Reflecting on Twenty-five Years of the ADA: Seeing Commitment Caveats and Legal Loopholes

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The Americans with Disabilities Act (ADA) was enacted twenty-five years ago on July 26, 1990. This civil rights law is cause for great celebration in the ongoing and honorable endeavor of championing equal access to facilities for persons with disabilities. While this landmark legislation has made tremendous progress, many of us involved in disability design implementation still see legal excuses and commitment caveats preventing equal facility access. Our perspectives are through the lenses of practicing professionals and educators familiar with problems inhibiting access on college campuses. With eyes close to interior design problems, the difficult question of particular interest to interior design educators and professionals is asked: What commitment caveats and legal loopholes surrounding the ADA legislation are still inhibiting access of the interior environment after twenty-five years?

Five professionals[1] analyzed accessibility in academic environments where we are particularly familiar with facility access problems "slipping through the cracks." Joseph Maxwell's (2013) qualitative research design methods guided our interactive questioning, memo writing, critiques, and written development of this position paper. Penetration into the Department of Justice's (DOJ) ADA enforcement history, as well as the 2010 DOJ Standards for Accessible Design and the International Building Code (IBC) accessibility standards were key resources for the collaborative work of our panel. Our direct experience with DOJ regulations and infractions and firsthand personal experiences further informed our understanding of the mounting unenforced and unresolved ADA problems faced among the growing number of persons with some form of mobility disability.

For one in five Americans with a disability, the simple use of an inaccessible university building can lead to cruel embarrassment, hazards, cascading medical complications, and frustrations. Meanwhile, demands for effective and targeted accessible design are increasing, exasperating the need for accessible structures and interiors. From 2005 to 2010, the total number of persons with disabilities in the U.S. grew by 2.2 million people, from 54.4 to 56.7 million people (Brault, 2012). According to the Survey of Income and Program Participation (SIPP), from 1990 to 2010 more than 10% of American households used some form of mobility aid or device. Extrapolating those numbers ten years in the future, the number of Americans using mobility aids rises to about 13%. Over the same period of time, the use of some mobility aid doubles in households from 1.5 to 3% (LaPlante & Kaye, 2013). Generally, these disability numbers are considered underrepresented, not accounting for the large percentage of older persons living in assisted living or nursing environments (Brault, 2012). Clearly, the need for accessible designs remains more critical than ever.

Commitment Caveats

Ever since the signing of the ADA, the legislation has been showing its teeth by including substantial fines in settlements of consent decrees with the DOJ. The gamut of possible legal actions includes private litigation,

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pursuit of a consent decree, settlement agreement, or federal lawsuit from the DOJ. The number and costs of private litigation cases regarding enforcement of ADA are unknown since these data are not recorded in aggregate. In consent decrees, settlement agreements, and federal lawsuits, substantial monetary fines and remedial costs are a normal finding. For state and local agencies—such as state colleges—generally the enforcement encompasses a *de novo* review of the entirety of the facilities owned or operated by the offending entity, not just the violation that brought the original action. While barriers may have gone unnoticed for years, the *de novo* review escalates the costs. In examining both enforcement and nonenforcement, it becomes apparent how numerous conditions exist suspending the full realization of the law. These conditions, or caveats, exist for several reasons.

Fragmented adoption of ICC

While most states and jurisdictions adopt the International Code Council (ICC) family of codes, this is not a federal mandate as with the ADA. As a result, the two regulations are enforced in a national patchwork of inconsistent local ordinances, county interlocal agreements and state-by-state statutes. Consequently, we see erratic understanding and application by enforcing authorities. Some communities mistakenly delete Chapter 11, "Accessibility" of the International Building Code (IBC), and replace it with the ADA. This tends to undermine many supporting provisions of the IBC and leads to unforeseen consequences and inability to enforce aspects of both regulations.

Varying levels of commitment to the transition plan

A "Self Evaluation" and "Transition Plan" are mandated by the ADA in the Code of Federal Regulations (CFR) 28 CFR Part 35.105 (Department of Justice, 2012). The self-evaluation is a review of all facilities, services, programs, and activities to identify barriers that may limit or exclude participation by people with disabilities. The transition plan applies to any Title II entity with more than 50 full-time employees, requiring a plan, budget, and changes toward remedying shortcomings noted in the evaluation. Unfortunately, an archaic or inaccurate 1992 transition plan may be seen as a document of futility and hopelessly lost in the library archives. Human resources and facilities management departments are other likely places to uncover aging and obsolete self-evaluations. Campus facility managers may be unaware of the transition plan requirements, negligent in updating the process, or worse: they may try to justify ignoring the process because of competing priorities and insufficient capital improvement funds.

This caveat is of particular concern for Title II colleges and universities. Unlike Title III, Title II entities can offer any service or program in an alternate setting or manner. For example, if an interior connecting ramp is too steep and too long without landings, a classroom or service would be relocated. What occurs, however, is an uninformed dispersion of offices, classrooms, and student services requiring access. Often, the persons making these decisions about distribution of facilities or programs are not mindful of the necessary strength, chronic shoulder pain or other dangers involved in negotiating steep ramps—in both directions—for persons with mobility aids. Consequently, people with disabilities are denied access. The noncompliant ramp would continue to exist, avoiding remedy for an extended period of time until renovations of the facility or formal complaints.

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Omission of furnishings

The 2010 ADA Standards focus on the structures, sidewalks, parking, and built-in elements, omitting furnishings (Department of Justice, 2013). While plan review and building inspections are conducted for the fixed features of a building and its utilities, plan review and building inspections *do not* cover the design of nonfixed furniture, fixtures, and equipment (FF&E).

Of specific concern are standards for bed height in mandated accessible conference hotel rooms and/or university residence halls. Some residence hall students may have a choice of bed height options: standard (19.5″ aff), captain (37″ aff), and bunked (29″ aff; 66″ aff). For comparison, the standard range for accessible benches, toilets, and other fixed seating is 17″– 19″ aff. Bed height between 20″–23″ is preferred for comfortable transfer. Bed heights above this range, so common in the hospitality industry, are dangerous when a person is transferring to or from a wheelchair. Shoulder joints wear out quickly, are highly vulnerable, and essential to a person depending on assistive devices for mobility. A single transfer to a residence hall bed or university conference hotel bed can seriously damage a shoulder that already is debilitated by negotiating steep ramps, inaccessible routes, and other transfers. Surgery and lengthy recuperation incapacitating a person for weeks, months, or years is not uncommon. When users are in their later years, the healing time can be even longer. These are persons who transfer many times a day to use vehicles, bathrooms, as well as beds. Shoulder pain is exacerbated because of the many transfers among users of cyclic wheelchair propulsion, motorized wheelchairs, and those using crutches or canes. Research by Jain, Higgins, Katz, and Garshick (2011) further documents the prevalence of shoulder pain and its association with the use of assistive devices for mobility in persons with chronic spinal cord injury.

No ongoing review

Life safety inspections are conducted after a building is built and occupied. State fire marshals, as well as communities with local fire officials, are given statutory authority to choose from and adopt several regulatory documents, including those from the IBC, the International Fire Code (IFC), and the National Fire Protection Association (NFPA). This adoption of regulatory documents grants the authority to inspect existing structures. Often, this is referred to as the "life safety" inspection process.

There is no comparable ongoing regular review of accessibility standards after a Title II building is occupied other than the implied diligence of the owners and users inherent in the self-evaluation or transition plans mentioned earlier. Arguably, the inspection of existing structures is one of the strongest tools for ensuring accessibility in FF&E use and placement. Fire officials are notorious for correctly citing blocked stairways, hallways, and exits that become convenient storage areas of stacked student papers. Equally, nearly every building official has personal stories about their concerns of what happens to a building once they issue the "Certificate of Occupancy" (CO), effectively ending the jurisdiction's ability to regulate the building design and use.[2] Some jurisdictions have taken steps to compel the building owners to provide signed documents attesting that the use of the building or specific operational characteristics will not change. Other jurisdictions pass local ordinances requiring inspections each time a commercial space is sold.

As people use buildings, they make unintentional adaptations impeding access. Both people and buildings learn to adapt and are in constant flux. Heavy trash containers, recycling bins, and thick rugs are placed at doorways. Merchandise is stacked in narrow aisles in bookstores and in faculty offices. Unreachable portable lamps are on large library tables. Heavy seating is closely arranged on thick area rugs in student lounges, which

prohibit access and social participation. Teachers may ask students to perform assignments without a mindful commitment to accessibility. These access problems can be a result of insensitive behaviors of able-bodied occupants unfamiliar with what it is like to use a wheelchair or other assistive device and therefore a lack of empathy for persons with disabilities coping in a community with able-bodied users.

ADA Legal Loopholes

Loopholes are defined here as inconsistencies with other regulations and avoidances of ADA standards inhibiting or evading full accessibility in the built environment.

Discord in scope and purpose of ADA and IBC

Despite best efforts of regulations, a major distinction of the ADA and IBC exists that creates a loophole. The IBC is intended to protect persons and property (International Code Council, 2012), while the DOJ's 2010 Standards for Accessible Design (2010 Standards) purpose is eliminating discrimination by design for ingress and egress accessibility. In short, the 2010 Standards are a graphical interpretation of a civil rights law—the ADA. Consequently, the difference in the scope and purpose of the two documents will always present barricades to a fully unified harmonization. By necessity, the 2010 Standards and the ICC family of codes are in a constant process intended to achieve the most optimal and seamless harmonization possible, despite the differences in purpose and scope. Endeavoring to catch the loopholes, the US Access Board, DOJ, International Code Council, and others collaboratively review these dynamic, complex, and evolving documents. With these extraordinary proactive efforts, a reasonable person might anticipate that designers would have fewer barriers to achieving full compliance. Equally reasonable—and equally flawed —would be the assumption of a commensurate ability on the part of enforcement agencies to identify design shortcomings early, during the less costly and disruptive plan review stage.

Unchecked autonomy in the academy

Some state academic institutions are not subjected to the plan review, permit, or inspection processes. State statutes grant some institutions self-regulatory autonomy, allowing them to bypass the same jurisdictional construction regulations that are enforced on the very communities in which these academies reside. Costly errors in new construction, alterations, and renovation projects can occur because of this *unchecked autonomy* while nearby local government entities have no authority. Meanwhile, with limited financial resources, shortcuts may be made to deal with the existing infrastructure. The dual standard, unchecked autonomy loophole of self-regulating colleges has been identified in a recent article in the ICC *Building Safety Journal* by two members of our panel. As explained,

> *Multi-million dollar projects may be built without plan review, permits or inspections by a party that is not invested in the project. With declining funds and escalating costs, short-cut renovations may be particularly problematic. Internal reviews in a self-regulation process at a school could be overtly influenced by financial up-front costs, self-serving interpretations and political persuasion. (Sternadori & Tofle, 2015, 32)*

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Loose enforcement

During the period when the country was under the 1991 ADAAG, six states submitted their own statutes for accessibility to the DOJ and Access Board and were certified as "Equivalent" under the ADA. Today, since publishing the 2010 Standards, no states have yet submitted their own statutes for equivalency. Regardless, there is nothing stopping a state or local jurisdiction from adopting and enforcing the ADA and 2010 Standards or from passing local regulations that exceed the minimums of the federal laws. In fact, many states' fire marshal's offices and other inspection agencies currently do just that. Many communities have also taken on the task of enforcing the ADA themselves. Regrettably, many government jurisdictions do not embrace the ADA and rely on the IBC for accessibility in construction.

Given the high degree of harmonization, a paradigm shift is slowly happening across the country as local code officials, inspectors, and plan reviewers are *de facto* enforcing the ADA and 2010 Standards by default, as they apply the harmonized provisions of the IBC/ICC A117.1. There are now multitudes of boots on the ground locally, many more than the multiple federal agencies that have ADA enforcement authority can provide, i.e., DOJ, Equal Employment Opportunity Commission (EEOC), Department of Education (DOE), and Office of Civil Rights (OCR). However, any required national standard for the education, certification, or licensing of jurisdictional codes personnel remains elusive. The results are inconsistent understanding, implementation, and enforcement of accessibility standards—whether the IBC/ICC A117.1 or the 2010 Standards. The ICC provides incomparable educational and certification programs nationwide, but adherence to those professional qualifications is in the hands of each jurisdiction as they establish their respective hiring standards for inspection personnel.

Plan review is ostensibly the nation's safety net when designers submit construction documents for building permits. If the reviewer is properly educated and has the resources and local support to thoroughly review drawings before construction, a high degree of accessibility is probable. In smaller communities, the field inspector, plan reviewers, and chief official can be the same person, bringing into focus this question of resources.

Accessible enforcement in the field means that concrete, steel, and other materials have been installed and the possibly faulty design overlooked and implemented. The political, financial, and other vested interests in the project may now themselves become the barriers to accessibility. Some violations may be detected only after occupancy. In other words, if compliance with the ADA is not detected in the electronic plan review stage, the nation relies on the filing of DOJ complaints and private litigation after construction.

A Discussion Among Professionals

At this twenty-fifth ADA anniversary when we celebrate its accomplishments, the academy is honored because it is a bastion of where discrimination is harshly fought and the high ideals of excellence and humanity are nurtured. These ideals mirror the professional ethics of the interior design practitioner to consider at all times the health, safety, and welfare of the public (IIDA, July 2015).

As professional and educational goals merge, the metaquestion we should ask is whether the educational requirements in the form of knowledge, skills, abilities, sensitivities, and commitments of designers, contractors, and enforcing code officials are keeping pace with mounting design needs. Evidence of the

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increasing numbers of persons with disabilities is good reason for design professionals, multidisciplinary faculty, and persons with disabilities to work together. In this effort we focus our lenses to see unenforced and unresolved access problems on college campuses. While we may be proficient at teaching the required quantitative dimensions and enforcement policies of access, we may be less proficient at instilling the qualitative mindfulness and commitment needed to keep up with the mounting needs.

The ADA was itself a product from the efforts of diverse people. It has survived great criticism associated with increased building construction cost. It has evolved with multiple amendments and regulatory updates. Most importantly, the ADA has endured as an undeniably successful civil rights act. We believe the hardy endurance of the ADA is testament to its rigorous testing. Rather than just complacently accepting the ADA as-is, identifying caveats and loopholes is positive criticism for public policy debate toward reducing discrimination of people with disabilities in our society.

There are times when we are confronted by vexing ethical dilemmas. When construction errors are recognized, when problems are not addressed because they are said to be financially infeasible to correct, and when insensitivity is continuously exhibited, we must choose to ignore, educate, advocate, and/or litigate. While litigation is the last resort, history demonstrates legal action has significantly contributed to the buoyancy and evolution of the ADA. Instrumental complaints to government entities have been ensuring justice for people with disabilities over the past decades. A person who feels their rights have been violated should do what they feel is right. Refinements in legislation reflect commitment for a more civil society and tolerance levels to discrimination through oversights, egregious errors, and loopholes. The threat of ADA enforcement may lead to greater commitment for accessibility, but there is no guarantee that enforcing creates a clear path to achieving accessibility. And certainly enforcement alone will not nurture or create a proactive and educated design workforce or academic environment that embraces accessible design. At the twenty-fifth-year anniversary of the ADA, it is clear the work of interior design educators, professionals, and persons with disabilities themselves play key roles in implementing the high ideals of civil rights. The words of a woman who had multiple disabilities are *apropos*:

> *"While they were saying among themselves it cannot be done, it was done."*
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> *—Helen Keller*

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Notes

[1]The authors wish to thank two additional colleagues. Chuck Graham is Associate Director of the Great Plains ADA Center, ADA systems and policy analyst, technical assistance provider, user of a wheelchair, former State Representative and State Senator, interior design advisory board member, and University of Missouri Instructor. Kimberly Paarlberg is a registered Senior Staff Architect for Codes and Standards at the International Code Council (ICC), teacher of accessible design for ICC and the National ADA Symposium, author in professional journals, and leader in harmonization endeavors between the Federal and Building Code provisions for accessible design.

[2]Based on author Sternadori's experience as Chief Building Official and Chief Building Inspector.

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