



New Jersey Protection and Advocacy, Inc.

210 South Broad Street • 3rd Floor • Trenton, New Jersey 08608

Advocating and advancing the human, civil and legal rights of persons with disabilities

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January 29, 2007

Hon. Joseph Coniglio, Chair
State Government Committee
New Jersey Senate
Trenton, New Jersey

Re: SCR-134 and S-2476

Dear Senator Coniglio and Members of the State Government Committee:

New Jersey Protection and Advocacy, Inc., is the designated protection and advocacy system for the State of New Jersey and operates eight programs established by federal legislation to protect and advance the rights of people with disabilities:

- Protection and Advocacy for Individuals with Developmental Disabilities (PADD), 42 U.S.C. §§ 15041 to 15045
- Protection and Advocacy for Individuals with Mental Illness (PAIMI), 42 U.S.C. §§ 10801 to 10851
- Protection and Advocacy of Individual Rights (PAIR); 29 U.S.C. § 794e
- Client Assistance Program (CAP); 29 U.S.C. § 732
- Protection and Advocacy for Assistive Technology (PAAT); 29 U.S.C. § 3004
- Protection and Advocacy for Beneficiaries of Social Security (PABSS); 42 U.S.C. § 1320b-21
- Protection and Advocacy for Voter Access (PAVA); 42 U.S.C. §§ 15461 and 15462.
- Protection and Advocacy for Traumatic Brain Injury (PATBI); 42 U.S.C. § 300d-53

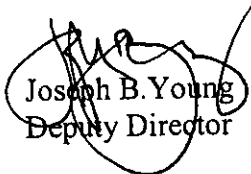
One of these is the Protection and Advocacy for Voter Access program established by the Help America Vote Act of 2002. NJP&A has been providing voter education and training and has been operating Election Day activities, including a hotline for voters with disabilities, for more than a decade. NJP&A staff, including me, have provided individual legal representation for people with disabilities in voting and guardianship matters.

NJP&A supports the removal of the terms “idiots” and “insane” from the New Jersey constitution and statutes. While we are certain that the authors of the 1948 constitution had only the best of intentions, these words just no longer have the same meaning they had then. We know from research commissioned by the New Jersey Council on Developmental Disabilities that people with disabilities experience a significant amount of name calling and ridicule and perceive these actions as emotional abuse. There is no reason for our government to participate in or to be perceived as condoning name calling – it is simply time for a change.

In making the change, however, I urge you to ensure that the ability of people with disabilities to cast a ballot is not diminished. The original meaning of the words that are being eliminated disenfranchised very few – only those individuals with the most severe disabilities. While I have the greatest respect for the judiciary, our reported cases show that trial courts may be reluctant to protect the rights of people with disabilities in capacity cases. As someone who has appeared before judges in these and similar situations, I urge you to provide the courts with the clearest and most objective test possible to ensure that people with disabilities continue to enjoy the same level of participation they do now. A more detail explanation and suggested language is attached to this testimony.

This is an opportunity for the legislature to eliminate needless and stigmatizing language from our constitution and laws, and you should be commended for seizing this opportunity.

Respectfully,


Joseph B. Young
Deputy Director



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REASONS AND SUGGESTIONS FOR AMENDING S-2476

Even with the offensive language, New Jersey currently has very good case law permitting people with disabilities to register and vote. The proposed new language that requires a court to determine whether an individual lacks "the capacity to understand the act of voting" is sufficiently subjective to risk individual judges applying widely varying factors in making their determinations and requiring people with disabilities to demonstrate greater capacity than is required of the general population. More objective criteria would have the benefit of limiting the judicial inquiry to specific functional capabilities that are more likely to be applied uniformly throughout the state.

It is not necessary to change the proposed constitutional amendment. Instead, the accompanying legislation that would operationalize the constitutional amendment appears to be the best available vehicle for limiting the potential harm that might arise from the new constitutional standard.

One proposal is to amend the current statute to provide that an individual will have demonstrated the capacity to understand the act of voting "if the person can communicate, with or without accommodations, a choice whether to cast a vote." This language was suggested initially by the Bazelon Center for Mental Health Law as the constitutional standard that would be most protective of individual rights.

In *Carroll v. Cobb*, 139 N.J.Super. 439 (App. Div. 1975), the Appellate Division of the New Jersey Superior Court held that residents of a state institution for people with mental retardation would be permitted to register to vote if they were able to answer the questions on the voter registration form. These questions include name, address, birth date, and require a declaration that the individual meets the qualifications for voting. An individual who, with or without accommodations, is able to answer these questions and complete the voter registration form approximates (or possibly exceeds) the skill set expected of a voter. Any additional requirements would effectively impose a higher standard on prospective voters with disabilities than on the general population. The Public Policy Committee of the Council on Developmental Disabilities recommended clarifying the proposed new constitutional standard by adding the following to the implementing legislation, "A person shall be determined to have the capacity to understand the act of voting if the person can communicate, with or without accommodation, the information necessary to complete a voter registration form."

The Public Policy Committee of the Council on Developmental Disabilities also agreed to recommend additional language to the implementing legislation that would ensure that the

person contesting an individual's capacity to vote would have the burden of proving incapacity by clear and convincing evidence and that declarations of incapacity would be for a limited time unless the court specifically provided otherwise.

With these recommendations the implementing legislation would read:

No person shall have the right of suffrage—

(1) Who has been adjudicated by a court of competent jurisdiction to lack the capacity to understand the act of voting

(a) A person shall be determined to have the capacity to understand the act of voting if the person can communicate, with or without accommodation, the information necessary to complete a voter registration form,

(b) No person shall be denied the right to vote by reason of incapacity except by clear and convincing evidence, and

(c) All court orders determining that a person lacks the capacity to vote shall expire in one year unless the order of the court specifically provides otherwise.

The text in **bold** is the language currently in the proposed legislation (and the language that would be added to the constitution. The underlined text is language that is proposed to be added to the legislation to ensure that the voting rights of people with disabilities are protected in the implementation of the constitutional amendment.

The following is an alternative to (a) above that would also limit the potential risks of the proposed new constitutional standard:

(a) A person shall be determined to have the capacity to understand the act of voting if the person can communicate, with or without accommodations, a choice whether to cast a vote,