SEEING AND SERVING STUDENTS WITH SUBSTANCE USE DISORDERS THROUGH DISABILITY LAW

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ABSTRACT

The opioid epidemic has brought the immense harms of substance abuse to the fore of national attention. Despite a growing bipartisan consensus that substance use disorders are best addressed through treatment and community support, rather than punitive deterrence measures, policymakers have yet to allocate the necessary resources for a comprehensive and evidence-based national drug policy. Until that occurs, advocates for individuals with substance use disorders must search for reform opportunities within existing law and policy.

To that end, this Article explores whether, and to what degree, the federal disability statutes that are applicable to public schools—the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act—can “see” and serve adolescents with substance use disorders within the public school system. It argues that substance use disorders can be education-impacting disabilities, that the general failure to recognize and address substance use disorders in school settings is due to widespread misperception of substance-involved students, and that a novel-but-reasonable interpretation of existing law could provide a meaningful degree of support for certain students with substance use disorders.

This Article has three objectives: (1) to instigate a debate in an uncharted area of education law and policy; (2) to provide a comprehensive

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survey of current medical research and special education case law for advocates of students with substance use disorders; and (3) to direct further attention to the broader inadequacies of special education law and policy for students with mental health challenges. The implications of this debate, upon the lives of the estimated 1.6 million adolescents with substance use disorders and upon education policy generally, are profound.

TABLE OF CONTENTS

INTRODUCTION.................................................................357

I. SUBSTANCE USE DISORDERS AND CURRENT EDUCATION POLICY...............................................360
   A. SUBSTANCE USE DISORDERS IN MEDICINE AND LAW ..........360
      1. Substance Use Disorders as Medical Conditions ..........360
      2. Substance Use Disorders as Legal Disabilities ..............362
   B. SUBSTANCE USE DISORDERS AMONG ADOLESCENTS .............365
      1. The Educational Impact of Substance Use Disorders .........365
      2. Perceptual Barriers for Adolescents with Substance Use Disorders .................................................369

II. SITUATING SUBSTANCE USE DISORDERS WITHIN SPECIAL EDUCATION LAW.................................373
   A. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT ..........374
      1. Eligibility Barriers for Students with Substance Use Disorders ......................................................375
         a. “Child with a Disability” ..................................375
            i. Emotional Disturbance ..................................376
            ii. Other Health Impairment ................................378
         b. “Adversely Affects Educational Performance” ............379
         c. “Needs Special Education” ..................................381
      2. Further Policy Considerations: Manifestation Determinations and Residential Placements ............386
         a. Manifestation Determinations .................................386
         b. Residential Placements ......................................387
   B. SECTION 504 AND THE AMERICANS WITH DISABILITIES ACT .................................................389
      1. Section 504 and the ADA’s Eligibility Requirements and Protections ...........................................390
      2. The Challenge of Substance-Involved Students ..........392
      3. Existing Space to Serve Students with Substance Use Disorders ......................................................395

CONCLUSION............................................................................396
INTRODUCTION

Tom Murphy attended the 2015 Prescription Drug Abuse and Heroin Summit in his professional capacity as a Senior Special Agent in the Virginia State Police. But the topic of the summit was of great personal interest to him: his teenage son Jason was struggling with a substance use disorder. Jason’s substance abuse, and its attendant consequences, deepened in the months following the conference.

In 2017, Jason died from an overdose of fentanyl and heroin.

Addressing the Prescription Drug Abuse and Heroin Summit in 2019, Special Agent Murphy implored those touched by substance use disorders to share their experiences with others in order to fight stigma. He concluded his remarks by placing his family’s tragedy within the grim national context: “There are 70,000 different stories that happened in 2017. You heard my son’s.” He paused, choking back tears. “His name was Matthew Jason Murphy.”

It is difficult to fathom the harms caused by substance abuse. For the past several years, the rate of fatal overdoses has exceeded the highest-ever annual death tolls from car accidents, the AIDS epidemic, and gun violence. There were 70,237 overdose deaths in the United States in 2017, 67,367 overdose deaths in 2018, 70,630 overdose deaths in 2019, 91,799

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1. See Remarks at the Rx Drug Abuse and Heroin Summit in Atlanta, Georgia, 2019 DAILY COMP. PRES. DOC. 237 (Apr. 24, 2019) (referring to Tom Murphy, Senior Special Agent in the Virginia State Police).
2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
7. Id.
overdose deaths in 2020,\textsuperscript{12} and a stunning 107,573 overdose deaths in 2021.\textsuperscript{13} The substantial increase in overdose deaths between 2019 and 2021 was likely fueled in part by the COVID-19 pandemic, which caused widespread misery and inhibited access to treatment.\textsuperscript{14}

For a frame of reference, Special Agent Murphy’s tribute to his son lasted four minutes;\textsuperscript{15} if a family member of every person who died from a drug overdose in 2017 shared their story for four minutes, back to back, it would last over 195 days. If family members of those who lost loved ones to overdoses in 2021 did the same thing, it would last over 298 days.

At the same conference, politicians and policymakers touted their efforts to combat the opioid epidemic, including the designation of a national public health emergency the previous year; the issuing of billions of dollars in state grants “[t]o expand access to treatment, recovery, and other crucial activities and services”; and the signing of the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment (“SUPPORT”) for Patients and Communities Act,\textsuperscript{16} which reduced regulatory hurdles concerning “opioid use disorder prevention, recovery, and treatment” the previous October.\textsuperscript{17} These and similar policy responses have received widespread praise.\textsuperscript{18}

Unfortunately, such policy responses—while generally welcomed by experts in the field of addiction studies\textsuperscript{19}—have not come close to creating

\begin{itemize}
\item \textsuperscript{12} Holly Hedegaard, Arial M. Miniño, Merianne Rose Spencer & Margaret Warner, NCHS DATA BRIEF NO. 428: DRUG OVERDOSE DEATHS IN THE UNITED STATES, 1999–2020 (2021), https://www.cdc.gov/nchs/data/databriefs/db428.pdf [https://perma.cc/B5C5-RUQN].
\item \textsuperscript{13} NAT'L CTR. FOR HEALTH STAT., PROVISIONAL DRUG OVERDOSE DEATH COUNTS (2021), https://www.cdc.gov/nchs/nvss/vsr/drug-overdose-data.htm [https://perma.cc/2JF9-PZ7M].
\item \textsuperscript{16} See Remarks at the Rx Drug Abuse and Heroin Summit in Atlanta, Georgia, supra note 1.
\item \textsuperscript{17} Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment (SUPPORT) for Patients and Communities Act, Pub. L. No. 115–271, 132 Stat. 3894 (2018).
\item \textsuperscript{18} See What They Are Saying: Support for President Trump’s Initiative to Fight the Opioid Epidemic, TRUMP WHITE HOUSE (Mar. 20, 2018), https://trumpwhitehouse.archives.gov/briefings-statements/saying-support-president-trumps-initiative-fight-opioid-epidemic [https://perma.cc/5767-LB5F].
\end{itemize}
the “Cascade of Care” required to serve the roughly forty million Americans with substance use disorders.\textsuperscript{20} Until the political will exists for such comprehensive policy initiatives, advocates for individuals with substance use disorders must contemplate ways in which existing law and policy can be marshaled to serve that population.

This Article offers such a solution: using the federal disability-discrimination laws applicable to public schools as a new way to “see” and serve individuals who—like Jason Murphy—develop debilitating substance use disorders as adolescents. This Article proposes that students with substance use disorders who meet the eligibility criteria of federal disability laws should be recognized as individuals with disabilities (and receive appropriate accommodations) from their schools, just as adults with substance use disorders who meet such diagnostic criteria have received appropriate accommodations from their employers since the 1970s.

The argument that substance use disorders should be recognized and addressed as legal disabilities under special education law is a novel one. While several scholars have powerfully addressed the need to recognize mental health conditions under special education law,\textsuperscript{21} no court opinion or piece of scholarship has yet engaged with the matter of applying such laws to students with substance use disorders specifically. It is not that the matter has been studied and rejected, but rather that this particular conversation has not yet begun.

This Article offers a possible explanation for this silence: that students with substance use disorders are rarely perceived within their schools to be afflicted with “medical” conditions, which is the necessary predicate for recognition of “legal” disabilities. To that end, this Article provides a survey of current medical research regarding substance use disorders and how such disorders affect adolescents’ academic development. It also discusses the power of social perception in this space; the manner in which adolescents face unique barriers to the identification of, and appropriate responses to, substance use disorders; and how students with substance use disorders are therefore largely invisible within schools’ current drug and alcohol policies.

Jason Murphy began “self-medicating” with marijuana while he was in


\textsuperscript{21} See infra note 114.
high school and moved out of his parents’ home the day he turned eighteen.\(^\text{22}\) If his school had recognized substance use disorders not as a propensity towards deviant behavior, but rather an addressable education-impacting disability, perhaps his story would not have been one of the 70,237—every one of whom, to some degree, representing a failure of policy—told in 2017. Radical as it may initially appear, the possibility that an avenue exists by which students like Jason can be seen and served in their schools is worth exploring.

I. SUBSTANCE USE DISORDERS AND CURRENT EDUCATION POLICY

Part I of this Article presents the case for the recognition of substance use disorders in federal special education law: Section I.A examines substance use disorders as “medical” conditions and “legal” disabilities; and Section I.B explores why schools are resistant to interpreting drug abuse by adolescents through these medical and legal constructs.

A. SUBSTANCE USE DISORDERS IN MEDICINE AND LAW

The term “substance use disorder” will be used frequently throughout this Article. This is in part because (as discussed below) the term “substance use disorder” is preferable to terms such as “addiction” and “alcoholism.”\(^\text{23}\) But more importantly, using such “medical” terminology when discussing drug abuse by adolescents reinforces a central argument of this Article: that seeing substance-involved adolescents as having medical conditions (as opposed to merely engaging in criminal behaviors) opens the door to recognition of and support for those adolescents under federal disability laws. Accordingly, a brief framing of “substance use disorders” within medicine and law is in order.

1. Substance Use Disorders as Medical Conditions

According to the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (“DSM-5”), the “essential feature” of substance use disorders—regardless of the particular substance being abused—is a “cluster of cognitive, behavioral, and physiological symptoms indicating that the individual continues using the substance despite significant substance-related problems.”\(^\text{24}\) In other words, individuals with substance use disorders continue to abuse substances despite the consequences stemming from that

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\(^{22}\) See Remarks at the Rx Drug Abuse and Heroin Summit in Atlanta, Georgia, supra note 1.

\(^{23}\) See infra Section I.B.2.

\(^{24}\) AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 483 (5th ed. 2013) [hereinafter DSM-V].
abuse, even when such individuals no longer desire to use drugs or obtain much pleasure from doing so.\textsuperscript{25}

Ten separate classes of drugs are discussed in the DSM-5: “alcohol; caffeine; cannabis; hallucinogens (with separate categories for phencyclidine [or similarly acting arylcyclohexylamines] and other hallucinogens); inhalants; opioids; sedatives, hypnotics, and anxiolytics; stimulants (amphetamine-type substances, cocaine, and other stimulants); tobacco; and other (or unknown) substances.”\textsuperscript{26} Misuse of any of these drugs, with the exception of caffeine,\textsuperscript{27} can result in an individual meeting the diagnostic criteria of a substance use disorder.\textsuperscript{28}

The absence of symptoms (with the exception of cravings) for one year or longer indicates that the substance use disorder is in “sustained remission.”\textsuperscript{29} Establishing and prolonging remission from an active substance use disorder, which is achieved by preventing relapses of the


\textsuperscript{26} DSM-V, \textit{supra} note 24, at 481.

\textsuperscript{27} See id. at 483.

\textsuperscript{28} The symptoms that are assessed to determine a use disorder are as follows:

\begin{itemize}
\item A problematic pattern of [substance] use leading to clinically significant impairment or distress, as manifested by at least two of the following, occurring within a 12-month period:
\begin{itemize}
\item [Substance] is often taken in larger amounts or over a longer period than was intended.
\item There is a persistent desire or unsuccessful efforts to cut down or control [substance] use.
\item A great deal of time is spent in activities necessary to obtain [substance], use [substance], or recover from its effects.
\item Craving, or a strong desire or urge to use [substance].
\item Recurrent [substance] use resulting in a failure to fulfill major role obligations at work, school, or home.
\item Continued [substance] use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of [substance].
\item Important social, occupational, or recreational activities are given up or reduced because of [substance] use.
\item Recurrent [substance] use in situations in which it is physically hazardous.
\item [Substance] use is continued despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by [substance].
\item Tolerance, as defined by either of the following:
  \begin{itemize}
  \item A need for markedly increased amounts of [substance] to achieve intoxication or desired effect.
  \item A markedly diminished effect with continued use of the same amount of [substance].
  \end{itemize}
\end{itemize}
\end{itemize}

\textit{Id.} at 490–91. Specific indicators of the remaining criteria, “withdrawal,” differ depending upon the substance involved. See \textit{id.} at 490–578.

\textsuperscript{29} \textit{Id.} at 491.
previously abused substance or the transitioning to another drug, is a primary goal of substance use disorder treatment.\textsuperscript{30}

Although relapse is a common part of the recovery process, a variety of therapeutic approaches can be employed to promote relapse prevention and increase the likelihood of long-term remission from substance use disorders.\textsuperscript{31} Critically, all approaches require a degree of intentionality and effort on the part of the individual with the substance use disorder and, ideally, their family or other support network.\textsuperscript{32} Establishing sustained remission from a substance use disorder is a long-term process that, for some, involves a personal commitment to lifelong abstinence from all mind-altering substances.\textsuperscript{33}

In 2020, the most recent year for which data is available, approximately 40.3 million people aged twelve and older met the diagnostic criteria for a substance use disorder.\textsuperscript{34} A significant gap exists between the number of individuals who need treatment for substance use disorders and the number of individuals who receive such treatment.\textsuperscript{35} Many individuals with substance use disorders have co-occurring mental health issues.\textsuperscript{36}

2. Substance Use Disorders as Legal Disabilities

As reflected by policymakers’ remarks to the 2019 Prescription Drug Abuse and Heroin Summit, there has been a notable, if incomplete, movement toward recognizing substance use disorders as “medical” conditions most efficaciously addressed through treatment and community support.\textsuperscript{37} Even now, however, the idea that substance use disorders can be

\textsuperscript{30} See Tammy Chung & Stephen A. Maisto, Relapse to Alcohol and Other Drug Use in Treated Adolescents: Review and Reconsideration of Relapse as a Change Point in Clinical Course, 26 CLINICAL PSYCH. REV. 149, 149 (2006).


\textsuperscript{32} See Chung, supra note 30, at 150. See generally Quigley, supra note 31 (describing a relapse prevention model that requires ongoing therapeutic intervention).

\textsuperscript{33} ALCOHOLICS ANONYMOUS 58–60 (4th ed. 2001).

\textsuperscript{34} SAMHSA Report, supra note 20, at 3.

\textsuperscript{35} Id. at 4.

\textsuperscript{36} Id.

\textsuperscript{37} Donald J. Trump, Remarks at the Rx Drug Abuse and Heroin Summit in Atlanta, Georgia, AM. PRESIDENCY PROJECT (April 24, 2019), https://www.presidency.ucsb.edu/documents/remarks-the-rx-
recognized within, and addressed by, federal disability laws may strike some as odd—if not wrongheaded.

Indeed, when presented with the argument that adolescents with substance use disorders should be seen and served by federal disability laws, many will likely find it more difficult to accept the premise that such laws should recognize substance use disorders in the first place than to accept the premise that such recognition should be extended to adolescents. But the first premise above has been in effect since the mid-1970s.  

The first major piece of federal disability-rights legislation was the Rehabilitation Act of 1973. The following language, contained in Section 504 of the Rehabilitation Act ("Section 504") represents "the first explicit Congressional statement recognizing ‘discrimination’ against people with disabilities."  

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.  

The Americans with Disabilities Act ("ADA"), which was passed in 1990, extends the Rehabilitation Act’s discrimination prohibitions to private companies, local and state governments, and public accommodations.  

During the initial drafting and subsequent revisions of the Rehabilitation Act and the ADA, lawmakers directly confronted the possibility of adults with substance use disorders seeking workplace accommodations. Regulations under both statutes acknowledge addiction and alcoholism as disabilities deserving of certain protections and clarify the obligations of employers of individuals with substance use disorders.

The Rehabilitation Act and ADA’s statutory language, regulatory guidance, and case law uniformly discharge any obligation on the part of employers to accommodate active drug use (or alcohol abuse that interferes with work obligations) by individuals with substance use disorders.\footnote{See Henderson, Jr., supra note 47.} Employees who are “currently engaging in the illegal use of drugs” are not considered “qualified individual[s] with a disability” under the ADA and are therefore not entitled to workplace accommodations, reasonable or otherwise.\footnote{29 C.F.R. § 1630.3(a) (2022).} However, employees with substance use disorders who have maintained sobriety beyond a minimum period of abstinence—the necessary length of which is determined on a case-by-case basis\footnote{While expressly excluding current drug users from statutory protection [in the workplace], the statutes provide a ‘safe harbor’ for recovering addicts \ldots \ldots \ldots .}—are entitled to reasonable accommodations for their continued recovery-support needs.\footnote{“Reasonable accommodations for recovering addicts may include part-time schedules to support inpatient or outpatient behavioral therapy, and may also include flex time or intermittent leave to participate in random drug screenings, rehab sessions, Alcoholics or Narcotics Anonymous meetings, physical activity, medically-assisted treatment (combining behavioral therapy with medications, such as Suboxone, to treat substance abuse disorders), or to participate in random drug screenings, rehab sessions, Alcoholics or Narcotics Anonymous meetings, physical activity, medically-assisted treatment (combining behavioral therapy with medications, such as Suboxone, to treat substance abuse disorders),
The fact that these regulations cannot be neatly transferred to the school environment—which, obviously, has significant implications for the project of extending coverage under the Rehabilitation Act and ADA to students with substance use disorders—will be discussed in Section II.B.

B. SUBSTANCE USE DISORDERS AMONG ADOLESCENTS

Substance use disorders are diagnosable, treatable, “medical” conditions that can, under certain conditions, be recognized as “legal” disabilities. But if an individual’s drug abuse is interpreted not as evidence of such a “medical” condition, and is instead interpreted only as maladaptive, dangerous, and unlawful behavior, then there is no possibility of such drug abuse being recognized and addressed as a “legal” disability. As discussed below, adolescents are especially vulnerable to such incomplete interpretations of their substance abuse, which perhaps is why a discussion regarding the inclusion of substance use disorders within special education laws has not yet occurred. Section B.1 discusses the prevalence of substance use disorders among adolescents and the education-related consequences of such disorders; Section B.2 discusses certain perceptual errors that prevent widespread recognition of substance use disorders among adolescents; and Section B.3 discusses the harms caused by schools’ resistance to recognizing substance use disorders among adolescents.

1. The Educational Impact of Substance Use Disorders

Substance use disorders among adolescents are considered to be a major public health challenge that presents certain difficulties distinct from the challenges presented by substance use disorders among adults.52 According to the most recent Substance Abuse and Mental Health Services Administration (“SAMHSA”) National Survey on Drug Use and Health, an estimated 6.3% of adolescents—1.6 million individuals—met the diagnostic criteria for substance use disorder.53 Given that the average class size in secondary schools is approximately twenty-seven students, one could visualize this prevalence by imagining that every middle and high school


53. SAMHSA Report, supra note 20, at 28.
class in the country has one or two students with a substance use disorder.\textsuperscript{54}

The same “treatment gap” that exists for individuals with substance use disorders generally also exists for adolescents with substance use disorders. Only 0.7\% of adolescents—169,000 individuals—received any substance abuse treatment in 2020, which is slightly over 10\% of the total number of adolescents who needed such treatment.\textsuperscript{55}

While more research is needed to further understand the nature and mechanisms of substance use disorders among adolescents,\textsuperscript{56} and debates over certain aspects of the condition are ongoing within the medical community,\textsuperscript{57} the notion that adolescents can and do have substance use disorders is uncontroversial among medical professionals.\textsuperscript{58}

And naturally, because adolescents spend a significant percentage of their waking hours in school,\textsuperscript{59} many of the harms posed by substance use disorders among adolescents manifest within the school environment. While the concept that substance use disorders are likely to negatively impact school performance is intuitive, the specific manners in which they can do so—and how the effects of substance use disorders may resemble other,


\textsuperscript{55} See SAMHS Report, supra note 20, at 38.


\textsuperscript{57} See Ramo et al., supra note 52, at 46; Hollis C. Karoly, Angela D. Bryan, Barbara J. Weiland, Andrew Mayer, Andrew Dodd & Sarah W. Feldstein Ewing, Does Incentive-Elicited Nucleus Accumbens Activation Differ by Substance of Abuse? An Examination with Adolescents, 16 DEV. COGNITIVE NEUROSCIENCE 5, 13 (2015).

\textsuperscript{58} See supra notes 52–57 and accompanying text. See generally Monica Luciana & Sarah W. Feldstein Ewing, Introduction to the Special Issue: Substance Use and the Adolescent Brain: Developmental Impacts, Interventions, and Longitudinal Outcomes, 16 DEV. COGNITIVE NEUROSCIENCE 1, 2 (2015) (presenting findings from an array of medical studies and scholarship focused upon substance use disorders among adolescents).

recognized disabilities—are deserving of review, if only to clarify the manners in which schools can serve affected students.

The purpose and objectives of schooling extend beyond the academic learning process; schools play a critical role in students’ social development and the fostering of time- and task-management skills critical to future achievement. This holds for students receiving special education services as well: the concept of “education” as encompassing more than academic instruction is reinforced by the stated purpose of the Individuals with Disabilities Education Act (“IDEA”), guidance from the U.S. Department of Education’s Office of Special Education Programs, and judicial interpretation of special education law. For the purposes of this analysis, the objectives of school can be roughly bifurcated into those academic—both classroom learning itself and the process of learning how to learn and retain information—and those connected with the socialization process. The emergence of a substance use disorder in adolescence can significantly impede progress in both spheres.

Substance abuse by adolescents has been shown to impair verbal memory, memory retrieval, executive function, and learning performance. Frequent substance use can cause “measurable and long-lasting cognitive impairments.” While the most acute cognitive effects of substance abuse

60. See Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (“School is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”); see also Margaret Etienne, Education, Violence, and Re-Wiring Our Schools, 2018 U. CHI. LEGAL F. 89, 115 (2018) (“Schools can play a formidable role in the academic and social development of children in both positive and negative ways.”).
62. See Letter to Pawliw, 24 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 959 (Mar. 6, 1996) (“In determining whether a child’s impairment adversely affects educational performance, the multidisciplinary team must consider non-academic as well as academic areas.”); Letter to Lybarger, 17 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 54 (Sept. 14, 1990) (“[A] child’s educational performance must be determined on an individual basis and should include non-academic as well as academic areas.”).
63. See Robert A. Garda, Jr., Untangling Eligibility Requirements Under the Individuals with Disabilities Education Act, 69 MO. L. REV. 441, 473 (2004) (“[A] majority of courts hold that a child must progress in more than just graded areas in order to be provided educational benefit and a free appropriate public education.”).
64. See Michael Takagi, Murat Yücel, Susan M. Cotton, Yasmin Baliz, Alan Tucker, Kathryn Elkins & Dan I. Lubman, Verbal Memory, Learning, and Executive Functioning Among Adolescent Inhalant and Cannabis Users, 72 J. STUD. ALCOHOL & DRUGS 96, 103 (2010).
are present during periods of frequent use, the scaffolded nature of secondary education can extend the consequences of failing to learn critical foundational information well into the future. The academic impact of substance abuse is also reflected in the lower grades consistently found among students with substance use disorders.

Substance use disorders also hinder adolescents’ social development. The illegality of substance use can result in criminal charges and involvement with the juvenile justice system; a significant percentage of adolescents in juvenile detention meet the criteria for substance use disorders. Adolescents who abuse substances are also at a higher risk of dropping out of school, which in turn can produce a myriad of social and economic harms.

Given the prevalence of substance use disorders among adolescents, and the fact that substance use disorders are highly likely to negatively impact the education of adolescents, it is striking that the argument that substance use disorders should be recognized under special education law remains a novel one. A reason for this, as argued below, is that substance abuse by adolescents is too infrequently assessed through a clinical, “medicalized” lens and is instead too frequently assessed through a punitive, foundational information well into the future.

66. See Volkow et al., supra note 65.
68. See Laurie Chassin, Juvenile Justice and Substance Use, FUTURE CHILD., Fall 2008, at 165, 167.
69. See generally DUPONT et al., supra note 67 (providing a thorough review of studies indicating an increased dropout risk for substance-involved students).
“disciplinary” lens.

2. Perceptual Barriers for Adolescents with Substance Use Disorders

Sociologists have long examined the role played by social constructs and labeling in assigning meaning to human behavior.70 These methods of categorization are not “constant, but [instead] change according to the dominant modes of thinking.”71 These processes have had a significant impact upon drug policy insofar as they heavily influence the manners in which individuals with substance use disorders are perceived by society.72

Indeed, over a century of policy responses to drug and alcohol abuse have been significantly influenced by the dominant social constructions of substance-abusing individuals.73 For example, an “alcoholic-as-sinner” construct undergirded the temperance movement;74 an “addict-as-criminal” construct inspired the “War on Drugs.”75

The heavy influence of social constructs in this space is apparent when considering one’s own responses to various labels associated with substance-involved individuals. Terms such as “addict” and “alcoholic” are not used in the DSM-V to describe individuals with substance use disorders, nor is the term “addiction.”76 While some individuals, such as those participating in Twelve Step recovery fellowships, choose to use such language—or moregraphic terms such as “junkie” and “dope fiend”—to describe themselves, the use of such terms to describe individuals with substance use disorders is discouraged due to their negative connotations.77

70. See ALLAN V. HORTITZ, CREATING MENTAL ILLNESS 7–8 (2002).
72. See infra notes 73–75 and accompanying text.
76. See DSM-V, supra note 24, at 485.
Such terminology has the secondary effect of erasing substance-involved adolescents altogether. To give an example, while a twelve-year-old child can meet the diagnostic criteria for an alcohol use disorder—the adolescents with alcohol use disorders in the aforementioned SAMHSA study included twelve-year-old respondents—describing a twelve-year-old child as an “alcoholic” reflexively appears to be misguided, if not outright impossible. Such dissonance surely stems from the notion that “alcoholism” requires years of problematic drinking to develop. But, as discussed in Section I.A. above, the diagnostic criteria for substance use disorders does not require a minimum age of onset or duration of symptoms. The notion that it requires years of drinking “alcoholically” before an individual can meet the criteria of an alcohol use disorder is simply wrong.

The logical extension of that incorrect belief is that problematic, harm-causing substance abuse by an adolescent is attributable not to a substance use disorder but rather to less-sympathetic causes such as youthful experimentation or simple defiance. Such a belief can prevent adolescents with substance use disorders from obtaining needed medical intervention and likely provides a tacit justification for punitive disciplinary policies.

Describing adolescents as “addicts” is perhaps easier to accept, insofar as a certain percentage of adolescents abuse drugs such as opiates that create an obvious physical dependence and precipitate rapid physical withdrawal symptoms. In other words, the abuse of certain drugs can cause symptoms that do align with our conceptions of “addiction” regardless of the age of the drug abuser.

But other drugs, such as marijuana, can cause physical withdrawal symptoms that last for weeks and are often mistaken for general irritability or depression. So despite the fact that marijuana use disorder is the most prevalent of all substance use disorders among adolescents, marijuana abuse does not align as neatly within the social construct of “addiction,” which requires physical tolerance to and withdrawal from a drug. When drug and alcohol abuse by adolescents often does not align with our constructs of “addiction” or “alcoholism,” such behavior is vastly more likely to be addressed within a punitive, “disciplinary” framework. Nowhere is this more evident than in schools.

78. See SAMHSA Report, supra note 20, at 36.
79. An estimated 0.3% of all adolescents aged 12 to 17—approximately 80,000 individuals—had an opioid use disorder in 2020. See SAMHSA Report, supra note 20, at 30.
3. Schools’ Outdated and Ineffective Responses to Substance-Involved Students

While a particular construct can achieve a measure of dominance on a societal level, various entities within society operate under their own dominant modes of thinking.Imagine, for example, a father who finds illicitly obtained opiate painkillers in his teenage daughter’s room and decides to take bold action in response. The nature of the response will depend significantly, if not entirely, upon the entity he contacts; the local police would likely address the situation differently from a substance abuse treatment center or a priest. If the painkillers were discovered in the girl’s school locker, however, the available responses would be limited by district-level or statewide disciplinary policies.

In a 2012 study of the drug- and alcohol-related policies of the one hundred largest school districts in the country, disciplinary responses to incidents of drug possession, use, sales, and distribution (including referral to law enforcement) were far more prevalent than interventions intended to detect and address possible substance use disorders. Though only 15% of districts’ policies referenced obtaining written assessments for potential substance dependence and 55% allowed for referrals to substance abuse counseling, intervention, and treatment programs following possession or use offenses, 98% referenced the imposition of principal-determined suspensions, 90% recommended expulsion hearings, 86% allowed for reporting to law enforcement, and 80% referenced placement in alternative schools or programs. Only 26% of districts referenced prevention education in their drug or alcohol policies, and only 44% referenced school-based interventions or remediations.

So-called “zero tolerance” policies towards drug- and alcohol-related


85. Id. at 3.

86. Id. at 4.
infractions have been criticized for being ineffective, punitive, and overbroad. There is also a degree to which such policies are too narrow, insofar as their focus—and therefore utility—extends only to the boundaries of active drug possession and use. Put another way, current methods of addressing adolescent drug abuse in schools focus more on the drugs being used than on the adolescents using them. When drugs are removed from a situation, through successful policy initiatives or carceral force, the particular “drug problem” ceases to exist: no laws are broken, and the threat to school safety disappears.

This framing of the problem of student drug use fails to recognize the fundamental nature of substance use disorders insofar as it presumes that the unwanted behavior of student drug use can be deterred through consequences, when continued use in spite of consequences is one of the indicators of substance use disorders. Furthermore, achievement of such policies’ primary objective—the cessation of drug possession and use—would not fully address students’ substance use disorders, as achieving long-term recovery is an active endeavor that persists far beyond the cessation of substance use.

Recognizing substance use disorders as diagnosable and treatable medical conditions, as well as education-impacting disabilities, provides a clearer lens through which to view adolescent substance abuse, albeit one with profoundly complicated implications. What were once considered merely to be willful acts of defiance could instead be interpreted to be ineffective and destructive attempts of self-medication.


90. See supra notes 20–23 and accompanying text.

91. See supra notes 41–47 and accompanying text.

92. Rudolf H. Moos, Theory-Based Processes That Promote the Remission of Substance Use Disorders, 27 CLINICAL PSYCH. REV. 537, 539 (2007).
deterrence mechanisms, absent attempts to address the underlying motivations for substance abuse, diminishes if not vanishes. In short, when substance use disorders are cognizable conditions in schools, the problematic activity of adolescent drug abuse necessitates a far greater degree of interpretative complexity.

The challenge this presents, its implications on the allocation of limited resources such as time and funding, and a reasonable desire to avoid controversial decision-making all serve as likely resistance points to the recognition of substance use disorders under special education law. That is why this Article seeks to instigate a new conversation among educators, policymakers, and scholars regarding how to best see and serve substance-involved students. To that end, Part II below will place substance use disorders within the two spheres of special education laws under which public schools operate, which will highlight current impediments to the recognition of substance-involved students and the areas of the law where recognition and accommodations could plausibly be obtained.

II. SITUATING SUBSTANCE USE DISORDERS WITHIN SPECIAL EDUCATION LAW

Two of the three major disability-rights statutes under which public schools operate—Section 504 and Title II of the ADA—currently offer sufficient tools to procure recognition of, and a degree of support for, certain students with substance use disorders. As discussed below, however, such students can neither be seen nor served under the other statute—the IDEA.

93. See supra notes 87–90 and accompanying text.
A. The Individuals with Disabilities Education Act

The first federal law to mandate that states receiving federal education funding provide “all handicapped children [with] a free appropriate public education” was the Education for All Handicapped Children Act of 1975 (“EAHCA”).\(^97\) The EAHCA was the product of many years of congressional lobbying from parents and advocates for children with disabilities.\(^98\) It was also influenced by two federal cases that upheld procedural due process and equal protection claims in favor of students with disabilities who had been excluded or otherwise denied services from their public schools.\(^99\) The EAHCA was reauthorized in 1990, at which time its name was changed to the Individuals with Disabilities Education Act.\(^100\)

The IDEA seeks to ensure that all students with qualifying disabilities and corresponding educational needs receive a “free appropriate public education.”\(^101\) The manners in which schools provide a free appropriate public education to IDEA-qualified students are articulated in students’ Individualized Education Programs (“IEPs”).\(^102\) Each student’s IEP must articulate which “special education and related services” the child is entitled to receive in order to meet their specific educational goals.\(^103\) Furthermore, the free appropriate public education offered to each child, codified by their IEP, must be provided in the least restrictive environment in which they can attain their individualized educational objectives.\(^104\) These entitlements are provided to children who meet the IDEA’s disability criteria\(^105\) and whose disability also “adversely affects [the] child’s educational performance”\(^106\) in a manner that creates the need for “special education and related services.”\(^107\) Each of these eligibility prongs will be analyzed in more detail below.\(^108\)

In addition to the substantive right to a free appropriate public
education, the IDEA provides certain procedural rights in disputes between parents or otherwise interested third parties and schools. Parents or public agencies may file a “due process complaint” on any matter relating to the “identification, evaluation or educational placement” of a child with a disability. Parties to disputes are afforded access to a timely mediation process conducted by a “qualified and impartial mediator.” The mediator’s decision in due process disputes can subsequently be challenged in a civil court action; in certain cases, such an action can be filed prior to full exhaustion of the administrative process.

The IDEA, and the EAHCA before it, have made a positive impact on public education and the lives of millions of children with disabilities. That said, many scholars have noted that the IDEA’s overly restrictive eligibility criteria appear to conflict with its stated objective of “ensuring that all children with disabilities have available to them a free appropriate public education.” Indeed, students with substance use disorders are functionally invisible under the IDEA.

1. Eligibility Barriers for Students with Substance Use Disorders
   a. “Child with a Disability”

   In order to receive services under the IDEA, a student must first qualify as a “child with a disability.” The following disabilities—and only the following disabilities—are recognized under the IDEA: “intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional

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disturbance, . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities.”

The IDEA’s regulatory guidance provides further clarification regarding the requisite components of each disability. Failure to meet the criteria for a “child with a disability” precludes a student from receiving services under the IDEA.

While two of the IDEA’s qualifying disabilities—emotional disturbance and other health impairments—may initially appear to encompass students with substance use disorders, the conditions for the disabilities that are articulated in the IDEA’s regulations would make such recognition difficult to obtain.

i. Emotional Disturbance

In order to obtain recognition under the IDEA as a child with an emotional disturbance, a student must, “over a long period of time and to a marked degree that adversely affects [the student’s] educational performance,” exhibit one or more of the following characteristics:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

The regulations further state that emotional disturbance “includes schizophrenia” but does not apply to children who are “socially maladjusted” unless they exhibit one of the criteria provided above.

The general deficiencies in this regulatory language have been catalogued at length. Insofar as students with substance use disorders are concerned, it should be noted that the criteria for emotional disturbances do

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116. Id.
117. See 34 C.F.R. § 300.8(c) (2022).
121. 34 C.F.R. § 300.8(c)(4)(i) (2022).
122. Id.
123. Id. § 300.8(c)(4)(ii) (2022).
124. 20 U.S.C. § 1400(d); 34 C.F.R. § 300.1 (2022); see also Callegary, supra note 114, at 183–87; Golembiewski, supra note 114, at 484–92; Mitchell, supra note 114, at 415–16; Weber, supra note 98, at 89–102; Dimoff, supra note 114, at 330–32.
not align with the DSM-V’s criteria for substance use disorders; some students would exhibit sufficient criteria under both conditions to obtain classification as a student with a substance use disorder and an emotional disturbance, but other students with substance use disorders would fail to meet the emotional disturbance criteria entirely. Nor does the requirement that qualifying behavior be exhibited “over a long period of time” reflect the DSM-V’s relative lack of emphasis upon the amount of time symptoms of substance use disorders must be present prior to a diagnosis. Furthermore, the clause referencing “socially maladjusted” students—a term used to describe juvenile delinquency at the time the IDEA’s precursor was drafted—appears to serve little purpose other than to bias decisionmakers against classifying certain types of maladaptive behavior as evidence of emotional disturbance.

Evidence of student drug use in the records of IDEA-based civil actions appears to dissuade reviewing judges from attributing student behavior to an underlying emotional disturbance in IDEA-based appeals. In denying a student eligibility under the emotionally disturbed category, Judge Richard Posner attributed the child’s drug use and criminal record to “a lack of proper socialization” and noted that while the child’s substance abuse "interferes

125. See supra note 28.
126. 34 C.F.R. § 300.8(c)(4)(i) (2022).
127. See supra note 28.
128. See supra note 28.
129. See supra note 28.
130. This assessment of the social maladjustment clause is informed by its curious placement in the regulatory definition of emotional disturbance: evidence of social maladjustment does not disqualify a student from receiving a disability classification of emotionally disturbed if one or more of the other five factors are present. 34 C.F.R. § 300.8(c)(4)(ii) (2022). As this would be a requirement regardless of the social maladjustment clause, the clause’s purpose—other than to present the false implication that emotional disturbance criteria resulting from social maladjustment does not qualify a student for an emotional disturbance classification—is unclear. For scholarly critiques of the social maladjustment clause, see Virginia Costenbader & Roberta Buntaine, Diagnostic Discrimination Between Social Maladjustment and Emotional Disturbance: An Empirical Study, 7 J. EMOTIONAL & BEHAV. DISORDERS 2, 3–4 (1999); Callegary, supra note 114, at 189; Cynthia A. Dieterich, Nicole D. Snyder & Christine J. Villane, A Legal Study of Children with Emotional Disturbance and Mental Health Needs and Implications for Practice, 45 J.L. & EDUC. 39, 46–48 (2016); Weithorn, supra note 82, at 1357–59; Lucy W. Shum, Note, Educationally Related Mental Health Services for Children with Serious Emotional Disturbance: Addressing Barriers to Access Through the IDEA, 5 J. HEALTH CARE L. & POL’Y 233, 244–46 (2002); and Felicia Winder, Note, Childhood Trauma and Special Education: Why the “IDEA” Is Failing Today’s Impacted Youth, 44 Hofstra L. Rev. 601, 623–24 (2015).
131. This matter was directly addressed in Springer v. Fairfax City School Board, 134 F.3d 659 (4th Cir. 1998), wherein a student’s “use of illegal substances . . . and reckless and risk-taking acts” was attributed to a “conduct disorder” that triggered the social maladjustment clause and precluded a finding of emotional disturbance under the IDEA. Id. at 664 (internal quotation marks omitted). For additional examples of the social maladjustment clause precluding a finding of emotional disturbance for students with a history of substance abuse, see Dale M. v. Bd. of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307, 237 F.3d 813, 817 (7th Cir. 2001); and Tracy v. Beaufort Cty. Bd. of Educ., 335 F. Supp. 2d 675, 688–89 (D.S.C. 2004).
with his schooling . . . it interferes with much else besides, such as [his] ability to conform to the law and avoid jail.\textsuperscript{132} A district court opinion, also denying eligibility, noted that “[t]eenagers . . . can be a wild and unruly bunch. Adolescence is, almost by definition, a time of social maladjustment for many people.”\textsuperscript{133} Some courts consider substance abuse to be a de facto indicator of social maladjustment.\textsuperscript{134} Given the barriers to receiving an emotional disturbance disability classification faced by all students with maladaptive school behaviors, and the particular barrier of the social maladjustment clause for students with a history of substance abuse, widespread acknowledgement of student substance use disorders via the emotionally disturbed category of IDEA-eligible disabilities is unlikely.

ii. Other Health Impairment

To qualify for IDEA services under the “other health impairment” category, a student must have “limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment” due to a “chronic or acute health problem[,] such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome [that] adversely affects a child’s educational performance.”\textsuperscript{135} The requirement that the health condition create a “limited alertness with respect to the educational environment” is far easier to demonstrate than the emotional disturbance criteria,\textsuperscript{136} it also more closely aligns with the typical manifestations of substance use disorders.\textsuperscript{137} Other obstacles exist, however, for individuals seeking recognition of substance use disorders as an “other health impairment.”

While the category’s list of “chronic or acute health problems” that are considered “other health impairments” is non-exhaustive,\textsuperscript{138} the absence of

\begin{itemize}
\item\textsuperscript{132} Dale M., 237 F.3d at 817.
\item\textsuperscript{133} Springer, 134 F.3d at 664.
\item\textsuperscript{134} W.G. v. N.Y.C. Dep’t of Educ., 801 F. Supp. 2d 142, 155 (S.D.N.Y. 2011) (supporting a denial of emotional disturbance finding with a student’s psychologist’s assessment that “under the IDEA students who are socially maladjusted or have a history of substance abuse [do] not qualify for the disability classification of emotional disturbance”). The student under review had a diagnosis of cannabis dependence under DSM-IV criteria, which delineated between “abuse” and “dependence” in a manner that was not continued in the DSM-V. See id. at 153; see also SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., IMPACT OF THE DSM-IV TO DSM-V CHANGES ON THE NATIONAL SURVEY ON DRUG USE AND HEALTH 10 (2016), https://www.samhsa.gov/data/sites/default/files/NSDUH-DSM5ImpactAdultMI-2016.pdf [https://perma.cc/D5BM-HYHT].
\item\textsuperscript{135} 34 C.F.R. § 300.8(c)(9) (2022).
\item\textsuperscript{136} See Hensel, supra note 98, at 1164.
\item\textsuperscript{137} See supra Section I.A.
\item\textsuperscript{138} 34 C.F.R. § 300.8(c)(9) (2022) (stating “chronic or acute health problems such as [list of OHI-recognized disabilities]” (emphasis added)).
\end{itemize}
substance use disorders leaves the decision of whether to acknowledge a particular student’s disorder to the special education team at the student’s school, subject to review of a mediator and, if appealed, a state or federal judge.\textsuperscript{139} Though such a finding would not be outside the realm of possibility, two factors diminish its likelihood. One, the lack of precedent for a substance use disorder being classified as an “other health impairment” compromises advocates’ ability to effectively argue for such a classification and would likely give reviewing authorities pause before making such a determination. Furthermore, the fact that other conditions (such as attention-deficit/hyperactivity disorder and Tourette syndrome) have been added to the original list of “other health impairments” in formal amendments to the IDEA’s regulations\textsuperscript{140} might dissuade school personnel or reviewing authorities from recognizing a condition absent from the regulations that has not been subjected to a similar degree of review and approval.

Another significant barrier impeding the classification of substance use disorders as an “other health impairment” is the secondary requirement—which also applies to findings of emotional disturbance and all other qualifying disabilities under the IDEA—that the impairment “adversely affects a child’s educational performance.”\textsuperscript{141} Indeed, most disputes over whether a student should receive IDEA services under the “other health impairment” classification focus not upon the existence of a disability but rather the degree to which that disability adversely affects the child’s educational performance.\textsuperscript{142}

b. “Adversely Affects Educational Performance”

Neither the IDEA statutory text nor its regulations clearly articulate the type and extent of adverse effect a disability must have upon a student’s educational performance in order for the child to qualify for IDEA

\textsuperscript{139} The overwhelming majority of IDEA-based causes of action are filed in federal courts. See James R. Newcomer & Perry A. Zirkel, An Analysis of Judicial Outcomes of Special Education Cases, 65 EXCEPTIONAL CHILD. 469, 474 (1999) (finding that 85% of IDEA-based civil suits were filed in federal court as of 1999). This figure has remained consistent twenty years after this initial finding. See LAURA J. GRANELLI & BETH L. SIMS, SPECIAL EDUCATION DISPUTES: LITIGATE OR SETTLE: WHAT IS THE QUESTION 6–7 (2018), https://www.nyssba.org/clientuploads/nyssba_pdf/Events/precon-law-2018/06-special-ed-disputes-outline.pdf [https://perma.cc/RR3H-Y57D].


\textsuperscript{141} 34 C.F.R. § 300.8(c)(1)-(9) (2022).

\textsuperscript{142} See Hensel, supra note 98, at 1164, 1170.
services.  

This element of the IDEA’s eligibility criteria has been a longstanding focus of scholarly critique. While students with substance use disorders who receive recognition of their disability as an “other health impairment” would face much of the same difficulty as other students with disabilities in demonstrating the adverse effect of their disability (and corresponding need for special education and related services), the unique nature of substance use disorders poses particular challenges in this space.

These challenges can be distinguished between those that would likely be faced by students who are actively using substances at the time of an eligibility determination or IEP meeting and those likely to be faced by students in remission from a substance use disorder. While students in remission would likely face fewer barriers in this space than substance-involved students, demonstrating sufficient adverse effects upon their educational performance that can be attributable to their substance use disorder might nevertheless be difficult. For one, the educators and reviewing entities making the eligibility determination may not fully understand the unique profile of substance use disorders and the manner in which they can continue to symptomatically manifest—and, possibly, adversely affect the student’s educational performance—even when a student is in remission from active drug use. Additionally, the existence of alternative vehicles of support for students with disabilities that do not feature as-stringent eligibility criteria—Section 504 and the ADA—might diminish the perceived significance of recognizing a substance use disorder in remission under the IDEA. Finally, the delicate balance of being in remission from a substance use disorder, and that disorder concurrently being recognized as adversely affecting the student’s educational performance to a degree that warrants special education and related services, is ever-vulnerable to disruption by the common occurrence of relapses.

Students who do not use or possess drugs at school but instead manifest

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143. See 20 U.S.C. §§ 1401–1482; 34 C.F.R. § 300.8 (2022); see also Callegary, supra note 114, at 186.

144. See Garda, supra note 63, at 481–86 (2004); Theresa Glenmon, Disabling Ambiguities: Confronting Barriers to the Education of Students with Emotional Disabilities, 60 Tenn. L. Rev. 295, 355–56 (1993); Jamie Lynne Thomas, Comment, Decoding Eligibility Under the IDEA: Interpretations of “Adversely Affect Educational Performance,” 38 Campbell L. Rev. 73, 97–104 (2016); Weber, supra note 98, at 116–18. For an astute critique of the most-common judicial interpretations of this clause, see generally Golembiewski, supra note 114.

145. Here, “remission” does not need to align with the DSM-V’s requirement of a minimum of three months free from symptoms of substance use disorders; students who are not currently engaging in drug or alcohol use and are not in need of intensive medical intervention fall within this category.

146. See supra Section I.A.

147. See infra Section II.B.

148. See supra note 31 and accompanying text.
the adverse effects of substance use disorders primarily at home can also “fall[] without” the “outer boundaries of IDEA eligibility.”149 According to the Department of Education’s Office of Special Education Programs, because the IDEA’s provisions “relate to the educational environment . . . for eligibility purposes, the student must meet the [adverse effect requirement] within the educational environment.”150 Unfortunately, such policies fail to acknowledge the degrees to which the consequences of substance use disorders extend beyond periods of active drug use.151

The remaining category of students, those with substance use disorders who commit drug-related offenses at school, would likely have the most-obvious claim that their disability is adversely affecting their educational performance. The significance of this finding, however, would be diminished by the disciplinary (and possibly legal) consequences the students would face following the infraction. Furthermore, the discovery of active substance abuse either at home or at school can result in parents seeking a degree of support for their students that schools are typically unwilling to fund.152 While these particular elements are distinct from the inquiry concerning IDEA eligibility for students with substance use disorders, they would factor significantly into the manner in which such students would be served under the IDEA were they to meet the initial eligibility criteria.

c. “Needs Special Education”

One eligibility prong remains: students who meet the aforementioned criteria must also “need[] special education and related services.”153 The IDEA defines special education as “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability.”154 The term “specially designed instruction” is defined as “adapting, as appropriate to the needs of an eligible child . . . the content, methodology, or delivery of instruction.”155 The IDEA provides a list of “related services” that “may be required to assist a child with a disability to benefit from special education,”

149. R.C. v. York Sch. Dep’t, Civil No. 07-177-P-S, 2008 U.S. Dist. LEXIS 75538, at *72 (D. Me. Sept. 25, 2008) (finding that a “deeply troubled young woman who suffered serious adverse effects from [depression], but displayed virtually none in school” was ineligible for IDEA services), aff’d, 2008 U.S. Dist. LEXIS 98762 (D. Me. Dec. 5, 2008). The “inappropriate behaviors” catalogued by the court, however, included “being drunk or high . . . in school.” Id.
150. Letter to Anonymous, 213 EDUC. FOR HANDICAPPED L. REP. 247, 249 (Aug. 11, 1989); see also Garda, supra note 63, at 479.
151. See supra Section I.A.
152. See infra Section II.A.2.b.
including “psychological services, . . . social work services, . . . counseling services, including rehabilitation counseling . . . and medical services . . . for diagnostic or evaluation purposes.” Whether a student needs “special education,” as opposed to accommodations such as preferential seating or mobility assistance, is often a determining factor in whether a student meets IDEA eligibility or the more-expansive Section 504 eligibility criteria.

While the eligibility requirement that a student must “need[] special education” is logically “intertwined” with the requirement that a student’s IDEA-recognized disability “adversely affects” their educational performance, they are distinct inquiries. Complicating this analysis is the fact that the statutory and regulatory language of the IDEA does not clarify (beyond the aforementioned definitions) which modifications constitute “special education” and which are simply best practices that address individual student needs.

The eligibility barriers discussed above are likely sufficient to preclude recognition of students with substance use disorders under the IDEA, rendering the discussion of whether such students need “special education” primarily theoretical at present. Nevertheless, advocates seeking IDEA reform must clearly establish that—if the statute were amended to recognize substance use disorders as education-impacting disabilities—there are available special education practices that could serve such students. Two foundations for this argument exist. One can first analogize the manner in which the students with substance use disorders could be served under the IDEA to the manner in which students with attention-deficit hyperactivity disorder (“ADHD”) are currently being served under the IDEA. One can then glean examples of “specially designed instruction” from school-based programs that currently serve students with substance use disorders, such as recovery schools.

ADHD and substance use disorders are “inextricably intertwined.” Children with ADHD are at a significantly higher risk of developing

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156. 20 U.S.C. § 1401(26)(A); see also 34 C.F.R. § 300.24(a) (2022).
157. See Garda, supra note 63, at 487 (“Section 504’s coverage is broader than IDEA’s because it does not consider the child’s need for special education.”). For an analysis of Section 504’s eligibility criteria as applied to students with substance use disorders, see infra Section II.B.
158. See Garda, supra note 63, at 490.
159. See Hensel, supra note 98, at 1174 (“Despite the statute’s thirty+-year existence, there is little agreement among courts and scholars as to what type of services fall under this umbrella.”); Weber, supra note 98, at 120 (“The reality is that there exists no precise definition for ‘need special education’ beyond the meaning of the words themselves.”); see also Garda, supra note 63, at 486–90.
160. See infra notes 162–66 and accompanying text.
161. See infra notes 167–70 and accompanying text.
162. Elizabeth Harstad, Sharon Levy & Committee on Substance Abuse, Attention-Deficit/Hyperactivity Disorder and Substance Abuse, 134 PEDIATRICS 293, e293 (2014).
substance dependence than children without ADHD, and rates of ADHD among adolescents receiving treatment for substance use disorders are significantly higher than among the general population of their peers. Like substance use disorders, ADHD is correlated with poor academic performance, higher risk of dropout, and an increased risk of involvement with the juvenile justice system.

ADHD was not included in the examples of “other health impairments” in the IDEA’s original regulations; the condition was added following the IDEA Amendments of 1997. In seeking similar recognition of substance use disorders, advocates need not entirely conflate such disorders with ADHD to nevertheless draw valid analogies between the two conditions. Both concern a medically grounded reassessment of maladaptive school behavior that, if left unaddressed, leaves students vulnerable to a higher risk of failure. Furthermore, to whatever degree the common symptoms of ADHD mirror the school performance of students with substance use disorders, similar special education and related services can be provided to the latter population.

Advocates can also look to programs that currently serve students with substance use disorders for examples of academic modifications and supportive services that allow such students to fully access their educational opportunities. Recovery schools, which provide integrated therapeutic support for students in remission from substance use disorders, are a valuable

163. See Steve S. Lee, Kathryn L. Humphreys, Kate Flory, Rebecca Liu & Kerrie Colass, Prospective Association of Childhood Attention-Deficit/Hyperactivity Disorder (ADHD) and Substance Use and Abuse/Dependence: A Meta-Analytic Review, 31 CLINICAL PSYCH. REV. 328, 338 (2011). The same study also found that “early ADHD strongly predicts future substance abuse/dependence in adolescence/adulthood and that this association is largely impervious to demographic and methodological factors that varied across each study.” Id. at 337.


165. See William J. Barbaresi, Slavica K. Katusic, Robert C. Colligan, Amy L. Weaver & Steven J. Jacobsen, Long-Term School Outcomes for Children with Attention-Deficit/Hyperactivity Disorder: A Population-Based Perspective, 28 J. DEV. & BEHAV. PEDIATRICS 265, 270 (2007); Regina Bussing, Dana M. Mason, Lindsay Bell, Phillip Porter & Cynthia Garvan, Adolescent Outcomes of Childhood Attention-Deficit/Hyperactivity Disorder in a Diverse Community Sample, 49 J. AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY 595, 596, 601 (2010).

source of such knowledge and experience.\textsuperscript{167} Recovery schools’ academic programming is typically more flexible than traditional schools, both to provide students the opportunity to learn foundational material that was not obtained prior to entering treatment and to allow time for supportive services throughout the day.\textsuperscript{168} Recovery schools also have small class sizes, which allow for a greater amount of individual student attention.\textsuperscript{169} Incorporating the principles and practices of recovery schools into public school systems would substantially alleviate the most pressing challenges of recovery schools—maintaining sustainability and offering a diverse suite of academic and elective courses\textsuperscript{170}—by leveraging economies of scale.

Despite the valuable insight recovery schools can provide, the manners in which “the content, methodology, or delivery of instruction”\textsuperscript{171} can most-efficaciously be adapted for students with substance use disorders remains a significant opportunity for further study and innovation. Much more is known regarding the “related services”\textsuperscript{172} schools can provide—and in some cases are already providing—to support this population. Approaches such as resilience theory,\textsuperscript{173} peer network counseling,\textsuperscript{174} motivational

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\item \textsuperscript{167} See D. Paul Moberg, Andrew J. Finch & Stephanie M. Lindsley, Recovery High Schools: Students and Responsive Academic and Therapeutic Services, 89 Peabody J. Educ. 165, 165 (2014) (“RHS [Recovery High School] programs are designed to meet both academic and therapeutic needs of adolescents who have received treatment for substance use disorders.”). See generally APPROACHES TO SUBSTANCE ABUSE AND ADDICTION IN EDUCATION COMMUNITIES: A GUIDE TO PRACTICES THAT SUPPORT RECOVERY IN ADOLESCENTS AND YOUNG ADULTS (Jeffery D. Roth & Andrew J. Finch, eds., 2010) (describing recovery high schools from the perspectives of students, teachers, and administrators).
\item \textsuperscript{168} See Moberg, supra note 167, at 165.
\item \textsuperscript{170} See Moberg, supra note 167, at 172–80.
\item \textsuperscript{171} 34 C.F.R. § 300.39(b)(3) (2022).
\item \textsuperscript{172} 20 U.S.C. § 1401(26)(A).
\item \textsuperscript{173} See Rebecca Kate Hodder, Megan Freund, Luke Wolfenden, Jenny Bowman, Smriti Nepal, Julia Dray, Melanie Kingsland, Sze Lin Yoong & John Wiggers, Systematic Review of Universal School-Based ‘Resilience’ Interventions Targeting Adolescent Tobacco, Alcohol or Illicit Substance Use: A Meta-Analysis, 100 Preventative Med. 248, 257 (2017) (“[U]niversal school-based interventions that address adolescent ‘resilience’ protective factors as part of any intervention approach are effective in reducing adolescent illicit substance use, supporting the implementation of such universal school-based interventions to reduce illicit substance use by adolescents.”).
\item \textsuperscript{174} See Michael J. Mason, Nikola M. Zaharakis, Michael Russell & Victoria Childress, A Pilot Trial of Text-Delivered Peer Network Counseling to Treat Young Adults with Cannabis Use Disorder, J. Substance Abuse Treatment, June 2018, at 1, 8 (finding that, while the study’s sample size was small, Peer Network Counseling interventions using text messages “may be efficacious in reducing cannabis related problems for those with moderate and high levels of CUD [Cannabis Use Disorder] severity, in reducing cannabis craving, and in reducing positive cannabis metabolites specimen results among young adults”).
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interviewing, and cognitive-behavioral therapy have all been demonstrated to improve outcomes for adolescents with substance use disorders. School-based interventions can strengthen “social resistance skills,” provide “normative education” regarding the dangers of substance abuse, and focus on “competence-enhancement” that addresses other social needs.

It should also be noted that the provision of “special education and related services” to students with substance use disorders aligns with the value of inclusion underlying the policy that students are to be educated in the “least restrictive environment” in which their needs can be met. This is especially the case if such interventions can be performed at the outset of the disorder’s manifestation. Providing early, effective, and evidence-based interventions can allow students to remain integrated in their schools and home environments and forestall, or ideally preempt altogether, a need for residential placement or the threat of juvenile justice involvement.

In summary, the IDEA’s eligibility criteria currently present barriers to the recognition of students with substance use disorders that would likely require statutory or regulatory amendments to overcome. In addition to amending the IDEA’s eligibility criteria, there are two important policy considerations that are deserving of attention, debate, and a similarly tailored response: (1) the balance between schools’ non-negotiable need to maintain safe and drug-free campuses and students’ protections against disciplinary actions that are “manifestations” of their disabilities; and (2) schools’ obligations to provide tuition reimbursement for residential treatment programs.

175. See Elizabeth Barnett, Steve Sussman, Caitlin Smith, Louise A. Rohrbach & Donna Sprujit-Metz, Motivational Interviewing for Adolescent Substance Use: A Review of the Literature, 37 ADDICTIVE BEHAVS. 1325, 1327 (2012) (“Twenty-six trials (67%) showed significant reductions in some type of substance use.”).
177. For additional examples of adolescent substance abuse treatment practices, see NAT’L INST. ON DRUG ABUSE, supra note 65, at 22–29.
178. See Kenneth W. Griffin & Gilbert J. Botvin, Evidence-Based Interventions for Preventing Substance Use Disorders in Adolescents, 19 CHILD & ADOLESCENT PSYCHIATRIC CLINICS N. AM. 505, 510 (2010).
179. See id.
180. See id. at 511.
2. Further Policy Considerations: Manifestation Determinations and Residential Placements
   
a. Manifestation Determinations

   If a student’s IEP team determines that a particular incident of school misbehavior is a manifestation of the child’s disability, the school, rather than levying punitive discipline, will conduct a “functional behavioral assessment, . . . implement a behavioral intervention plan[,] and . . . return the child to the placement from which the child was removed.”183 However, drug-related offenses trigger an exception to the IDEA’s standard protocol of determining whether a student’s misbehavior can be considered a “manifestation” of the student’s disability.184 Students who are caught using or possessing drugs at school are thus subject to disciplinary action, referral to law enforcement, and removal to an alternative educational setting for up to forty-five days “without regard to whether the behavior is determined to be a manifestation of the child’s disability.”185 Under the IDEA, schools still have the discretion to hold manifestation determination hearings following drug-related infractions by students with disabilities, but they are not required to do so as they are with other infractions.186

   The fact that substance use disorders are functionally invisible within special education law has resulted in inconsistent outcomes of manifestation determinations involving drug-related offenses for students with IDEA-recognized disabilities.187 If a student with a substance disorder who is deemed to have met the aforementioned IDEA eligibility criteria—by, again, meeting the criteria for emotional disturbance or being recognized as having

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183. Id.
185. Id.
186. Id.
an “other health impairment,” either of which must adversely affect the student’s educational performance to a degree that requires special education—committed a drug-related offense at school, it would almost certainly be considered a manifestation of their disability. Nevertheless, absent an amendment to the current guidelines, the aforementioned exception would apply, and the student’s school district would still have the ability to discipline the student, refer the student to law enforcement, and remove the student to an alternative placement for up to forty-five days.188

Any legislative response that adheres to the value of school safety would ensure that schools maintain the flexibility to adequately respond to all drug-related offenses, including, if necessary, the temporary removal of students from campus. Such responses, however, should initiate, rather than foreclose, a dialogue regarding the “special education and related services” students are to be provided in their new placement. Without such support, the value of safety—both for the individual student and the school community—would be compromised upon the student’s return.

b. Residential Placements

The school’s response could be rendered moot, however, if the student is first withdrawn from the district by their parents and placed in a residential drug-treatment program. Under the IDEA’s regulations, parents of children who have previously received special education services and are dissatisfied by a school’s current provision of services can enroll their child in a private school program and file a due process action seeking reimbursement.189 Such reimbursement is justified only if “the public placement violated IDEA and the private [here, residential] school placement was proper under the Act.”190

Federal circuits employ different tests for determining whether a particular student’s residential placement is proper (and therefore reimbursable).191 Under the oldest, most lenient, and most widely employed standard, courts assess “whether full-time placement may be considered necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are segregable from the learning process.”192 The Seventh Circuit modified the above test to

188. 20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g) (2022).
focus more directly upon the primary purpose of the chosen residential facility; reimbursement is not provided for placements that are “oriented more toward enabling the child to engage in noneducational activities.”

The Fifth Circuit adopted elements of the aforementioned tests to create a two-part standard for proper residential placements: such placements “must be 1) essential in order for the disabled child to receive a meaningful educational benefit, and 2) primarily oriented toward enabling the child to obtain an education.”

The second prong of this test is a “fact-intensive inquiry” that involves “weeding out inappropriate treatments from the appropriate (and therefore reimbursable) ones.”

In practice, courts are reluctant to order reimbursement for programs designed to address substance use disorders for students with disabilities currently recognized under the IDEA. A valid concern exists, however,

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195. Michael Z., 580 F.3d at 301.
that broadening the IDEA’s eligibility standards to encompass more students 
with mental health disorders would place a significant burden upon school 
districts to underwrite treatment costs.197

In conclusion, students with substance use disorders will likely remain 
invisible under the IDEA. Fortunately, another mechanism exists by which 
this population can be seen and served in their schools: the prohibitions 
against disability-based discrimination by public entities contained in 
Section 504 and further contextualized by the ADA.

B. SECTION 504 AND THE AMERICANS WITH DISABILITIES ACT

Compared to the IDEA, Section 504 and the ADA appear to impose 
altogether different obligations upon schools: the IDEA imposes an 
affirmative duty to provide students that meet its exclusive eligibility criteria 
with a free appropriate public education198 while Section 504 and the ADA 
contain strong prohibitions against disability-based discrimination.199

Functionally, however, Section 504 and the ADA stand alongside the IDEA 
as powerful mechanisms by which students with disabilities can be seen and 
served in their schools.200

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199. See 34 C.F.R. § 104.1 (2022) (“The purpose of this part [of the Code of Federal Regulations] is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.”); 42 U.S.C. § 12101(b)(2) (“It is the purpose of [the ADA statute] . . . to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”).

200. See Christopher J. Walker, Note, Adequate Access or Equal Treatment: Looking Beyond the IDEA to Section 504 in a Post-Schaffer Public School, 58 STAN. L. REV. 1563, 1588 (2006) (“Once [its] regulations were in place, Section 504 became a powerful tool for combating disability discrimination in employment, as well as in preschool, elementary, secondary, and postsecondary education.”).
1. Section 504 and the ADA’s Eligibility Requirements and Protections

Unlike the IDEA, Section 504 and the ADA’s current eligibility standards provide sufficient opportunity to recognize and serve certain students with substance use disorders. While the IDEA only recognizes particular enumerated disabilities, Section 504 and the ADA prohibit discrimination against—and provide needed protections for—all students for whom “a physical or mental impairment . . . substantially limits one or more major life activities.”

According to Section 504’s school-specific regulations, schools must provide each “qualified handicapped person” with a “free appropriate public education.” To be considered “handicapped” under Section 504 and the ADA, students must have “any physiological disorder or condition . . . affecting one or more” of a broad list of bodily systems, or “any mental or psychological impairment,” that substantially limits one or more “major life activities,” including learning, reading, and concentrating. Subsequent ADA regulatory language—particularly its requirement that “the definition of disability . . . shall be construed in favor of broad coverage of individuals”—informs the manner in which Section 504 eligibility is to be determined by educators.

Because Section 504 and the ADA’s disability-based eligibility criteria are far less restrictive than the IDEA’s, virtually all students with IDEA-recognized disabilities receive concurrent recognition and protections under Section 504 and the ADA, while some students who are eligible for “Section

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201. See supra Section II.A.1.a.
202. 34 C.F.R. § 104.3 (2022); 42 U.S.C. § 12102(1)(A).
203. 34 C.F.R. § 104.33 (2022).
204. Of the bodily systems listed, “neurological” is most directly relevant to substance use disorders. See 34 C.F.R. § 103 (2022); 29 U.S.C. § 794.
206. 42 U.S.C. § 12102(2). The non-exhaustive list of major life activities also includes “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing . . . thinking, communicating, and working.” Id. An individual who exhibits a sufficient number of DSM-V symptoms to qualify for diagnosis of a substance use disorder would likely meet the initial eligibility criteria for Section 504 protections.
207. 42 U.S.C. § 12102(4)(A); see also 29 C.F.R. § 1630.2(j)(1)(i) (2022) (explaining that the ADA Amendments Act of 2008 is to be “construed broadly in favor of expansive coverage”).
208. See supra notes 112–15.
504 Plans are ineligible for accommodations under the IDEA. Nevertheless, the IDEA and Section 504 both require the provision of a “free appropriate public education” to students who meet their separate eligibility criteria.

Providing a “free appropriate public education” under Section 504 requires the “provision of regular or special education and related aids and services that . . . are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met.” While it is “noncontroversial” that Section 504 and the ADA prohibit certain actions such as “unnecessary segregation, unjustified disparate-impact discrimination, refusal to furnish comparable academic and nonacademic facilities and settings, and failure to provide reasonable accommodation,” the nature of services schools must provide in order to meet the needs of students with disabilities “as adequately” as their nonhandicapped peers (and thus provide an “appropriate” education) is a matter of debate. If a disagreement occurs as to whether students with disabilities are receiving a free appropriate public education, Section 504 regulations provide for “a system of procedural safeguards that includes . . . to examine relevant records, an impartial hearing . . . .

209. Although Section 504 and the ADA operate in tandem in defining eligibility and general protections for students with disabilities, Section 504 alone articulates the substantive right to a “free appropriate public education.” 34 C.F.R. § 104.33 (2022); see also K.M. ex rel. Bright v. Tustin Unified Sch. Dist., 725 F.3d 1088, 1099 (9th Cir. 2013) (“[Indeed, Title II does not impose any FAPE [free appropriate public education] requirement.”). Accordingly, individual student accommodations are generally referred to as “Section 504 Plans” or simply “504 Plans.” See Perry A. Zirkel, Comparison of IDEA IEP’s and Sec. 504 Accommodations Plans, 191 EDUC. L. REP. 563, 563 (2004). 210. See Perry A. Zirkel & Tiedan Huang, State Rates of 504-Only Students in K-12 Public Schools: An Update, 354 EDUC. L. REP. 621, 624–25 (2018) (discussing prevalence rates of students receiving Section 504, but not IDEA, accommodations).

211. Courts have held that there are “few differences, if any” between the IDEA’s “free appropriate public education” (“FAPE”) standard and the same standard under Section 504. See Lauren G. ex rel. Scott G. v. W. Chester Area Sch. Dist., 906 F. Supp. 2d. 375, 377 (E.D. Pa. 2012) (quoting Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 253 (3d Cir. 1999)). The Ninth Circuit described the “overlapping but different” standards as follows:

In sum, the IDEA contains a statutory FAPE provision and allows private causes of action only for prospective relief. Section 504 contains a broadly-worded prohibition on discrimination against, exclusion of and denial of benefits for disabled individuals, under which the U.S. DOE has promulgated regulations containing a FAPE requirement worded somewhat differently from the IDEA FAPE requirement.

Mark H. v. Lemahieu, 513 F.3d 922, 925, 930 (9th Cir. 2008). Scholars have argued that Section 504’s FAPE standard, while technically different, is equally robust to the IDEA’s FAPE standard. See Walker, supra note 200, at 1598–1603.


214. See id. at 11; Walker, supra note 200, at 1593 (“The final condition—that of the level of accommodation required—is perhaps the most controversial and widely debated Section 504 concept among practitioners, policymakers, and academics.”).
with opportunity for participation by the person’s parents or guardian and representation by counsel, and a review procedure.\textsuperscript{215}

With the growing recognition of substance use disorders as complex, “biopsychosocial” conditions that often begin in adolescence, advocates for substance-involved students are better positioned than ever to seek Section 504 accommodations for students with substance use disorders. While this project would break new ground in the education context, a separate area of disability-nondiscrimination doctrine under Section 504 and the ADA can provide an initial (though incomplete) framework for such advocacy—the manners in which qualifying adults with substance use disorders have, for decades, been accommodated in their workplaces.\textsuperscript{216}

2. The Challenge of Substance-Involved Students

As discussed in Section 1.A.2, substance use disorders have long been considered “impairment[s] [that] substantially limit[] one or more major life activities” under Section 504 and the ADA.\textsuperscript{217} Advocates for students with substance use disorders can thus stand upon decades of scholarship and case law addressing the recognition and protection of employees with substance use disorders in their workplaces. But the school context presents a challenging issue that is not present in the workplace context: what, if any, obligations are owed to substance-involved students.

The standards for qualifying for Section 504 and ADA protections differ in key ways within the employment and education contexts. In the employment context, “qualified” individuals are only those who, “with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”\textsuperscript{218} Those who are “currently engaging in the illegal use of drugs” are not considered “qualified individual[s] with a disability.”\textsuperscript{219} In the school context, however, students can only lose their status as a “qualified individual” for Section 504 accommodations in schools by no longer being “of an age during which nonhandicapped persons are provided” public education.\textsuperscript{220}

\begin{itemize}
\item \textsuperscript{215} 34 C.F.R. § 104.36 (2022).
\item \textsuperscript{216} See Benedict v. Cent. Cath. High Sch., 511 F. Supp. 2d 854, 858 (N.D. Ohio 2007) (“[	extit{T}he decisional principles of the disability discrimination in employment cases are analogous to those in education cases, and much of the support for education cases will come from employment cases.
\textit{]}”); see also supra Section I.A.2.
\item \textsuperscript{217} 34 C.F.R. § 104.3 (2022); 42 U.S.C. § 12102(1)(a); see \textit{supra} note 44.
\item \textsuperscript{218} 42 U.S.C. § 12111(8).
\item \textsuperscript{219} 29 C.F.R. § 1630.3 (2022).
\item \textsuperscript{220} 34 C.F.R. § 104.3(l)(2) (2022). Students even maintain their status as a “qualified individual” following disciplinary proceedings for drug infractions that require the student to leave a particular campus. See \textit{Benedict}, 511 F. Supp. 2d at 859 (finding that, even following a drug-related infraction resulting in a school expulsion, “[	extit{T}he parties do not dispute that the identification of [the student’s]
Furthermore, while Section 504’s procedural protections do not preclude schools from issuing “legitimate, non-discriminatory”\textsuperscript{221} consequences for school misbehavior,\textsuperscript{222} and some students can therefore face expulsion following drug-related offenses, the student’s relationship with the public school system—through an alternative school within their local school district, or perhaps a school program within a treatment or carceral setting—typically continues after such disciplinary measures have been taken.\textsuperscript{223} Put another way, while adults with substance use disorders are not entitled to any particular job (or to employment generally), students with substance use disorders are entitled, and indeed obligated, to attend school in some capacity.\textsuperscript{224}

These distinctions expose a critical gap in special education law. Students with substance use disorders can meet the eligibility criteria of Section 504 and the ADA,\textsuperscript{225} and, unlike adult employees, students (1) cannot lose their status as a “qualified individual” deserving of Section 504 accommodations on the basis of active substance abuse,\textsuperscript{226} and (2) typically remain in an ongoing relationship with the public school system following the discovery of active substance abuse. What, then, are schools’ “free appropriate public education” duties under Section 504 to these students? Specifically, what manner and extent of academic and behavioral supports are legally necessary to provide an appropriate education for students in all stages of substance use disorders?\textsuperscript{227}

\textsuperscript{221} Benedict, 511 F. Supp. 2d at 859.

\textsuperscript{222} See 29 U.S.C. § 705(20)(C)(iv) (“For purposes of programs and activities providing educational services, local educational agencies may take disciplinary action pertaining to the use or possession of illegal drugs or alcohol against any student who is an individual with a disability and who currently is engaging in the illegal use of drugs or in the use of alcohol to the same extent that such disciplinary action is taken against students who are not individuals with disabilities.”).

\textsuperscript{223} See U.S. DEP’T OF EDUC. OFF. CIV. RTS, CIVIL RIGHTS DATA COLLECTION, DATA SNAPSHOT: SCHOOL DISCIPLINE 2 (2014), https://ocrdata.ed.gov/assets/downloads/CRDC-School-Discipline-Snapshot.pdf (finding that 130,000 students, out of 49 million nationwide, were expelled in 2011–2012—the last school year for which national data is available).

\textsuperscript{224} The free, appropriate public education afforded to students with Section 504-recognized disabilities alone provides this entitlement, in addition to the general entitlement to a public education afforded to all children. The obligation to attend school derives from individual states’ truancy laws. Furthermore, every state constitution contains an affirmative right to an education. See Eric Blumenson & Eva S. Nilsen, One Strike and You’re Out? Constitutional Constraints on Zero Tolerance in Public Education, 81 WASH. U. L.Q. 65, 103 n.161 (2003) (cataloging the state constitutional provisions that provide a right to an education).

\textsuperscript{225} See supra note 206.

\textsuperscript{226} See supra notes 218–20 and accompanying text.

\textsuperscript{227} The analysis regarding the “special education and related services” that could be provided to students with substance use disorders (were such disorders to be recognized under the IDEA) can contribute to this important conversation. See supra Section II.A.1.c.
For now, these queries must be addressed on an individual basis and subjected to review by individuals who may be unaware of, or actively resistant to, the needs of adolescents with substance use disorders.\textsuperscript{228} Until the public school system’s obligations to students with substance use disorders are determined and articulated to schools, obtaining services or accommodations for substance-involved students will be challenging.\textsuperscript{229} But even if formal Section 504 accommodations are not obtained, there may nevertheless be value in recognizing a substance-involved student as a child with a disability. The simple act of incorporating the vocabulary of a medicalized construct of substance use disorders into schools could have a significant effect on parents, educators, and the students themselves. A meeting convened to discuss a student’s “relapse,” for example, would likely have a different tone, and possibly outcome, than one discussing a student’s continued rule- and law-violations. And ideally all parties would recognize that any mandatory punitive responses on the part of the school will, absent concurrent therapeutic support, almost certainly fail to incentivize the student to cease drug use.\textsuperscript{230}

Furthermore, if such district-level drug policies prove to be consistently illogical and counterproductive over time, perhaps district-level policymakers would then be motivated to reform their policies in a manner that acknowledges the complexity of substance use disorders. Section 504’s affirmative obligation for schools to identify disabled students might also impact district-level behavior through increased screening for substance use disorders and timely communication with parents regarding warning signs and symptoms.\textsuperscript{231} In fulfilling their evaluative obligations under Section 504, schools can play an invaluable role in the education of families and implementation of proactive responses to budding substance use disorders. Meeting this requirement might also entail increasing training opportunities for teachers and counselors to identify and initially address evidence of substance abuse.

\begin{itemize}
\item \textsuperscript{228} See supra Section I.A.
\item \textsuperscript{229} The analysis regarding the challenges substance-involved students would face with regards to meeting the IDEA’s “adversely affects educational performance” eligibility prong broadly applies here as well. See supra notes 149–52 and accompanying text.
\item \textsuperscript{230} See supra notes 87–91 and accompanying text.
\item \textsuperscript{231} See 34 C.F.R. § 104.35(b) (2022) (“[Public schools] shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services . . . ”).
\end{itemize}
3. Existing Space to Serve Students with Substance Use Disorders

There is, however, a class of individuals who could immediately obtain formal recognition and accommodations under Section 504: non-using students in recovery from substance use disorders. This population stands to benefit from decades of precedent on the matter without triggering the complex questions raised by substance-involved students.

Though the effort-intensive nature of maintaining remission from substance use disorders arguably justifies a robust provision of “regular or special education and related aids and services”\(^{232}\) for students in recovery, there are also several practical—and relatively easy to provide—accommodations that advocates can and should seek for that population. Examples of such accommodations include the coordination of communication between school personnel, parents, and, upon consent, outside treatment providers to ensure that aberrations in students’ academic performance or behavior are addressed quickly and strategically; giving students the opportunity to call their sponsors or therapists during school hours without judgment or consequence; and excusing absences to attend outpatient treatment programs. Schools can also be more sensitive to the scheduling needs of students in recovery and, where possible, provide opportunities to transfer out of classes containing students from whom they should maintain distance.

Such interventions, if proven effective for a particular student, should remain available as long as the student attends school. This argument finds support in the ADA Amendments Act of 2008, which proscribes factoring the “ameliorative effects of mitigating measures” when assessing an individual’s impairment.\(^{233}\) In other words, the impact of a student’s disability must be assessed insofar as how it would manifest absent any mitigating measures (such as school-based recovery supports).\(^{234}\) Students in recovery are entitled to support under Section 504 and the ADA regardless of the length of their sobriety.

In any event, advocates for students with substance use disorders can and should initiate this conversation by seeking support and protections for this population under Section 504 and the ADA. Reasonable applications of the statutes as they currently stand can make a significant impact upon the lives of students in various stages of substance use disorders, as well as upon the school systems that serve them.

Nevertheless, the primary impact of broadly acknowledging and addressing substance use disorders in schools may lay outside the strict bounds of statutory obligations. Important as specific accommodations are, the greatest value in extending Section 504 protections to students in recovery may be simple recognition: for them to be seen, celebrated, and supported in their schools.

CONCLUSION

Substance use disorders are incredibly challenging to address. Initial instincts, on a personal and policy level, are often to mistake substance use disorders for problems that are seemingly easier to solve, if not to ignore them altogether. It is no surprise, then, that the primary policy framework for serving students with disabilities—the IDEA—fails to acknowledge and address students with substance use disorders. That said, certain students (particularly students in recovery) are entitled to recognition and accommodations under Section 504 and the ADA. Seeing and serving students with substance use disorders would be a complex and controversial project, but such students—like all other students with disabilities—are deserving of support.