004 HAVA package in early January 2005. The League noted with concern that the Senate did not introduce legislation to consolidate election operations at the county level (not a HAVA requirement) although the Assembly had passed such legislation. This had also been a recommendation of the Governor's Task Force on Election Reform as well as the NYS Election Commissioners Association.

The first HAVA joint conference committee met on March 7, 2005, and met for five times during March. As a result of often contentious discussions between legislators, resolution of differences on creation of a statewide voter registration database, voter ID, funding in the budget, and a complaint

process for aggrieved voters was finally accomplished. The HAVA Coalition issued a strong memo of opposition to the joint Assembly-Senate database bill citing a lack of specific privacy protections for confidential voter information and detailed specifications concerning the state databases of agencies offering voter registration in the bill. The Coalition supported the joint administrative complaint procedure bill and issued a memo of support.

The conference committee process stalled again during April because of a continuing partisan disagreement between Democrats and Republicans over the issue of appointing an Executive Director and Deputy Executive Director at the NYS Board of Elections. The Board of Elections is the implementing agency for HAVA in the state and should be fully bipartisan in staff and in the appointment of its four commissioners to ensure the fair and equal representation of all voters in the state. The League supported legislation to correct that imbalance and lobbied the Senate to pass legislation which would create co-Executive Directors (the Assembly had passed their bill in March 2005).

The New York State League Board voted on March 9, 2005, to endorse the use of optical scan voting machines, with the addition of ballot marking devices for accessibility, to replace lever voting machines statewide. Using the LWVUS' criteria of secure, accurate, re-countable and accessible, the Board decided that the League's voice should be heard in the public debate about the best voting system for NYS.

The Assembly proposed legislation which described both DREs and optical scan voting machines technologies by setting forth specific standards for these voting systems. The Senate legislation, while it did not exclude optical scan equipment, did not specifically name it, as the Assembly bill had done and only addressed only general standards for new machines. Both bills included requirements for a voter verified paper trail for DREs. However, there are no machines currently qualified by the federal government and certified for use in NYS which meet that requirement. Machine selection was further complicated and limited because of New York's full-face ballot requirement which the Legislature did not repeal despite the recommendation of the Governor's Task Force and the advocacy efforts of the HAVA Coalition and others.

The HAVA joint conference committee resumed on May 4, 2005 with discussion on the three remaining issues and several new compromise proposals were shared between Assembly and Senate conferees. The League endorsed a report issued by NYPIRG on Election Day Registration in New York State and appeared at a press conference in support of the proposal (a LWVUS position).

After two years of intensive work to ensure that the Help America Vote Act was implemented so that New York voters could be assured of more accurate, modern, uniform elections, legislation was passed in June 2005 and signed by Governor Pataki in July of that same year.

The following is a brief description of the new law:

- I. Election Reform Modernization Act – voting machine replacement. This law will allocate \$190 million dollars to purchase new voting machines that will have to be certified by the State Board of Elections to determine compliance established by the legislation. Funds will be allocated based on the percentage of voters in each jurisdiction. Localities can choose to

purchase either optical scan machines or electronic voting machines. If local elections commissioners cannot agree on the type of machine for their county, the State Board of Elections will execute a contract for the purchase of the required voting machines and charge the county for the expense. If electronic voting machines are certified by the state, they must be equipped with a voter-verified paper ballot.

An appointed Citizen's Election Modernization Advisory Committee will advise the SBOE on which machines meet the standards. Once the SBOE certifies that a machine meets the standards it is eligible to be purchased by a county. The SBOE will act as the purchasing agent and direct the State Comptroller to release HAVA funds to vendors who in turn deliver the machines to the county and will ensure bulk purchase savings and that manufacturers provide counties with educational and technical support.

Every polling place must have at least one disability-ready machine for use in the November 2006 election and remaining replacement of lever voting machines must be accomplished by September 2007. An automatic random audit of 3% of the voter verifiable audit records of an election is required.

Provisions of the bill would also allocate funds for the training of poll workers, increase compensation for those training sessions and require a public campaign to educate voters on the new voting machines and other changes affecting voters at the polls on Election Day.

- II. Election Consolidation and Improvement Act of 2005 – county consolidation of election operations and voting machines. This law will consolidate election administration within the local boards of elections. Counties will own the voting machines and all equipment related to the conduct of elections and be required to conduct at least one annual mandatory training session for poll workers with an exam. Counties will be permitted to charge back to the municipalities within the county for the cost of election operations within that municipality.
- III. Voter Registration – new ID requirements for first-time voters who register by mail and have not previously voted in a federal election. This law makes permanent the identification legislation which was enacted in 2004 and was in effect for the November 2004 election. It was in effect for one year only (until July 2005). Under the bill, the following identification can be submitted by a voter to avoid identification requirements at the polls:
  1. A driver's license or DMV non-driver's photo ID number;
  2. The last four digits of the individual's SS number;
  3. A copy of a current and valid photo identification; and,
  4. A copy of a current utility bill, bank statement or government document that shows the name and address of the voter.
- IV. Voter Verification -- establishes the process for verifying the identity of individuals registering to vote through state databases or with Social Security numbers. HAVA requires that states should attempt to "match" information provided on voter registration applications with that in driver's license and social security databases for the purpose of verifying the accuracy of the information provided by new registrants in order to prevent voter fraud. This law requires board of elections to offer the new registrant multiple opportunities to correct the registration record before Election Day or to inform him/her that they must present HAVA ID in order to vote on a machine. (all voters are allowed to vote using provisional (affidavit) ballots if they

- forget ID or are not listed in the poll books.) Affidavit ballots are counted after election officials verify the individual's identity and voter registration.
- V. Administrative Complaint Procedure – HAVA mandates that a complaint procedure for aggrieved voters to be administered by the NYS Board of Elections be established. This legislation was passed and signed into law earlier in the 2005 session.
  - VI. Statewide Voter Registration Database – HAVA requires that states must establish a statewide voter registration system, effective January 1, 2006. The statewide voter registration list will serve as the “official” list of registered voters and will merge the existing county registration lists into a statewide list, available to all counties. This law, passed earlier in the 2005 legislative session, appropriated monies and the requirements for the system.
  - VII. New York State Board of Elections Governance – alters structure of the board in order to achieve bipartisanship. This law was not required under HAVA. Bipartisanship will be achieved in two ways: creation of two co-chairs on the board of SBOE commissioners and co-executive directors at the staff level, with salaries set by the SBOE commissioners (for staff). The law will also establish that if a vacancy occurs among the commissioners, and if a recommendation for appointment is not approved by the governor within 30 days of the recommendation, the appointment can be made by the legislative leaders themselves.

The effective date for the NYS BOE governance law was August 1, 2005. At the August 8<sup>th</sup> meeting of the NYS BOE, the two co-executive directors were formally acknowledged by the commissioners in their new positions. However, the board still lacked a fourth commissioner (Democratic appointment). The recommendation for this appointment was to be presented by the Senate Minority Leader, David Patterson. At the December 15<sup>th</sup> NYS BOE meeting, a new Democratic Commissioner was seated filling the vacancy and returning the board to two Democrats and two Republicans.

HAVA action now goes to the local BOE for decisions regarding new voting machines.

Delegates to the 2005 biennial state League convention approved a *Convention Action Motion* which was sent to over 1,000 county elected officials throughout the state: “As delegates to the League of Women Voters of New York State convention, held in Albany, New York, on May 20-22, 2005, we request that you support precinct-based optical scan voting systems with accessible marking devices to replace lever voting machines currently in use in the state.”

Recognizing that the decision on new machines was to be made by local officials, the League moved to educate our members with an intense Campaign for Optical Scan in the summer of 2005. A series of four advocacy training sessions in Buffalo, Syracuse, Albany and NYC were held for League members and others. The trainings were conducted by the League's elections specialist and a colleague from New Yorkers for Verified Voting. A videotape of the training session was produced and made available for purchase for those unable to attend.

New York's HAVA statute required the New York State Board of Elections to prepare voting system standards to implement the requirements of the law. The League and fellow members of the NYS Citizen's Coalition on HAVA Implementation submitted testimony on the Draft Voting System Standards in December 2005. The League's separate comments criticized the proposed standards as

weak, inadequate, and unable to protect the integrity of New York State's voting process for the following reasons:

1. Public confidence in the election process is directly linked to the transparency of the process (which we objected to as being non-transparent);
2. The standards should be written by independent voting system and computer professionals who should be selected by a diverse cross-section of computer scientists and professionals and government and civic representatives;
3. Vendors are given the power to determine what information they will provide to the State agency to satisfy state requirements for equipment;
4. Testing of machines should be done publicly and by a truly independent body;
5. There should be a transparent and public certification process;
6. The Citizen's Election Modernization and Advisory Committee should be representative of the public as well as the elections community and should have access to all information that the Board of Elections has in order to fulfill its mandate;
7. The proposed Regulations are incomplete and inadequate and should be re-written.

A revised set of standards was issued in February 2006 but only minimal changes were made and continue to stand as the requirements for voting systems. The League, along with fellow members of the NYS Citizen's Coalition, in a February press conference, called for the commissioners of the BOE to reject the revised regulations.

In January 2006, New York was officially notified by the US Department of Justice that the State was not in compliance with the federal HAVA deadline of 1/01/06 for establishment of a statewide interactive voter registration database and an implementation plan to provide for replacement of voting machines. (NYS had received a waiver until 1/01/06) The State was told that unless a negotiated settlement between the State and the DOJ could occur, the Court would impose a settlement, a solution no one wanted. Such settlement might require full compliance by September 2006. In March the League, fearing that such a possibility existed, decided to become interveners in a lawsuit to oppose the suit by the DOJ. A coalition of four individuals and the League filed a Motion to Intervene asserting that the relief sought by the DOJ – rushing out new electronic voting machines for the September 2006 primary -- would inevitably cause mass chaos on election day and would deny the right of citizens to have their votes counted. The Motion was denied by the U.S. District Court Judge in the case on the grounds that the case would become too unwieldy if too many parties became involved, but held open the possibility that the proposed Interveners might be allowed to participate later, at a point when a specific plan for HAVA compliance was proposed. The Court also asked for clarification from DOJ on whether it was seeking to force full and complete HAVA compliance by September 2006. Attorneys for DOJ said that they did not intend to do so. The Court also ordered the NYS BOE to produce a proposed compliance plan by April 10, 2006. In April 2006 the BOE proposed "Plan B" which would provide partial compliance for accessibility by allowing each county to determine the number and location of accessible voting equipment to be in place for the Primary election in September. The Court accepted this solution, as well as an interim solution for the establishment of a statewide voter registration database.

"Plan A" (the original plan would have required full compliance by September 2007), the BOE was required to provide the full description of the process of testing, certification, ordering of new voting machines and the process for county acceptance testing and related procedures by August 2006.

Legislation which would expand the Citizen's Committee with two additional members, one from a representative of the League of Women Voters, was introduced in January 2006 by Senate Elections Chair, John Flanagan. The bill had Assembly sponsorship and passed both houses of the legislature in April 2006 and was signed by Governor Pataki. We had called for an expanded Committee and supported this bill. Our appointee to the committee is a member of the League with expert technical credentials and professional experience. Committee members observed the first stage of certification processes in summer 2006 when ballot-marking devices were tested by the NYS BOE.

League members continued local advocacy during the summer of 2006 by focusing on county legislatures and elected officials in a *Campaign for Accountability*. Some county legislatures indicated their support for optical scan voting by passing non-binding resolutions favoring optical scan. Petition drives and letters of support were initiated.

Widespread failures of DREs and some optical scan systems in the November 2006 election received national media coverage. The League and fellow advocates for paper ballot optical scan voting held a press conference in November to point to these failures as an example of how New York election officials could take advantage of this experience by selecting optical scan for their counties.

With a newly-elected governor, the opportunity for gaining support for a single statewide optical scan system increased. The League had a member appointed to sit on the transition team. One of the top recommendations of the team on election reform was that the state should implement a single statewide system using optical scanning equipment which would also provide accessibility. Advocates held a press conference in February calling on the new governor to endorse optical scan voting and learn from Florida's mistakes, as well as others. We followed that with an Action Alert/blast FAX campaign urging the governor to take the lead and introduce legislation to achieve this. Unfortunately, the Governor did not respond and the 2005 statute leaving the decision on voting machine technologies in the hands of county election commissioners continued.

The certification process which began in fall 2006 came to an abrupt halt in January 2007 when NYS suspended testing with the independent testing authority under contract to New York because this agency was disqualified by the US Election Assistance Commission for inadequate security testing procedures. New York would have to issue a new contract for an Independent Testing Authority (ITA), making it unlikely that the state would be able to meet the September 2007 DOJ court order for full implementation ("Plan A"). However, until a renegotiated agreement occurred, counties continued to make plans for September implementation.

In a related matter, in April, the Troy City School District (Rensselaer County) voted to accept the loan of uncertified voting machines from a prospective vendor for use in their May school district election. The League and our partner, New Yorkers for Verified Voting, mounted an intensive campaign to counter the vendor's claims of security and reliability and urged the school board to reconsider their decision. Because of a loophole in the NYS Education Law which governs school elections, this was a permissible decision. The Assembly's Education Committee chair introduced legislation disallowing such action in the future, but the election was held using the uncertified electronic voting machines. LWVNYS sent a letter to the 716 school district superintendents in the state to inform them of the danger of using uncertified voting machines in school district elections.

The 2007 NYS Legislature concluded with the passage of a bill which extends the life of the Citizen's Election Modernization Advisory Committee until 2010. (The previous bill was a one-year authorization) Under provisions of this bill created in statute, the committee gains access to all technical and proprietary information on voting machines submitted for NYS certification and the testing of same. A League representative will continue to sit on this advisory committee. In an unusual situation, the League issued a memo in opposition to a bill which didn't then exist! Having learned of a potential threat to the HAVA statute of 2005 which requires voting machine vendors to place in escrow their source code information and documentation, we issued a memo in opposition to alert the legislature of that possibility. This is a frequently used lobbying strategy to scare off the introduction of legislation because public awareness existed of its potential evils. When the Legislature returned for a special session in July they took up the 2007 implementation date which New York had passed in 2006 and recognized that it was no longer feasible. The new statute reflected reality and required that counties provide at least one location per county with one or more ballot marking devices for persons with disabilities and permits the use of lever voting machines until new machines are certified and available for purchase by the counties.

The League issued a memorandum of support for this solution to a difficult situation.

New York's implementation of HAVA continued to be stalled. Certification has been delayed indefinitely and federal legislation (House of Representatives and U.S. Senate) which might have impacted New York State was stalled.