IMPROVING ADA COMPLIANCE BY LINKING ACCESSIBILITY IMPLEMENTATION AND CAPITAL BUDGETING

March 2, 2011

OAO Report 2011-01
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Memorandum

To: Secretary Jay Gonzalez
CC: Deputy Secretary Scott Jordan
From: Ron Marlow, Assistant Secretary for Access and Opportunity
Date: March 2, 2011
Re: ADA Compliance, Accessibility Improvements and Capital Budgeting

The enclosed report is submitted to improve and advance compliance efforts with respect to the Americans with Disabilities Act (ADA).

The enclosed report provides an overview of the state’s responsibilities and outlines a strategic approach designed to bring state government, in particular those agencies of state government that rely on and utilize capital funds, into compliance with the ADA. Specifically, this report makes the case that the Executive Office for Administration and Finance, given its role vis-à-vis the capital planning and funding process, should assume greater responsibility in ensuring that state agencies take steps to comply fully with the ADA.

The development of this report has benefitted greatly from the guidance, input and overall engagement of individuals, who understand the ADA, its requirements, and capital planning and implementation. The Massachusetts Office on Disability (Myra Berloff and Barbara Lybarger), the Division of Capital Asset Management (Michael Williams and Polly Welch), ANF’s capital planning team (Scott Jordan and Karol Ostberg), the Attorney General's Office (Maura Healey and Bethany Brown) and a private citizen (Chris Palames) have all contributed to this end product. I am grateful to each and all.
**INTRODUCTION**

The Americans with Disabilities Act (ADA), enacted on July 26, 1990, is a civil rights law whose purpose is to prohibit discrimination against individuals on the basis of disability. The ADA consists of five titles outlining protections in the following areas:

- Employment
- State and local government services
- Public accommodations
- Telecommunications
- Miscellaneous Provisions

Title II of the ADA is the section that pertains to the programs, activities and services public entities provide. Title II of the ADA provides that, “...no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” (42 U.S.C. Sec. 12132; 28 C.F.R. Sec. 35.130)

In order to ensure compliance with Title II of the ADA, public agencies are required to conduct a self-evaluation of its programs activities and services and to the extent an agency cannot make all of them "programmatically accessible" to develop a Transition Plan detailing how and when the agency will remove physical barriers that interfere with access for all individuals.

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**Footnote** ¹ "Programmatic access" requires that: “A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.” 28 C.F.R §35.150(a). It further dictates a process by which ready accessibility be assessed, achieved and maintained. 28 C.F.R. §§35.149 - .151.
EVOLUTION OF LAWS TO ENSURE ACCESSIBILITY:

Title II of the ADA is companion legislation to two previous federal statutes and regulations; the Architectural Barriers Acts of 1968 and Section 504 of the Rehabilitation Act of 1973.

On August 12, 1968, the Congress enacted Public Law 90-480, known as the Architectural Barriers Act of 1968 (82 Stat. 718, 42 U.S.C. 4151 -e t seq.). The act's purpose was to insure that certain federally funded buildings were designed and constructed to be accessible to people with disabilities. Included in the act were federally financed buildings in which a person with a disability might live or work and buildings intended for public use. Privately owned residential structures and those on a military installation to be used primarily by able-bodied military personnel were specifically excluded.

Sections 2, 3, and 4 of the act authorized several federal agencies to prescribe standards for the design, construction, and alteration of buildings. In practice, each agency followed the ANSI Standard, which by that time had been adopted by numerous States and Federal agencies. Section 6 of the act authorized each agency (1) to make whatever surveys and investigations deemed necessary to insure compliance with the standards and (2) to modify or waive the standards on a case-by-case basis upon application by the head of the agency involved.

Adoption of the Architectural Barriers Act allowed the federal government to catch up to state activity as 34 states, including Massachusetts, had already adopted similar laws by 1968.


The Board's functions include:

- Insuring compliance with the standards prescribed by GSA, DOD, and HTJD pursuant to the Architectural Barriers Act.
- Initiating investigations on the nature of architectural, transportation, and attitudinal barriers confronting persons with a disability, particularly with respect to public buildings and monuments, parks and parklands, public transportation systems, and residential and institutional housing.
- Considering the housing needs of persons with a disability.
- Determining how and to what extent transportation barriers impede the mobility of persons with a disability and considering ways in which their travel expenses to and from work can be met or subsidized.
- Determining the actions being taken by other governmental units and public and nonprofit agencies and preparing proposals for consolidating the efforts of
agencies, organizations, and groups whose cooperation is essential for effective and comprehensive action.

- Conducting investigations; holding public hearings, and issuing such orders as it deems necessary to insure compliance with the act's provisions.
- Making recommendations to the President and to the Congress for administration and legislation as deemed necessary or desirable to eliminate architectural, transportation, and attitudinal barriers to the handicapped.

Section 504 of the Rehabilitation Act of 1973 protects qualified individuals from discrimination based on their disability. The non-discrimination requirements of the law apply to employers and organizations that receive financial assistance from any Federal department or agency. Title II of the ADA extended this coverage to all state and local government entities, regardless of the receipt of federal funding. In response to enactment of the ADA, it appears that the state took meaningful planning and administrative steps to set the stage for compliance.

On September 15, 2010 the U.S. Department of Justice published new ADA regulations and design standards for Title II entities. New design standards take effect March 15, 2012 and elements which are now covered under the standards but were not previously regulated are not protected by the safe harbor provisions of the revised regulations.
PRIOR EFFORTS TO ACHIEVE ADA COMPLIANCE

In fiscal year 1993, in response to ADA requirements, the Massachusetts Office on Disability developed and implemented a training curriculum, which was delivered to approximately 160 state agencies.\(^2\) In addition to the MOD-led training sessions, DCAM (then DCPO) issued an ADA workbook to assist state agencies in conducting the self-evaluation process and preparing transition plans (mandated by the ADA).

In 1995, the Massachusetts Office on Disability and the Division of Capital Planning and Operations (DCPO), the predecessor agency to DCAM, prepared a memorandum that (a) identified a series of concerns relative to ADA compliance and (b) outlined a plan of action to address the areas of concern.

Although it is clear that much activity has taken place in response to this memorandum, it is also clear that, at present, we lack a comprehensive and coordinated approach to addressing ADA compliance issues. Finally, it is clear that implementing a comprehensive and coordinated approach will require: (1) changes in operational procedures, (2) clarification of various agency roles and responsibilities, and (3) a clear linkage between accessibility planning and implementation and capital planning, budgeting and implementation.

2010-2011 ACCESSIBILITY WORKING GROUP

In 2010, the Office of Access and Opportunity convened a working group for the purpose of: (1) discussing accessibility efforts to comply with the ADA, (2) creating a common understanding regarding such requirements, and, (3) developing a policy and programmatic framework to ensure compliance, especially in the context of capital budgeting. Those invited to and participating in the meeting included the following:

- David Perini, DCAM
- Michael Williams, DCAM
- Polly Welch, DCAM
- Karol Ostberg, ANF
- Myra Berloff, MOD
- Barbara Lybarger, MOD
- Maura Healey, AGO
- Bethany Brown, AGO
- Chris Palames, Chair, Disability Policy Consortium

In October 2010, the Assistant Secretary for Access and Opportunity, in an effort to develop a clearer path forward, directed the formation of a sub-committee to define a programmatic/process approach. The sub-committee, chaired by Michael Williams, developed an initial blueprint for action that reflected the charge to the sub-committee. This initial blueprint for action became the topic of discussion and refinement during the months of January and February 2011.

After further discussion and refinement, the Office of Access and Opportunity is pleased to submit this Report and the recommendations contained herein.
FOREWORD
To achieve full ADA compliance, we must bring forward a new policy framework and operational paradigm that are designed to achieve this objective. The operational paradigm accepts that no single agency can “own” responsibility in this area; the responsibility must be collectively shared.

The Executive Office for Administration and Finance, as home to the Office of Access and Opportunity, the Massachusetts Office on Disability and the Division of Capital Asset Management (as well as others) and as the agency responsible for establishing the policy and programmatic framework for capital spending, should take the lead on these issues, but will do so in partnership with other executive offices and recipients of capital funds.

On behalf of the Accessibility Working Group, the Office of Access and Opportunity is pleased to bring forward the following recommendations:

**Issue an ANF Administrative Bulletin to define policy and programmatic framework**
Using the ADA and Executive Order 526[^3] as a foundation for action the Executive Office of Administration and Finance should promulgate an ANF Administrative Bulletin to: (a) reinforce the objective of equal access for people with disabilities to state programs, services and activities, (b) define an organizational framework to achieve this objective, (c) outline the processes to achieve this objective, and (d) define the roles and responsibilities of state agencies and personnel to achieve the objective.

[^3]: Executive Order 526, which was signed by the Governor on February 17, 2011, superseded Executive Order 478.
Establish a Universal Access Committee as the organizational mechanism to drive policy formulation and action

Pursuant to the Administrative Bulletin, a Universal Access Committee will be created. The purposes of the UAC will be as follows:

- Define policy objectives and direction consistent with the state objective of the Administrative Bulletin;
- Oversee and coordinate implementation of the actions necessary to achieve the objectives of the Administrative Bulletin, including the development of agency Self-Evaluations and Transition Plans;
- Define the process for review of capital projects which are delegated by DCAM to the state agency seeking to implement said projects;
- Ensure the linkage between actions to bring about accessibility and the capital budgeting process;
- Share best practices across the executive branch and among agencies that receive capital funding; and,
- Provide a means for the provision of technical assistance to state agencies.

The UAC will be chaired by the Assistant Secretary for Access and Opportunity and will have representation from the following state agencies (at a minimum):

- ANF Capital Team
- Massachusetts Office on Disability
- Division of Capital Asset Management
- Office of Diversity and Equal Opportunity
- Human Resources Division
- Information Technology Division
- Executive Offices including MassDOT
- Civil Rights Division, Office of the Attorney General
Clearly define the role of Agencies
Executive branch agencies should be directed to review compliance with the ADA, in particular the status of the self-evaluation and transition plans. Additionally, these agencies should be directed to commit the requisite personnel and resources to achieve ADA compliance (note: this is anticipated to happen via a phased approach). Finally, the same requirements should be extended to any agency that receives capital funding. Access to capital funding should be contingent on these actions.

ANF to strategically deploy capital resources
ANF, through the capital plan, should provide adequate funding to support the execution of self-evaluation plans (where required) and the development of transition plans. These funds should be clearly identified and segregated in a manner similar to the Reasonable Accommodations Capital Reserve Account (RACRA). Based on an analysis of prior self-evaluation and transition planning efforts, such a pool would require at a minimum of $3.1 million ($0.05/SF) and at most $12.6 million ($0.20/SF) to fund. Due to existing constraints on capital funding, it is anticipated that any funds set aside for this purpose and other purposes will need to come from existing bond cap allocations available to the Division of Capital Asset Management.

Additionally, ANF via the capital plan should provide funding to support proactive barrier removal (where program modifications are not sufficient to ensure accessibility) and strategic accessibility improvements that leverage a high return on investment for people with disabilities. Whether this is done via a separate pool of funds or as a part of capital projects that are funded via the capital plan is a matter for further discussion.

Finally, ANF, through the ANF Administrative Bulletin, should clearly communicate that access to capital funds will be directly contingent upon agencies fulfilling their responsibilities as outlined herein.

Footnote 4 Experience to date is anecdotal. It is anticipated that the findings of these self-evaluations and transition plans will be incorporated within CAMIS and that the cost estimates above are subject to change as experience with actual cost of these evaluation processes within the various agencies grows.
**Awareness and Education**
MOD will conduct additional ADA trainings at several levels of government: (1) senior managers, (2) ADA Coordinators; and (3) facility managers. MOD will rely on assistance from DCAM to provide training to facility managers.

MOD will develop a model job description for ADA Coordinators. In an ideal world, agencies would be able to hire individuals to perform solely in the role as ADA Coordinator; however, we recognize that resources are not consistent with this ideal. Notwithstanding this reality, we should work, over time, to ensure that either through hiring or the provision of professional development activity, each person serving in the role of ADA Coordinator will meet or exceed the job requirements.

MOD will develop and implement a training curriculum that provides to ADA Coordinators the range of knowledge and understanding that is required to play a meaningful coordinating role to ensure compliance with ADA law, regulations and the ANF Administrative Bulletin.

DCAM will investigate the development and implementation of a design consultant certification program.

Each of these elements will be spelled out, developed and implemented pursuant to a schedule contained in the ANF Administrative Bulletin.

**Transparency**
Each agency will include on its website a statement of non-discrimination and links to available accommodations, accessible buildings, and its ADA grievance policy.

All state owned buildings will comply with the ADA requirement for a statement of rights and ADA coordinator contact information at the front entrance.

**Accountability**
Secretariat ADA coordinators shall maintain a copy of the agency Self-Evaluation, agency Transition Plan, and agency progress reports.

Secretariat ADA coordinators shall meet bi-annually with department ADA coordinators to review progress, understand challenges, and share successes.

MOD, based on a schedule of activity to be determined by the Universal Access Committee, to meet periodically with agency level ADA Coordinators to assess progress. MOD will report to the UAC on successful activity as well as obstacles to compliance.

MOD and DCAM will report to the Universal Access Committee on progress related to training, agency level engagement, and facility implementation.
Self-evaluation and Transition Plans prepared by state entities will be reviewed for compliance by DCAM and MOD and a report will be made to the Universal Access Committee.

Agency self-evaluations and transition plans will be available to the public.

**Phased Roll-Out of Effort**

Specific executive branch agencies have been selected for an immediate roll-out of updated Self-Evaluation and Transition Planning activity because they have, or are in the process of developing, comprehensive master plans that will identify priority projects to be funded and undertaken over the next five to ten years. These include the college campuses of the Department of Higher Education (DHE), the jails and prisons managed by county sheriffs and the Department of Corrections (DOC), and the facilities of the EOHHS, specifically the Department of Youth Services facilities.

These agencies have been selected for Phase I because they:

1. occupy a large number of facilities
2. appear to have remaining accessibility issues, and
3. serve critical populations in the Commonwealth

Additionally, a phased approach will allow us to learn through application. Lessons learned in Phase I should enhance our Phase II (rest of executive branch and any other agency receiving capital funds) efforts.

**Application of capital funds**

The Administrative Bulletin will spell out how capital funds should be set aside to support the preparation and completion of agency Self-Evaluation and Transition Plans (see above). These actions will be taken where an agency does not have an existing, updated evaluation and/or plan.

The Self-Evaluations will review programs, services, and activities, as well as policies and procedures, to determine compliance with the ADA and related laws, particularly identifying areas that do not comply. It also includes an audit of all buildings for barriers that may impede program access.

The Self Evaluation will also specify when and how any deficiencies will be addressed, as well as interim measures that will be taken to ensure non-discriminatory operations until permanent solutions can be put in place.

The Transition Plan will identify where specific physical barriers must be removed to ensure programmatic accessibility for people with disabilities to existing facilities, as well as identify where new construction may be needed.
**Time frame for action**
The Administrative Bulletin will establish and spell out a system-wide time line for completion of the Self Evaluations and Transition Plans and the subsequent implementation of barrier removal.

**Establishing Priorities / Stakeholder Engagement**
State agencies will set priorities among its entities and building stock, consistent with the time line identified in the Administrative Bulletin, to strategically prioritizing the provision of the greatest level of accessibility possible, using operational and programming plans whenever possible, over physical repairs and other alterations.

State agencies shall consult with people with disabilities in establishing priorities.

**Accessibility and Capital Planning: Ensuring a meaningful link**
Where applicable, Agency Master Plans shall include strategies for bringing an agency’s programs and facilities into compliance with ADA using resources as efficiently as possible.

New capital projects will be authorized based on completion (or comprehensive updating) of an entity’s ADA Self Assessment and Transition Plan, after review and acceptance by DCAM/MOD.

Requests for capital funding for major renovations must identify the projects contribution to the entity’s meeting its ADA non-discrimination obligations.

Requests for transfer of capital funds to address access improvements will be considered only if these projects are listed on the Commonwealth’s CAMIS system and are assigned a priority number by the agency as a part of their Transition Plan.

Funding of new construction will be tied to progress made on reducing the number of barriers and success in achieving equal access to programs, services and activities.

**DCAM’s role moving forward**
DCAM will continue to review its projects at different stages of design and provide technical assistance to staff and design consultants.

DCAM will pursue the possibility of using available software to ensure comprehensive compliance of design contract documents with the ADA.

Outreach and training provided to agencies will emphasize the importance of fixing barriers through maintenance funds and the importance of maintaining accessibility through standard operating procedures. (Note: DCAM has already offered some preliminary training through MAFMA, DCAM’s technical assistance organization for Facility Managers of state facilities.)
DCAM will report back to the Universal Access Committee on these activities.

CONCLUSION
This Report and the recommendations contained herein are meant to plot a path forward on our collective responsibility to achieve full ADA compliance. Admittedly, the Report does not answer every question; some questions have been purposely left to the Universal Access Committee to answer. However, we believe that through the questions we have answered, we have defined a clear enough path forward.

An effort of this magnitude will require sufficient lead time to ensure that internal stakeholders are well-educated as to expectations and anticipated outcomes. Our recommendations anticipate the ANF Administrative Bulletin to be signed to take effect April 1, 2011 even though anticipated actions on the part of agencies are not expected to commence until July 1, 2011. This three-month lag time should provide sufficient time and space to allow the Universal Access Committee to answer those questions that are not answered in this Report, to engage in the internal education process, to further define expectations not clearly defined in the Administrative Bulletin, and to take any and all action that facilitates progress.