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for Mental Health Law

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Testimony of Jennifer Mathis

Director of Programs, Bazelon Center for Mental Health Law Hearing of Presidential Commission on Election Administration Sept. 4, 2013

Good afternoon, Chairs Bauer and Ginsberg and Members of the Commission. Thank you for convening this hearing and for the opportunity to offer testimony concerning the experiences of voters with disabilities. I am here on behalf of the Judge David L. Bazelon Center for Mental Health Law, a national nonprofit legal advocacy organization that promotes equal opportunities for individuals with mental disabilities in all aspects of life. The Center has worked for many years to advance the voting rights of individuals with mental disabilities, including through state and federal legislative advocacy as well as litigation. We have long been concerned about the barriers that inappropriately prevent many people with mental disabilities from exercising their right to vote.

Consistent with the Commission's direction to "identify best practices and otherwise make recommendations to promote the efficient administration of elections in order to . . . improve the experience of voters facing other obstacles in casting their ballots, such as . . . voters with disabilities," we urge the Commission to make the following recommendations, based on "best practices" as well as knowledge of widespread barriers to people with disabilities exercising the right to vote:

1. The Commission should recommend that states examine their voter qualification requirements and take steps to bring those into compliance with federal law.

The Voting Rights Act provides that no person "acting under color of law" shall "in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote." 42 U.S.C. Sec. 1971(a)(2)(A). That is, any test for determining whether someone is qualified to vote (including based on competency standards) must be applied to all voters equally.

Currently, this requirement is violated in many states, in practice and/or by law. For example, many states apply different rules to individuals under guardianship than to others, placing significantly higher burdens on them to demonstrate the capacity to vote. These individuals are asked many types of

questions that individuals without disabilities are not required to answer in order to vote. In some other states, individuals under guardianship are barred from voting altogether, regardless of whether they have the capacity to vote.¹ In many states, irrespective of what state law provides, voters with disabilities in certain settings are routinely required to meet higher burdens than others in order to vote: service providers, poll workers, and/or election officials have frequently required individuals with disabilities to take tests or answer questions not required of other voters, or simply prevented these individuals from voting or refused to count their ballots.² These practices have occurred even in states that do not have any voter competence requirement.

- a. **The Commission should identify states that do not impose any voter competence requirement or disability-based restriction on the right to vote as having the best practices. The Commission should recommend that states follow the rules adopted by those states concerning voter competence requirements.**

There are eleven states that have adopted the best practice of not imposing any voter competence requirement or disability-based restriction on the right to vote (Colorado, Idaho, Illinois, Indiana, Kansas, Maine, Michigan, New Hampshire, North Carolina, Pennsylvania, and Vermont).

- b. **The Commission should recommend that if states choose to have a voter competence requirement, it should be applied to *all* individuals seeking to vote, or should be tailored to impose no greater burden on individuals with disabilities (including individuals under guardianship) than individuals without disabilities.**

Two states have adopted voter competence standards that are designed to ensure that people with disabilities are not held to a higher standard than people without disabilities. Maryland's law states: "An individual is not qualified to be a registered voter if the individual . . . is under guardianship for mental disability and a court of competent jurisdiction has specifically found by clear and convincing evidence that the individual cannot communicate, with or without accommodations, a desire to participate in the voting process." Nevada's law states: "A person is not ineligible to vote on the ground that the person has been adjudicated mentally incompetent unless a court of competent jurisdiction specifically finds by clear and convincing evidence that the person lacks the mental capacity to vote because he or she cannot communicate, with or without accommodations, a specific desire to participate in the voting process and includes the finding in a court order."

2. **The Commission should recommend that poll workers, election officials, and disability service providers should be trained concerning:**
 - (a) **federal and state law requirements concerning voter competence (including the Voting Rights Act provision described above)**
 - (b) **types of voter assistance that are and are not permitted under federal law**

¹ See, e.g., Bazelon Center for Mental Health Law and National Disability Rights Network, *Vote. It's Your Right: A Guide to the Voting Rights of People with Mental Disabilities*, at 5-6, at http://www.bazelon.org/LinkClick.aspx?fileticket=8GRTfqaH_Qc%3d&tabid=543.

² See, e.g., *id.* at 6-8.

- (c) **other types of reasonable modifications required by the ADA and Section 504 of the Rehabilitation Act (including, for example, helping residents of nursing homes and other service settings to register, get to the polling place, or apply for and complete an absentee ballot if the resident chooses to vote by absentee ballot).**

The Voting Rights Act and National Voter Registration Act, as well as the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, apply to state voting systems and require that voters with disabilities be provided with certain types of assistance in the registration and voting process. These requirements appear to be poorly understood and, too often, are not followed. For example, our experience is that large numbers of individuals with disabilities in nursing homes, board and care homes, group homes and other congregate service settings do not receive assistance with voting and are often discouraged from voting. Additionally, many individuals either fail to provide needed assistance to voters with disabilities because they do not understand what kinds of help are permitted, or provide inappropriate help (such as marking ballots in ways that do not reflect the choices of the voter himself or herself). As a consequence, people with disabilities -- particularly mental disabilities -- frequently lose the opportunity to exercise their right to vote.

3. **The Commission should recommend that the following principles, taken from the Bazelon Center and National Disability Rights Network voter guide for individuals with disabilities, be included in any training of poll workers, election officials and service providers with respect to the voting rights of individuals with mental disabilities.**³

A state need not require a voter to demonstrate competence, and some states don't.

If a state chooses to impose a voter-competence requirement, that requirement cannot be so broad that it takes away the right to vote of people who are capable of voting. For example, a state generally may not have laws that impose a blanket ban on voting by anyone under guardianship.

If a state chooses to impose a voter-competence requirement, that requirement must be applied to *all* voters. It cannot single out a particular group of voters, such as people who are the subject of guardianship proceedings.

In virtually all states, only a court can find that a person is not competent to vote. In fact, it would present serious constitutional concerns for election officials or anyone else to make such a determination without the procedural safeguards of a court proceeding.

Service providers, such as nursing homes, hospitals, assisted living facilities and group homes, cannot bar residents from voting based on staff or administrators' decisions that residents are not competent to vote.

³ *Id.* at 3-4 (including legal citations).

Questions about a voter's competence can form the basis for a voter challenge only under very limited circumstances, if at all. Most states' laws restrict the grounds on which a voter may be challenged, the people who may bring a challenge and the types of evidence that can form the basis for a challenge.

People with disabilities have the right to get help with voting and to decide who will help them vote.

A person with a disability can get help from a friend, family member, caregiver, residential service provider or almost anyone else of his or her choosing except an employer or union member. The person can also ask a poll worker for assistance with voting.

A person helping a voter with a disability should ask the voter what choice he or she wants to make, if any. It is the voter who makes the choice whether to vote and how to vote, not the person providing help.

The person providing help should not mark a ballot to reflect any choice other than the choice expressed by the voter.

The person providing help must respect the voter's privacy at all times during the voting process.

Thank you for the opportunity to testify on this important issue.