

Jacobs Proposed Motion:

The United States District Court for the Western District of Wisconsin entered an Opinion and Order, as well as a Permanent Injunction and Declaration, in the matter of *Timothy Carey et al. v. Wisconsin Elections Commission et al.* (22-cv-402jdp) on August 30, 2022. These materials have been attached for your consideration. In his decision, Judge James Peterson clarified how the Voting Rights Act applies to Wisconsin voters who require assistance with mailing or delivering their absentee ballot (“ballot return assistance”) because of a disability.

Pursuant to the Voting Rights Act, **any Wisconsin voter who requires assistance with mailing or delivering their absentee ballot to the municipal clerk because of a disability must be permitted to receive such assistance by a person of the voter’s choice, other than the voter’s employer or agent of that employer or officer or agent of the voter’s union.**

In administering future elections, all municipal clerks and their staff should comply with the above statutory requirement. The remainder of this memorandum addresses some questions that have arisen in light of the recent rulings in *Carey* and other court cases. The Commission suggests that you discuss this guidance and any other questions you may have with local legal counsel.

Do I need to confirm a person’s disability if they are being provided voting assistance, and if so, how?

No. Municipal clerks do not need to confirm that a voter utilizing ballot return assistance is a voter who requires ballot return assistance due to a disability. A Wisconsin voter may self-identify as requiring ballot return assistance due to a disability. This approach is consistent with previous court decisions holding, in analogous contexts, that voters may personally determine whether they fall within a particular statutory category. *See, e.g., Jefferson v. Dane Cnty.*, 2020 WI 90, 394 Wis. 2d 602 (allowing voters to self-identify indefinitely confined status).

When a clerk is presented with an absentee ballot delivered in-person to the clerk’s office, the Commission believes that the clerk may ask the following questions

- Are you the voter? *If not, then:*
- Are you delivering the voter’s ballot because the voter has determined that they require assistance returning their ballot due to their disability? *If yes, then:*
- Are you someone other than the voter’s employer, an agent of that employer, or an officer or agent of the voter’s union? *If yes, then the ballot can be accepted.*

Additionally, as in all cases, any person who commits voter fraud or violates any statutory voting requirement may be subject to legal remedies in a criminal or civil proceeding.

Do I need to confirm the disabled voter or agent's identity, or otherwise request additional information?

No. If the agent answers the above bullet-point questions correctly, the ballot should be accepted. Nothing in the statutes provides for otherwise confirming the agent's identity or requesting additional information. As for the disabled voter, she will have provided any statutorily necessary identification and residency information prior to the absentee ballot request. The statutes do not require a second presentation of that information.

Did the Carey case overrule Teigen v. Wisconsin Elections Commission (976 N.W.2d 519)?

No. The *Carey* decision did not overrule or invalidate any portion of the Wisconsin Supreme Court's decision in *Teigen*. The *Teigen* court did not decide whether voters with disabilities may be entitled to absentee ballot return assistance. The *Teigen* court also did not decide whether voters in general may have someone else return a ballot through the U.S. Mail.

Who can provide a disabled voter with absentee ballot return assistance?

Under the Voting Rights Act, a voter requiring ballot return assistance due to a disability may select any person to serve as their agent providing ballot return assistance, provided that the person is not the voter's employer, an agent of their employer, or an officer or agent of the voter's union.

Can a single agent provide assistance to more than one disabled absentee voter?

Yes. As stated above, a voter requiring ballot return assistance due to a disability may select any person to serve as their agent providing ballot return assistance, provided that the person is not the voter's employer, an agent of their employer, or an officer or agent of the voter's union. It is possible that more than one voter might select the same agent.

What constitutes a permissible absentee ballot "mailing," and when has the agent's "assistance" stopped?

The Commission recommends treating the following as circumstances constituting "mailing" with respect to returning an absentee ballot on behalf of a voter requiring ballot return assistance due to a disability:

- A lawful agent places the absentee ballot in the voter's residential mailbox.
- A lawful agent places the absentee ballot in a United States Postal Service or similar parcel carrier's mailbox or delivers it to a designated drop facility for such parcel carriers.

- A lawful agent turns over custody of the absentee ballot directly to a postal or parcel carrier's employee/agent.
- A lawful agent places the absentee ballot into a reasonable, legitimate, and legally compliant stream of mail delivery services (*e.g.* care facilities, jails and correctional institutions, military installations, and other similar institutions and organizations often have a designated clerk or courier service responsible for collecting or otherwise delivering mail to postal officials or mail carriers).

The agent's assistance is complete when that party lawfully returns the absentee ballot to the appropriate clerk's office or deposits the absentee ballot into the stream of mail services discussed above (including any other lawful means of providing the ballot to a designated mail carrier, mailbox, or mail facility).

If election officials have any questions about this guidance, they may discuss them local counsel or contact the Commission Help Desk at elections@wi.gov or by phone at (608) 261-2028.
Thank you for your prompt attention to this matter