

STATE OF NEW YORK  
NEW YORK STATE BOARD OF ELECTIONS

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In the Matter of:

GINA BARBARA,

Complainant,

HAVA Complaint No. 23-08  
Determination

-v-

NASSAU COUNTY BOARD OF ELECTIONS,

Respondent.

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**Procedural Background**

On January 24, 2023, the New York State Board of Elections (hereinafter “SBOE”) received a written, sworn, signed, and notarized Complaint (hereinafter “Complaint”) dated January 13, 2023, filed by Gina Barbara, alleging violation of Title III of the Help America Vote Act of 2002 (52 U.S.C. § 21081) (hereinafter “HAVA”).

According to the Complaint, on Election Day of the 2022 General Election, Ms. Barbara, who utilizes a motorized wheelchair, attempted to vote at the Forest Lake Elementary School in Wantagh, New York. Upon checking in, she was handed a ballot without a privacy sleeve. She inquired about the absence of a privacy sleeve and was informed by a poll worker that they had not been provided to the poll site. Ms. Barbara then proceeded to mark her ballot using the ballot marking device (hereinafter “BMD”).

At the ballot scanner, a poll worker informed Ms. Barbara that a piece had broken off the top of the scanner, and that the ballot would need to be placed carefully to ensure that it would scan properly. Ms. Barbara informed the poll worker that she has cerebral palsy, and that it would be difficult to insert the ballot with particular care. Without asking, the poll worker took the ballot from Ms. Barbara and examined it closely, appearing to read it. When Ms. Barbara inquired what the poll worker was doing, she replied “nothing,” and fed the ballot into the scanner. The ballot was successfully scanned.

In response, the Nassau County Board of Elections (hereinafter “Nassau County BOE”) acknowledged Ms. Barbara’s Complaint and apologized “that her voting experience was not what she expected.” The Nassau County BOE stated that poll workers are trained annually and are provided with written materials on how to work with voters who require assistance. BMDs are audited and tested annually to prevent issues from occurring.

### **Hearing**

A hearing was held on March 21, 2023. In attendance was Ms. Barbara, as well as Jenessa Seymour, Ms. Barbara’s advocate from Disability Rights New York. Nassau County BOE was represented by Steven Marx and Wayne Wink, Counsels to the Board, as well as Ricki Casta, Election Clerk. SBOE Deputy Counsels Kevin Murphy and Aaron Suggs served as Hearing Officers.

During the hearing, Ms. Barbara reaffirmed the allegations in the Complaint, adding that it is difficult to protect the privacy of her ballot without a sleeve, particularly while in movement in her chair. She claims she did not receive any information from the poll workers regarding the future availability of privacy sleeves following her request and added that she has not received one in her last few elections. She also repeated her concern that the poll worker took the ballot from her hand without first inquiring whether she required assistance and appeared to read her ballot prior to feeding it into the scanner.

The testimony of Nassau County BOE reaffirmed its Response to the Complaint, adding that they believed that they had an “overzealous” poll worker who should have clarified what level of assistance Ms. Barbara required before taking the ballot from her. It was suggested that the poll worker was not reading the ballot itself while inspecting it prior to scanning, but was instead looking at the ballot to confirm the presence of intact timing marks to ensure the ballot would scan properly. In addition, privacy sleeves were discontinued countywide as a result of the COVID-19 pandemic and have not been provided since 2020. This policy is not currently under review by Nassau County BOE and remains in place.

### **Jurisdiction**

Section 402 of HAVA (52 U.S.C. § 21112) requires the State to create a state-based administrative complaint procedure to assure compliance with Title III of HAVA. Subdivision 16 of § 3-102 of the New

York State Election Law directs SBOE to establish a HAVA administrative complaint procedure. Section 3-105 of the Election Law outlines the Complaint procedure, such as that a formal complaint shall be in writing, signed and notarized; that the evidentiary standard shall be a preponderance of the evidence; and that the final determination shall be published and appropriate action shall be taken by the state Board of Elections as necessary. Additionally, 9 NYCRR § 6216.2 further outlines the administrative complaint process.

As the Complaint was written, signed and notarized, and as the Complaint alleges certain conduct that constitutes a violation of Title III of HAVA, SBOE determines that Gina Barbara has standing to bring a Complaint.

### **Issues Raised by the Complainant**

The Complainant, Gina Barbara, alleges the following:

1. Ms. Barbara attempted to vote at the Forest Lake Elementary School in Wantagh, New York. Upon checking in, she was handed a ballot without a privacy sleeve. She inquired about the absence of a privacy sleeve and was informed by a poll worker that they had not been provided to the poll site.

2. Ms. Barbara then proceeded to mark her ballot using the BMD. At the ballot scanner, a poll worker informed Ms. Barbara that a piece had broken off the top of the scanner, and that the ballot would need to be placed carefully to ensure that it would scan properly.

3. Ms. Barbara informed the poll worker that she has cerebral palsy, and that it would be difficult to insert the ballot with particular care. Without asking, the poll worker took the ballot from Ms. Barbara and examined it closely, appearing to read it before feeding the ballot into the scanner which defeated her ability to vote privately.

### **Legal Authority**

Title III of HAVA, Section 301(a), outlines the minimum standards for polling locations used in federal elections. It is explicitly stated that all voting systems must be accessible to persons with disabilities (52 U.S.C. § 21081(a)(3)(A)). Furthermore, Title III outlines particular requirements that states must satisfy; namely, providing non-visual accessibility to the blind and visually impaired and maintaining at

least one voting system at each polling location equipped for persons with disabilities (52 U.S.C. § 21081(a)(3)(A-B)). Title III also requires that the voting opportunities provided by elections officials to persons with disabilities “be accessible...in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters...” (52 U.S.C. § 21081 (a)(3)(A)).

Section 8-102 of the Election Law requires election inspectors to inspect ballot devices and BMDs to ensure they are in working order prior to the opening of the polls, and to inspect the polling site to ensure that there is sufficient privacy when using devices, booths, and BMDs. Section 8-300 of the Election Law provides that “(t)he operating of the ballot scanner by the voter while voting or the use of a privacy booth or ballot marking device for marking a ballot shall be secret and obscured from all other persons except as provided by this chapter in cases of voting by assisted voters or in cases of children under the age of sixteen accompanying their voting parents or guardians.”

### **Findings of Fact**

#### Ms. Barbara was not provided with a privacy sleeve for her ballot:

It is undisputed that Ms. Barbara was not provided with a privacy sleeve for her ballot, as it has been countywide policy since the COVID-19 pandemic not to provide privacy sleeves at poll sites. Though there is no statutory authority requiring privacy sleeves to be provided, under HAVA voters are to be afforded the opportunity to cast their ballot independently and with privacy.

#### A poll worker took the ballot from Ms. Barbara’s hands without permission:

When Ms. Barbara informed a poll worker that she may have difficulty inserting her ballot into the scanner with a high level of dexterity, the poll worker took it upon herself to take the ballot from Ms. Barbara’s hands without inquiring what level of assistance she was requesting.

### **Remedy**

Section 3-105 of the Election Law requires that “(w)hen a violation has been found, the final determination shall include an appropriate remedy for any violation of Title III of the Help America Vote Act of 2002 (HAVA) found by the state board of elections.” Further, 9 NYCRR 6216.2(f)(1) states that

“(r)emedies may consist of a directive to the local or State official(s) or entities to undertake or to refrain from certain actions or to alter certain procedures pertaining to Federal elections.”

Pursuant to this authority, SBOE directs Nassau County BOE to do the following:

1. Review procedures related to maintaining the privacy of all voters including voters with disabilities.
2. Strongly consider adoption of a countywide plan to resume providing privacy sleeves to voters at all poll sites given the termination of the declared COVID-19 national emergency.
3. Review poll worker training materials relating to disability etiquette to ensure that poll workers are directed to receive affirmative requests for assistance from voters before taking action.

**Determination**

For the reasons stated above, SBOE finds the allegations in the Complaint to be credible, finds that there was a violation of Title III of HAVA, and directs Nassau County BOE to comply with the Remedy section of these findings.

Dated: May 3, 2023

Kevin G. Murphy  
Deputy Counsel, New York State Board of Elections

Aaron Suggs  
Deputy Counsel, New York State Board of Elections