

April 2022

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Recommended Citation

Elizabeth R. Schiltz, *The Dangers of Being Disabled in the Time of COVID*, 18 U. ST. THOMAS L.J. 405 (2022).

Available at: <https://ir.stthomas.edu/ustlj/vol18/iss2/7>

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ARTICLE

THE DANGERS OF BEING DISABLED IN THE TIME OF COVID

ELIZABETH R. SCHILTZ*

I. INTRODUCTION

Legal Scholar Jasmine Harris wrote that “COVID-19 is a perfect storm of systemic flaws with people with disabilities at its eye.”¹ Policy decisions made in the wake of the pandemic have negatively affected almost every aspect of the lives of people with disabilities in ways that go largely unnoticed by the general public. This is, sadly, consistent with much of the history of people with disabilities.² But these COVID-19-related decisions deserve attention—they shine a bright spotlight on the thinness of our commitment to the ideals of equality under the law for people with disabilities. These ideals have strong expression in civil rights laws like the Americans with Disabilities Act³ (the ADA) and the Individuals with Disabilities Education Act⁴ (IDEA), and Supreme Court decisions like *Olmstead v. L.C.*,⁵ but when push comes to shove, in crises like the current pandemic, people with disabilities are once again relegated to less than equal status.

This essay will address three areas in which the pandemic has had a disproportionately negative impact on people with disabilities: health care, education, and employment. Each of these topics represent a set of moving targets, as the evolution of the COVID-19 virus forces constant shifts in the public policies responding to it. Each topic alone could be the subject of many long law journal articles; this essay does not attempt to provide more

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1. Jasmine E. Harris, *The Frailty of Disability Rights*, 169 U. PA. L. REV. ONLINE 29, 33 (2020), <https://www.penlawreview.com/2020/07/28/the-frailty-of-disability-rights>.

2. *Id.* at 29–31.

3. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2018).

4. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482 (2018).

5. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1991) (holding that unjustified isolation of persons with disabilities in institutional settings constitutes unlawful discrimination under the ADA). For a concise discussion of this ruling, including its implications beyond the institutional context of the case itself, see Robert D. Dinerstein, *The Olmstead Imperative: The Right to Live in the Community and Beyond*, 4 INCLUSION 16 (2016).

than a summary overview of the situation at a fixed point in time—as of the writing of this article.

II. HEALTH CARE

A. *Increased vulnerability of people with disabilities to complications from COVID-19.*

Coronavirus death rates are significantly higher for people with disabilities than those without. Some physical disabilities can be in themselves underlying medical risk factors, of course. But research from the earliest days of the pandemic has consistently shown that individuals with developmental disorders are significantly more likely to die from COVID-19 than others. Indeed, a study of 64,858,460 patients across 547 health care organizations revealed that “having an intellectual disability was the strongest independent risk factor for presenting with a Covid-19 diagnosis and the strongest independent risk factor other than age for Covid-19 mortality.”⁶ The odds of mortality for people with intellectual disabilities were found to be “significantly higher than other conditions such as congestive heart failure, kidney disease, and lung disease.”⁷ Another study of people with Down syndrome showed that this group had a fourfold increased risk of hospitalization and a tenfold increased risk of death;⁸ even after one dose of a COVID-19 vaccine, a study in the United Kingdom revealed a twelvefold increased risk of death for people with Down Syndrome.⁹ A review of private health insurance claims data for people diagnosed with COVID-19 looked at fifteen different conditions, including heart failure, chronic kidney disease, liver disease, and cancer. The category showing the highest risk of death was people with “developmental disabilities” (three times higher than others); a separate category of “intellectual disabilities” and related conditions like Down syndrome was third on the list (2.75 times higher than others).¹⁰

6. Jonathan Gleason, Wendy Ross, Alexander Fossi, Heather Blonsky, Jane Tobias & Mary Stephens, *The Devastating Impact of Covid-19 on Individuals with Intellectual Disabilities in the United States*, NEJM CATALYST: INNOVATIONS IN CARE DELIVERY 1 (2021), <https://catalyst.nejm.org/doi/pdf/10.1056/CAT.21.0051>.

7. *Id.* at 10.

8. Ashley Kieran Clift, Carol A.C. Coupland, Ruth H. Keogh, Harry Hemingway & Julia Hippisley-Cox, *COVID-19 Mortality Risk in Down Syndrome: Results From a Cohort Study of 8 Million Adults*, 174 ANNALS OF INTERNAL MED. 572, 574 (2021).

9. Julia Hippisley-Cox, Carol A.C. Coupland, Nisha Mehta, Ruth H. Keogh, Karla Diaz-Ordaz, Kamlesh Khunti, Ronan A. Lyons, Frank Kee, Aziz Sheikh, Shamim Rahman, Jonathan Valabhji, Ewen M. Harrison, Peter Sellen, Nazmus Haq, Malcolm G. Semple, Peter W. M. Johnson, Andrew Hayward & Jonathan S. Nguyen-Van-Tam, *Risk prediction of covid-19 related death and hospital admission in adults after covid-19 vaccination: national prospective cohort study*, BRITISH MED. J. 1 (2021).

10. MARTY MAKARY & WEST HEALTH INSTITUTE, RISK FACTORS FOR COVID-19 MORTALITY AMONG PRIVATELY INSURED PATIENTS 11 (2020).

As early as December 2020, the CDC officially acknowledged Down Syndrome as a condition that carries an increased risk of severe illness from COVID-19.¹¹ Nearly two years later, in February 2022, the CDC acknowledged more broadly that:

People with some types of disabilities may be more likely to get very sick from COVID-19 because of underlying medical conditions, living in congregate settings, or systemic health and social inequities, including:

- People with any type of disability that makes it more difficult to do certain activities or interact with the world around them, including people who need help with self-care or daily activities
- People with attention-deficit/hyperactivity disorder (ADHD)
- People with cerebral palsy
- People with birth defects
- People with intellectual and developmental disabilities
- People with learning disabilities
- People with spinal cord injuries
- People with Down syndrome.¹²

B. Decreased ability of people with disabilities to protect themselves from COVID-19.

Many persons with disabilities are not physically or mentally able to live in situations that allow them the privilege of quarantine. There are people with disabilities in nursing homes and prisons where communal life and lack of protections contribute to high rates of COVID-19 infections and deaths.¹³ With the move toward deinstitutionalization, though, persons with disabilities are more likely to be living in other types of communal settings that carry the same increased risks but receive much less attention: group homes or supported living situations.¹⁴ A New York study found that there were higher COVID-19 case mortality rates for people with intellectual dis-

11. *Science Brief: Evidence Used to Update the List of Underlying Medical Conditions Associated with Higher Risk for Severe COVID-19*, CTNS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/underlying-evidence-table.html> (last updated May 13, 2021).

12. Michelle Diamant, *CDC Adds IDD to List of Conditions at Increased Risk from COVID-19*, DISABILITY SCOOP (Mar. 3, 2022), <https://www.disabilityscoop.com/2022/03/03/cdc-adds-idd-to-list-of-conditions-at-increased-risk-from-covid-19/29731>; *People with Certain Medical Conditions*, CTNS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (last visited Feb. 25, 2022).

13. Nina A. Kohn, *Nursing Homes, COVID-19, and the Consequences of Regulatory Failure*, 110 GEO. L. J. ONLINE 1–2 (2021); R. Tamara Konetzka & Rebecca J. Gorges, *Nothing Much Has Changed: COVID-19 Nursing Home Cases and Deaths Follow Fall Surges*, 69 J. OF AM. GERIATRICS SOC'Y. 46, 46 (2021); Beth Schwartzapfel, Katie Park & Andrew Demillo, *1 in 5 Prisoners in the U.S. Has Had Covid-19*, THE MARSHALL PROJECT (Dec. 18, 2020), <https://www.themarshallproject.org/2020/12/18/1-in-5-prisoners-in-the-u-s-has-had-covid-19>.

14. Laura I. Appleman, *Pandemic Eugenics: Discrimination, Disability, & Detention During COVID-19*, 67 LOY. L. REV. 329, 372–373 (2021).

abilities and related disabilities living in residential group homes than for the general population in and around the New York City area.¹⁵ The Autistic Self Advocacy Network established a website to track COVID-19 infection rates for people with disabilities living in congregate settings, in light of the failure of many states or the federal government to track such numbers; as of April 22, 2022, they report 202,270 deaths.¹⁶

Even in group homes or less institutional assisted living situations, persons with disabilities often must rely on direct support professionals (DSPs) or family members for the degree of independence that keeps them out of nursing homes or other institutional settings.¹⁷ Residents of group homes may have difficulty wearing masks¹⁸ or practicing social distancing,¹⁹ and barriers to expressing their needs and emotions can hinder early detection of COVID-19 infections.²⁰ Even before the pandemic, the low wages, lack of benefits, and high turnover among DSPs were identified as compromising the quality of support for independent living for people with disabilities.²¹ The pandemic exacerbated the difficulties of finding and retaining adequate staff; as day programs and work opportunities for people with disabilities closed down, staffing needs increased at residential settings.²² A series of nationwide surveys of DSPs, the first conducted between April and May of 2020,²³ with six-²⁴ and twelve-²⁵-month follow-up reports, confirmed the pressures faced by DSPs during the pandemic. The third survey reported

15. Scott D. Landes, Margaret A. Turk, Margaret K. Formica, Katherine E. McDonald & J. Dalton Stevens, *COVID-19 Outcomes Among People with Intellectual and Developmental Disability Living in Residential Group Homes in New York State*, *DISABILITY & HEALTH J.* 2 (2020).

16. *COVID-19 Case Tracker*, AUTISTIC SELF ADVOC. NETWORK, <https://autisticadvocacy.org/covid19> (last visited Apr. 22, 2022).

17. Appleman, *supra* note 14, at 374; Gleason, Ross, Fossi, Blonsky, Tobias & Stephens, *supra* note 6, at 10.

18. Elizabeth Pendo, Robert Gatter & Seema Mohapatra, *Resolving Tensions Between Disability Rights Law and COVID-19 Mask Policies*, *MD. L. REV. ONLINE* 4–5 (2020); Gleason, Ross, Fossi, Blonsky, Tobias & Stephens, *supra* note 6, at 10.

19. Appleman, *supra* note 14, at 374.

20. Appleman, *supra* note 14, at 374; Gleason, Ross, Fossi, Blonsky, Tobias & Stephens, *supra* note 6, at 10.

21. *See, e.g.*, Matthew D. Bogenschutz, Amy Hewitt, Derek Nord & Renee Hepperlen, *Direct Support Workforce Supporting Individuals with IDD: Current Wages, Benefits, and Stability*, 52 *INTELL. & DEVELOPMENTAL DISABILITIES* 317 (2014) (summarizing past studies and updating research).

22. *See* Jane Coaston, “We’re Being Punished Again”: *How People with Intellectual Disabilities Are Experiencing the Pandemic*, *VOX* (Apr. 9, 2020, 10:39 AM), <https://www.vox.com/2020/4/6/21200257/disabilities-coronavirus-group-homes-isolation-policy>.

23. A. Hewitt, S. Pettingell, J. Kramme, J. Smith, K. Dean & B. Kleist, *Direct Support Workforce and COVID-19 National Report*, UNIV. OF MINN.: INST. ON CMTY. INTEGRATION (2020) (survey conducted with the Nat’l All. of Direct Support Pros.), <https://publications.ici.umn.edu/community-living/covid19-survey/overview>.

24. A. Hewitt, S. Pettingell, J. Kramme, J. Smith, K. Dean, B. Kleist, M. Sanders & J. Bershadsky, *Direct Support Workforce and COVID-19 National Report: Six-Month Follow-up*, UNIV. OF MINN. INST. ON CMTY. INTEGRATION (Apr. 2, 2021) (survey conducted with the Nat’l All. of Direct Support Pros.), <https://publications.ici.umn.edu/community-living/covid19-survey-6-month-followup/main>.

that 30 percent of the DSPs were working more hours since before the pandemic;²⁶ 50 percent reported experiencing physical and/or emotional burnout, 47 percent reported anxiety, 36 percent reported depression, and 38 percent reported sleep difficulties,²⁷ and only 27 percent reported any increased salary or bonus pay related to COVID-19.²⁸

Even in the best of times, there is little oversight of staff at such facilities, and during the pandemic, restrictions on visitors closed them to informal inspections by family members and friends.²⁹ Indeed, between March and August of 2020, The Department of Health and Human Services Centers for Medicare and Medicaid Services suspended regular inspections to prioritize “the utilization of resources in order to be able to provide a robust response to emerging concerns,” and to “allow facilities to be able to focus their efforts on infection control preparation.”³⁰ But because the federal government has not mandated reporting of COVID-19 deaths in these settings, as it does for nursing homes,³¹ these conditions did not get the same attention as the deaths in nursing homes.³²

Furthermore, through the first year of the pandemic, Medicaid failed to increase reimbursements to intermediate care facilities and group homes to cover the extra costs of more staff and to protect against COVID-19.³³ Not until March 2021, with the American Rescue Plan Act of 2021 (ARP),³⁴ did

25. A. Hewitt, S. Pettingell, J. Bershadsky, J. Smith, B. Kleist, M. Sanders & J. Kramme, *Direct Support Workforce and COVID-19 National Report: 12-Month Follow-up*, UNIV. OF MINN.: INST. ON CMTY. INTEGRATION (Sept. 2021) (survey conducted with the Nat’l All. of Direct Support Pros.), <https://publications.ici.umn.edu/community-living/covid19-survey-12-month-followup/main>.

26. UNIV. OF MINN. INST. ON CMTY. INTEGRATION, PROVIDING SUPPORT DURING THE COVID-19 PANDEMIC: DIRECT SUPPORT WORKFORCE 12-MONTH FOLLOW-UP SURVEY — NATIONAL VERSION 2 (2021).

27. *Id.* at 3.

28. *Id.* at 2.

29. Appleman, *supra* note 14, at 374–76.

30. CENTER FOR CLINICAL STANDARDS AND QUALITY/QUALITY, SAFETY AND OVERSIGHT GROUP, FREQUENTLY ASKED QUESTIONS FOR STATE SURVEY AGENCY AND ACCREDITING ORGANIZATION CORONAVIRUS DISEASE 2019 (COVID-19) SURVEY SUSPENSION 1 (2020); *CMS Announces Resumption of Routine Inspections of All Provider and Suppliers, Issues Updated Enforcement Guidance to States, and Posts Toolkit to Assist Nursing Homes*, CTR. FOR MEDICARE & MEDICAID SERVS. (Aug. 17, 2020), <https://www.cms.gov/newsroom/press-releases/cms-announces-resumption-routine-inspections-all-provider-and-suppliers-issues-updated-enforcement>.

31. While Medicaid and Medicare require nursing homes to publicly report COVID-19 infection rates, reporting is not required for living facilities for the disabled. Danny Hakim, ‘*It’s Hit Our Front Door*’: Homes for the Disabled See a Surge of Covid-19, N.Y. TIMES (Apr. 17, 2020), <https://www.nytimes.com/2020/04/08/nyregion/coronavirus-disabilities-group-homes.html>; see also Michelle Diamant, *COVID-19 Cases at Group Homes, Institutions Going Untracked*, DISABILITY SCOOP (May 11, 2020), <https://www.disabilityscoop.com/2020/05/11/covid-19-cases-at-group-homes-institutions-going-untracked/28313/2020>.

32. Appleman, *supra* note 14, at 372.

33. Appleman, *supra* note 14, at 376–77.

34. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9817, 135 Stat. 4, 216–17 (2021).

Congress allocate a temporary 10 percent increase for some Medicaid expenditures, but it took months for the Department of Health & Human Services to issue guidelines for administering this funding,³⁵ allowing qualified states to begin the process of determining how such funds would be spent in each state. As of February 2022, nineteen states had still not managed to receive the approval needed by the Centers for Medicare and Medicaid Services to access this funding.³⁶ President Joe Biden's American Jobs Plan proposed in March 2021 initially included a \$400 billion investment in the home-and-community based infrastructure that would have addressed the underfunding of many of these services and staff positions.³⁷ By November 2021, that number was cut to \$150 billion in the Build Back Better Act passed by the House of Representatives, but as of January 2022, the Senate had not taken up the legislation.³⁸ In the meantime, the staffing shortages in facilities that support people with disabilities continue to force closures of group homes and day training and habilitation centers, fueled significantly by the increases in wages in other industries not hobbled by Medicaid's wage restrictions. In the words of the President of one network of thirty group homes forced to close and consolidate some homes in January 2022, "This is an emergency now, no longer a crisis. We've been in crisis since 2010."³⁹

35. Letter from Anne Marie Costello, Dep't. of Health and Hum. Services, to State Medicaid Director, (May 13, 2021) (on file with Ctrs. for Medicare & Medicaid Services, <https://www.medicaid.gov/federal-policy-guidance/downloads/smd21003.pdf>).

36. Lauren Weber & Andy Miller, *Programs for People with Disabilities Still Not Seeing Federal Funds*, DISABILITY SCOOP (Mar. 9, 2022), <https://www.disabilityscoop.com/2022/03/09/programs-for-people-with-disabilities-still-not-seeing-federal-funds/29746>.

37. Michelle Diamant, *Disability Advocates Warn \$400 Billion Community-Based Services Plan Could Get Chopped*, DISABILITY SCOOP (July 23, 2021), <https://www.disabilityscoop.com/2021/07/23/disabilityadvocates-warn-400-billion-community-based-services-plan-could-get-chopped/29422>.

38. Michelle Diamant, *Massive Investment in Disability Services in Limbo*, DISABILITY SCOOP (Jan. 6, 2022), <https://www.disabilityscoop.com/2022/01/06/massive-investment-in-disability-services-in-limbo/29647>.

39. Andy Steiner, *A Staffing 'Emergency' is Forcing Big Changes at Twin Cities Group Homes*, MINNPOST (Jan. 7, 2022), <https://www.minnpost.com/mental-health-addiction/2022/01/a-staffing-emergency-is-forcing-big-changes-at-twin-cities-group-homes> (describing staffing shortages leading to closure of group homes in Minnesota). See also Peter McGuire, *Disability Service Providers Struggle to Compete for Workers*, DISABILITY SCOOP (Oct. 26, 2021), <https://www.disabilityscoop.com/2021/10/26/disability-service-providers-struggle-compete-workers/29563> (staffing shortages leading to closure of group homes in Maine); Molly O'Malley Watts, MaryBeth Musumeci & Meghana Ammula, *State Medicaid Home & Community-Based Services (HCBS) Programs Respond to COVID-19: Early Findings from a 50-State Survey*, KAISER FAMILY FOUNDATION (Aug. 10, 2021), <https://www.kff.org/coronavirus-covid-19/issue-brief/state-medicaid-home-community-based-services-hcbs-programs-respond-to-covid-19-early-findings-from-a-50-state-survey> (50-state survey finding most states reporting permanent closures on at least one type of Medicaid-funded service provider for people with disability due to workforce shortages and social distancing measures) [hereinafter *Kaiser 50-State Survey*].

C. *Discriminatory health care policy decisions.*

Health care policy decisions from the beginning of the pandemic have consistently demonstrated a predisposition to relegate people with disabilities to the end of the line in receiving treatment for COVID-19—in clear violation of civil rights laws. In the earliest days of the pandemic, states and hospitals began implementing rationing frameworks for access to ventilators and ICU beds that gave express preference to nondisabled patients or categorically excluded patients with certain disabilities. For example:

- Alabama’s rationing plan listed “severe or profound mental retardation,” “moderate to severe dementia,” and “severe traumatic brain injury” as among the reasons to deny a ventilator to a patient;
- Tennessee’s plan denied ventilators to people with “advanced neuromuscular disease” who require “assistance with activities of daily living or requiring chronic ventilatory support;”
- Kansas’s plan not only denied ventilators but called for removing ventilators from people who used them on a regular basis if they had “advanced untreatable neuromuscular disease,” or “advanced and irreversible immunocompromise.”⁴⁰

The story of Michael Hickson reflects how these sorts of attitudes were affecting health care of COVID-19 patients.⁴¹ Mr. Hickson was a 46-year-old Black father of five with multiple disabilities—quadriplegia, cortical blindness, and a brain injury.⁴² When he contracted COVID-19 in his nursing facility, he was admitted to a hospital, which discontinued his medical treatment, including hydration and nutrition, over the objection of his wife; he died six days later.⁴³ In a conversation with Hickson’s doctor that Mrs. Hickson recorded, the doctor told Mrs. Hickson that treatment was futile because her husband did not “have much of” a quality of life due to his disabilities.⁴⁴

Disability rights advocacy groups sprang into action as these sorts of plainly discriminatory policies were announced, challenging such policies as violating Title II of the ADA, Section 504 of the Rehabilitation Act of

40. See *COVID-19 Medical Rationing & Facility Visitation Policies*, CTR. FOR PUB. REPRESENTATION, <https://www.centerforpublicrep.org/covid-19-medical-rationing> (last updated May 25, 2021).

41. Ariana Eunjung Cha, *Quadriplegic Man’s Death from COVID-19 Spotlights Questions of Disability, Race and Family*, WASH. POST (July 5, 2020), <https://www.washingtonpost.com/health/2020/07/05/coronavirus-disability-death>.

42. NATALIE M. CHIN & JASMINE HARRIS, EXAMINING HOW CRISIS STANDARDS OF CARE MAY LEAD TO INTERSECTIONAL MEDICAL DISCRIMINATION AGAINST COVID-19 PATIENTS 1, 2 (2021).

43. Cha, *supra* note 41.

44. Cha, *supra* note 41.

1973, and Section 1557 of the Affordable Care Act.⁴⁵ Complaints and lawsuits challenging plans were filed in Washington, Tennessee, Kansas, Utah, New York, Oklahoma, Connecticut, North Carolina, Oregon, Nebraska, Arizona, Texas, Alabama, and Pennsylvania.⁴⁶ The Office of Civil Rights of the Department of Human Services (OCR) reacted quickly, issuing a bulletin on March 28, 2020, that warned that these civil rights statutes remained in effect during medical emergencies like these, and that:

persons with disabilities should not be denied medical care on the basis of stereotypes, assessments of quality of life, or judgments about a person's relative 'worth' based on the presence or absence of disabilities or age. Decisions by covered entities concerning whether an individual is a candidate for treatment should be based on an individualized assessment of the patient based on the best available objective medical evidence.⁴⁷

OCR enforcement actions have led to revised triage plans rectifying this sort of blatant discrimination in a number of states: Alabama and Pennsylvania in April 2020, Tennessee in June 2020, Utah in August 2020, North Carolina and Texas in January 2021, and Arizona in May 2021.⁴⁸ Renewed surges of COVID-19 due to variants and the inevitability of future pandemics demand continued attention to these plans.⁴⁹

And, when vaccines started to become available, the same sorts of fierce, state-by-state battles had to be fought by disability advocacy groups to get any kind of priority for people with disabilities, despite the scientific evidence of their increased vulnerability to complications from COVID-19.⁵⁰ These advocates had only limited success in a handful of states, even after the CDC added Down syndrome to its official list of underlying conditions that increase the risk of complications from COVID-19.⁵¹ As vaccine supply expanded and more states opened access broadly, the CDC began to

45. Appleman, *supra* note 14, at 384–88; Harris, *supra* note 1, at 34–35; see also Samuel R. Bagenstos, *Who Gets the Ventilator? Disability Discrimination in COVID-19 Medical-Rationing Protocols*, 130 *YALE L. J. F.* 1 (2020).

46. Appleman, *supra* note 14, at 387–88.

47. HHS OFF. FOR CIV. RTS., *BULLETIN CIVIL RIGHTS, HIPAA, AND THE CORONAVIRUS DISEASE 2019 (COVID-19) 1* (2020).

48. *Civil Rights and COVID-19*, U.S. DEP'T OF HEALTH & HUM. SERVICES, <https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/index.html?language=EN> (last visited Mar. 23, 2022); *OCR Provides Technical Assistance to Ensure Crisis Standards of Care Protect Against Age and Disability Discrimination*, U.S. DEP'T OF HEALTH & HUM. SERVICES (Jan. 14, 2021), <https://www.hhs.gov/about/news/2021/01/14/ocr-provides-technical-assistance-ensure-crisis-standards-of-care-protect-against-age-disability-discrimination.html>.

49. *National Organizations Call for Action to Implement Crisis Standards of Care During COVID-19 Surge*, NAT'L ACAD. OF MED. (Dec. 18, 2020), <https://nam.edu/national-organizations-call-for-action-to-implement-crisis-standards-of-care-during-covid-19-surge>.

50. Elizabeth R. Schiltz, *By this Measure, Minnesota is Not Doing So Well in Deciding Who Gets a Vaccine*, ST. PAUL PIONEER PRESS (Feb. 14, 2021), <https://www.twincities.com/2021/02/14/elizabeth-schiltz-by-this-measure-minnesota-is-not-doing-so-well-in-deciding-who-gets-a-vaccine>.

51. *CTRS. FOR DISEASE CONTROL AND PREVENTION*, *supra* note 11.

allocate some funding to improve access to vaccines for people with disabilities, working with disability networks in every state to “provide assistance with scheduling vaccine appointments, transportation to vaccine sites, pay for the direct support services needed for such appointments and help[ing] connect people to in-home vaccine options.”⁵² In April 2021, the OCR issued guidance clarifying the application of federal civil rights laws to discrimination against people with disabilities in the context of COVID-19 vaccine programs.⁵³ In the current state of plentiful vaccine supplies, this particular instance of pushing people with disabilities to the end of the line has lost some of its urgency—but it has not disappeared. Unless it is addressed, it will reappear with every new variant, every new pandemic, and every new vaccination developed in response.

In February 2022, the OCR issued a more comprehensive guidance clarifying that federal civil rights laws prohibit discrimination against people with disabilities in all aspects of health care.⁵⁴ The OCR explained the scope of these laws clearly:

federal civil rights laws apply to health care providers, including those administering COVID-19 testing, medical supplies, and medication. These rules also apply to entities providing hospitalization, long-term care, intensive treatments, and critical care, such as oxygen therapy and mechanical ventilators. Additionally, federal civil rights laws apply to state Crisis Standard of Care plans, procedures, and related standards for triaging scarce resources that hospitals are required to follow.⁵⁵

The OCR’s responsiveness to the advocacy of disability rights groups confronted with the “overtones of eugenics”⁵⁶ underlying the treatment of people with disabilities in the earliest days of the COVID-19 pandemic has resulted in increased attention to this form of discrimination, as well as some powerful articulations of the reach of civil rights laws. However, the discouraging persistence of discriminatory attitudes was dramatically displayed in January 2022, when Rochelle Walensky, Director of the CDC,

52. Michelle Diament, *Feds Ramping Up Vaccine Access For People with Disabilities*, DISABILITY SCOOP (Apr. 9, 2021), <https://www.disabilityscoop.com/2021/04/09/feds-ramping-up-vaccine-access-for-people-with-disabilities/29283>.

53. U.S. DEP’T OF HEALTH AND HUM. SERVICES OFF. FOR CIV. RTS., HHS OFFICE FOR CIVIL RIGHTS GUIDANCE ON FEDERAL LEGAL STANDARDS PROHIBITING DISABILITY DISCRIMINATION IN COVID-19 VACCINATION PROGRAMS (Apr. 13, 2021).

54. *FAQs for Healthcare Providers during the COVID-19 Public Health Emergency: Federal Civil Rights Protections for Individuals with Disabilities under Section 504 and Section 1557*, U.S. DEP’T OF HEALTH AND HUM. SERVICES OFF. FOR CIV. RTS. (Feb. 4, 2022), <https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/disability-faqs/index.html>.

55. *HHS Issues New Guidance for Health Care Providers on Civil Rights Protections for People with Disabilities*, U.S. DEP’T OF HEALTH AND HUM. SERVS. (Feb. 4, 2022), <https://www.hhs.gov/about/news/2022/02/04/hhs-issues-new-guidance-health-care-providers-civil-rights-protections-people-disabilities.html>.

56. Samuel R. Bagenstos, *The New Eugenics*, 71 SYRACUSE L. REV. 752, 761 (2021).

appeared on ABC's "Good Morning America" news program to discuss a study on the effectiveness of COVID-19 vaccines. She said, "The overwhelming number of deaths, over 75%, occurred in people who had at least four comorbidities, so really these are people who were unwell to begin with, and yes, really encouraging news in the context of omicron. We're really encouraged by these results."⁵⁷ The outrage of the disability activists who live with these comorbidities sparked an apology by Walensky, a commitment to regular meetings between senior leaders at the CDC and disability advocacy groups, and a new initiative by President Biden to better serve the disability community during the ongoing pandemic.⁵⁸

Against this stubbornly pervasive background of discrimination, the warning of a coalition of national health care associations, including the National Academy of Medicine, the American Medical Association, and the National League for Nursing, issued in May 2021, appears to be just as pressing now as it was then:

Although the late winter wave of COVID-19 in the United States seems to have crested, the emergence of variant strains and ongoing questions about immunity and vulnerability leave open the real possibility of additional waves later this year. . . . [T]he fight against COVID-19 is not over. . . . The prospect of once again facing decisions about whether to transition to crisis standards of care (CSC) calls for action now, while a relative lull in cases allows stakeholders to plan thoughtfully for such decisions. This is especially important in light of painful lessons the pandemic has taught about the need for clarity and consistency across institutions and jurisdictions about invoking CSC and the disproportionate impact COVID-19 has had on historically minoritized and marginalized populations. Going forward, addressing equity must be recognized as a vital consideration for refining and deploying CSC.⁵⁹

III. EDUCATION

Online education has been a challenge for all school-aged children, but children with disabilities are experiencing particularly severe challenges.⁶⁰ The legal guarantees found in federal laws like the IDEA are proving to be

57. Michelle Diament, *White House Unveils COVID Plan Focused on People with Disabilities*, DISABILITY SCOOP (Feb. 28, 2022), <https://www.disabilityscoop.com/2022/02/28/white-house-unveils-covid-plan-focused-on-people-with-disabilities/29722>.

58. *Id.*

59. *National Organizations Share Strategies to Improve Crisis Standards of Care Implementation During Future COVID-19 Surges and Beyond*, NAT'L ACAD. OF MED. (May 13, 2021), <https://nam.edu/national-organizations-share-strategies-to-improve-crisis-standards-of-care-implementation-during-future-covid-19-surges-and-beyond>.

60. U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-43, *DISTANCE LEARNING: CHALLENGES PROVIDING SERVICES TO K-12 ENGLISH LEARNERS AND STUDENTS WITH DISABILITIES DURING COVID-19* (2020) [Hereinafter GAO Report]; Cayla Bamberger, *Thousands of Families in Spe-*

ineffective and virtually meaningless in light of the pressures of the pandemic.

The IDEA guarantees students with disabilities the right to a “free and appropriate public education.”⁶¹ This guarantee is enforced through procedural rights given to parents of children found eligible for special education services.⁶² In essence, parents negotiate with their school districts every year for the package of educational supports and services that will enable their child to progress through the K–12 curriculum to the extent appropriate in light of the child’s circumstances.⁶³ These negotiated agreements are formalized in what the IDEA calls an “Individualized Education Plan” (IEP).⁶⁴ A school district’s eligibility for federal funding for special education services depends on its compliance with the IDEA, including compliance with IEPs.⁶⁵

But schools’ responsibilities under the IDEA have never been fully funded by the federal government,⁶⁶ and the history of the IDEA reflects a constant struggle between the ideals of the law and the realities of stretched school budgets. As schools first started moving to distance learning, they were confronted with the task of translating all of the commitments to services found in individual IEPs to this new environment. The reality is, virtually all students face educational regression due to the pandemic.⁶⁷ But only students with special education services have individual plans detailing specific hours of specific kinds of teaching, therapy, and other services to be provided during the school year; and only they have legal protections and claims to compensatory education under the IDEA if educational regression can be documented.

So, from the beginning of the pandemic, school districts petitioned the Department of Education (DOE) and the courts for waivers from IDEA provisions to allow for greater flexibility in meeting the needs of students, and to avoid liability for non-compliance with IDEA that could lead to litigation.⁶⁸ These petitions have been largely unsuccessful, and schools have

cial Education Limbo, DISABILITY SCOOP (Jan. 5, 2021), <https://www.disabilityscoop.com/2021/01/05/thousands-families-special-education-limbo/29130>.

61. 20 U.S.C. § 1412(a)(1) (2004).

62. Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1420–24 (2011).

63. *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017).

64. 20 U.S.C. § 1401(9)(a).

65. 20 U.S.C. § 1412.

66. CONG. RSCH. SERV., R44624, THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) FUNDING: A PRIMER, 21 (2019); *see also*, National Education Association, *Special Education: Key Facts About Funding IDEA*, NAT’L EDUC. ASS’N. (Dec. 2, 2021), <https://www.nea.org/student-success/smart-just-policies/special-education>.

67. U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS., EDUCATION IN A PANDEMIC: THE DISPARATE IMPACTS OF COVID-19 ON AMERICA’S STUDENTS 1–5 (2021).

68. Harris, *supra* note 1, at 40–41.

not been able to get much guidance from the DOE about how to navigate these impossible situations. Early in the pandemic, in March 2020, the DOE's Office for Civil Rights issued a vague "fact sheet" that simply reaffirmed the requirements of IDEA.⁶⁹ In an April 2020 report to Congress, then Education Secretary Betsy DeVos declined to issue any general waivers from any of the "core tenets of the IDEA, most notably a free appropriate public education (FAPE) in the least restrictive environment (LRE)."⁷⁰

As the schools struggled to deal with the pandemic, parties continued to ask the DOE for more guidance. In March 2021, a coalition of parents, teachers unions, and disability advocates filed a "petition for guidance" with the DOE, noting that the students hit hardest by the pandemic's disruption of schooling are students with disabilities, particularly students of color.⁷¹ They requested the DOE to issue guidance to school districts clarifying that funds allocated to schools through the ARP should be used to help students with disabilities recover from "disrupted learning and delayed or foregone services" during the pandemic. The group also asked for the DOE to provide "meaningful guidance about special education and disability discrimination in a remote learning environment."⁷²

In the fall of 2021, the DOE began issuing a series of guidance documents on IDEA and school reopening efforts.⁷³ The first was an affirmation of schools' child find obligations under IDEA.⁷⁴ Shortly thereafter came a 'roadmap' on fully implementing all aspects of the IDEA's requirements despite the challenges of the pandemic.⁷⁵ The DOE's general guidance to schools about reopening included reminders that students with disabilities should not be left behind, and that, in fact, given that their needs are often

69. U.S. DEPT. OF EDUC., OFF. FOR CIV. RTS., FACT SHEET: ADDRESSING THE RISK OF COVID-19 IN SCHOOLS WHILE PROTECTING THE CIVIL RIGHTS OF STUDENTS (2020).

70. BETSY DEVOS, U.S. SEC'Y OF EDUC., RECOMMENDED WAIVER AUTHORITY UNDER SECTION 3511(D)(4) OF DIVISION A OF THE CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT ("CARES ACT") 11 (2020).

71. Michelle Diament, *Ed Department Urged To Direct More COVID-19 Relief Funds To Students With Disabilities*, DISABILITY SCOOP (Mar. 26, 2021), <https://www.disabilityscoop.com/2021/03/26/ed-department-urged-to-direct-more-covid-19-relief-funds-to-students-with-disabilities/29259>.

72. *Id.*

73. Michelle Diament, *Ed Department Weighs In On Special Ed Requirements Amid Ongoing Pandemic*, DISABILITY SCOOP (Aug. 25, 2021), <https://www.disabilityscoop.com/2021/08/25/ed-department-weighs-in-on-special-ed-requirements-amid-ongoing-pandemic/29462>.

74. U.S. DEP'T. OF EDUC., OFF. OF SPECIAL EDUC. AND REHABILITATIVE SERVICES, OSEP QA 21-05, RETURN TO SCHOOL ROADMAP: CHILD FIND UNDER PART B OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (2021).

75. U.S. DEP'T. OF EDUC., OFF. OF SPECIAL EDUC. AND REHABILITATIVE SERVICES, OSEP QA 21-06, RETURN TO SCHOOL ROADMAP: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment Under The Individuals With Disabilities Education Act (2021).

difficult to meet virtually, it may be appropriate to prioritize them.⁷⁶ In February 2022, the DOE's Office for Civil Rights published a fact sheet reminding schools again of their obligations to provide services under the IDEA despite the challenges of the pandemic, and emphasizing the rights of students with disabilities to receive compensatory services if they did not receive appropriate evaluations or services during the pandemic.⁷⁷ The guidance stresses,

Providing compensatory services to a student does not draw into question a school's good faith efforts during these difficult circumstances. It is a remedy that recognizes the reality that students experience injury when they do not receive appropriate and timely initial evaluations, re-evaluations, or services, including the services that the school had previously determined they were entitled to, regardless of the reason.⁷⁸

The very fact that such a reminder was deemed necessary confirms widespread reports that IDEA's mandate of individualized determinations of appropriate instruction, carefully negotiated by teams of educators and parents, is being ignored on a wide scale across the nation.⁷⁹ Indeed, a DOE spokesperson confirmed that the additional guidance was prompted by an increase in complaints alleging failures to provide FAPE.⁸⁰ School districts are scaling back or eliminating services, offering services virtually with no regard to the terms of individual IEPs, and ignoring procedural requirements of the IDEA with respect to students already being served and stu-

76. U.S. DEP'T OF EDUC., OFF. OF PLAN., EVALUATION AND POL'Y DEV., ED COVID-19 HANDBOOK, VOLUME 1: STRATEGIES FOR SAFELY REOPENING ELEMENTARY AND SECONDARY SCHOOLS 7 (2021).

77. U.S. DEP'T OF EDUC., OFF. OF SPECIAL EDUC. AND REHABILITATIVE SERVICES, FACT SHEET: PROVIDING STUDENTS WITH DISABILITIES FREE APPROPRIATE PUBLIC EDUCATION DURING THE COVID-19 PANDEMIC AND ADDRESSING THE NEED FOR COMPENSATORY SERVICES UNDER SECTION 504 (2022).

78. *Id.*

79. *See, e.g., ParentsTogether Survey Reveals Remote Learning is Failing Our Most Vulnerable Students*, PARENTSTOGETHER (May 27, 2020), <https://parentstogetheraction.org/2020/05/27/parents-together-survey-reveals-remote-learning-is-failing-our-most-vulnerable-students-2> (surveying parents whose children's schools are providing remote learning, reporting that only 20 percent of the children with IEPs are receiving mandated services); Dia Jackson & Jill Bowdon, *Research Brief, Spotlight on Students with Disabilities*, AMERICAN INSTITUTES FOR RSCH. (Oct. 2020), <https://www.air.org/sites/default/files/COVID-Survey-Spotlight-on-Students-with-Disabilities-FINAL-Oct-2020.pdf> (summarizing results of survey of 744 school districts on challenges of providing special education services during pandemic, with 73 percent of districts reporting it was more or substantially more difficult to provide appropriate accommodations); Cayla Bamberger, *Is the Pandemic a Chance to Reimagine Special Education*, DISABILITY SCOOP (Feb. 4, 2021), <https://www.disabilityscoop.com/2021/02/04/is-pandemic-chance-reimagine-special-education/29180> (detailing failure of schools across the country to provide special education services mandated by IEPs).

80. Michelle Diamant, *Ed Department Prods Schools on Compensatory Services for Students with Disabilities*, DISABILITY SCOOP (Feb. 22, 2022), <https://www.disabilityscoop.com/2022/02/22/ed-department-prods-schools-on-compensatory-services-for-students-with-disabilities/29714>.

dents awaiting identification for eligibility for special education services.⁸¹ Lawsuits have been filed in many states. The DOE's Office for Civil Rights has initiated investigations against a number of school districts for pandemic-related violations of IDEA.⁸² Who knows how those will be resolved over the coming years.

But in the meantime, kids with disabilities have generally had a disastrous educational experience during the pandemic, and the consequences will be long-term. Studies of effects of disruptions in special education services during past public emergencies like Hurricanes Katrina and Rita document severe and long-lasting adverse consequences.⁸³

[M]id-pandemic reports indicate that for many students with disabilities . . . the quality of special education has diminished, as has the access to instruction, especially for students who can't benefit from online instruction without additional support from an in-person assistant or technical support from assistive technology. . . . 73% of special education administrators responding to AIR's [American Institutes of Research] national October 2020 survey reported, 'that it was more or substantially more difficult to provide appropriate instructional accommodations.'⁸⁴

IV. EMPLOYMENT

The arc of disability rights has been the move from segregation and isolation to desegregation and full integration in the wider community.⁸⁵ The earliest activism started with the release of people with disabilities from institutions and continues with the fight to live as independently as possible in all communities. Then came the integration of children with disabilities into public schools and the continued battle for access to higher education. The ADA addressed physical barriers to access to public facilities, businesses, and services, as well as the barriers posed by workplace discrimination.

81. Bamberger, *supra* note 79.

82. Michelle Diamant, *Ed. Department Investigating Special Ed Failures During COVID-19*, DISABILITY SCOOP (Jan. 29, 2021), <https://www.disabilityscoop.com/2021/01/29/ed-department-investigating-special-ed-failures-during-covid-19/29171>.

83. Harris, *supra* note 1, at 43–44.

84. Daniel J. Losen, Paul Martinez & Grace Hae Rim Shin, *Disabling Inequity: The Urgent Need for Race-Conscious Resource Remedies*, THE CTR. FOR CIV. RTS. REMEDIES AT THE CIV. RTS. PROJECT 54–55 (Mar. 22, 2021), <https://www.civilrightsproject.ucla.edu/research/k-12-education/special-education/disabling-inequity-the-urgent-need-for-race-conscious-resource-remedies/final-Report-03-22-21-v5-corrected.pdf>; *see also* GAO Report, *supra* note 60, at 9–19.

85. The evolution of the disability rights movement described briefly in this paragraph is a fascinating story and well-documented in a number of excellent books. *See, e.g.*, JUDITH HEUMANN, *BEING HEUMANN: AN UNREPENTANT MEMOIR OF A DISABILITY RIGHTS ACTIVIST* (2020); JAMES I. CHARLTON, *NOTHING ABOUT US WITHOUT US* (1998); JOSEPH P. SHAPIRO, *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* (1994).

Although all of these fronts are still active battlefields, it is the fight for employment that is in some ways the most important, yet also the least successful. *Even before* the pandemic, the poverty rate for working-age people with disabilities [was] nearly two and a half times higher than that for people without disabilities.⁸⁶ *Even before* the pandemic, fewer than one in three working-age people with disabilities were employed, as compared to three-fourths of their nondisabled peers.⁸⁷ Again, the strong statement in the ADA about the right to equal treatment in the workplace has not translated into actual equality in employment opportunity, and, again, the pandemic has shown how fragile the minor gains in employment have proven to be.

Of course, education gaps and the restrictions of disability income support from the government are important factors, but research also points to discrimination both in hiring and in promoting people with disabilities.⁸⁸ When people with disabilities are hired, they are more likely to work in low-wage, part time, and contingent jobs than non-disabled workers; more likely to receive lower pay and benefits than non-disabled workers at those same jobs; and are more likely to be laid off by employers when times are bad than non-disabled workers.⁸⁹ A study published in February 2021, based on data from the Bureau of Labor Statistics' Current Population Survey for the pandemic year 2020, showed that individuals with disabilities reported a markedly larger decline in jobs at the beginning of the pandemic and a slower bounce back to employment in the summer and fall.⁹⁰ Research conducted by Global Disability Inclusion suggests that close to 40 percent of people with disabilities were laid off or furloughed as a result of the pandemic.⁹¹ According to the National Council on Disability, "By the end of April 2020, nearly 1 million people with disabilities lost their jobs, representing about 20 percent of working people with disabilities. By comparison, 14 percent of people without disabilities lost their jobs."⁹²

A significant part of the disability employment gap can be explained by the fact that workers with disabilities who do find jobs are most often in the occupations and industries that had the largest employment declines

86. U.S. SENATE, COMM. ON HEALTH, EDUC., LAB. & PENSIONS, MAJORITY COMMITTEE STAFF REPORT, *FULLFILLING THE PROMISE: OVERCOMING PERSISTENT BARRIERS TO ECONOMIC SELF-SUFFICIENCY FOR PEOPLE WITH DISABILITIES* 2-3 (2014).

87. Lisa Schur, Yana van der Meulen Rodgers & Douglas Kruse, *COVID-19 and Employment Losses for Workers with Disabilities: An Intersectional Approach* 1 (The Ctr. For Women and Work, Working Paper No. 2021-2, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788319.

88. *Id.* at 2.

89. *Id.* at 2-3.

90. *Id.* at 9.

91. Pam Katz, *The Workplace in 2020: Getting People With Disabilities Back to Work Safely During COVID-19*, THE ARC (Oct. 12, 2020), <https://thearc.org/the-workplace-in-2020-getting-people-with-disabilities-back-to-work-safely-during-covid-19>.

92. NAT'L COUNCIL ON DISABILITY, *THE IMPACT OF COVID-19 ON PEOPLE WITH DISABILITIES* 153 (2021).

during the pandemic—such as building and grounds cleaning, food preparation and serving, and transportation and material moving.⁹³ The authors of the study found, however, that there was still an increase in the unexplained component of the disability gap during the pandemic, one that is consistent with pre-pandemic research indicating higher layoff rates among workers with disabilities that cannot be explained by differences in occupation or education.⁹⁴

Many people with disabilities rely on the support of direct support professionals and job coaches. The disability service agencies that support employment and hire these support people have had increasing difficulty finding staff willing to do this work and have been subject to budget cuts causing closures and cutbacks on services.⁹⁵ A 50-State Survey by the Kaiser Family released in August 2021 revealed that thirty-two states reported closure of adult day programs, and twenty-six reported closure of supported employment service providers due to staffing shortages and social distancing measures.⁹⁶

There is hope that some of the innovations forced on employers by the pandemic will ultimately benefit workers with disabilities—such as virtual hiring processes and widespread acceptance of telework and other flexible work arrangements.⁹⁷ But the short-term picture is grim, because “[h]istorically, people with disabilities who find themselves unemployed or seeking to enter the workforce have been among the last to secure employment during times of economic recovery.”⁹⁸

In conclusion, the picture painted in this essay substantiates Professor Harris’s characterization of COVID-19 as “a perfect storm of systemic flaws with people with disabilities at its eye.”⁹⁹ At the same time, it is important to acknowledge that some of the innovations forced on us during the pandemic have the potential for significantly improving life for people with disabilities going forward. The aggressive response of disability activists to the early pandemic’s discriminatory health care policies has shone a light on heretofore largely hidden negative assumptions about the relative worth of the lives of those with and without disabilities; the OCR’s subsequent actions in enforcement and publication of strong statements of the

93. Schur, Rodgers & Kruse, *supra* note 87, at 10.

94. Schur, Rodgers & Kruse, *supra* note 87, at 10.

95. Katz, *supra* note 91.

96. Kaiser 50-State Survey, *supra* note 39.

97. NAT’L COUNCIL ON DISABILITY, *supra* note 92, at 153–58; Lisa A. Schur, Mason Ameri & Douglas Kruse, *Telework After COVID: A “Silver Lining” for Workers with Disabilities?*, 30 J. OF OCCUPATIONAL REHAB. 521 (2020).

98. Josh Cunningham, *National Conference of State Legislatures, The Pandemic’s Effect on the Economy and Workers*, NAT’L CONF. OF STATE LEGISLATURES (Jan. 19, 2021), <https://www.ncsl.org/research/labor-and-employment/the-pandemic-s-effect-on-the-economy-and-workers637463008.aspx>.

99. Harris, *supra* note 1 at 33.

applicability of civil rights laws to health care policies has resulted in some potentially forceful legal protections for people with disabilities.¹⁰⁰ Some features of the skills in distance teaching developed by educators during the pandemic might prove beneficial for people with disabilities.¹⁰¹ On the employment front, innovations like virtual hiring processes and the widespread acceptance of telework and other flexible work arrangements could dramatically expand what employers may be required to offer in the future as reasonable accommodations under the ADA.

But we cannot afford to ignore the disproportionate impact that the pandemic has had on our brothers and sisters with disabilities. We have to take seriously the demands of disability advocates for a full place at the table in pandemic-related policies offering relief from the current epidemic and setting the stage for future epidemics. We must listen to the coalition of over eighty disability rights groups that issued an open letter urging policymakers to reject health care policies based on discriminatory measurements of the value of medical treatments.¹⁰² We must listen to the coalition of parents, teachers unions, and disability advocates that petitioned the DOE, asking that schools be directed to use funds allocated to schools in the various COVID-19 relief plans to help students with disabilities recover from “disrupted learning and delayed or foregone services.”¹⁰³ And we must support efforts to invest in the outmoded Medicaid-based infrastructure for supporting true independence for people with disabilities, including employment supports. We must start putting our money where our mouths are with respect to equality for people with disabilities.

100. See *supra* notes 47–56 and accompanying text.

101. Billy Jean Louis, *Changes Wrought by Pandemic Helped People With Disabilities. They're Not Ready To Give Them Up*, THE BALTIMORE SUN (Sept. 21, 2021), <https://www.disabilitycoop.com/2021/09/21/changes-pandemic-people-disabilities-theyre-not-ready-give-them-up/29495>.

102. REJECT HEALTH POLICIES THAT DISCRIMINATE, <https://www.aapd.com/wp-content/uploads/2021/04/Updated-Open-Letter-Reject-Health-Policies-That-Discriminate.pdf>.

103. Diament, *supra* note 71.