University of Washington School of Law
UW Law Digital Commons

Articles | Faculty Publications and Presentations

2021

Substance Use Disorder Discrimination and The CARES Act: Using Disability Law to Inform Part 2 Rulemaking

Kelly K. Dineen

Elizabeth Pendo
University of Washington School of Law

Follow this and additional works at: https://digitalcommons.law.uw.edu/faculty-articles

Part of the Administrative Law Commons, Disability Law Commons, and the Health Law and Policy Commons

Recommended Citation

Kelly K. Dineen and Elizabeth Pendo, *Substance Use Disorder Discrimination and The CARES Act: Using Disability Law to Inform Part 2 Rulemaking*, 52 ARIZ. STATE L. J. 1143 (2021), https://digitalcommons.law.uw.edu/faculty-articles/954

This Article is brought to you for free and open access by the Faculty Publications and Presentations at UW Law Digital Commons. It has been accepted for inclusion in Articles by an authorized administrator of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

HEINONLINE

DATE DOWNLOADED: Tue Sep 19 16:09:21 2023
SOURCE: Content Downloaded from HeinOnline

Citations:
Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.
Kelly K. Dineen & Elizabeth Pendo, Substance Use Disorder Discrimination and the CARES Act: Using Disability Law to Inform Part 2 Rulemaking, 52 ARIZ. St. L.J. 1143 (2020).

ALWD 7th ed.
Kelly K. Dineen & Elizabeth Pendo, Substance Use Disorder Discrimination and the CARES Act: Using Disability Law to Inform Part 2 Rulemaking, 52 Ariz. St. L.J. 1143 (2020).

APA 7th ed.
Dineen, K. K., & Pendo, E. (2020). Substance use disorder discrimination and the cares act: using disability law to inform part rulemaking. Arizona State Law Journal, 52(4), 1143-1166.

Chicago 17th ed.
Kelly K. Dineen; Elizabeth Pendo, "Substance Use Disorder Discrimination and the CARES Act: Using Disability Law to Inform Part 2 Rulemaking," Arizona State Law Journal 52, no. 4 (Winter 2020): 1143-1166

McGill Guide 9th ed.
Kelly K. Dineen & Elizabeth Pendo, "Substance Use Disorder Discrimination and the CARES Act: Using Disability Law to Inform Part 2 Rulemaking" (2020) 52:4 Ariz St LJ 1143.

AGLC 4th ed.
Kelly K. Dineen and Elizabeth Pendo, 'Substance Use Disorder Discrimination and the CARES Act: Using Disability Law to Inform Part 2 Rulemaking' (2020) 52(4) Arizona State Law Journal 1143

MLA 9th ed.
Dineen, Kelly K., and Elizabeth Pendo. "Substance Use Disorder Discrimination and the CARES Act: Using Disability Law to Inform Part 2 Rulemaking." Arizona State Law Journal, vol. 52, no. 4, Winter 2020, pp. 1143-1166. HeinOnline.

OSCOLA 4th ed.
Kelly K. Dineen & Elizabeth Pendo, 'Substance Use Disorder Discrimination and the CARES Act: Using Disability Law to Inform Part 2 Rulemaking' (2020) 52 Ariz St LJ 1143 Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Provided by:
University of Washington Law Library

Substance Use Disorder Discrimination and the CARES Act: Using Disability Law To Inform Part 2 Rulemaking

Kelly K. Dineen* & Elizabeth Pendo**

INTRODUCTION

Substance use disorder (SUD) is a chronic health condition[1]—like people with other chronic health conditions, people with SUDs experience periods of remission and periods of exacerbation or recurrence.[2] Unlike people with most other chronic conditions, people with SUDs may be more likely to garner law enforcement attention than medical attention during a recurrence. They are also chronically disadvantaged by pervasive social stigma, discrimination, and structural inequities. The COVID-19 pandemic has had devastating consequences for people with SUDs, who are at higher risk for both contracting the SARS-CoV-19 virus and experiencing poorer outcomes.[3] Meanwhile, there are early indications that pandemic conditions

---

* Copyright © 2020. Kelly K. Dineen. Associate Professor of Law, Creighton University School of Law; J.D. & Ph.D., Saint Louis University.

** Copyright © 2020. Elizabeth Pendo. Joseph J. Simeone Professor of Law, Center for Health Law Studies, Saint Louis University School of Law; B.A. University of California Los Angeles; J.D., University of California Berkeley School of Law.

1. Substance Use Disorders are complex, chronic medical conditions that are characterized by clusters of symptoms involving impaired control, social problems, risky use, and drug effects. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 483 (5th ed. 2013). Severity is assessed by the diagnosing clinician as mild, moderate, or severe. *Id.*; *see also* Deborah S. Hasin et al., *DSM-5 Criteria for Substance Use Disorders: Recommendations and Rationale*, 170 AM. J. PSYCHIATRY 834, 841–48 (2013).

2. *See, e.g.*, Charles H. Smith & Kathi A. Borden, Editorial, *Introduction to the Special Issue on Substance Use Disorders and Addictions*, 51 PRO. PSYCH. 1, 1 (2020) (noting that "relapse" rates for SUDs are equal to or lower than for diabetes and hypertension, for example).

3. *See, e.g.*, Felipe Ornell et al., Letter to the Editor, *The COVID-19 Pandemic and Its Impact on Substance Use: Implications for Prevention and Treatment*, PSYCHIATRY RSCH., July 2020, at 1 (describing the range of factors that predispose people with SUD to worsened health status during the pandemic); *see also* Yufeng Wei & Rameen Shah, *Substance Use Disorder in the COVID-19 Pandemic: A Systematic Review of Vulnerabilities and Complications*, PHARMACEUTICALS, July 18, 2020, at 1; Wossenseged Birhane Jemberie et al., *Substance Use Disorders and COVID-19: Multi-Faceted Problems Which Require Multi-Pronged Solutions*, FRONTIERS PSYCHIATRY, July 21, 2020, at 1, 2, http://www.frontiersin.org/article/10.3389/fpsyt.2020.00714/full [https://perma.cc/48QA-YF37].

have led to new and increased drug use,[4] and overdose deaths are surging.[5] More than ever, people with SUDs need access to evidence-based treatment and other services without structural barriers and with civil rights protections. To that end, a new provision in the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) strengthens penalties for the wrongful disclosure of SUD treatment records as well as addresses discrimination in multiple settings based on the misuse of those records.[6]

People with SUDs reasonably fear negative treatment and discrimination if their condition is exposed. To address this barrier, federal law strictly protects the confidentiality of SUD treatment records.[7] These protections have existed for nearly fifty years;[8] however, the stringent requirements have been blamed for hampered and even deadly treatment decisions by health care providers who do not have access to SUD treatment records.[9]

Section 3221 of the CARES Act, effective March 2021, enacts the first major statutory changes to SUD treatment record confidentiality since 1992 and is aimed at improving information sharing among SUD treatment providers and other health care providers.[10] But increased information sharing

---

4. *See, e.g.*, Mark É. Czeisler et al., *Mental Health, Substance Use, and Suicidal Ideation During the COVID-19 Pandemic United States, June 24 30, 2020*, 69 CDC MORBIDITY & MORTALITY WKLY. REP. 1049, 1049–56 (2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6932a1-H.pdf [https://perma.cc/RR7H-XVC7].

5. *See* Nat'l Ctr. for Health Stat., *Provisional Drug Overdose Death Counts*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm [https://perma.cc/YCJ3-8A37] (indicating a predicted nationwide increase of 21.3% in overdose deaths between June 2019 and June 2020); Aliese Alter & Christopher Yeager, *COVID-19 Impact on US National Overdose Crisis*, OVERDOSE DETECTION MAPPING APPLICATION PROGRAM, http://www.odmap.org/Content/docs/news/2020/ODMAP-Report-June-2020.pdf [https://perma.cc/3LTJ-UCRS] (reporting an almost 17% increase between March and May 2020 in overdoses involving psychoactive substances compared with the same period in 2019).

6. CARES Act, Pub. L. No. 116-136, § 3221, 134 Stat. 281, 375–79 (2020) (codified at 42 U.S.C. § 290dd-2).

7. *See* Confidentiality of Substance Use Disorder Patient Records, 82 Fed. Reg. 6052, 6053 (Jan. 18, 2017) (to be codified at 42 C.F.R. pt. 2) ("The laws and regulations governing the confidentiality of substance use disorder records were written out of great concern about the potential use of substance use disorder information against individuals, causing individuals with substance use disorders not to seek needed treatment.").

8. *Id.*

9. *Improving the Coordination and Quality of Substance Use Disorder Treatment: Hearing on H.R. 3545 Before the Subcomm. on Health, Comm. on Energy & Com.*, 115th Cong. 22–24 (2018) (statement of Rep. Earl Blumenauer) [hereinafter *Hearing on H.R. 3545*], https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/20180508-HE%20Improving%20the%20Coordination%20and%20Quality%20of%20Substance%20Use%20Disorder%20Treatment.pdf [https://perma.cc/689S-5JEV].

10. § 3221, 134 Stat. at 375–79; *see, e.g.*, *Hearing on H.R. 3545*, *supra* note 9, at 22–24 (statement of Rep. Earl Blumenauer).

also creates concerns about information misuse and discrimination and the possibility of renewed treatment avoidance. To address the tension between the benefits of information sharing and the possible harms of discrimination after disclosure, Section 3221 strengthens the disclosure penalties to align with the Health Insurance Portability and Accountability Act of 1996 (HIPAA).[11] It also adds an entirely new nondiscrimination provision, which prohibits discriminatory use by *recipients* of disclosed SUD treatment information in areas including health care; employment and receipt of worker's compensation; rental or sale of housing; access to courts; and social services and benefits funded by federal, state, or local governments.[12]

This essay provides the first analysis of the new nondiscrimination protections in Section 3221 of the CARES Act for individuals with SUDs using the framework of existing protections against disability-based discrimination in the Americans with Disabilities Act (ADA),[13] Section 504 of the Rehabilitation Act,[14] Section 1557 of the Patient Protection and Affordable Care Act (ACA),[15] and the Fair Housing Act (FHA).[16] We propose that as the new protections of Section 3221 are implemented through regulations, guidance, and enforcement, they should be understood within the context of existing disability nondiscrimination laws as well as the specific purpose of Section 3221 to ensure that discrimination against such people does not continue to serve as a barrier to seeking treatment. We offer three insights to achieve this goal. First, the new protections should be understood to include current illegal substance users and should be construed broadly. Second, the scope of entities covered by the new protections should be interpreted consistently with existing definitions in laws that prohibit disability-based discrimination in employment; public programs, services and activities; health care; and housing. Finally, robust enforcement must be coupled with educational initiatives about the pervasive discrimination faced by people with SUDs and new and existing nondiscrimination requirements that protect them.

11. § 3221(g), 134 Stat. at 377–78.
12. *Id.*
13. Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (amended 2008).
14. Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794.
15. Affordable Care Act § 1557, 42 U.S.C. § 18116.
16. Fair Housing Act, 42 U.S.C. §§ 3601–3619, 3631 (amended 1988).

I. FACTUAL BACKGROUND: PERSISTENT STIGMA AND DISCRIMINATION

In the United States, people with SUDs have faced more than a century of social stigma and structural discrimination.[17] Mistreatment remains pervasive, with roughly one in six people with SUDs still avoiding treatment because of well-founded fears of discrimination.[18] SUD is arguably the most stigmatized health condition, with multiple studies finding people with SUDs experience social stigma and self-stigma at rates that far outpace those with even the most serious mental illnesses.[19] People living with SUDs continue to face public and private shaming,[20] sometimes built into accepted

---

17. *See generally* COMM. ON THE SCI. OF CHANGING BEHAV. HEALTH SOC. NORMS ET AL., ENDING DISCRIMINATION AGAINST PEOPLE WITH MENTAL AND SUBSTANCE USE DISORDERS (2016), https://www.ncbi.nlm.nih.gov/books/NBK384915/pdf/Bookshelf_NBK384915.pdf [https://perma.cc/B4YT-YZEB]; Lawrence H. Yang, Liang Y. Wong, Margaux M. Grivel & Deborah S. Hasin, *Stigma and Substance Use Disorders: An International Phenomenon*, 30 CURRENT OP. PSYCHIATRY 378 (2017). For some evidence of the historical attitudes toward people with SUDs, see for example M.I. Wilbert, *Narcotic Drugs: Recent Legislation Designed To Restrict Their Use*, 31 PUB. HEALTH REPS. 114, 115 (1916) (describing the behavior of people with SUDs as involving "physical, mental, and moral degeneration"); W. L. Treadway, *Dedication and Opening of the Lexington Narcotic Farm*, 50 PUB. HEALTH REPS. 996, 999 (1935) (noting that the Assistant Surgeon General of the United States described people with SUDs as prone to criminality and praised the new federal "farm" in which people with SUDs would be involuntarily treated, saying "[t]he isolation and segregation of drug addicts with the object of medical treatment appears desirable and necessary; for their presence and contact with others in American communities are a potential danger and a causative factor in the production of further addiction").

18. RACHEL N. LIPARI & EUNICE PARK-LEE, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2018 NATIONAL SURVEY ON DRUG USE AND HEALTH 55 (2019), https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHNationalFindingsReport2018/NSDUHNationalFindingsReport2018.pdf [https://perma.cc/S85M-AHCU].

19. *See, e.g.*, Colleen L. Barry, Emma E. McGinty, Bernice A. Pescosolido & Howard H. Goldman, *Stigma, Discrimination, Treatment Effectiveness, and Policy: Public Views About Drug Addiction and Mental Illness*, 65 PSYCHIATRIC SERVS. 1269, 1269–72 (2014); Arthur Crisp, Michael Gelder, Eileen Goddard & Howard Meltzer, *Stigmatization of People with Mental Illnesses: A Follow-up Study Within the Changing Minds Campaign of the Royal College of Psychiatrists*, 4 WORLD PSYCHIATRY 106, 110 (2005); Brandon Muncan et al., *"They Look at Us Like Junkies": Influences of Drug Use Stigma on the Healthcare Engagement of People Who Inject Drugs in New York City*, HARM REDUCTION J., July 31, 2020, at 53; *see also* COMM. ON THE SCI. OF CHANGING BEHAV. HEALTH SOC. NORMS ET AL., *supra* note 17.

20. *See, e.g.*, Jessica Wakeman, *Public Shaming of Drug Addicts Doesn't Work, Experts Say*, HEALTHLINE, https://www.healthline.com/health-news/public-shaming-of-drug-addicts-does-not-work#1 [https://perma.cc/MN5G-JLSQ] (Sept. 6, 2018) (exploring the trend of posting videos of people experiencing drug overdoses on social media platforms without their permission); Maia Szalavitz, *No One Should Have To Prove Their Worth To Get Medical Care, Regardless of Addiction or Pain*, 8 NARRATIVE INQUIRY BIOETHICS 233, 235 (2018); Molly Fogel,

"treatments" rooted in confrontation and humiliation, with no evidence base or oversight.[21] This stigma is socially reflected and culturally sanctioned,[22] as evidenced by common language choices,[23] the criminalization of addiction,[24] addiction exceptionalism in law and medicine,[25] the embrace of stigmatizing "treatment" programs—even in drug courts,[26] and continuing exclusion from health care settings.[27]

Humiliating People with Addiction Is Not Treatment, PAC. STANDARD (June 14, 2017), https://psmag.com/social-justice/humiliating-people-with-addiction-is-not-treatment [https://perma.cc/W9HD-MN9K].

21. MAIA SZALAVITZ, *The Problem with Bottom*, *in* UNBROKEN BRAIN: A REVOLUTIONARY NEW WAY OF UNDERSTANDING ADDICTION 174, 176–79, 187 (2016); MAIA SZALAVITZ, *The 12-Step Conundrum*, *in* UNBROKEN BRAIN, *supra*, at 212.

22. Patrick Corrigan, George Schomerus & David Smelson, *Are Some of the Stigmas of Addictions Culturally Sanctioned?*, 210 BRIT. J. PSYCHIATRY 180, 180–81 (2017).

23. *See, e.g.*, John F. Kelly & Cassandra M. Westerhoff, *Does It Matter How We Refer to Individuals with Substance-Related Conditions? A Randomized Study of Two Commonly Used Terms*, 21 INT'L J. DRUG POL'Y 202, 206 (2010); Linda Richter & Susan E. Foster, *Effectively Addressing Addiction Requires Changing the Language of Addiction*, 35 J. PUB. HEALTH POL'Y 60, 61 (2014).

24. *See, e.g.*, Teneille R. Brown, *Addiction as Disease* 18–23 (Univ. of Utah Coll. of L., Research Paper No. 307, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3345176 [https://perma.cc/TP9M-GAY9].

25. *See, e.g.*, Corey S. Davis & Derek H. Carr, *Legal and Policy Changes Urgently Needed To Increase Access to Opioid Agonist Therapy in the United States*, 73 INT'L J. DRUG POL'Y 42, 42–44 (2019) (describing the legal barriers to treatment for opioid use disorders and suggesting reforms at the federal, state, and local levels); Rachel Roubein & Nat'l J., *If Prescription Drug Addiction Is a Disease, Why Does the Law Make It So Hard To Get Treatment?*, ATLANTIC (Dec. 7, 2015), https://www.theatlantic.com/politics/archive/2015/12/if-prescription-drug-addiction-is-a-disease-why-does-the-law-make-it-so-hard-to-get-treatment/456369/ [https://perma.cc/PS9T-GTG5]; Leonieke C. van Boekel, Evelien P.M. Brouwers, Jaap van Weeghel & Henk F.L. Garretsen, *Stigma Among Health Professionals Towards Patients with Substance Use Disorders and Its Consequences for Healthcare Delivery: Systematic Review*, 131 DRUG & ALCOHOL DEPENDENCE 23, 33 (2013).

26. *See, e.g.*, Corrigan et al., *supra* note 22, at 181; SZALAVITZ, *supra* note 21, at 219. For a discussion of the ways in which many drug courts embrace "treatments" that are not evidence-based, see for example Nathaniel P. Morris & Brandon S. Bentzley, *Supporting the Use of Medications for Addiction Treatment in US Drug Courts: Opportunities for Health Professionals*, 14 J. ADDICTION MED. 277, 277–78 (2020). For a journalistic account of the harms that drug courts cause people with OUD, see Maia Szalavitz, *How America Overdosed on Drug Courts*, PAC. STANDARD (May 3, 2017), https://psmag.com/news/how-america-overdosed-on-drug-courts [https://perma.cc/3M5A-84KG].

27. *See, e.g.*, Kelly K. Dineen, Commentary, *Disability Discrimination Against People with Substance Use Disorders by Postacute Care Nursing Facilities: It Is Time To Stop Tolerating Civil Rights Violations*, J. ADDICTION MED., July 15, 2020 (commenting on Simeon D. Kimmel et al., *Rejection of Patients with Opioid Use Disorder Referred for Post-Acute Medical Care Before and After an Anti-Discrimination Settlement in Massachusetts*, J. ADDICTION MED., July 15, 2020).

People with opioid use disorder (OUD), a type of SUD, often face compound disadvantages.[28] Along with the stigma of having a SUD, they also face significant structural barriers to accessing the most effective, evidence-based treatment—medication for opioid use disorder (MOUD).[29] MOUD, sometimes referred to as medication assisted treatment,[30] includes three medications (in various formulations) approved by the Food and Drug Administration for treatment of OUD: Methadone, Buprenorphine, and Naltrexone.[31] MOUDs drastically reduce overdose and overall mortality rates,[32] reduce serious co-occurring conditions, improve retention rates in treatment, and improve quality of life for people with OUD.[33] Yet, only a minority of people with OUD receive MOUD—receiving MOUD is itself associated with stigma and discrimination.

Not only do people with OUD have to navigate the myriad hurdles and antiquated regulatory restrictions to access MOUD,[34] the lucky few who

---

28. *See, e.g.*, Kelly K. Dineen, Commentary, *It's Not the Patient, It's the System*, J. ADDICTION MED., Jan. 20, 2021 (commenting on Paul Tobias, *How Advance Directives Help When Patients Refuse Life-Saving Treatment Because of Their Substance Use*, J. ADDICTION MED., Jan. 20, 2021).

29. *See, e.g.*, Davis & Carr, *supra* note 25, at 42; COMM. ON MEDICATION-ASSISTED TREATMENT FOR OPIOID USE DISORDER ET AL., MEDICATIONS FOR OPIOID USE DISORDER SAVE LIVES 33–62 (Alan I. Leshner & Michelle Mancher eds., 2019), https://www.ncbi.nlm.nih.gov/books/NBK538936/pdf/Bookshelf_NBK538936.pdf [https://perma.cc/CW29-QJVV]; Sarah E. Wakeman, Editorial, *Using Science To Battle Stigma in Addressing the Opioid Epidemic: Opioid Agonist Therapy Saves Lives*, 129 AM. J. MED. 455, 455–56 (2016).

30. We deliberately choose MOUD to refer to this type of treatment because "medication assisted treatment" furthers the incorrect idea that medication is outside or additive to standard treatment, instead of standard of care, and also that SUDs are not like other medical conditions. For a discussion of the issues around the language choices for MOUD, see Sarah E. Wakeman, *Medications for Addiction Treatment: Changing Language To Improve Care*, 11 J. ADDICTION MED. 1, 1–2 (2017).

31. *See, e.g.*, Tyler S. Oesterle, Nuria J. Thusius, Teresa A. Rummans & Mark S. Gold, *Medication-Assisted Treatment for Opioid-Use Disorder*, 94 MAYO CLINIC PROC. 2072, 2072–73 (2019) (discussing the history of MOUDs and reviewing the clinical benefits and challenges of currently available MOUDs).

32. *See, e.g.*, Lindsay A. Pearce et al., *Opioid Agonist Treatment and Risk of Mortality During Opioid Overdose Public Health Emergency: Population Based Retrospective Cohort Study*, BRIT. MED. J., Mar. 31, 2020, at 5; Jun Ma et al., *Effects of Medication-Assisted Treatment on Mortality Among Opioids Users: A Systematic Review and Meta-Analysis*, 24 MOLECULAR PSYCHIATRY 1868, 1879–80 (2019).

33. *See, e.g.*, COMM. ON MEDICATION-ASSISTED TREATMENT FOR OPIOID USE DISORDER ET AL., *supra* note 29, at 39, 52. Methadone and Buprenorphine have the best evidence of effectiveness, whether or not the person with OUD is also receiving counseling or other psychological services. *Id.* at 39.

34. *See, e.g.*, Justin Berk, *To Help Providers Fight the Opioid Epidemic, "X the X Waiver,"* HEALTHAFFAIRS: HEALTH AFFS. BLOG (Mar. 5, 2019),

receive MOUD often experience discrimination in a variety of settings. For example, discrimination in housing is pervasive;[35] even in housing devoted to people with SUDs, such as recovery housing, exclusion of people simply because they are receiving MOUD is not unusual.[36] Employment-based discrimination is also common, with multiple cases of employee termination after an employer discovered the employee receives MOUD.[37]

In the last few years, enforcement in other areas has exposed the ubiquity of discrimination, in contexts ranging from places of incarceration to child welfare decisions to receipt of health care. For example, in 2020 the federal government reached a settlement with West Virginia after the Bureau of Child Welfare refused to place children in the custody of their aunt and uncle because of the uncle's treatment with MOUD.[38] As a series of cases in Washington, Maine, and Massachusetts reveals, jails and prisons have long denied people on MOUD their treatment, even after conviction for crimes as small as the theft of forty dollars in change.[39] Overt discrimination in health

---

https://www.healthaffairs.org/do/10.1377/hblog20190301.79453/full/ [https://perma.cc/JB9L-Y7E8]; Alaina McBournie, Alexandra Duncan, Elizabeth Connolly & Josh Rising, *Methadone Barriers Persist, Despite Decades of Evidence*, HEALTHAFFAIRS: HEALTH AFFS. BLOG (Sept. 23, 2019), https://www.healthaffairs.org/do/10.1377/hblog20190920.981503/full/ [https://perma.cc/Q6P2-7C49].

35. *See* Leslie P. Francis, *Illegal Substance Abuse and Protection from Discrimination in Housing and Employment: Reversing the Exclusion of Illegal Substance Abuse as a Disability*, 4 UTAH L. REV. 891, 893–902 (2019).

36. *See, e.g.*, OFF. OF ASSISTANT SEC'Y FOR PLAN. & EVALUATION, U.S. DEP'T OF HEALTH & HUM. SERVS., HOUSING OPTIONS FOR RECOVERY FOR INDIVIDUALS WITH OPIOID USE DISORDER: A LITERATURE REVIEW 10 (2019), https://aspe.hhs.gov/system/files/pdf/261951/OUDlr.pdf [https://perma.cc/54QT-9SAR].

37. For an overview of federal agency enforcement, see LEGAL ACTION CTR., CASES INVOLVING DISCRIMINATION BASED ON TREATMENT WITH MEDICATION FOR OPIOID USE DISORDER (MOUD) (2020), https://www.lac.org/assets/files/Cases-involving-denial-of-access-to-MOUD-10.8.2020.pdf [https://perma.cc/RFJ6-3UZQ].

38. OFF. FOR C.R., U.S. DEP'T OF HEALTH & HUM. SERVS., OCR NO. 18-306552, VOLUNTARY RESOLUTION AGREEMENT BETWEEN THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, OFFICE FOR CIVIL RIGHTS (OCR) AND THE WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, BUREAU FOR CHILDREN AND FAMILIES (2020), https://www.hhs.gov/sites/default/files/ocr-agreement-with-wv-dhhr.pdf [https://perma.cc/C7YD-26Z3]; *see also* Press Release, U.S. Dep't of Health & Hum. Servs., OCR Secures Agreement with West Virginia To Protect Persons in Recovery from Opioid Use Disorder from Discrimination on the Basis of Disability (May 13, 2020), https://www.hhs.gov/about/news/2020/05/13/ocr-secures-agreement-west-virginia-protect-persons-recovery-opioid-use-disorder-discrimination-basis-of-disability.html [https://perma.cc/UYU9-JR62].

39. *See* LEGAL ACTION CTR., *supra* note 37, at 1–2; Kevin Doyle, *Appeals Court's Smart Move Paves the Way for Opioid Addiction Treatment in Prisons and Jails*, STAT (June 10, 2019), https://www.statnews.com/2019/06/10/opioid-addiction-treatment-correctional-facilities/ [https://perma.cc/3FW6-UFJF].

care has finally attracted the attention of enforcement agencies, with a series of settlements with primary care and long term care providers for refusing to accept any patient into their care who is receiving MOUDs.[40] Very recently, a settlement was reached with Massachusetts General Hospital after they rejected a patient from consideration for a lung transplant without even consulting with his SUD treatment provider solely because he was receiving MOUD.[41]

II. LEGAL BACKGROUND: SECTION 3221 OF THE CARES ACT

Discrimination against people with SUDs was and remains a barrier to treatment. In 1972, the Drug Abuse Office and Rehabilitation Act included several provisions aimed at reducing this barrier by protecting the confidentiality of SUD treatment records.[42] This underlying purpose has been

40. DEP'T. OF JUST., DJ NO. 202-80-64, SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND SELMA MEDICAL ASSOCIATES, INC. UNDER THE AMERICANS WITH DISABILITIES ACT (2019), https://www.ada.gov/selma_medical_sa.html [https://perma.cc/DH9W-J3JW] (stating settlement terms when primary care provider practice discriminated against people who receive MOUD by regularly screening out and failing to reasonably accommodate people who receive MOUD); DEP'T. OF JUST., DJ NO. 202-36-306, SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND CHARLWELL OPERATING, LLC UNDER THE AMERICANS WITH DISABILITIES ACT (2018), https://www.ada.gov/charlwell_sa.html [https://perma.cc/J8X6-E4Y3] (stating settlement terms when skilled nursing facility refused to accept a patient because he was receiving MOUD in violation of the ADA); DEP'T. OF JUST., DJ NO. 202-36-308, SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND ATHENA HEALTH CARE SYSTEMS UNDER THE AMERICANS WITH DISABILITIES ACT (2019), https://www.ada.gov/athena_healthcare_sa.html [https://perma.cc/866L-7P3M] (stating settlement terms when operator of sixteen skilled nursing facilities screened out patients who were receiving MOUD in violation of the ADA).

41. DEP'T. OF JUST., DJ NO. 202-36-304, SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND MASSACHUSETTS GENERAL HOSPITAL UNDER THE AMERICANS WITH DISABILITIES ACT (2020), https://www.ada.gov/mass_gen_hosp_sa.html [https://perma.cc/BK9K-NKL2].

42. Drug Abuse Office and Treatment Act of 1972, ch. 16, § 408, 86 Stat. 65, 79 (codified as amended at 42 U.S.C § 290dd-2) (creating federal confidentiality protections for substance use disorder treatment records associated with programs assisted or authorized by the Act). Section 407 of the Drug Abuse Office and Treatment Act of 1972 prevented hospitals from refusing access to patients with SUDs solely because of their drug use. *Id.* § 407 (codified as amended at 42 U.S.C § 290dd-1). Other laws provided some protection for alcohol treatment records. *See, e.g.*, Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, ch. 59, § 333, 84 Stat. 1848, 1853 (allowing the Secretary to direct privacy protections for people receiving alcohol use disorder treatment or participating in research); Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act Amendments of 1974, Pub. L. No. 93-282, § 121(a), 88 Stat. 125, 130 (codified at 42 U.S.C. § 4581) (strengthening provision related to confidentiality of alcohol use disorder treatment records). In

affirmed over time. As the Substance Abuse and Mental Health Services Administration (SAMHSA) has repeatedly explained,

> The laws and regulations governing the confidentiality of substance [use] records were written out of great concern about the potential use of . . . information against individuals, causing individuals . . . to not seek needed treatment. The disclosure of records . . . has the potential to lead to a host of negative consequences including: Loss of employment, loss of housing, loss of child custody, discrimination by medical professionals and insurers, arrest, prosecution, and incarceration.[43]

This year, SAMHSA stated that these laws were "originally written out of concern for the potential for misuse of those records against patients in treatment for a SUD, thereby undermining trust and leading individuals with SUDs not to seek treatment."[44] Reducing the specter of discrimination for those in need of care is at the heart of laws that protect confidentiality of treatment records.

Prior to the CARES Act, the last major amendment to the provision in the Public Health Service Act that governs confidentiality of SUD records was in 1992.[45] Codified at 42 U.S.C. § 290dd-2 (Part 2 Law) with regulations at 42 C.F.R. 2 (Part 2 Regulations) (collectively Part 2), Part 2 currently applies to federally assisted programs and providers that diagnose, treat, or refer patients for treatment; the law requires heightened consent requirements and prohibits redisclosure without additional specific patient consent.[46] After HIPAA was enacted, some Part 2 providers were required to comply with both laws while others fell outside the definition of a covered entity under

---

1992, the Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act brought confidentiality protections for alcohol use disorder and other substance use disorders together, now codified at 42 U.S.C § 290dd-2. ADAMHA Reorganization Act, Pub. L. No. 102-321, § 543, 106 Stat. 323, 368–70 (1992) (codified at 42 U.S.C. § 290dd-2).

43. Confidentiality of Substance Use Disorder Patient Records, 81 Fed. Reg. 6987, 6989 (proposed Feb. 9, 2016) (to be codified at 42 C.F.R. pt. 2) (also noting "the purpose of the regulations at 42 CFR part 2 is to ensure that a patient receiving treatment for a substance use disorder in a part 2 program is not made more vulnerable by reason of the availability of their patient record than an individual with a substance use disorder who does not seek treatment").

44. Confidentiality of Substance Use Disorder Patient Records, 85 Fed. Reg. 42,986, 42,987 (July 15, 2020) (to be codified at 42 C.F.R. pt. 2).

45. § 543, 106 Stat. at 368–70.

46. 42 U.S.C. § 290dd-2; 42 C.F.R. pt. 2 (2020). See Nicolas Terry, Melissa Goldstein & Kirk Nahra, *COVID-19: Substance Use Disorder, Privacy, and the CARES Act*, HEALTHAFFAIRS: HEALTH AFFS. BLOG (June 8, 2020), https://www.healthaffairs.org/do/10.1377/hblog20200605.571907/full/ [https://perma.cc/947M-MRY8] for a more detailed analysis of the changes (other than the discrimination provision) in Section 3221 of the CARES Act regarding confidentiality and security of SUD treatment records.

HIPAA.[47] Wrongful disclosure under Part 2 was punishable only as a criminal infraction.[48]

Part 2 sat unchanged (and unenforced) for decades; nonetheless, its existence induced compliance.[49] More importantly, its existence served an important expressive function—that people with SUDs should not face discrimination for receiving treatment.[50] However, the opioid crisis exposed a downside to Part 2's protections—impaired information sharing among providers, which was blamed for deadly consequences.[51] Calls for Part 2 revisions intensified, with appeals to loosen Part 2 requirements to align more closely with HIPAA confidentiality and security provisions.[52] On the regulatory side, a succession of incremental changes occurred,[53] culminating with a final rule in 2020 to improve data integration and communication.[54] On the legislative side, a series of house and senate bills were proposed that would loosen Part 2's requirements and allow information sharing without specific consent for ongoing treatment purposes.[55] These bills advanced to

---

47. 42 U.S.C. §§ 1320d to 1320d-9; *see also* Terry et al., *supra* note 46.

48. *See* 18 U.S.C. §§ 3571–3580 (describing fines and imprisonment for infractions, misdemeanors, and felonies).

49. *See, e.g.*, Susan Awad, *Confused by Confidentiality? A Primer on 42 CFR Part 2*, AM. SOC'Y OF ADDICTION MED. (Aug. 15, 2013), https://www.asam.org/Quality-Science/publications/magazine/read/article/2013/08/15/confused-by-confidentiality-a-primer-on-42-cfr-part-2 [https://perma.cc/DK4J-YPZZ].

50. For a discussion of the expressive function of the law, see for example, Janice Nadler, *Expressive Law, Social Norms, and Social Groups*, 42 LAW & SOC. INQUIRY 60, 71 (2017).

51. *See, e.g.*, Ryan Stanton, *'Jessie's Law' Named After Ann Arbor Woman Who Died of Opioid Overdose*, MLIVE (Apr. 2, 2019), https://www.mlive.com/news/ann-arbor/2017/03/jessies_law_named_after_ann_ar.html [https://perma.cc/UG6M-K7B5].

52. *See, e.g.*, Sarah E. Wakeman & Peter Friedmann, *Outdated Privacy Law Limits Effective Substance Use Disorder Treatment: The Case Against 42 CFR Part 2*, HEALTHAFFAIRS: HEALTH AFFS. BLOG (Mar. 1, 2017), https://www.healthaffairs.org/do/10.1377/hblog20170301.058969/full/ [https://perma.cc/YM2Z-CTA7].

53. *See* Confidentiality of Substance Use Disorder Patient Records, 81 Fed. Reg. 6987 (proposed Feb. 9, 2016) (to be codified at 42 C.F.R. pt. 2); Confidentiality of Substance Use Disorder Patient Records, 82 Fed. Reg. 6052 (Jan. 18, 2017) (to be codified at 42 C.F.R. pt. 2); Confidentiality of Substance Use Disorder Patient Records, 82 Fed. Reg. 5485 (proposed Jan. 18, 2017) (to be codified at 42 C.F.R. pt. 2); Confidentiality of Substance Use Disorder Patient Records, 83 Fed. Reg. 239 (Jan. 3, 2018) (to be codified at 42 C.F.R. pt. 2); Confidentiality of Substance Use Disorder Patient Records, 84 Fed. Reg. 44,566 (proposed Aug. 26, 2019) (to be codified at 42 C.F.R. pt. 2).

54. Confidentiality of Substance Use Disorder Patient Records, 42 C.F.R. §§ 2.1–2.67 (2020).

55. The Jessica Grubb Legacy Act was introduced in the Senate (S1850) in 2017 and referred to the committee on Health, Education, Labor, and Pensions. *See* S. 1850, 115th Cong. (2017). It did not contain the antidiscrimination provision until it was reintroduced in a subsequent

committee on several occasions; one was included in an early version of the SUPPORT Act of 2018, but all but a few weaker provisions were removed from the final bill.[56] A number of powerful provider organizations vocally supported the efforts.[57] Those that opposed the bills, mostly patient advocacy organizations, cited concerns about deterring treatment seeking by people with SUDs, and worsened stigma and discrimination if protections were loosened.[58] Seemingly in an effort to address objections related to discrimination, a nondiscrimination provision was added to one of the bills in committee,[59] thereafter appearing in the bill as introduced in subsequent congressional sessions, until its final inclusion in the CARES Act.[60]

Section 3221 of the CARES Act, effective March 2021, ends those legislative efforts by amending the Public Health Service Act to bring the Part 2 Law in close alignment with HIPAA.[61] It loosens the patient consent requirement for disclosure and adopts definitions and some disclosure standards from HIPAA, as well as parts of the HIPAA Privacy and Breach Notification rules.[62] Once effective, SUD treatment records from Part 2 providers can be shared in similar ways to protected health information under HIPAA, for "treatment, payment, and health care operations."[63]

Section 3221 also adds an entirely new nondiscrimination provision, reaching outside of Part 2 programs to prohibit discriminatory use by

---

congressional session on April 3, 2019 (S1012). *See* S. 1012, 116th Cong. (2019). In March 2020, the same bill was introduced (S3374) and ultimately became part of the CARES Act. *See* S. 3374, 116th Cong. (2020). In the House, the Overdose Prevention and Patient Safety Act was introduced in 2017 (HR3545) without the discrimination provision. *See* H.R. 3545, 115th Cong. (2017). In 2018, it was reintroduced (HR5795) and later (HR6082) with an additional model training programs provision that was carved out and included in the SUPPORT Act of 2018. *See* H.R. 5795, 115th Cong. (2018); H.R. 6082, 116th Cong. (2018).

56. *See* Terry et al., *supra* note 46; SUPPORT Act, Pub. L. No. 115-271, §§ 7051–7053, 132 Stat. 3894, 4017 (2018) (codified at 42 U.S.C. § 290dd-2).

57. *See, e.g.*, *Hearing on H.R. 3545*, *supra* note 9, at 123–24.

58. *See, e.g.*, 164 CONG. REC. H5325–35 (daily ed. June 20, 2018).

59. *See* Memorandum from the Comm. on Energy & Com. Democratic Staff to the Subcomm. on Health Democratic Members & Staff 6–8 (May 7, 2018), https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Dem-Memo-HE-Hrg-on-Improving-the-Coordination-and-Quality-of-Substance-Use-Disorder-Treatment-2018-05-08.pdf [https://perma.cc/H7W6-5M2K] (describing amendments in nature of substitute that includes antidiscrimination provision added to HR3545).

60. *See id.*; CARES Act, Pub. L. No. 116-136, § 3221, 134 Stat. 281, 375–79 (2020) (codified at 42 U.S.C. § 290dd-2).

61. § 3221, 134 Stat. at 375–79.

62. *Id.* § 3221(b)–(d), (f), 134 Stat. at 375–77. See 45 C.F.R. §§ 160, 164.102–106, 164.500–534 (2020), for the HIPAA privacy rule. See 45 C.F.R. §§ 164.400–414 (2020), for the breach notification rule.

63. § 3221(b)(1)(C), 134 Stat. at 376.

recipients of disclosed SUD treatment information in myriad settings.[64] Section 1 of the antidiscrimination provision prohibits any "entity" from discriminating against an "individual" in health care access, admissions, or treatment; employment and receipt of worker's compensation; rental or sale of housing; access to local, federal, or state courts; or approval of social services and benefits funded by federal, state, or local governments.[65] Section 2 prohibits discrimination by recipients of federal funds in affording access to those funded services.[66]

Section 3221 also changes the penalties and enforcement mechanisms for Part 2 violations.[67] The criminal infraction penalty is eliminated and replaced by the significant civil monetary and criminal penalties that apply to HIPAA violations.[68] Enforcement will rest with the U.S. Department of Health and Human Services' Office for Civil Rights (OCR), which also enforces HIPAA, with referrals to the Department of Justice (DOJ) for criminal prosecutions.[69] For Part 2 providers that were not already covered by HIPAA, the new penalties dramatically raise the stakes of non-compliance. However, the Part 2 Law does not currently include a private right of action, and Section 3221 does not explicitly change this, meaning individuals harmed by the use of disclosed information must rely on government agencies to take enforcement action.

III. EXISTING DISABILITY RIGHTS LAWS STRENGTHEN AND INFORM NEW PROTECTIONS

Existing laws prohibit discrimination against individuals with disabilities—including individuals with SUDs—in a wide range of settings and activities, including those identified in Section 3221. As the new protections of Section 3221 are implemented through regulations, guidance, and enforcement, they should be understood within the context of existing laws as well as the specific purpose of Section 3221 to ensure that discrimination against such people does not continue to serve as a barrier to seeking treatment.

We offer three proposals to achieve this goal. First, the new protections apply to individuals with a current SUD, including individuals who are

64. *Id.* § 3221(g), 134 Stat. at 377–78.

65. *Id.* § 3221(g)(1), 134 Stat. at 377–78.

66. *Id.* § 3221(g)(2), 134 Stat. at 378.

67. *Id.* § 3221(f), 134 Stat. at 377.

68. *Id.* (applying the penalties that already apply to HIPAA violations under the Social Security Act sections 1176 (civil) and 1177 (criminal)).

69. *Id.*; 42 U.S.C. §§ 1320d-5 to 1320d-6.

currently using drugs. Consistent with existing laws and the goals of Section 3221, individuals with a history of SUDs and who are regarded as having a SUD should also be protected. Second, "entities" should be interpreted consistently with existing definitions in laws that prohibit disability-based discrimination in employment; public programs, services, and activities; health care; and housing. Individuals with SUDs retain access to the broader rights and remedies under existing laws, including a private right of action and a right to accommodations. Accordingly, robust enforcement must be coupled with educational initiatives about the pervasive discrimination faced by people with SUDs, and new and existing nondiscrimination requirements that protect and promote their access to medical care; employment; public programs, services, and activities; and housing.

A. Existing Disability-Based Protections that Apply to People with Substance Use Disorders

The ADA is a comprehensive civil rights law that establishes a clear national mandate for eliminating discrimination and ensuring that people with disabilities have opportunities, full participation, independent living, and economic self-sufficiency in all areas of American life.[70] The ADA's broad reach prohibits discrimination based on disability in employment (Title I);[71] public programs, services, and activities (Title II);[72] public transportation and places of public accommodations (Title III);[73] and telecommunications (Title IV).[74] The ADA expands the protections of an earlier federal statute that prohibits disability discrimination in federal employment and in programs and activities that receive federal financial assistance, the Rehabilitation Act.[75] Section 1557 of the Affordable Care Act amends the Rehabilitation Act to provide additional protections in certain health care programs, activities, and settings.[76]

Additional protections are available under other federal disability rights laws.[77] For example, the FHA prohibits housing discrimination because of an individual's disability or an individual's association with someone who has a

---

70. 42 U.S.C. §§ 12101–12213.
71. *Id.* §§ 12111–12117.
72. *Id.* §§ 12131–12165.
73. *Id.* §§ 12181–12189.
74. 47 U.S.C. § 225.
75. 29 U.S.C. § 701.
76. 42 U.S.C. § 18116.
77. *A Guide to Disability Rights Laws*, U.S. DEP'T OF JUST. (Feb. 24, 2020), https://www.ada.gov/cguide.htm [https://perma.cc/2LHG-QBGV].

disability.[78] Because other scholars, in particular Professor Leslie Francis, have examined the FHA and related laws,[79] this essay focuses primarily on the ADA and the Rehabilitation Act.

Agencies responsible for implementation of existing nondiscrimination laws have a record of educational initiatives and enforcement actions in the context of SUDs, especially in recent years. For example, the Equal Employment Opportunity Commission (EEOC) has taken a number of enforcement actions against employers for discrimination against applicants or employees being treated with MOUD or prescription opioids.[80] These cases underscore the ADA's requirement that employers engage in an individualized assessment of what, if any, impact the medication has on the individual's ability to perform the job safely, rather than relying on stereotypes or assumptions.[81] In 2020, the EEOC issued guidance for employers[82] and for health care providers[83] on existing legal protections in the workplace for individuals who are using opioids or individuals with a current or former SUD.

The DOJ has worked to provide education about the protection of people with SUDs under existing law in health care settings.[84] As noted above, it has taken recent action against private entities that discriminate against people with SUDs receiving MOUD, with recent examples including enforcements

78. 42 U.S.C. § 3604(f).

79. *See* Francis, *supra* note 35.

80. *See* LEGAL ACTION CTR., *supra* note 37, at 2–3.

81. *Id.* at 3; Breaux v. Bollinger Shipyards, LLC, No. 16-2331, 2018 WL 3329059, at *12 (E.D. La. July 5, 2018); Pollard v. Drummond Co., No. 12-CV-03948, 2015 WL 5306084, at *7 (N.D. Ala. Sept. 10, 2015); Equal Emp. Opportunity Comm'n v. Hussey Copper Ltd., 696 F. Supp. 2d 505, 517–18 (W.D. Pa. 2010).

82. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC–NTVA–2020–2, USE OF CODEINE, OXYCODONE, AND OTHER OPIOIDS: INFORMATION FOR EMPLOYEES (2020), https://www.eeoc.gov/laws/guidance/use-codeine-oxycodone-and-other-opioids-information-employees [https://perma.cc/S2NJ-EMUM].

83. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC–NTVA–2020–1, HOW HEALTH CARE PROVIDERS CAN HELP CURRENT AND FORMER PATIENTS WHO HAVE USED OPIOIDS STAY EMPLOYED (2020), https://www.eeoc.gov/laws/guidance/how-health-care-providers-can-help-current-and-former-patients-who-have-used-opioids [https://perma.cc/AB5J-MYAU].

84. *See* Press Release, U.S. Dep't of Just., Eastern District of Pennsylvania Hosts Roundtable Addressing Medication-Assisted Treatment for Opioid Use Disorder and the Americans with Disabilities Act (Apr. 24, 2019), https://www.justice.gov/usao-edpa/pr/eastern-district-pennsylvania-hosts-roundtable-addressing-medication-assisted-treatment [https://perma.cc/T8BJ-LPDW].

against skilled nursing facilities and primary care providers that denied access on the basis of disability[85] and denial of eligibility for a lung transplant.[86]

Similarly, the OCR has initiated much-needed action to address health care discrimination and recently reached an agreement with West Virginia after discovering practices that excluded people with SUDs receiving MOUD from serving as foster parents, in violation of Section 504 and Title II of the ADA.[87] In 2018, the OCR launched a public education campaign[88] aimed at increasing access to evidence-based treatments, including MOUD, by clarifying the federal civil rights protections[89] for people with SUDs and providing specific guidance in the context of OUD.[90]

B. Definition of "Individual" Does Not Exclude Current Illegal Substance Users and Should Be Interpreted Broadly

Section 3221 prohibits discrimination against any "individual" based on SUD-related information in disclosed patient records.[91] Consistent with existing protections against disability discrimination, "individual" should include individuals with a current SUD, individuals with a history of SUDs,

---

85. *See* Press Release, U.S. Dep't of Just., U.S. Attorney's Office Settles Disability Discrimination Allegations with Operator of Skilled Nursing Facilities (Sept. 17, 2019), https://www.justice.gov/usao-ma/pr/us-attorney-s-office-settles-disability-discrimination-allegations-operator-skilled [https://perma.cc/7B2E-5GW5]; Press Release, U.S. Dep't of Just., Justice Department Reaches Settlement with Selma Medical Associates Inc. To Resolve ADA Violations (Jan. 31, 2019), https://www.justice.gov/opa/pr/justice-department-reaches-settlement-selma-medical-associates-inc-resolve-ada-violations [https://perma.cc/9HRA-YXK5].

86. Press Release, U.S. Dep't of Just., Massachusetts General Hospital Enters Agreement with U.S. Attorney's Office To Better Ensure Equal Access for Individuals with Disabilities (Aug. 7, 2020), https://www.justice.gov/usao-ma/pr/massachusetts-general-hospital-enters-agreement-us-attorney-s-office-better-ensure-equal [https://perma.cc/7ML8-MFFF].

87. *See* Press Release, U.S. Dep't of Health & Hum. Servs., *supra* note 38.

88. Press Release, U.S. Dep't of Health & Hum. Servs., OCR Launches Public Education Campaign About Civil Rights Protections in Response to the National Opioid Crisis (Oct. 25, 2018), https://www.hhs.gov/about/news/2018/10/25/ocr-launches-public-education-campaign-about-civil-rights-protections-in-response-to-the-national-opioid-crisis.html [https://perma.cc/4PBP-NDRU].

89. OFF. FOR C.R., U.S. DEP'T OF HEALTH & HUM. SERVS., FACT SHEET: DRUG ADDICTION AND FEDERAL DISABILITY RIGHTS LAWS (Oct. 25, 2018), https://www.hhs.gov/sites/default/files/drug-addiction-aand-federal-disability-rights-laws-fact-sheet.pdf [https://perma.cc/7WT2-TUCY].

90. U.S. DEP'T OF HEALTH & HUM. SERVS., NONDISCRIMINATION AND OPIOID USE DISORDERS FACT SHEET (Oct. 25, 2018), https://www.hhs.gov/sites/default/files/fact-sheet-nondiscrimination-and-opioid-use.pdf [https://perma.cc/Z2Z4-MU5Y].

91. CARES Act, Pub. L. No. 116-136, § 3221(g), 134 Stat. 281, 377–78 (2020) (codified at 42 U.S.C. § 290dd-2).

and individuals who are regarded as having a SUD. Significantly, unlike existing laws, there is no exclusion of current illegal substance users in the statutory text of Section 3221.

The definition of disability in existing laws includes people with SUDs. The ADA protects individuals with a physical or mental impairment that substantially limits a major life activity, those with a history of an impairment, and those who are regarded as having an impairment.[92] Congress amended the ADA in 2008 to clarify that the statutory definition of disability should be construed in favor of broad coverage of individuals.[93] Recent guidance from the OCR affirmed that people with SUDs are protected under the ADA, Rehabilitation Act, and Section 1557 when the condition substantially limits a major life activity (which includes major bodily functions such as neurological and brain functions).[94] Individuals with a history of SUDs or who are regarded as having SUDs are also protected.[95] The EEOC has issued similar guidance for the ADA's employment title.[96]

Determining whether an individual with a current or past SUD is protected is complicated by the ADA's categorical exclusion of individuals who are currently engaged in the illegal use of drugs.[97] However, the ADA provides a "safe harbor" for an individual who

> (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use; (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or (3) is erroneously regarded as engaging in such use, but is not engaging in such use . . . .[98]

However, there is no definitive test for determining when an individual is no longer "currently engaged" in illegal use of drugs, and courts have taken different approaches to the number of drug-free days, weeks, or months

---

92. 42 U.S.C. § 12102(1).

93. *Id.* at §12102(4)(A).

94. *See* OFF. FOR C.R., *supra* note 89.

95. *Id.*; Press Release, U.S. Equal Emp. Opportunity Comm'n, Steel Painters Sued by EEOC for Disability Discrimination (June 29, 2018), https://www.eeoc.gov/newsroom/steel-painters-sued-eeoc-disability-discrimination [https://perma.cc/TK99-GM34].

96. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 82.

97. 42 U.S.C. § 12114(a); *see also* 29 U.S.C. § 705(20)(C)(i) (Rehabilitation Act); 42 U.S.C. § 3602(h) (FHA).

98. 42 U.S.C. § 12114(b)(1)–(3).

required.[99] Notably, though, under the Rehabilitation Act, current illegal use of drugs is not a basis to deny health services in hospitals and outpatient facilities or services provided in connection with drug rehabilitation, vocational rehabilitation programs and services, and other covered programs and services funded if the individual is otherwise entitled to such services.[100]

There is no exclusion of active illegal substance users in the statutory text of Section 3221. The drafters were clearly aware of the exclusion under existing laws and could have incorporated it. In fact, the lack of protection for such individuals under existing laws was explicitly acknowledged as problematic in an earlier bill with identical language to Section 3221.[101] For example, a May 2018 Memorandum to the Subcommittee on Health Democratic Members and Staff from the Committee on Energy and Commerce Democratic Staff explained,

> Although former or sufficiently rehabilitated drug addiction may be considered a disability . . . and therefore protected, those with a substance use disorder, who may just be entering treatment or who have a relapse after a period of recovery, are not protected from housing discrimination under the FHA or discrimination in a broad range of areas under ADA. . . . As a result, federal laws do not prevent a person with a substance use disorder, who actively uses illegal drugs, from losing their housing or their job, or being excluded from public services or places of public accommodation such as doctors' offices, homeless shelters, or social service establishments, if information about them were accidentally, maliciously, or otherwise disclosed without authorization.[102]

The decision to protect individuals whose disclosed patient records reveal or appear to reveal current illegal use of drugs is also consistent with Section 3221's specific purpose to remove well-founded fear of discrimination as a barrier to treatment. As advocates and scholars have noted, the exclusion of individuals deemed to be currently engaged in illegal substance use has

---

99. *See, e.g.*, Jarvela v. Crete Carrier Corp., 776 F.3d 822, 830 (11th Cir. 2015); Mauerhan v. Wagner Corp., 649 F.3d 1180, 1187 (10th Cir. 2011); Brown v. Lucky Stores, Inc., 246 F.3d 1182, 1188 (9th Cir. 2001); Zenor v. El Paso Healthcare Sys., Ltd., 176 F.3d 847, 856 (5th Cir. 1999); Shafer v. Preston Mem'l Hosp. Corp., 107 F.3d 274, 278 (4th Cir. 1997); Quinones v. Univ. of P.R., No. 14-1331 JAG, 2015 WL 631327, at *4 (D.P.R. Feb. 13, 2015).

100. *See* OFF. FOR C.R., *supra* note 89.

101. *See* Memorandum from the Comm. on Energy & Com. Democratic Staff, *supra* note 59, at 5; *Hearing on H.R. 3545*, *supra* note 9, at 49, 51 (statement of H. Westley Clark, The Dean's Executive Professor, Public Health Program, Santa Clara University).

102. Memorandum from the Comm. on Energy & Com. Democratic Staff, *supra* note 59, at 5.

perverse and damaging effects.[103] In many cases, seeking medical treatment, either initially or due to recurrence, which is part of any chronic condition, can result in the loss of legal protections from discrimination in employment, health care, housing, court proceedings, and critical social supports.[104] For example, the EEOC has determined that an employer may deny time off or a leave of absence as a reasonable accommodation if an employee is currently using illegal drugs but plans to go to treatment during the leave of absence.[105] In addition, although individuals engaged in supervised MOUD with lawfully prescribed medications fall within the safe harbor and are protected,[106] lack of knowledge regarding the legal status of MOUD and noncompliance with the ADA's protection of individuals with MOUD persists.

The decision not to exclude current illegal substance users reflects the growing consensus that SUD is a disease that requires treatment and is a disability worthy of the same protections as others. It is also a rejection of deeply rooted stigma against individuals with SUDs, legal exceptions that discourage them from seeking medical treatment, and exacerbation of harms caused by removal of protections against discrimination. Some scholars have argued that the current illegal use of drugs exclusion should be removed from the ADA and other nondiscrimination laws for similar reasons.[107] Addressing the exclusion in existing laws may be necessary to fully achieve Section 3221's purpose, because landlords and employers may become aware of SUDs or illegal use of drugs other than through medical records.[108]

In addition, as noted by Professor Leslie Francis, requirements in the ADA and FHA and related laws are sufficient to address issues of qualification and safety in employment, public benefits and services, and housing.[109] For example, employers do not have to provide accommodations that pose a "direct threat" (a significant risk of substantial harm to the health or safety of the employee or others that cannot be eliminated or reduced by a reasonable accommodation).[110] However, multiple EEOC enforcement actions have underscored that qualification and direct threat must be assessed on an

---

103. *See, e.g.*, Francis, *supra* note 35; Elie G. Aoun & Paul Appelbaum, *Ten Years After the ADA Amendment Act (2008): The Relationship Between ADA Employment Discrimination and Substance Use Disorders*, 70 PSYCHIATRIC SERVS. 596 (2019).

104. *See, e.g.*, Quigley v. Austeel Lemont Co., 79 F. Supp. 2d 941, 946 (N.D. Ill. 2000).

105. *Id.*

106. 29 C.F.R. § 1630.3 (2020).

107. *See, e.g.*, Francis, *supra* note 35, at 912–13; Aoun & Appelbaum, *supra* note 103, at 603; *see also* MJ Egan, Comment, *When Does "Currently" Using No Longer Apply? The Americans with Disabilities Act, the Opioid Crisis, and a Search for the Solution*, 27 GEO. MASON L. REV. 307, 344 (2019).

108. *See* Francis, *supra* note 35, at 912.

109. *Id.* at 903.

110. 42 U.S.C. §§ 12113(b), 12111(3).

individualized basis and supported by credible, objective evidence, rather than assumptions, stereotypes, or speculation.[111]

C. Definitions of "Entities" Should Be Similar to Existing Laws

Section 3221 of the CARES Act prohibits any "entity" from discrimination on the basis of disclosed treatment information but does not provide a definition of "entity."[112] Section 3221 adopts the HIPAA definition of "covered entities" to include health plans, health care clearinghouses, and health care providers who transmit health information in electronic form.[113] Not only did the drafters choose to use the word "entity" and not "covered entity," but adopting the HIPAA definition of "covered entity" in Section 3221(g) is inconsistent with the purpose of penalizing discrimination by non-health care actors, including employers; federal, state, and local entities; and housing providers. Instead, "entities" should be interpreted consistently with existing definitions in laws that prohibit disability-based discrimination in employment; public programs, services, and activities; health care; and housing.

Existing laws contain broad and well-developed definitions of entities that would further the purpose of Section 3221(g). Drawing upon definitions in Title VII of the Civil Rights Act of 1964,[114] which prohibits discrimination on the basis of race, national origin, sex, and religion, Title I of the ADA applies to employers with at least fifteen employees, employment agencies, labor organizations, and joint labor-management committees.[115] Sections 501 and 503 of the Rehabilitation Act extend nondiscrimination requirements to federal employers,[116] to private employers with federal contracts in excess of $10,000 (under the nondiscrimination provision),[117] and to private employers with fifty or more employees and federal contracts of $50,000 or more (under the affirmative action provision).[118]

Section 3221(g) also prohibits discrimination in public services and benefits. Title II of the ADA applies to services, programs, and activities of public entities, which includes state and local governments, departments, and

111. 29 C.F.R. § 1630.2(r) (2020) (definition of direct threat).

112. CARES Act, Pub. L. No. 116-136, § 3221(d), 134 Stat. 281, 376 (2020) (codified at 42 U.S.C. § 290dd-2).

113. 45 C.F.R. § 160.103 (2020).

114. 42 U.S.C. § 2000e.

115. *Id.* §§ 12111(2), 12111(5)(A).

116. 29 U.S.C. § 791.

117. *Id.* § 793(a).

118. 41 C.F.R. §§ 60–741.40(b)(1) (2020).

agencies.[119] ADA regulations define services, programs, and activities to include "operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government"; "a college, university, or other postsecondary institution, or a public system of higher education"; "a local educational agency . . . , system of career and technical education, or other school system"; a "corporation, partnership, or other private organization, or an entire sole proprietorship"; an entity "which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation"; or any combination of these.[120] This broad definition includes many of the actors contemplated by Section 3221(g), including state and local court systems,[121] state-administered programs such as workers' compensation programs,[122] and state Medicaid programs and health care services provided by public hospitals and clinics.[123] With the exception of federal courts,[124] federal services and benefits are regulated by Section 504 of the Rehabilitation Act which, similar to Section 3221(g)(2), applies to programs or activities receiving federal financial assistance or conducted by a federal executive agency.[125]

A core concern of Section 3221 is removing barriers to treatment by prohibiting discrimination in health care services and programs and in other key areas of persistent discrimination against people with SUDs. As noted above, Title II of the ADA covers state Medicaid programs and health care services provided by public hospitals and clinics.[126] In addition, Title III of the ADA governs places of public accommodations, which include private physician's offices and private hospitals, private nursing homes, and private SUD treatment programs.[127] Section 1557 of the ACA provides additional

---

119. 42 U.S.C. § 12131(1).

120. 29 U.S.C. § 794(b).

121. MAMADI K. CORRA, FED. JUD. CTR., DISABILITY AND THE FEDERAL COURTS: A STUDY OF WEB ACCESSIBILITY 6 (2019), https://www.fjc.gov/sites/default/files/materials/24/Disability%20and%20the%20Federal%20Courts.pdf [https://perma.cc/CB3X-XHWQ].

122. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC–CVG–1996–3, ENFORCEMENT GUIDANCE: WORKERS' COMPENSATION AND THE ADA (1996), https://www.eeoc.gov/laws/guidance/enforcement-guidance-workers-compensation-and-ada [https://perma.cc/DE5F-9TXS].

123. *See, e.g.*, Anderson v. Pa. Dep't of Pub. Welfare, 1 F. Supp. 2d 456, 459 (E.D. Pa. 1998); Nondiscrimination on the Basis of Disability in State and Local Government Services, 28 C.F.R. §§ 35.101–.999 (2020) (including numerous examples in health care programs and settings).

124. CORRA, *supra* note 121, at 6.

125. 29 U.S.C. § 794(a).

126. *See supra* note 123 and accompanying text.

127. U.S. DEP'T OF JUST., ADA TITLE III TECHNICAL ASSISTANCE MANUAL 31–32 (2020), https://www.ada.gov/taman3.html [https://perma.cc/CC9Y-E4Y3]; *see also* 42 U.S.C. § 12181(7)(F).

protections by amending the Rehabilitation Act to prohibit discrimination by any health program or activity that receives federal financial assistance or any program or activity administered by a federal executive agency or an entity established under Title I of the ACA (such as state-based and federal marketplaces).[128]

Finally, the FHA and related laws prohibit disability discrimination by "direct providers of housing, such as landlords and real estate companies as well as other entities, such as municipalities, banks or other lending institutions and homeowners insurance companies."[129]

IV. ENFORCEMENT EFFORTS MUST INCLUDE EDUCATION ON NEW AND EXISTING RIGHTS AND REMEDIES

Laws are powerful tools to address stigma and discrimination against people with SUDs, but they require persistent enforcement to be effective. Public enforcement of the nondiscrimination requirements of Section 3221 by the OCR must be robust. The OCR already plays a role in public enforcement of existing nondiscrimination laws in health care settings. The OCR does not, however, have a record of enforcing nondiscrimination requirements in contexts outside of health care, such as employment, public services, or housing. In 2015, the DOJ and the EEOC formed an interagency partnership to prosecute cases of discrimination against people with SUDs.[130] Similar partnerships between the OCR and other agencies should be employed in enforcement of Section 3221.

The ongoing enforcement and educational initiatives of the EEOC, DOJ, and OCR in the context of SUDs underscore the importance of disability-based nondiscrimination requirements in a wide range of settings. They also underscore the need for continued educational initiatives about the pervasive discrimination faced by people with SUDs and new and existing nondiscrimination requirements that protect and promote access to medical care; employment; public programs, services, and activities; and housing. In particular, health care providers, institutions, and systems need education about barriers to care for people with SUDs, along with the existing civil

128. 42 U.S.C. § 18116; *see also* Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160, 37,161 (June 19, 2020) (to be codified at 42 C.F.R. §§ 438, 440, 460, 86, 92, 147, 155, 156).

129. *The Fair Housing Act*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/fair-housing-act-1 [https://perma.cc/A8TZ-8B9C] (Dec. 21, 2017); 42 U.S.C. § 3604.

130. Chris Marr, *Employers Walk Fine Line with Opioid-Addicted Workers*, BLOOMBERG L. (Aug. 2, 2019, 3:01 AM), https://news.bloomberglaw.com/daily-labor-report/employers-walk-fine-line-with-opioid-addicted-workers [https://perma.cc/MF2M-C8YW].

rights protections that protect and promote accessible health care for individuals with disabilities.[131]

The ADA, the Rehabilitation Act, Section 1557 of the ACA, and the FHA provide important rights and remedies beyond Section 3221. These laws each provide a private right of action in addition to public enforcement mechanisms.[132] These laws also require affirmative acts—covered entities must take reasonable steps to accommodate the needs of individuals with disabilities in employment; public services, activities and programs; most public and private health care services; and housing, subject to certain limits. In employment, for example, the ADA requires that employers make reasonable accommodations, which are changes to the job or work environment that permit a qualified individual[133] to perform the essential functions of the job.[134] Reasonable accommodations for an individual with a SUD might include schedule changes or a leave of absence to allow time for treatment and attendance at group meetings.[135] Public entities have a similar requirement to make reasonable modifications to policies, practices, and procedures to ensure programmatic access (under Title II), and covered businesses must make changes to ensure equal access to goods and services (under Title III).[136] The FHA also has a corresponding prohibition of any refusal to make reasonable accommodations that would give a person with a disability equal opportunity to use and enjoy a dwelling.[137]

CONCLUSION

This essay provides the first analysis of the new nondiscrimination protections in Section 3221 of the CARES Act for individuals with SUDs using the framework of existing protections against disability-based discrimination. We submit that these important new protections express the growing consensus that SUD is a disability worthy of the same protections of others, and we draw upon established disability law principles to strengthen

131. *See* Nicole D. Agaronnik, Elizabeth Pendo, Eric G. Campbell, Julie Ressalam & Lisa I. Iezzoni, *Knowledge of Practicing Physicians About Their Legal Obligations when Caring for Patients with Disability*, 38 HEALTH AFFS. 545 (2019).

132. 29 U.S.C. § 794a; 42 U.S.C. §§ 12188, 18116, 3613.

133. 42 U.S.C. § 12111.

134. *Id.* §§ 12111–12112.

135. *The ADA: Your Employment Rights as an Individual with a Disability*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/publications/ada-your-employment-rights-individual-disability [https://perma.cc/FTV9-VE2P].

136. *Frequently Asked Questions About Titles II and III of the ADA*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/frequently-asked-questions-about-titles-ii-and-iii-ada [https://perma.cc/KWJ2-RTKM] (Aug. 6, 2015).

137. *See* Francis, *supra* note 35, at 893.

these new protections and further the specific purpose of Section 3221 to eliminate discrimination against people with SUDs.