HIGH TIMES AT THE SENIOR CENTER: THE IMPACT OF GROWING MARIJUANA LEGALIZATION ON SENIOR HOUSING POLICIES

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With the legalization of medical marijuana becoming increasingly common throughout the United States, the substance's popularity in treating various medical conditions has risen greatly. Older Americans, who are more likely to have chronic pain and nerve conditions that marijuana has been shown to relieve, could particularly benefit from incorporating doses into a medical regimen. Though many states have legalized the drug at the state level, it is still classified as an illegal substance at the federal level. For entities receiving federal funding, which includes senior public housing as well as nursing homes receiving Medicare funds, noncompliance with the federal law may result in a loss of that funding. As a result, seniors often end up the victims of their housing provider's ambiguous policy changes or are completely banned from using the drug as part of a treatment plan. This Note explores different legislative and policy solutions that would permit housing providers to formally allow the use of the substance as part of a treatment plan without fear of losing federal funding. It argues that clear and comprehensive initiatives must be put in place to promote housing stability and diminish the risks posed by informal "don't ask, don't tell" guidelines. This Note recommends that targeted legislation be passed to allow exceptions for federally funded housing residents; though in the absence of such legislation, formal acknowledgement practices can still be implemented.

I. Introduction

Ninety-eight-year-old Ruth Brunn takes a cannabis oil pill each day at her nursing home to ease her neuropathy symptoms and cut

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back on morphine.[1] Conversely, a man suffering from pain and muscle spasms, a woman fighting pain and PTSD, and a breast cancer survivor were all evicted from or denied acceptance to the housing they could afford—federally subsidized housing.[2] What is the reason for the adverse actions taken against these individuals? Their use of medical marijuana, even though they all reside in states where the substance has been legalized at the state level.[3] A stark contrast from Ruth Brunn's experience at her nursing home.

Seventy-eight-year-old John Flickner resided in his federally subsidized apartment in Buffalo, New York until he was legally evicted, causing him to bounce between homeless shelters.[4] Though medical marijuana has been legalized in his state, federal regulations from the Department of Housing and Urban Development ("HUD") gave Flickner's landlord the ability to legally evict him unless he stopped using the drug.[5] Flickner refused to stop.[6] He uses the drug with a doctor's recommendation to help with pain management and breathing difficulties.[7] Flickner's eviction is part of a growing problem caused by a lack of comprehensive legislation regarding the use of legalized marijuana as a medical treatment.[8]

In the twenty-first century, state-wide marijuana legalization has taken off at a rapid pace. As of August 2019, thirty-three states have legalized access to medical marijuana, eleven of which legalized recreational use of the drug.[9] As legalization becomes more popular, so will the use of marijuana among the older population.[10] Though

1. Winnie Hu, *When Retirement Comes With a Daily Dose of Cannabis*, N.Y. TIMES (Feb. 19, 2017), https://www.nytimes.com/2017/02/19/nyregion/retirement-medicinal-marijuana.html.

2. Emma Ockerman, *Medical marijuana users are being shut out of public housing*, VICE (Sept. 10, 2018, 3:24 PM), https://www.vice.com/en_us/article/3kezqk/medical-marijuana-users-are-being-shut-out-of-public-housing.

3. *See id.*

4. Thomas J. Prohaska, *Evicted tenant welcomed back as landlord revisits medical marijuana policy*, BUFFALO NEWS, https://buffalonews.com/2018/12/10/evicted-medical-marijuana-user-may-return-to-niagara-falls-apartment/ (last updated Aug. 3, 2020).

5. *Id.*

6. *Id.*

7. *Id.*

8. *See id.*

9. Jeremy Berke & Shayanne Gal, *All the states where marijuana is legal—and 5 more that just voted to legalize it*, BUS. INSIDER (Nov. 6, 2020, 9:48 AM), https://www.businessinsider.com/legal-marijuana-states-2018-1.

10. *See* Benjamin Han et al., *Demographic Trends Among Older Cannabis Users in the United States, 2006–13*, 112 ADDICTION 516, 522 (2017); *see also* Shawnta L. Lloyd

statistics vary, studies show an increase in elderly marijuana use, with one comprehensive study showing a 15.3 percent increase in past-year use among those sixty-five and older.[11] Seniors have been taking advantage of the drug for both recreational and medical purposes, with prescriptions and medical marijuana cards given out to treat a variety of ailments often experienced by those of advanced age.[12] In particular, studies have displayed benefits in treating chronic pain, sleep disorders, anxiety, and nerve conditions with medical doses of marijuana.[13] Researchers view the drug's lack of significant side effects compared to other medications as an additional benefit, particularly helpful for those who suffer from nausea or a poor appetite.[14] As many of the foregoing problems plague seniors more frequently than the general population, marijuana is seen as an increasingly beneficial treatment with the growth of the legalization movement.[15]

Some have suggested medical marijuana use to replace opioids for those suffering from long-term pain.[16] Utilizing the drug as a replacement has been encouraged by medical professionals due to the highly addictive nature of opioids in general, which has caused an epidemic to which seniors have not been immune.[17] Seniors are more likely to experience pain than those in the general population.[18] Accordingly, from 1999–2014, those aged sixty-five and older comprised 25.4 percent of all long-term opioid users.[19] A transition

& Catherine W. Striley, *Marijuana Use Among Adults 50 Years or Older in the 21st Century*, 4 GERONTOLOGY & GERIATRIC MED. 1, 2–3 (2018).

11. Lloyd & Striley, *supra* note 10, at 3.

12. Hu, *supra* note 1.

13. Dennis Thompson, *Medical marijuana helped elderly with chronic pain and reduced their use of opioids, study found*, CHI. TRIB. (Mar. 11, 2019, 8:30 AM), https://www.chicagotribune.com/lifestyles/health/sc-hlth-medical-marijuana-elderly-pain-relief-0320-story.html.

14. Paula Span, *Older Americans Are Flocking to Medical Marijuana*, N.Y. TIMES (Dec. 7, 2018), https://www.nytimes.com/2018/12/07/health/seniors-marijuana-cannabis-pain.html.

15. *See id.*

16. Kevin F. Boehnke et al., *Pills to Pot: Observational Analyses of Cannabis Substitution Among Medical Cannabis Users with Chronic Plain*, 20 J. PAIN 830, 831 (2019) (arguing that "medical cannabis legislation is associated with 25% fewer opioid overdose deaths in states with medical cannabis laws compared with those without…" and that states with medical cannabis laws have consistent decreases in opioid prescribing compared with those without).

17. *Id.*

18. Christoffel Le Roux et al., *Alcohol and Opioid Use Disorder in Older Adults: Neglected and Treatable Illnesses*, 18 CURRENT PSYCHIATRY REP. 87, 87 (2016).

19. Ramin Mojtabai, *National Trends in Long-Term Use of Prescription Opioids*, 27 PHARMACOEPIDEMIOLOGY & DRUG SAFETY 526, 530 (2017).

from long-term opioid use to medical marijuana could therefore be particularly significant to the older population, though research on long-term implications in this area is currently lacking.[20]

Housing is also a particularly important problem for seniors, who may have to take into account new considerations when choosing living accommodations at an older age.[21] Accessibility and safety become greater concerns as an individual's physical and cognitive limitations may decline.[22] Seniors often have to consider proximity to family and medical facilities when choosing where to live, and many have to consider whether independent or dependent living situations would offer them the best quality of life.[23] And, as the baby boomer generation ages into retirement, there will be a higher demand for a variety of care facilities from retirement communities to assisted living to nursing homes.[24] The current housing inventory is not considered well-equipped to handle such growth.[25]

This is especially a problem for low-income seniors and those with chronic conditions or disabilities because "the availability of housing with supports and services determines the quality and cost of long-term care—particularly the portion paid with public funds."[26] Low-income persons and those with disabilities already have a limited housing market.[27] Consequently, seniors', especially those with low incomes, ability to secure and maintain housing that suits their needs is perhaps more important, and more difficult, than ever before.[28]

This Note will focus on the issues arising for seniors living in subsidized housing as marijuana usage becomes more popular, particularly as a treatment for many of the ailments from which seniors may suffer. Part II of the Note will explore the policy holes created by

20. *See id.* at 532.

21. JOINT CTR. FOR HOUSING STUD. OF HARV. U., HOUSING AMERICA'S OLDER ADULTS 1 (Marcia Fernald ed., 2014).

22. *Id.*

23. *See id.* at 4.

24. *See id.* at 1.

25. *See id.* at 6 (arguing that the growing older-adult population in the U.S. has grown is not accommodated by the increasingly expensive and non-accessible housing, which can lead to a population that has fewer independent and dependent housing options).

26. *Id.* at 1.

27. JOINT CTR. FOR HOUSING STUD. OF HARV. U., THE STATE OF THE NATION'S HOUSING 2019 3 (Marcia Fernald ed., 2019), https://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_State_of_the_Nations_Housing_2019.pdf.

28. *Id.*

legislation that prevent seniors from taking advantage of—or anticipating the consequences of—using marijuana in states where the drug has been legalized. Part III explores potential legal solutions including legislative initiatives, trends in judicial interpretation of existing statutes, and careful policy drafting by housing facilities to avoid liability. Part IV of the Note then proposes that there should be exceptions to the federal ban on marijuana for housing providers, both public and private, that let seniors have a safer, fairer, and more predictable understanding of how legalized marijuana use will be available in senior housing. Further, for dependent living providers, this Note suggests the need for clear policies that allow those providing assistance with medication and who run the risk of liability to be able to use marijuana in their care setting.

II. Background

The biggest hurdle for those desiring to partake in or allow marijuana use in federally subsidized housing is that the Controlled Substances Act ("CSA") still classifies the drug as illegal for both medical and recreational use at the federal level.[29] Due to this classification, problems arise for seniors who live in federally subsidized housing, because the providers of federally subsidized housing must comply with federal law to receive funding.[30] The drug's illegal status also makes other senior housing providers, even those not using federal funding, hesitant to implement, administer, and allow the use of the drug in their facilities.[31]

This Background Section will first look at how the federally funded independent living policy, managed primarily by the Department of Housing and Urban Development's Public Housing Agency ("PHA"), is shaped by the CSA in resident admittance and usage procedures. Additionally, the Background Section will examine how dependent living facilities, most commonly nursing homes,

29. 21 U.S.C. § 812(c) (2019); Jay M. Zitter, Annotation, *Construction and Application of Medical Marijuana Laws and Medical Necessity Defense to Marijuana Laws*, 50 A.L.R.6th 353 (Originally published in 2009); *State Medical Marijuana Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (last updated Nov. 10, 2020).

30. Hu, *supra* note 1.

31. *See* Tim Regan, *Senior Living Providers Can No Longer Blow Off Pot Policies*, SENIOR HOUS. NEWS (Apr. 19, 2018), https://seniorhousingnews.com/2018/04/19/senior-living-providers-can-no-longer-blow-off-pot-policies/.

examine the issue when deciding how involved to become with the substance in the care of their residents while maintaining appropriate funding. Moreover, the Background Section will examine how dependent living facilities encounter the greater liabilities that come with allowing residents access to this form of treatment.

A. Federally Funded Independent Living

Independent seniors needing housing assistance can receive support via public housing options specifically for seniors or through their local PHA's Housing Choice Voucher ("HCV") program, commonly known as Section 8 Housing.[32] In public housing, properties are managed by the PHA, and seniors apply directly through their local PHA.[33] Certain public housing complexes are available exclusively to seniors, requiring an age limit for those who wish to reside at the property.[34] In the HCV program, however, seniors apply for a housing subsidy voucher, which they can then take to a variety of privately-owned, HUD-approved properties.[35] The voucher is then used to subsidize a certain portion of the tenant's rent.[36] Eligibility for the two programs is based on the total household income of the program beneficiaries.[37] Each program also offers different subsidy sizes, which are based on need.[38] In either program, acceptance of the federal money comes with the requirement that the household conform to HUD standards.[39] The local PHA manages and monitors adherence to these standards for the households in their provided housing.[40] While HUD regulations usually bind PHAs to set specific rules for households,

32. *Information for Senior Citizens*, U.S. DEPT. HOUSING & URBAN DEV., https://www.hud.gov/topics/information_for_senior_citizens (last visited Sept. 29, 2019).

33. Kimberlee Leonard, *How Do I Qualify as Low Income for HUD Senior Housing?*, SFGATE, https://homeguides.sfgate.com/qualify-low-income-hud-senior-housing-8480.html (last updated Dec. 15, 2018).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Questions and Answers About HUD*, U.S. DEP'T. HOUS. & URB. DEV., https://www.hud.gov/about/qaintro (last visited Sept. 29, 2020) (explaining that HUD provides assistance to 1.3 million households via public housing and over 3 million households via Section 8 Housing Choice Voucher programs).

38. *Id.*

39. *See id.*

40. *Id.*

some regulations give PHAs more discretion in establishing whether or not to adopt and enforce HUD rules.[41]

The Quality Housing and Work Responsibility Act of 1998 gives PHAs the ability to establish standards that allow a PHA to terminate assistance for household members illegally using a controlled substance.[42] Though HUD does not require landlords to evict a tenant with a medical marijuana license in a state where medical marijuana use is legal, guidelines set out in 2011 give landlords of federally subsidized tenants the freedom to do so.[43] This guideline was upheld by the Supreme Court in *Department of Housing and Urban Development v. Rucker*, where the court affirmed that HUD's statute "unambiguously requires lease terms that give local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity."[44]

In its implementation, this often means policy is decided on a case-by-case basis, varying by governing authority and even within the same governing authority.[45] As a result, housing residents are left unsure of whether their landlords will continue enforcing anti-marijuana policies, or whether landlords who do allow use will change their minds.[46] Accordingly, even though HUD does not require mandatory evictions for public housing residents using medical marijuana, residents are discouraged from using it based on the ambiguous possibility of termination at any time.[47] Residents may also

41. Dep't of Hous. & Urb. Dev. v. Rucker, 535 U.S. 125, 130 (2002) (affirming the ability of HUD to let PHAs have their own discretion for drug-related activity evictions).

42. 42 U.S.C § 13662(a)(1) (2018) ("[A] public housing agency or an owner of federally assisted housing (as applicable), shall establish standards or lease provisions for continued assistance or occupancy in federally assisted housing…that allow the agency or owner (as applicable) to terminate the tenancy or assistance for any household with a member who the public housing agency determines is illegally using a controlled substance").

43. Memorandum from the U.S. Dep't of Hous. and Urban Dev. to Assistant Sec'y for Fair Hous. and Equal Opportunity on Med. Use of Marijuana and Reasonable Accommodation in Fed. Pub. and Assisted Hous. (Jan. 20, 2011) (available at https://www.nhlp.org/files/3.%20KanovskyMedicalMarijunanaReasAccomm(012011).pdf) [hereinafter Memorandum from the U.S. Dep't of Hous. and Urban Dev.].

44. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 130 (2002).

45. *See* Prohaska, *supra* note 4.

46. *See* Ockerman, *supra* note 2.

47. *See id.*

fear marijuana being used as a pretext for other forms of discrimination, or if a landlord simply does not like a particular resident who happens to use marijuana.[48]

Even when housing authorities have loosened their enforcement regulations, ambiguous policy means that a resident might not know if their marijuana use is "okay" until allegations have already been reported against them.[49] For example, after recreational marijuana became legal in Illinois on January 1, 2020, the Chicago Housing Authority ("CHA") updated its marijuana policy to consider "mitigating circumstances" on a case-by-case basis when a resident is reported to have violated federal marijuana laws.[50] The CHA includes potential mitigating factors such as the "…nature and extent of the conduct; the relationship of the conduct to the disability of a family member; the impact on others [or] impact of a proposed action on family members . . . and any factors that might indicate a reasonable probability of favorable future conduct of the resident, including rehabilitation. . . ."[51] This policy, however, is broad enough that residents may not be able to anticipate whether their use would be viewed favorably by the CHA and its leasing partners if a violation were to be acted upon.

Additionally, seniors seeking new admission to federally subsidized housing who disclose their medical marijuana usage may be denied admission to housing under HUD recommendations set in 2011 and emphasized in 2014.[52] In contrast to HUD policy regarding use by current occupants, which suggests the ability to evict, PHAs are

48. *See generally* Garcia v. Tractor Supply Co., 154 F. Supp. 3d 1225, 1226–27 (D.N.M. 2016) (employee disclosed to his employer that he had HIV/AIDS and was enrolled in a Medical Cannabis program. The employee required the employee to submit to a drug test and subsequently terminated the employee).

49. *Cannabis CHA Resident Notice*, CHA, https://cha-assets.s3.us-east-2.amazonaws.com/s3fs-public/2020-01/Cannabis%20CHA%20Resident%20Notice%20FINAL%20FOR%20ISSUE%5B10%5D.pdf (last visited Sept. 29, 2020).

50. *Id.*

51. *Id.*

52. Memorandum from Sandra B. Henriquez, U.S. Dep't of Hous. and Urban Dev., Med. Marijuana Use in Pub. Hous. and Hous. Choice Voucher Programs, (Fed. 10, 2011), https://www.hud.gov/sites/documents/MED-MARIJUANA.PDF; Memorandum from Benjamin T. Metcalf, Use of Marijuana in Multifamily Assisted Prop., (Dec. 29, 2014), https://www.hud.gov/sites/documents/USEOFMARIJINMFASSISTPROPTY.PDF.

directed to deny applicants admitting to routine usage.[53] Housing application questionnaires can make the process of identifying users easier for housing authorities by directly asking whether the applicant possesses a medical marijuana card.[54] Lily Fisher, a Montana resident who obtained a medical marijuana card after the amputation of her leg, faced this problem firsthand after making it to the top of the waiting list for subsidized housing.[55] During a mandatory screening, Fisher responded affirmatively to a question which asked her to disclose her medical marijuana card, resulting in the PHA removing her name from the waiting list for housing assistance.[56] Because of the directives given by HUD and lack of aiding legislation, Fisher had no legal solution for recourse.[57]

Many cases aiming to fight the Drug Enforcement Administration ("DEA") and the CSA have been dismissed due to lack of jurisdiction and the broad reach of the CSA itself.[58] Courts have been hesitant to uphold any arguments seen as a "loophole" to federal law.[59] Essentially, PHAs, their subsidiaries, and Section 8 landlords can evict tenants at their discretion, citing federal law violations.[60] Even more harshly, HUD has directed local housing agencies to deny acceptance to those admitting to marijuana usage, recreational or not.[61] As legalization increases, making the difference between state and federal law even more confusing, litigation in this area is expected to rise.[62] Further, zero-tolerance policies held by many PHAs have resulted in fewer available options for low-income individuals to find and keep housing due to the zero-tolerance policies.[63]

53. Memorandum from Sandra B. Henriquez, U.S. Dep't of Hous. and Urban Dev. Med. Marijuana Use in Pub. Hous. and Hous. Choice Voucher Programs, (Fed. 10, 2011), https://www.hud.gov/sites/documents/MED-MARIJUANA.PDF.

54. Susan Olp, *Medical marijuana card or federal housing help? Billings woman learns she can have one or the other, not both*, BILLINGS GAZETTE (Sept. 9, 2018), https://billingsgazette.com/news/local/medical-marijuana-card-or-federal-housing-help-billings-woman-learns/article_079320b3-a065-58eb-88e0-0f786fbede6f.html.

55. *Id.*

56. *Id.*

57. *Id.*

58. Nathan Solis, *Fight Over HUD Housing Eviction Over Medical Pot Tossed*, COURTHOUSE NEWS SERV. (July 18, 2019), https://www.courthousenews.com/fight-over-hud-housing-eviction-over-medical-pot-tossed/.

59. *See id.*

60. *See generally* Olp, *supra* note 54.

61. *Id.*

62. *See generally id.*; Solis, *supra* note 58.

63. *See* Olp, *supra* note 54.

B. Dependent Living

1. FEDERAL FUNDING CONCERNS

Similar issues also arise in private institutions receiving federal Medicare and Medicaid funding. More specific to seniors, these include most nursing homes and certain assisted living facilities, depending on state requirements.[64] Though they are not held to the same HUD obligations as PHAs, private institutions are required to abide by the CSA's federal classification of marijuana as an illegal controlled substance to continue receiving federal funds.[65]

As of 2017, the federally operated Centers for Medicare and Medicaid Services ("CMS") claim no nursing home had specifically lost funding or been penalized for allowing marijuana use.[66] Still, CMS has the ability to monetarily punish facilities who admit marijuana users or have marijuana-positive policies.[67] Even though federal law has not been enforced in this capacity historically, the looming threat of illegality and criminal prosecution under federal law has left many nursing homes reluctant to permit marijuana use or confused on how to best do so while still maintaining their funding.[68]

Regarding privately operated senior and nursing facilities, legislators and policymakers are not yet sure how to handle implementing marijuana use.[69] Housing providers have posed questions such as "are facilities allowed to be aware of residents' usage?" and "What methods and devices should be allowed?" when considering a marijuana treatment program.[70] Many implement a

64. Hu, *supra* note 1; *see* AM. COUNCIL ON AGING, *Medicaid Coverage of Nursing Home Care: Where, When, and How Much They Pay* https://www.medicaidplanningassistance.org/medicaid-and-nursing-homes/ (last updated Jan. 7, 2020); *see also* PAYING FOR SENIOR CARE, *Comparing Assisted Living and Nursing Home Care*, https://www.payingforseniorcare.com/assisted-living-vs-nursing-homes (last updated Aug. 21, 2020).

65. Tim Regan, *Senior Living Providers Develop Smarter Pot Policies as Legalization Continues*, SENIOR HOUSING NEWS (Dec. 3, 2018), https://seniorhousingnews.com/2018/12/03/senior-living-providers-develop-smarter-pot-policies-legalization-continues/ [hereinafter SENIOR HOUSING NEWS]

66. Hu, *supra* note 1.

67. *Id.*

68. *See* SENIOR HOUSING NEWS, *supra* note 65; Samantha J. Gross, *If you need medical marijuana, you better not be in a Florida nursing home or ALF*, MIAMI HERALD, https://www.miamiherald.com/news/health-care/article227395904.html (last updated Jan. 6, 2020, 3:30 PM).

69. *Id.*

70. *Id.*

"don't ask, don't tell" policy regarding usage, but this can open up the door to a variety of safety concerns for residents who may need help maintaining a medical treatment regimen.[71]

One successful leading example, frequently cited by researchers, is Hebrew Home nursing home in New York.[72] The nursing facility promotes their own established medical marijuana policy that complies with existing state and federal laws.[73] Under the program, residents and their families are notified of the ability to use medical marijuana in the facility to help with certain medical conditions, including pain, seizures, PTSD, Huntington's, HIV/AIDS, Parkinson's, and Multiple Sclerosis.[74] Residents who choose to partake in the program must be able to legally obtain and administer the drug themselves, which requires a medical marijuana recommendation from a doctor.[75] They must also obtain the drug from a state-certified dispensary and keep their marijuana in a lockbox, which is provided by the facility.[76] The facility does not allow smoking on the premises, so administration must be in the form of a capsule, drops, or other smokeless method.[77] If the resident is unable to administer their medical marijuana themselves, they can designate a caregiver to administer it for them.[78] The chosen caregiver must register with the New York Department of Health under state law.[79] These qualifications are among the many requirements to use marijuana under a system like Hebrew Home's.[80]

Other health care facilities facing similar problems have adopted similar policies.[81] For patients using medical marijuana on its premises, HealthQuest, a New York based hospital system, requires the same

71. Hu, *supra* note 1.

72. *See generally* Zachary J. Palace & Daniel A. Reingold, *Medical Cannabis in the Skilled Nursing Facility: A Novel Approach to Improving Symptom Management and Quality of Life*, 20 J. AM. MED. DIRECTORS ASS'N 94, 94–98 (2019).

73. *Id.* at 94–95.

74. *Id.* at 96.

75. *Id.* at 95.

76. *Id.* at 95–97.

77. *Id.* at 97.

78. *Id.*

79. Carlo Calma, *How SNFs Can Reduce the Stigma Around Legal Marijuana*, SKILLED NURSING NEWS (Jan. 17, 2018), https://skillednursingnews.com/2018/01/snfs-can-reduce-stigma-medical-marijuana/.

80. Palace & Reingold, *supra* note 72, at 95–97.

81. Calma, *supra* note 79; Gavin Souter, *State Cannabis Laws Present Medical Malpractice Conundrum*, BUS. INS. (Oct. 25, 2019), https://www.businessinsurance.com/article/20191025/NEWS06/912331350/State-cannabis-laws-present-medical-malpractice-conundrum.

administration and storage procedures as Hebrew Home.[82] Moreover, the hospital system instructs their physicians to record medical marijuana use in patient care charts, even though they do not administer the drugs themselves.[83]

Under Hebrew Home's program, the nursing home is aware of and able to monitor residents' marijuana use without providing, storing, or actually administering it to their residents.[84] The nursing home's lack of involvement in administering the drug allows the facility to stay compliant with federal law and to continue receiving Medicare and Medicaid funding while operating the program.[85] Residents of Hebrew Home who have participated in the program have reported improvements in health and well-being.[86]

One of the downsides of the current program at Hebrew Home is that residents need to have certain abilities and qualifications in order to partake in and benefit from the program. If the resident is not able to administer the drug themselves or designate a caregiver to administer it, the staff are unable to aid the resident in administration without violating federal law.[87] Furthermore, while personal administration may work for some seniors, concerns remain for the many who require assistance to keep track of and take medication daily.[88]

Finally, as Medicare does not cover marijuana treatment, residents need to have the financial capability to cover their own costs.[89] This has limited the program to a subsection of seniors as opposed to solving the wider problem.[90] State legislators do have some ability to lower costs through legislation by structuring the market to increase supply and capping costs on things like medical marijuana registration

82. Souter, *supra* note 81.
83. *Id.*
84. Palace & Reingold, *supra* note 72 at 94–95.
85. *Id.* at 94.
86. *Id.* at 97.
87. *Id.*
88. Gross, *supra* note 68.
89. Palace & Reingold, *supra* note 72, at 97.
90. *Id.* ("To date, a total of 10 residents have participated in our facility's program (Table 1). Seven residents have been receiving medical cannabis for more than 1 year. Residents range in age from 62 to 100. Six residents qualified because of a diagnosis of chronic pain, 2 residents qualified because of Parkinson's disease, and 1 patient as a result of both diagnoses. One resident is participating in the program for seizure disorder. Three residents have since withdrawn from the program because of financial constraints.").

fees.[91] But gaps in legislation and the overall patchwork of state laws governing marijuana usage make financial relief inconsistent.[92] Thus, while prices in legalizing states may drop,[93] financing treatment is still a burden for many.[94]

2. LIABILITY CONCERNS

Nursing homes also face liability concerns regarding marijuana use. Nursing homes and other long-term care facilities are governed by the Nursing Home Reform Act, which was adopted in 1987 to establish federal regulation of nursing facilities and to ensure quality care.[95] Under the Act, long-term care facility residents have established rights that must be accommodated, such as "[t]he right to freedom from abuse, mistreatment, and neglect" and "[t]he right to accommodation of medical, physical, psychological, and social needs."[96] The law also established a survey program allowing states to review facility compliance under federal guidelines.[97] If a surveyed facility is found to be noncompliant, an enforcement process begins, and the nursing home is subject to a variety of sanctions, including state monitoring, civil monetary penalties, denial of payment for all new Medicare or Medicaid admissions, denial of payment for all Medicaid or Medicare patients, temporary management, and termination of the provider agreement.[98] Consequently, long-term facilities have a large interest in

91. Rosalie Liccardo Pacula & Rosanna Smart, *Medical Marijuana and Marijuana Legalization*, 13 ANN. REV. CLINICAL PSYCHOL. 397, 401 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6358421/pdf/nihms-1006453.pdf (discussing how states that legalize may influence changes in product availability, variety, production methods, or costs that reduce prices).

92. *See id.*

93. Keith Humphreys, *How legalization caused the price of marijuana to collapse*, WASH. POST (Sept. 5. 2017, 7:42 AM), https://www.washingtonpost.com/news/wonk/wp/2017/09/05/how-legalization-caused-the-price-of-marijuana-to-collapse/ (using Washington state data to show a 67% decrease in marijuana prices in the 3 years since legalization as of 2017).

94. *See* Palace & Reingold, *supra* note 72, at 97 (emphasizing that several participants wanted use the treatment, but had to drop out of the program due to financial burden).

95. Nursing Home Reform Act, 42 C.F.R. § 483 (2016) (establishing the "Bill of Rights" of nursing home residents); Martin Klauber & Bernadette Wright, *The 1987 Nursing Home Reform Act*, AARP (Feb. 2001), https://www.aarp.org/home-garden/livable-communities/info-2001/the_1987_nursing_home_reform_act.html.

96. 42 C.F.R. § 483.12 (2016).

97. Klauber & Wright, *supra* note 95.

98. *Id.*

protecting residents' individual rights and freedoms while keeping them safe to avoid liability.

Nursing homes allowing substance use may open themselves up to liability due to the risks involved and the facility's duty to provide safety and care.[99] Liability for issues due to marijuana consumption may be somewhat comparable to that of alcohol use due to the unpredictable nature of substance use generally.[100] Some potential concerns include residents being more susceptible to falls or accidents, residents sharing the drugs with other residents, and residents experiencing adverse drug interactions between marijuana and other medicines they may be taking. Yet, one concern that differs from alcohol policy is the lack of evidence-based guidance on appropriate use, as the effects of marijuana have not been studied as extensively.[101] Still, marijuana's potential medical benefits differentiate it from alcohol, and may make it worth the risk for care providers to consider allowing marijuana use as part of a treatment plan.[102]

The Society for Post-Acute and Long-Term Care Medicine advocates for patient-centered decision-making, which involves collaboration between the resident, their clinician, and facility administrators to determine the best course of action.[103] Even if physicians, residents, and the facility agree that marijuana is the best method of care, policy formation requires "some form of care planning to make sure the resident doesn't get hurt—an elderly patient can have addiction issues, and they both interfere with medication or care."[104] While the Hebrew Home's policy expands options for those wanting to use medical marijuana in a nursing facility, it may still open Hebrew Home up to more risks than if the drug was not allowed at all because of Hebrew Home's responsibility to provide safety and care under the Nursing Home Reform Act.[105]

99. *Id.*
100. SENIOR HOUSING NEWS, *supra* note 65.
101. AMDA, *Use of Marijuana in Nursing Homes: Resolution and Position Statements* (Nov. 7, 2019), https://paltc.org/amda-white-papers-and-resolution-position-statements/use-marijuana-nursing-homes.
102. *Id.*
103. *Id.* (arguing that factors to be taken into account by residents and families when making decisions include applicable state law, dispensing, storage, disposal, documentation, and prevention of diversion of marijuana).
104. *Id.*
105. *See* 42 C.F.R. § 483 (2016).

In determining liability, should problems arise, more conservative policies maintain the ability to use the drug while shifting liability to a third-party provider as opposed to the nursing facility itself.[106] The Washington Health Care Association, which represents various assisted-living and skilled nursing facilities, released a sample policy to its members which does just that.[107] Under the policy, medical marijuana patients must obtain a "designated provider" to handle the administration and storage of the patient's doses.[108] Facility staff are not allowed to be involved beyond approving program participation and the outside provider must ensure that the drug is removed after distribution.[109] Using this system, there is less risk of another patient stealing the drug or of the licensed patient misusing it, further reducing the likelihood of liability-causing accidents.[110]

III. Analysis

A. Outlook on Federal Legalization

Legalizing marijuana at the federal level would be the most straightforward solution to closing loopholes like those described above, and the movement is gaining momentum in Congress.[111] The Ending Federal Marijuana Prohibition Act of 2019 was introduced in the House of Representatives in March 2019, following various previously introduced versions.[112] The bill, if passed, would remove marijuana from the CSA and would eliminate penalties for its use and distribution.[113] Similarly to its prior versions, however, the bill has yet to get past the House.[114] Another bill, the Marijuana Opportunity Reinvestment and Expungement Act ("MORE Act") was introduced in

106. See WASH. HEALTH CARE ASS'N, *Medical Marijuana*, http://www.whca.org/files/2013/04/sample-medical-marijuana-policy.pdf (last visited Sept. 29, 2020).
107. *Id.*
108. *Id.*
109. *Id.*
110. *See* Palace & Reingold, *supra* note 72, at 97.
111. *See* Angelica LaVito, *US lawmakers look to legalize pot in 'historic' marijuana reform hearing*, CNBC, https://www.cnbc.com/2019/07/10/us-lawmakers-look-to-legalize-pot-in-historic-marijuana-reform-hearing.html (last updated July 11, 2019, 9:54 AM).
112. Ending Federal Marijuana Prohibition Act of 2019, H.R. 1588, 116th Cong. (2019).
113. *Id.*
114. *Id.*

the House in July 2019.[115] While the MORE Act would also remove marijuana from the CSA, it is considered more comprehensive than previous legislation.[116] Its provisions seek not only to decriminalize the marijuana industry, but also to incentivize the creation of a legalized marijuana industry.[117] Furthermore, the bill specifically covers federal public benefits such as housing, stating that "[n]o person may be denied any Federal public benefit. . . on the basis of any use or possession of cannabis, or on the basis of a conviction or adjudication of juvenile delinquency for a cannabis offense, by that person."[118]

Another approach to the issue has been to match federal legalization to state legalization.[119] The Strengthening the Tenth Amendment Through Entrusting States ("STATES") Act, introduced in 2018 and 2019, would require federal agencies to recognize state-level marijuana laws.[120] Thus, instead of federalizing marijuana for all states, the Act allows federal recognition of state marijuana laws.[121] Through the STATES Act, those complying with their state's laws regarding legalized marijuana would no longer be in violation of the CSA.[122] The Act addresses the Tenth-Amendment-based argument that federal preemption in this area hurts states' ability to enforce their own marijuana laws.[123]

Even with growing national support for legalization, Congress is conflicted in dealing with the issue.[124] The opposition, usually conservatives, worry that fully legalizing recreational marijuana will

115. Marijuana Opportunity Reinvestment and Expungement Act of 2019, H.R.3884. 116th Cong. (2019).

116. Press Release, Sen. Kamala D. Harris & Rep. Jerrold Nadler, Harris, Nadler Introduce Comprehensive Marijuana Reform Legislation (July 23, 2019), https://www.harris.senate.gov/news/press-releases/harris-nadler-introduce-comprehensive-marijuana-reform-legislation.

117. *Id.*

118. Marijuana Opportunity Reinvestment and Expungement Act of 2019, H.R. 3884 § 8(a), 116th Cong. (2019).

119. *See* Press Release, Sen. Elizabeth Warren & Sen. Cory Gardner, The STATES Act https://www.warren.senate.gov/imo/media/doc/STATES%20Act%20One%20Pager.pdf (last visited Sept. 29, 2020).

120. *Id.*

121. *See id.*

122. *See id.*

123. *Id.*

124. Paul Demko & Natalie Fertig, *Why the most pro-marijuana Congress ever won't deal with weed*, POLITICO (Sept. 9, 2019, 5:01 AM), https://www.politico.com/story/2019/09/09/marijuana-congress-1712973.

make the drug too accessible.[125] With accessibility, there are concerns about overuse and misuse.[126] There are also arguments that legalization will give too much power to for-profit industry groups, similar to Big Tobacco's influence on government.[127] Even those in support of legalization cannot reach a consensus on how radical to be in implementation, with various bills receiving differing levels of support over the years.[128] Thus, it is important to look at how smaller-scale, localized remedies could be implemented to help seniors living in federally subsidized housing in both independent and dependent living situations.[129]

B. Outlook on Federally Subsidized Housing for Independent Seniors

With federal law classifying marijuana as an illegal substance, HUD's subsidiary PHAs must decide how to combat discrepancies between their relevant state laws and HUD guidelines.[130] Many PHAs don't have formal policies against marijuana specifically and instead include it alongside other illegal substances.[131] PHAs could claim to overcome federal preemption and apply state law based on the nature of state drug enforcement and control, thus allowing marijuana to be used in accordance with state guidelines.[132]

Some state representatives have been trying to introduce legislation granting an exception for residents of federally subsidized

125. German Lopez, *The case against marijuana legalization*, VOX, https://www.vox.com/identities/2018/8/20/17938414/big-marijuana-legalization-corporations-advertising (last updated Nov. 14, 2018, 4:14 PM) (arguing that while many opponents agree there should be reforms, legalization "goes too far").

126. *Id*. (comparing that in Colorado, the top 29.9 percent heaviest pot users made up 87.1 percent of demand for the drug. Therefore, the marijuana industry depends on heavy users and those who do not use the drug in moderation).

127. *Id.*

128. Demko & Fertig, *supra* note 124.

129. *See generally* U.S. GOV'T ACCOUNTABILITY OFF. GAO-05-174, ELDERLY HOUSING: FEDERAL HOUSING PROGRAMS THAT OFFER ASSISTANCE FOR THE ELDERLY (Feb. 2005), https://www.gao.gov/new.items/d05174.pdf.

130. *See* NEWS TRIB., *Housing Authority considering medical marijuana use in public housing units* (Sept. 25, 2019, 12:05 AM), http://www.newstribune.com/news/local/story/2019/sep/25/housing-authority-considering-medical-marijuana-use-in-public-housing-units/796714/.

131. *Id.*

132. Sarah Simmons, *Medical Marijuana Use in Federally Subsidized Housing: The Argument for Overcoming Federal Preemption*, 48 UNIV. BALTIMORE L. REV. 117, 133 (2018) available at https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=2045&context=ublr.

housing to use legal marijuana in their residences.[133] Congress, however, has not been particularly active in advancing solutions in this area.[134] Congresswoman Eleanor Holmes Norton, of D.C., has twice introduced a bill to permit marijuana use in federally assisted housing.[135] The bill, known as the Marijuana in Federally Assisted Housing Parity Act of 2019, would allow marijuana use in public and Section 8 housing in compliance with state marijuana laws where the property is located.[136] In advocating for the bill, Congresswoman Norton reasoned that "[i]ndividuals living in federally funded housing should not fear eviction simply for treating their medical conditions or for seeking a substance legal in their state."[137] Additionally, the Congresswoman touched on the idea of the drug's growing legality at the state level, arguing that the disparities between federal and state legalization is a states' rights issue.[138] The bill, however, has yet to gain any steam since introduction.[139]

One solution might be found in the Americans with Disabilities Act ("ADA") and the Fair Housing Act ("FHA").[140] The ADA and FHA require that public housing providers make their facilities accessible to and usable by individuals with disabilities.[141] Accessibility is obtained through resident requests for reasonable accommodations.[142] The accommodation itself is a "change, exception, or adjustment to a rule, policy, practice, or service that may be necessary for a person with disabilities to have an equal opportunity to use and enjoy a

133. Ockerman, *supra* note 2.

134. *See* Marijuana in Federally Assisted Housing Parity Act of 2019, H.R. 2338, 116th Cong. (2019).

135. *Id.*

136. *Id.*

137. Press Release, Congresswoman Eleanor Holmes Norton, Norton Introduces Bill to Permit Marijuana Use in Public Housing, Will Speak at National Cannabis Festival Saturday (Apr. 18, 2019), https://norton.house.gov/media-center/press-releases/norton-introduces-bill-to-permit-marijuana-use-in-public-housing-will (As of March 2020, the Marijuana in Federally Assisted Housing Parity Act of 2019 or any other similar legislation had still not advanced in Congress).

138. *Id.*

139. *See* Marijuana in Federally Assisted Housing Parity Act of 2019, H.R. 2338, 116th Cong. (2019).

140. Marla J. Diaz, *Understanding and Contrasting the ADA and FHA*, WHITEFORD TAYLOR PRESTON LLP (Apr. 8, 2014), https://www.wtplaw.com/news-events/understanding-and-contrasting-the-ada-and-fha.

141. *Id.*

142. *Id.*

dwelling."[143] Accommodations allow residents to be approved for different treatments or features based on the existence of a disability.

As of now, medical marijuana is not considered to be a reasonable accommodation, as the ADA states that "a qualified individual with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use."[144] The ADA defines which drugs constitute "illegal" use based on the CSA's schedules of controlled substances, which include marijuana.[145] Thus, courts have historically interpreted the ADA to mean the use of a federally illegal drug such as marijuana is *per se* unreasonable as an accommodation in housing based on federal legislation.[146] HUD has also addressed this issue in their 2011 memorandum on the medical use of marijuana in public and assisted housing, saying that while PHAs cannot be charged with enforcing federal criminal laws, requiring them to condone violations of federal law would undermine their operations.[147] To resolve this issue on a national level using the ADA, marijuana would either need to be declassified as a Schedule I Drug under the CSA, so users could be qualified as individuals not using "illegal drugs," or an exception to the ADA would need to be made to uniquely distinguish accommodations for marijuana and classify those accommodations as "reasonable."[148]

A growing trend in state interpretation of the ADA provides a possible comparison for housing residents.[149] Employment discrimination cases for employees fired over disclosure of their marijuana use are another large class of ADA and marijuana-related lawsuits.[150] Fewer than half of the states with medical marijuana laws

143. *Reasonable Accommodations and Modifications*, U.S. DEP'T OF HOUS. AND URBAN DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/reasonable_accommodations_and_modifications (last visited Sept. 27, 2019).

144. 42 U.S.C. § 12114(a) (2018).

145. 21 U.S.C. § 812 (2018).

146. Scott M. Badami, *Medical Marijuana, Reasonable Accommodation Requests, and the Fair Housing Act*, FOX ROTHSCHILD LLP (Feb. 6, 2018), https://fairhousing.foxrothschild.com/2018/02/articles/disability/medical-marijuana-reasonable-accommodation-requests-and-the-fair-housing-act/.

147. Memorandum from the U.S. Dept. of Hous. and Urban Dev., *supra* note 43.

148. Marijuana Opportunity Reinvestment and Expungement Act of 2019, H.R.3884. 116th Cong. (2019); Marijuana in Federally Assisted Housing Parity Act of 2019, H.R. 2338, 116th Cong. (2019).

149. *See* Candice Norwood, *Can Medical Marijuana Get You Fired? Depends on the State,* GOVERNING (May 15, 2019), https://www.governing.com/topics/mgmt/gov-medical-marijuana-legalization-workplace-policies.html.

150. *Id.*

protect patients who have a positive cannabis test from being fired or rejected for a job.[151] Also, patients often do not have any protection from being fired even if they are registered on a medical marijuana database.[152] Courts have traditionally sided with employers, citing the same reasoning examined above.[153]

Yet, in recent years, courts have shifted to reasoning that favors employees.[154] A Delaware court reasoned that the CSA "does not make it illegal to employ someone who uses marijuana, nor does it purport to regulate employment matters within this context."[155] In a Massachusetts case in 2017, the plaintiff, a new employee, was terminated after revealing to her employer that she was a licensed medical marijuana user in compliance with the Massachusetts medical marijuana statute.[156] She sued, alleging that all she needed was a reasonable accommodation to do the job.[157] The employer argued that such an accommodation was *per se* unreasonable as it violated federal law.[158] The Massachusetts court ruled that the plaintiff qualified for a reasonable accommodation as she met the burden of establishing that marijuana was the most effective treatment method that would not affect her work.[159] To address the employer's argument, the court stated: the fact that the employee's possession of medical marijuana is in violation of federal law does not make it *per se* unreasonable as an accommodation.[160] The only person at risk of federal criminal prosecution for her possession of medical marijuana is the employee. An employer would not be in joint possession of medical marijuana or

151. *Id.*
152. *Id.*
153. *Id.*
154. Robert M. Kline, *Courts are Siding with Employees Who Use Medical Marijuana*, NAT'L L. REV., (June 19, 2019), https://www.natlawreview.com/article/courts-are-siding-employees-who-use-medical-marijuana.
155. Chance v. Kraft Heinz Foods Co., 2018 WL 6655670, at *3 (Del. Super. Ct. Dec. 17, 2018).
156. Barbuto v. Advantage Sales & Mktg., LLC, 78 N.E. 3d 37, 41 (Mass. 2017).
157. *Id.* at 43.
158. *Id.* at 45.
159. *Id.* (explaining when plaintiffs met the burden of proving the effectiveness of marijuana as a treatment option and lack of other equally effective remedies, the burden shifted to the defendant to prove undue hardship to the employer's business that would justify refusal to make exceptions to established policy and accommodate).
160. *Id.* at 46.

aid and abet its possession simply by permitting an employee to continue his or her off-site use.[161]

This context may not apply exactly to ADA claims and their potential application to housing, as the usage in the employment context can be offsite, whereas a reasonable accommodation for housing could very well require usage onsite.[162] Nevertheless, these views offer promise. Such a shift in viewing accommodation law, as well as further deference to state law in these matters could signal promise in how the CSA is applied in discrimination cases for those using medical marijuana.[163]

As more states pass bills legalizing the drug, more questions about equal rights of use for those in federally subsidized housing have arisen.[164] Many advocate groups argue that restrictions on use of the drug in their homes prevents people living in subsidized housing from accessing their rights.[165] Since most state marijuana legalization laws prohibit people from lighting up in public places and public housing residents are not allowed to do so in their homes, they are essentially not allowed to access legalized marijuana.[166] Further, since people living in subsidized housing are poor and the majority are people of color, arguments on equal protection surrounding race and class come into play.[167] But courts have been reluctant to entertain these sorts of arguments, as those living in federally subsidized housing are bound to different standards because they receive federal subsidies, prompting federal preemption under the United States Constitution.[168] State laws also have strong public policy interests to consider, such as prohibiting smoking in public areas, further making fairness and equal protection arguments difficult claims to raise on this issue.[169]

161. *Id.*

162. *Id.*

163. *See id.*; Chance v. Kraft Heinz Foods Co., 2018 WL 6655670, at *3 (Del. Super. Ct. Dec. 17, 2018).

164. Ockerman, *supra* note 2; Solis, *supra* note 58.

165. Carlos Ballesteros, *No pot use allowed in public housing even though it's legal in Illinois, CHA says*, CHICAGO SUN-TIMES (Nov. 4, 2019, 8:10 PM), https://chicago.suntimes.com/cannabis/2019/11/4/20948374/chicago-housing-authority-recreational-marijuana-legalization-use-banned.

166. *See Illinois Weed Legalization Guide*, ABC7 NEWS, https://abc7chicago.com/politics/weed-legalization-guide/5337346/ (last updated Jan. 8, 2020).

167. Ballesteros, *supra* note 165.

168. U.S. Const. art. VI, cl. 2.

169. *See* Cynthia Hallett, *Secondhand marijuana smoke is not just a growing nuisance, it's dangerous*, NBC NEWS (May 20, 2019, 3:49 AM), https://www.nbcnews.com/think/opinion/secondhand-marijuana-smoke-not-just-growing-nuisance-it-s-

As growing homelessness due to drug evictions becomes a concern, it is unclear how or if local PHAs will adapt their policies to become more lenient towards marijuana users.[170] It is more clear, however, that both HUD and courts have put the power in PHA's hands to control tenant usage through their discretion on whether or not to evict.[171] Even so, PHAs face tough choices in trying to clarify ambiguous policy. PHAs could potentially "pre-approve" residents for marijuana use in their homes, using criteria such as the CHA's "mitigating factors" to decide who is able to use the drug without penalty.[172] This would allow residents to know exactly how the PHA is going to respond to their use and ultimately, whether they face eviction because of it.[173] Federally, however, this solution may read like PHAs enabling the violation of federal law, as opposed to just not enforcing it.[174] Thus, it seems like PHAs may be stuck with weakening enforcement and providing ambiguous standards until a legislative solution is passed.[175] Residents, in turn, are confronted with anxiety and uncertainty over what the rules are and whether or not they will be applied.[176]

C. Outlook on Dependent Housing for Seniors

1. FEDERAL FUNDING CONCERNS

Federally funded senior housing providers have options when formulating lawful policies that best meet the needs of residents.[177] The system set up by the Hebrew Home seems to have solved Medicare and Medicaid funding concerns because the facility does not play a role in

dangerous-ncna1007161 (explaining the argument that as of 2019, 266 cities and counties and 11 states prohibit smoking and vaping of recreational and medical marijuana in at least one of the following: non-hospitality workplaces, restaurants, bars or gambling facilities. But these comprehensive smoke-free protections are at risk, as marijuana proponents and lobbyists pressure states and cities to make exemptions for marijuana smoking).

170. Badami, *supra* note 146.

171. *Id.*

172. Jason Ketterer, *In Light of Legalization, Chicago Housing Authority Revises Policy on Cannabis Use*, PARADISE FOUND (Jan. 25, 2020), https://paradisefoundor.com/in-light-of-legalization-chicago-housing-authority-revises-policy-on-cannabis-use/.

173. Memorandum from the U.S. Dep't of Hous. and Urban Dev., *supra* note 43.

174. *Id.* at 8.

175. *Id.*

176. *See* Solis, *supra* note 58.

177. SENIOR HOUSING NEWS, *supra* note 65.

prescribing, purchasing, or administering marijuana.[178] Law enforcement has been quiet thus far on the issue.[179] Even in adopting policies where marijuana usage complies with existing federal and state law, there are still other legal considerations for housing providers in implementing marijuana usage policies.[180]

2. LIABILITY CONCERNS

a. Comparison to Other Existing Policies

For facilities wary of the extra liability that comes with having "high" residents, looking at pre-existing alcohol policies may be a helpful comparison.[181] Alcohol affects seniors differently than younger people, producing a greater chance of over-intoxication.[182] In addition, seniors often take medications that may create dangerous reactions when mixed with alcohol.[183] Seniors are often more at risk for falls and disorientation, which could be further exacerbated by alcohol.[184] Despite less extensive research, many of the same liabilities surrounding risk of injury, accidents, and harmful drug interactions have been shown in older marijuana users.[185]

While there is no consensus among elderly care facilities as to the ideal alcohol policy, there are four types of potential policies that a facility may choose to adopt.[186] First, many facilities don't allow alcohol at all, and second, some only allow alcohol if residents provide it and serve it to themselves.[187] Third, some policies require a doctor's approval before the resident may be allowed to have and consume alcohol.[188] Fourth, and most liberally, some facilities serve residents

178. Howard Gleckman, *Psychedelics and Seniors: Can Drugs Such as Marijuana and Psilocybin Improve Their Quality of Life?*, FORBES (Sept. 18, 2019, 12:48 PM), https://www.forbes.com/sites/howardgleckman/2019/09/18/psychedelics-and-seniors-can-drugs-such-as-marijuana-and-psilocybin-improve-their-quality-of-life/#83190276f999.

179. SENIOR HOUSING NEWS, *supra* note 65.

180. *Id.*

181. *See* Jeff Anderson, *Should Assisted Living Communities Serve Alcohol?*, ASSISTEDLIVING.COM (Aug. 10, 2013), https://www.assistedliving.com/assisted-living-facilities-serving-alcohol/.

182. *Id.*

183. *Id.*

184. *Id.*

185. Lloyd & Striley, *supra* note 10 at 9–11.

186. Anderson, *supra* note 181.

187. *Id.*

188. *Id.*

alcohol at social gatherings.[189] Since marijuana use raises many of the same risks as alcohol, facilities could create a marijuana policy that matches their alcohol policy, since the facility is already presumably knowledgeable about and prepared to handle liability surrounding resident alcohol use.

To address concerns about the deficiency of research focused on long-term marijuana use, as voiced by the Society for Post-Acute and Long-Term Care Medicine, facilities who want to permit alcohol and marijuana use could work with their residents' doctors to limit the frequency and dosage at which a resident is allowed to consume marijuana.[190] The facility could also limit use to residents with certain conditions that would provide limited liability; similar to how at Hebrew Home, residents must qualify to be a part of the program and show they are suffering from a specified, listed condition to take part in said program.[191]

b. Comparison to Other Existing Liabilities

A constraint on the ability of staff to control marijuana administration also protects nursing homes from other kinds of potential lawsuits, while preventing resident rights from being abused.[192] Particularly, the risks surrounding the abuse of medication would be limited, unlike the case with antipsychotic drugs.[193] A 2018 report from the Human Rights Watch found that "[i]n an average week, nursing facilities in the United States administer antipsychotic drugs to over 179,000 people who do not have diagnoses for which the drugs are approved."[194] The drugs are often used to aid agitated or unruly patients and control behavior.[195] Nursing facilities have been found to administer antipsychotic drugs without free and informed consent,

189. *Id.*

190. SOC'Y POST-ACUTE & LONG-TERM CARE MED., *Use of Marijuana in Nursing Homes* (Nov. 7, 2019), https://paltc.org/amda-white-papers-and-resolution-position-statements/use-marijuana-nursing-homes.

191. Palace & Reingold, *supra* note 72, at 95–97.

192. *See* Hannah Flamm, *"They Want Docile": How Nursing Homes in the United States Overmedicate People with Dementia*, HUM. RIGHTS WATCH (Feb. 5, 2018), https://www.hrw.org/report/2018/02/05/they-want-docile/how-nursing-homes-united-states-overmedicate-people-dementia.

193. *US: Nursing Homes Misuse Drugs to Control Residents: Government Should Enforce Rules to Stop Abuse*, HUM. RIGHTS WATCH (Feb. 5, 2018, 3:01 AM), https://www.hrw.org/news/2018/02/05/us-nursing-homes-misuse-drugs-control-residents.

194. Flamm, *supra* note 192.

195. *Id.*

while the families of those being treated are often unaware or misinformed about the practice.[196] Moreover, this practice is often not met with sanctions from the government or enforced human rights protections.[197] The Human Rights Watch found, "[t]he use of antipsychotic drugs without permission from the resident or their proxy is common."[198] Federal regulations require nursing facilities to inform residents of treatment options and to give them the right to refuse treatment.[199] Some state laws require informed consent for these medications.[200] Yet, staff at many facilities openly admitted they do not even try to follow these rules.[201] Nursing homes have been able to avoid sanctions by claiming that "no actual harm" was done or by citing behavior to justify the use of antipsychotics, even if they are not the best treatment option.[202]

Should marijuana be allowed as a treatment in these types of facilities, there is a risk that the drug would be used similarly to antipsychotics to calm agitated residents—outside the parameters of their treatment plans. But while nursing facilities have more authority to administer antipsychotic drugs, this would not be the case for marijuana under a plan like Hebrew Home's.[203] Using a strict ban on staff administration, facilities would have no justification for the use of marijuana by staff, or else they put themselves at risk for losing federal funding.[204] Such a shift would protect both parties. Having a policy against staff administration would protect nursing homes from liability should abuse allegations arise, since staff would have proof that they are not allowed to administer the drugs at all, let alone outside the guidelines of a treatment plan.[205] On the other hand, residents would have a lower risk of the drug being used against them, since they would be in charge of keeping and administering it themselves.[206]

196. *Id.* (explaining that not only are residents often unaware of the practice, but that nursing home abuse often takes place because of a lack of resources for recourse. "Many depend entirely on the institution's good faith and have no realistic avenues to help or safety when that good faith is violated.").
197. *Id.*
198. HUM. RIGHTS WATCH, *supra* note 193.
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *See* Palace & Reingold, *supra* note 72, at 94.
204. *Id.*
205. *See* HUM. RIGHTS WATCH, *supra* note 193; Flamm, *supra* note 192.
206. Palace & Reingold, *supra* note 72, at 97

c. Determining Who is at Fault

Determining who exactly is at fault for potential mishaps, particularly for medical marijuana patients, can be difficult.[207] Courts have recognized that doctors themselves are not allowed to prescribe medical marijuana as a solution, but can recommend it to a patient suffering from a condition, according to each state's medical marijuana laws.[208] *Conant v. Walters*, the Ninth Circuit case from which this principle was widely recognized, used a First Amendment argument to justify absolving recommending doctors from liability.[209] This argument affirmed that doctors are able to use their right to free speech by giving recommendations for medical marijuana to patients.[210] Thus, this "loophole" often prevents doctors from being liable for any mishaps caused by the drug, since the doctor only "recommended it" and did not "prescribe it."[211] Senior care providers therefore have to establish how liability for marijuana use would be divided between the resident, caregiver, or third party administering the drug, and the facility in charge of caring for the individual themselves.[212]

Senior living providers can and should work with legal counsel to develop their policies. Chateau, a retirement community based in Washington state, works with Lane Powell PC, a Seattle-based firm, to continually develop their marijuana-use policy.[213] The firm recommends using negotiated risk agreements to protect housing facilities while allowing those at risk of accidents to partake in marijuana use.[214] Negotiated risk agreements serve as both documentation of an agreed-upon treatment plan and a way for nursing homes to reduce liability by showing that the resident understood his or her risks in the facility.[215]

207. *See* SENIOR HOUSING NEWS, *supra* note 65.
208. Conant v. Walters, 309 F.3d 629, 635 (9th Cir. 2002).
209. *Id.* at 639.
210. *Id.* at 636 (arguing that First Amendment interests of openness and transparency are essential to the core of the doctor-patient relationship).
211. *Id.* at 639 (explaining that free speech allows doctors to be able to make recommendations without added liability).
212. *See* SENIOR HOUSING NEWS, *supra* note 65.
213. *Id.*
214. *Id.*
215. Heather Brown, *Negotiated Risk Agreements: What are They and Why Do They Matter?*, PCALIC (Aug. 25, 2017), https://www.pcalic.com/negotiated-risk-agreements-matter/ (explaining the need for negotiated risk agreements when "the new care needs may also be outside the scope of the typical services offered by an adult residential care facility. Any changes in health or care needs open doors to different risks including falls, skin breakdown, wandering, etc.").

For residents with memory and confusion problems, who may have issues administering the drug or making decisions about administering it, power of attorney can be utilized to make a decision about whether to partake in marijuana-based treatment.[216] Power of attorney can be utilized similarly to how it is used to deal with other medical problems and treatments.[217] Many state medical marijuana program registration forms already account for the use of power of attorney in cases where it is needed.[218] Accordingly, these forms require legal documents establishing power of attorney to be submitted for the registration card to be issued.[219] In situations where an individual has power of attorney over a senior living resident, the individual holding power of attorney would represent the resident when entering into risk agreements[220] and would presumably bear the burden of risk the resident themselves would face for problems or accidents that cannot be attributed to the care facility.

If private senior living facilities like nursing homes want to offer the benefit of a marijuana treatment program, one of the most important ways of lessening liability is managing awareness of who is using, how they are using, and when they are using.[221] Awareness is important for preventing falls or adverse drug reactions.[222] Documentation is equally as important to preventing liability.[223] Though a facility cannot absolve all risks, when a nursing home has a clear policy, documentation proving their adherence to that policy, and documentation proving that a negotiated risk agreement is in place, it is in a better position than that of a "don't ask, don't tell" situation.[224]

216. *Id.*
217. Flamm, *supra* note 192.
218. *See* Application for Registry Identification Card, MICH. MARIJUANA REGULATORY AGENCY, https://www.michigan.gov/documents/lara/MMMP_Application_Pkt_601712_7.pdf (last visited Sept. 27, 2020); Medical Cannabis Program, N.M. DEP'T OF HEALTH, https://nmhealth.org/publication/view/form/133/.
219. Application for Registry Identification Card, MICH. MARIJUANA REGULATORY AGENCY, https://www.michigan.gov/documents/lara/MMMP_Application_Pkt_601712_7.pdf (last visited Sept. 27, 2020); Medical Cannabis Program, N.M. DEP'T OF HEALTH, https://nmhealth.org/publication/view/form/133/.
220. SENIOR HOUSING NEWS, *supra* note 65. (explaining that individuals acting with power of attorney on behalf of someone else are presumed to be acting in good faith and are thus not liable themselves for the decisions they make, unless shown to be a decision not made in good faith.)
221. *Id.*
222. *Id.*
223. *Id.*
224. *See* Regan, *supra* note 31.

IV. Recommendation

Solutions should be crafted in both dependent and independent living contexts that allow for the creation of clear and predictable policy despite the absence of federal legalization. In the public housing context, solutions include the use of local PHA discretion or nationwide legislation providing an exception for public housing residents to use marijuana.[225] Nursing homes should use policies like Hebrew Home's.[226] Care facilities and state laws should prioritize increased access to methods that provide safe and manageable options for medical marijuana patients.

A. Public Housing and the Need for a Targeted Solution

Since HUD does not force PHAs to carry out mandatory evictions for marijuana users, instead leaving it up to the PHA's discretion,[227] PHAs should, at the very least, make medical marijuana available for use by those who have a medical marijuana card and take the drug by some "medicinal" method. PHAs should also use the discretion granted to them by HUD to lay out guidelines for use and offer more uniform, predictable protections for residents who wish to use the drug. PHAs could also offer incentives and protection to the private HCV landlords who decide to allow medical marijuana use and should lay out clear policies on the PHA's expectations for HCV landlords and voucher holders who wish to do so.

Marijuana-positive policies would benefit PHAs and landlords as they could potentially decrease evictions and the need to litigate against tenants who are using marijuana for medicinal purposes. While this does not solve the problem of those who disclose marijuana use while applying for subsidized housing, it would help current residents who rely on subsidized housing assistance, like John Flickner, to have an option rooted in clear policy that would allow them to enjoy their low-income housing without resorting to opioids or facing homelessness.[228]

In states where marijuana use has been legalized, either for medical or recreational reasons, the Marijuana in Federally Assisted Housing Parity Act would be a helpful solution regarding the problems

225. Memorandum from the U.S. Dept. of Hous. and Urban Dev., *supra* note 43.
226. *See* Palace & Reingold, *supra* note 72.
227. Memorandum from the U.S. Dept. of Hous. and Urban Dev, *supra* note 43.
228. Prohaska, *supra* note 4.

of ambiguity and inconsistency in PHA policies.[229] PHAs would be able to enact proactive policies, in compliance with state law, that would allow residents to have a clearer understanding of what is allowed—as opposed to wondering whether mitigating factors would weigh in their favor should allegations be made.[230] Access to unambiguous and steady policy would allow residents to make more informed decisions about using the drug as a treatment while promoting housing stability.

In the absence of more comprehensive legislative solutions, such as the MORE Act, exceptions specifically designed for public housing residents in states where the drug is legal are a smaller and potentially less controversial step. This would allow for fewer evictions in cases where the drug serves a medicinal purpose. This type of targeted solution could aid both applicants and current tenants without making marijuana completely legal for everyone, making it a potentially easier and less controversial solution for legislators to implement.

B. Nursing Homes and the Need for Expanded Access Through Policy and State Law

Federal legalization would also have a positive impact on the ability of nursing homes to offer and administer marijuana to patients as part of a treatment plan without these facilities worrying about termination of their Medicare and Medicaid funds.[231] In the absence of federal legislation, however, nursing homes should establish formal marijuana policies that allow them to work with both residents and physicians to be aware of which residents are using marijuana and how. This would eliminate many of the risks that arise with informal "don't ask, don't tell" policies.[232] Particularly as legalization becomes more popular across the country, formal policies will be needed to clarify what residents can and cannot do regarding marijuana. These policies need to be clearly explained to seniors and their families so the best decisions and treatment choices can be made.

229. Marijuana in Federally Assisted Housing Parity Act of 2019, H.R. 2338, 116th Cong. (2019).

230. *See* Olp, *supra* note 54; *see also Cannabis in CHA Resident Notice*, CHA, https://cha-assets.s3.us-east-2.amazonaws.com/s3fs-public/2020-01/Cannabis%20CHA%20Resident%20Notice%20FINAL%20FOR%20ISSUE%5B10%5D.pdf (last visited Sept. 27, 2020).

231. *See* Regan, *supra* note 31.

232. *See* Hu, *supra* note 1.

The most practical immediate solution would be one modeled after the policy used in places like Hebrew Home.[233] Nursing homes and assisted living facilities should be able to keep track of and monitor residents' use of the drug to maintain safety, but put residents themselves in charge of obtaining and storing the drug.[234] Ideally though, some of the shortcomings of Hebrew Home's policy, such as cost and accessibility for those who cannot self-administer, should be improved.

For residents who cannot or should not be administering the drug themselves, a third party could be called in to avoid liability on the part of the nursing home and to prevent staff from administering marijuana to residents.[235] This could be a caregiver, someone with power of attorney over the individual, or a contracted third party that is fit to administer the drug.[236] In drafting state marijuana legislation, options for the expansion of third-party administration should be considered.[237] For instance, as states already provide certification procedures for dispensaries, a state-wide certification system could be expanded to certify third-party administration companies, who could provide trained medical staff for those unable to administer treatment themselves.[238]

Undoubtedly, a third-party system may further increase costs for patients, which has already proven to be a major obstacle to accessing medical marijuana as treatment.[239] With federal illegality restricting the treatment's insurance coverage, cost will continue to be an issue.[240] Nursing homes themselves are unable to address this problem, so it would be up to state policymakers to address the issue and set limits on how much medical marijuana costs an individual.[241] In the absence of insurance coverage, fees and charges should be brought down to improve accessibility. Further, with formal policies increasing

233. *See* Palace & Reingold, *supra* note 72.
234. *Id.* at 95–97.
235. Hu, *supra* note 1.
236. *See id.*
237. *See* Palace & Reingold, *supra* note 72, at 97.
238. *Id.* at 95.
239. *Id.* at 97.
240. *See id.*
241. *See* Shefali Luthra, *After Medical Marijuana Legalized, Medicare Prescriptions Drop for Many Drugs*, NPR (July 6, 2016, 5:09 PM), https://www.npr.org/sections/health-shots/2016/07/06/484977159/after-medical-marijuana-legalized-medicare-prescriptions-drop-for-many-drugs.

awareness, safety, and usage, alongside increased legalization, costs may continue to lower on their own by the market.[242]

The separation between awareness and administration in nursing homes is vital to ensuring facilities still have access to Medicare and Medicaid funds. State medical marijuana laws are also vital in filling some of the gaps that nursing homes are not able to address because of their need to comply with federal law. These two elements are imperative for promoting the safety and full disclosure of residents' health treatment plans while minimizing risk of abuse by facilities. While formal policies like that of Hebrew Home are not a perfect solution, they are increasingly necessary, even without a federal nationwide solution.

V. Conclusion

As the legalization movement grows, the waters remain murky for seniors who wish to use legalized marijuana in their subsidized housing, even for those living in states where marijuana has been legalized. Furthermore, additional options are potentially on the horizon for those using the drug medically as opposed to recreationally. While several federal bills have been proposed offering broad solutions, there are promising smaller-scale options applying to both PHAs and nursing home facilities that could allow seniors living in these types of properties access to marijuana with or without federal legalization.

Some solutions can and should be put in place for those residing in Medicare or Medicaid-funded nursing facilities, such as the use of third-party administration or marijuana use through a self-maintained medical regimen. A plan such as the one currently implemented at Hebrew Home nursing facility in New York should serve as a model for other nursing home facilities seeking to introduce marijuana use as a treatment option without losing their Medicare and Medicaid funding. Though not perfect or even applicable to all residents, Hebrew Home's plan takes advantage of the facility's ability to monitor use and reduce risk while providing marijuana as a beneficial treatment option to a subset of residents.[243]

242. *See id.*; Humphreys, *supra* note 93.
243. Palace & Reingold, *supra* note 72, at 94–95.

Facilities that wish to be more involved with administering the drug face a tougher challenge, as this is usually seen to violate the requirements for receiving federal funding. No matter a facility's level of acceptance, facilities should have formal plans in place to minimize under-the-table use and extra liability that could be caused by a medically dependent individual's drug use. Risk agreements should be used so that both the facility and the individual are aware of the treatment plan and understand any potential consequences.

Regarding public housing, the simplest solution would be federal legalization through the declassification of marijuana as a Schedule-I substance in the CSA. In the absence of federal legalization, either adopting legislation to allow public housing residents access to medical marijuana or creating a more lenient PHA policy that allows residents to use the drug as an accommodation, at least for medicinal purposes, would be helpful in allowing seniors to use the drug to aid their ailments without worrying whether it will cost them their homes. Low-income seniors are already a particularly vulnerable part of the population. Comprehensive policy change would support housing stability for this vulnerable group and provide much-needed peace of mind.