OFF LIMITS 25 YEARS LATER:

One Step Removed from Equal Access
to DC’s Neighborhood Businesses

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The 25th Anniversary
of the Americans with Disabilities Act

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Since 1996, University Legal Services, Inc. (ULS), a private, non-profit organization, has been the federally-mandated protection and advocacy (P&A) program for individuals with disabilities in the District of Columbia. Congress vested the P&As with the authority to investigate violations of the rights of individuals with disabilities. Accordingly, ULS advocates and represents DC residents with disabilities to promote their civil and human rights including their right under the Americans with Disabilities Act (ADA) of 1990 to live and fully participate in integrated community settings.
“Accessible design does not cost more money — the human costs of inaccessible design are tremendous. Our society must open its doors to all.”

Testimony in support of Congressional passage of the ADA by Evan Kemp before House Subcommittees on Select Education and Employment Opportunities, Ser. No. 101–37, July 18, 1989, p. 49.
I. Introduction

Twenty-five years ago on July 26, 1990, Congress enacted the Americans with Disabilities Act\(^1\) (ADA) — the landmark civil rights statute that prohibits discrimination against persons with disabilities — to ensure community integration for people with disabilities. Congress publically declared its intent that disabilities should in “no way diminish a person’s right to fully participate in all aspects of society.”\(^2\) The ADA guarantees people with disabilities protections similar to those afforded under the Civil Rights Act of 1964. Title III of the ADA mandates accessibility in public accommodations (private businesses that are open to the public) in order to ensure people with disabilities have an equal opportunity to participate in, and benefit from, the goods and services offered by the public accommodations in the most integrated community settings alongside people without disabilities.\(^3\) Community inclusion under Title III of the ADA means affording people with disabilities equal access to restaurants to eat out with friends, and to other businesses such as gyms, grocery stores, pharmacies, and other retail shops, cinemas, sports arenas, and other places where they can participate in a wide array of activities available to people without disabilities.

The law prohibits businesses that are open to the public from excluding people based on their disabilities, and characterizes such exclusion as discrimination. Maintaining businesses that are not wheelchair-accessible is the equivalent of posting signs marked “people who use wheelchairs are not welcome” because of the architectural barriers.

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1. 42 U.S.C. § 12101, \textit{et seq.}
Two and a half decades later, the ADA’s goals remain aspirational. Despite Title III’s mandate, many businesses in the District of Columbia have consistently failed to provide access to the reported 70,000 DC residents with disabilities, often due to half or full step entrances. DC residents with disabilities have the right to enter these establishments; their access is essential to living meaningful and active lives in the community.

It is indefensible to deny individuals basic equal access to businesses — getting through the door. All public accommodations have an obligation under Title III of the ADA to not only remove existing barriers when removal is “readily achievable” but also to remain barrier-free. The failure by local businesses to remove architectural barriers when it is “readily achievable” constitutes discrimination and is actionable under the law. This report highlights the neighborhood businesses in two DC communities that violate their obligations under the ADA, and summarizes the remedy for ensuring that people with disabilities have equal access to community businesses.

II. The Current Landscape in the District of Columbia

In 2013, 11 percent of DC residents (70,000) reported having a disability.4 Over one-third of DC residents (23,873) ages 65 years and older reported having a disability in 2013.5 These residents, in addition to approximately 4 million tourists with disabilities who visit the District each year,6 are literally shut out of scores of inaccessible restaurants and other businesses by one-step entrances and the lack of accessible bathrooms.

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5 Id. at 18 (Table 1.7).
a. H Street NE

For the past 13 years, H Street NE from 3rd Street to 15th Street has been the focus of considerable planning, as half of the buildings were vacant at the outset of the redevelopment plan, as were about 54 parcels of land and one-third of the storefronts. City officials, residents, and long-time neighborhood commercial space renters including ULS, enthusiastically awaited the resurgence of the area.

Now part of the newly-coined “NOMA” neighborhood, the H Street NE corridor is marked by sharp increases in residential as well as commercial office space development, in addition to the multitude of restaurants, bars, gyms, theatres, and other public accommodations. Development is ongoing, so the time is right for ensuring accessibility in compliance with Title III of the ADA.

b. Woodley Park NW

The commercial strip on Connecticut Avenue from Calvert Street to Woodley Road NW is a central hub surrounding the red line metro station at Woodley Park-Zoo NW. It is lined with restaurants, conference hotels, and businesses. The ownership of some restaurants in the area has changed over the past four years, along with renovations of storefronts and entrances. Other local businesses have also undergone significant renovations recently. Nevertheless, the majority continue to have half-step to one-step entrances that shut out people with mobility disabilities, in violation of Title III of the ADA.

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7. See http://hstreet.org/h-street/history/.
III. The ADA Mandates Removal of Barriers

Title III of the ADA\(^8\) prohibits public accommodations from discriminating against individuals with disabilities by denying them access to their premises. A public accommodation is a private entity that owns, operates, leases, or leases to, a place of public accommodation. Places of public accommodation include a wide range of entities, such as restaurants and bars, retail stores including pharmacies, hotels and other “places of lodging,” theaters, health care offices, privately-owned museums and other “places with public displays,” privately-owned educational facilities, places of entertainment, recreation and services including social service and day care centers.

All public accommodations must ensure that individuals with disabilities have equal access to their businesses. To meet this obligation, businesses must remove architectural barriers in existing facilities when barrier removal is “readily achievable.” As defined by 42 U.S.C. § 12181(9), the term “readily achievable” means “easily accomplishable and able to be carried out without much difficulty or expense.” This does not mean removal is required only if it is cost-free. Ramp construction costs vary significantly, based on the ramp dimensions (slope and length) and type of materials used, from approximately $1,500 for wood construction to $10,000 for concrete construction. Portable ramps are typically available for under $1,000. The determination of whether a business must remove barriers takes into account the nature and cost of the renovation, the overall financial resources of the business, the number of persons employed at the site, the action steps required to ensure the safe operation of the business, and the type and size of

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\(^8\) 42 U.S.C. § 12181. The ADA defines a public accommodation as “a facility, operated by a private entity, whose operations affect commerce.” 28 C.F.R. § 36.104. The statute lists 12 distinct categories of public accommodations. Id.
operations of any parent company or entity. If a renovation is not warranted under this standard, the business must then consider and employ alternative methods to improve accessibility.

Courts interpret Title III’s readily achievable standard broadly. In PGA v. Martin, the Supreme Court found that the Title III “phrase ‘public accommodations’…‘should be construed liberally’ to afford people with disabilities ‘equal access’ to the wide variety of establishments available to the nondisabled.” For example, in a case brought by a customer who used a wheelchair but was denied access to a grocery store, the Ninth Circuit held that the store violated the ADA by “not providing ‘full and equal’ access to the store,” instead forcing the customer to navigate through unused checkout aisles. In another case involving the availability of sign language interpreters to ensure program access, a federal district court ruled that the ADA “sought to comprehensively address…the failure to make modifications to existing facilities and practices that prevented disabled individuals from being fully ‘integrate[d] into the economic and social mainstream of American life.’” Moreover, the D.C. Circuit, held that the Verizon Center (formerly called the MCI Center) – an arena open to the public, must provide access, i.e., unobstructed views, to spectators with disabilities “comparable” to those provided to spectators without disabilities. Another D.C. federal court ruled that AMC cinemas, as a public accommodation, must comply with the ADA to “retrofit[] existing structures” to provide equal access to individuals with disabilities by dispersing accessible seats throughout the theaters.

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9 28 C.F.R. § 36.104.
Private citizens have the right to enforce the ADA through individual or group lawsuits. The U.S. Department of Justice — the agency that Congress authorized to promulgate regulations and enforce the ADA — has issued definitive guidance and federal regulations to implement Title III’s requirements.\(^\text{16}\) According to the DOJ Manual:

> [a]rchitectural barriers are physical elements of a facility that impede access by people with disabilities. These barriers include more than obvious impediments such as steps and curbs that prevent access by people who use wheelchairs….Conventional doorknobs and operating controls may impede access by people who have limited manual dexterity. Deep pile carpeting on floors and unpaved exterior ground surfaces often are a barrier to access by people who use wheelchairs and people who use other mobility aids, such as crutches.\(^\text{17}\)

a. **“New” versus Altered Businesses**

The Title III accessibility requirements depend on whether the public accommodations are located in “newly-constructed” buildings that were built after January 26, 1992 (following promulgation of the Title III regulations), versus those located in existing buildings, which are altered (renovated). “All newly constructed places of public accommodation and commercial facilities must be readily accessible to and usable by individuals with disabilities to the extent that it is not structurally impracticable…only [in] rare and unusual circumstances” involving steep terrain.\(^\text{18}\)

According to the Title III Manual, alterations begun after January 26, 1992 “must be readily accessible to and usable by individuals with disabilities in accordance with the 2010 ADA

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\(^{16}\) *See* ADA Technical Assistance Manual at § III-4.300, Standards to Apply.

\(^{17}\) *Id.* at § III-4.4100, Removal of Barriers, General.

\(^{18}\) *Id.* at § III-5.1000, New Construction, General (citing 28 CFR §§ 36.401-.406); Appendix A.
Accessibility Guidelines (ADAAG) to the maximum extent feasible.”19 The Manual further clarifies:

An alteration is any change that affects usability. It includes remodeling, renovation, rearrangements in structural parts, and changes or rearrangement of walls and full-height partitions. Normal maintenance, reroofing, painting, wallpapering, asbestos removal, and changes to electrical and mechanical systems are not "alterations," unless they affect usability.20

DOJ provided examples of alterations including “moving walls…changing a doorway entrance, replacing fixtures, flooring or carpeting.”21

Businesses are required to comply with the ADAAG, which specifies how to achieve wheelchair-accessibility unless compliance is not “readily achievable,” and their building permit application was certified prior to March 15, 2012, in which case, the 1991 Access Standards apply. The deadline for compliance with the 2010 technical standards is long past: March 15, 2012.22

“When removing barriers, businesses are required to comply with the Standards to the extent possible.”23 The DOJ Manual states, “barrier removal measures may be taken that do not fully comply with the standards, so long as the measures do not pose a significant risk to the health or safety of individuals with disabilities or others.”24

The Manual cites the following illustration:

As a first step toward removing architectural barriers, the owner of a small shop decides to widen the shop’s 26-inch wide front door. However, because of space constraints, he is unable to widen the door to the full 32-inch clearance required for alterations under

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19 Id.
20 Id.
22 Id. at 2.
23 Id. at 10.
24 ADA Technical Assistance Manual at § III-4.4300, Removal of Barriers, Standards to Apply.
ADAAG. Because full compliance with ADAAG is not readily achievable, the shop owner need not widen the door the full 32 inches but, rather, may widen the door to only 30 inches. The 30-inch door clearance does not pose a significant risk to health or safety. Are portable ramps permitted? Yes, but only when the installation of a permanent ramp is not readily achievable. In order to promote safety, a portable ramp should have railings and a firm, stable, nonslip surface. It should also be properly secured.25

b. Small Businesses Are Not Exempt from Title III

DOJ issued specific guidance explaining how the Title III requirements apply to small businesses in particular.26 As the guidance makes clear, “[g]randfather provisions…do not exempt businesses from their obligations under the ADA.”27 The DOJ regulations recommend priorities for removing barriers in existing facilities.28 In recognizing that businesses may not be able to remove all existing barriers at one time, DOJ’s Title III regulations “suggest a way to determine which barriers should be mitigated or eliminated first.”29 As such, the first priority for a public accommodation “should be to enable individuals with disabilities to physically enter its facility.”30 This priority “recognizes that providing physical access to a facility from public sidewalks…is generally preferable to any alternative arrangements in terms of both business efficiency and the dignity of individuals with disabilities.”31 In addition, “[p]roviding access to public restrooms” is among the most important priorities.

DOJ’s enforcement authority applies to and spans across all types of businesses that provide goods and services to the public. DOJ investigates citizen complaints and brings civil

26 See ADA Primer for Small Businesses.
27 42 U.S.C. § 12182(b)(2)(A)(iv); Id. at 1.
29 Id.
30 Id.; See also ADA Primer for Small Business at 11-12.
31 Id. at § III-4.4500, Priorities for Barrier Removal.
actions where a pattern or practice of discrimination is alleged or is a matter of “general public importance” is raised as a result of discriminatory practice.\textsuperscript{32} Following extensive compliance reviews, DOJ uncovered a multitude of violations of Title III’s architectural barrier removal provisions, and entered into settlement agreements with scores of neighborhood businesses to prompt their compliance with the ADA.\textsuperscript{33}

**IV. ULS’ Outreach to Neighborhood Businesses**

**a. H Street NE**

Beginning in 2011, ULS sent letters to myriad restaurants that were undergoing renovations on H Street NE to advise them of their obligations under Title III of the ADA. The ULS letter recited the prohibition against disability-based discrimination and the requirement to have at least one wheelchair-accessible entrance wide enough to allow entry by a person in a wheelchair, particularly during renovations or construction, where access is “readily achievable,” \textit{i.e.}, can be “easily accomplished and able to be carried out without much difficulty or expense.” If there were restrooms for customers, the letter called for wide doorways for wheelchair access and grab bars within one restroom stall. The letter cited the regulatory factors to be considered in determining whether access is readily achievable, as “the nature and cost of the renovation, overall financial resources of the enterprise, [and] the number

\textsuperscript{32} 42 U.S.C. § 12188(b)(1).

\textsuperscript{33} See e.g., Alliance NY, LLC Settlement Agreement (entered into September 30, 2014); 800 North Charles Street Limited Partnership, LLP and Palamino Corporation (Donna’s restaurant, Baltimore, MD) Settlement Agreement (entered into September 17, 2009); Aqua Turf Club Settlement Agreement (entered into May 22, 2012); Mrs. K’s Toll House Restaurant Settlement Agreement (entered into October 21, 2012).
of persons employed at the site.” ULS also provided a link to the DOJ’s “ADA Update: A Primer for Small Business” referenced above.

ULS’ advocacy for accessibility focused on restaurants with half-step or one-step entrances where accessibility was indeed “readily achievable.” From 2011 to 2014, ULS sent letters repeatedly to the following 17 inaccessible businesses urging them to comply with the ADA:

- Argonaut
- Batter Bowl Bakery
- Chef Corner Café
- Ethiopic
- Georgetown Valet
- Le Grenier
- Liberty Tree
- Ocopa
- Pizza Parts & Service
- PNC Bank
- Pursuit Wine Bar
- Rock n’ Roll Hotel
- Sahra
- Smith Commons
- Star & Shamrock
- Sticky Rice
- Vendetta

New inaccessible businesses have opened recently that are worthy of note: DC Conscious Café and Nomad Hookah Bar.

Beginning in 2012, ULS staff attended the annual H Street festival, talked with business and civic leaders, attendees, and distributed fliers calling for accessibility that listed inaccessible businesses. Driftwood, H Street Country Club, Taylor Gourmet, Ben’s Chili Bowl, 6 & H Street Bar and Grill, among other businesses, made wheelchair access a reality during the course of their construction and renovation.
b. **Woodley Park, NW**

In 2013, ULS notified Italian Pizza Kitchen and District Kitchen in writing of their obligations to make their entrances accessible, particularly in light of their one-step entrances. Neither restaurant responded to ULS’ letter. Both restaurants undertook renovations in conjunction with changes in ownership and also set up sidewalk patio seating, but failed to afford people access into the restaurants in order to eat or use the restrooms. *See Appendix A.* Café Paradiso is also inaccessible. Three businesses — Debonair Cleaners, Sherry Liquors, and Wylie Wagg — recently renovated their storefronts and beyond, but failed to ramp their one-step entrances. *See Appendix A.*

Medaterra is accessible, as is Manhattan Market, Rajaji, and Woodley Café. Given the high volume of individuals with disabilities, in addition to the rate of tourism, in the neighborhood, all businesses should be accessible to people with mobility disabilities.

**V. Neighborhood Businesses Must Take Remedial Measures to Comply**

The ADA is comprised of a set of provisions that not only outline the rights afforded to individuals with disabilities but also identify the forms of discrimination that were, and unfortunately still remain, pervasive in our society. As DOJ emphasized, “[o]ne small step at an entrance can make it impossible for individuals using wheelchairs, walkers, canes or other mobility devices to do business with [small business owners]. Removing this barrier may be accomplished in a number of ways, such as installing a ramp or a lift or regrading the walkway to provide an accessible route.”34 If the main entrance cannot be made accessible, alternative accessible

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34 ADA Small Business Primer at 14.
entrance(s) can be used and properly marked with signage.\textsuperscript{35} In line with the DOJ’s guidance, businesses should take these, among other, remedial measures: providing an accessible path of travel to move about inside the business and access dining areas, tables, food service and beverage lines, providing an accessible restroom, among other measures. Each of these measures is discussed in further detail below.

The best method for ensuring barrier removal is retrofitting the entrance to the business. A half or full step at the entrance shuts out people who use wheelchairs and other assistive devices such as walkers. To ensure full compliance with the law, ULS urges businesses to install permanent ramps at their front entrances. Ramps are constructed in a variety of materials, from wood to concrete. If, and only if, installation of a permanent ramp proves too expensive or infeasible in light of the factors outlined above, businesses must install alternative methods of access, such as portable ramps.\textsuperscript{36}

Additionally, once an individual is able to enter a store, the layout of the store should be such that they are able to freely move around the building. Under the ADA, this is known as an accessible route.\textsuperscript{37} Businesses must also make certain that individuals have access to restroom facilities that are accessible, which means widening stalls, installing grab bars, and providing accessible signage.\textsuperscript{38} Business should “take any other measures necessary” to guarantee full and complete access.\textsuperscript{39}

Currently, a multitude of businesses throughout the District’s most viable and high traffic neighborhoods are not in compliance with the most basic requirement of ensuring individuals can

\textsuperscript{35} Id.
\textsuperscript{36} 28 C.F.R. § 36.304(c)(1).
\textsuperscript{37} 28 C.F.R. § 36.304(c)(2).
\textsuperscript{38} 28 C.F.R. § 36.304(c)(3).
\textsuperscript{39} 28 C.F.R. § 36.304(c)(4).
get in the door, let alone access to any goods, services, and other facilities inside. While it is common, especially in the warm months of the year, for restaurants in particular to provide outdoor seating areas, some of which are accessible, this does not serve as a viable alternative to retrofitting the store’s main entrance. Most importantly, individuals with disabilities clearly have the right to choose where they would like to sit, as do customers without disabilities. More so, outdoor seating is not available throughout the year, and does not provide shelter in the event of inclement weather. Lastly, the presence of outdoor seating is not a substitute for indoor seating as it does not allow for access to all of the restaurant’s facilities — such as bathrooms — that are available to the general public.

VI. **Conclusion**

In July 26, 1990, Congress enacted the landmark civil rights law to ensure full and equal access to public accommodations for people with disabilities. Now, 25 years later, it is unlawful and inexcusable to deny individuals with disabilities full access to their neighborhood. The time for compliance by local businesses is now.
Appendix A
H Street NE: Inaccessible Businesses

Batter Bowl Bakery

Pursuit Wine Bar

Liberty Tree

Le Grenier

Star and Shamrock

Ethiopic Restaurant
Woodley Park NW: Inaccessible Businesses

- Italian Pizza Kitchen
- District Kitchen
- Debonair Cleaners
- Sherry's Liquors