MOUD IN CORRECTIONS

Recent Legal Developments and Implications

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Who is the Legal Action Center?

- National policy and law organization
- Policy and legal work to end discrimination against and protect the privacy of people with:
  - Substance use disorders
  - Conviction records
  - HIV/AIDS
- Aims to expand access to alcohol/drug treatment in the criminal justice system and elsewhere

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This Training is About

Recent legal developments that affect correctional facilities' obligations and capacity to provide medication for opioid use disorder (MOUD; also called MAT)

Litigation overview:

- Recent court decisions & settlements; pending cases; what may come down the pike
- DOJ's work

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Language Matters. Words Have Power. People First.

The Legal Action Center uses affirming language to promote dignity and combat stigma and discrimination.

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Examples of Preferred Language

Terms and phrases to be avoided in specific context and situations:

RECOVERY DIALECTS

Language matters but can change depending on the setting we are in. Choosing when and where to use certain language and labels can help reduce stigma and discrimination towards substance use and recovery.

	Mutual Aid Meetings	In Public	With Clients	Medical Settings	Journalists
Addict	✓	✗	✗	✗	✗
Alcoholic	✓	✗	✗	✗	✗
Substance Abuser	✗	✗	✗	✗	✗
Opioid Addict	✓	✗	✗	✗	✗
Relapse	✓	✗	✗	✗	✗
Medication-Assisted Treatment	✗	✗	✗	✗	✗
Medication-Assisted Recovery	✓	✓	✓	✓	✓
Person w/ a Substance Use Disorder	✓	✓	✓	✓	✓
Person w/ an Alcohol Use Disorder	✓	✓	✓	✓	✓
Person w/ an Opioid Use Disorder	✓	✓	✓	✓	✓
Long-Term Recovery	✓	✓	✓	✓	✓
Pharmacotherapy	✓	✓	✓	✓	✓

Credit: Robert D Ashford et al., *Drug and Alcohol Dependence* (2018)

Source: Changing the Narrative, https://www.changingthenarrative.news/stigmatizing-language

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Background

- Until recently, MOUD virtually unavailable in U.S. jails/prisons except for pregnant women
- A few cases challenged lack of medical supervision of withdrawal; people died or had major medical complications as a result. Some cases succeeded.
- No real challenges to lack of ongoing treatment since 1970s-1980s
- 2011: LAC authored report, Legality of Denying Access to MAT in the Criminal Justice System. Argued: denying MAT in jails/prisons and to people under community supervision can violate Americans with Disabilities Act (ADA) & Constitution.

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Litigation

- Sea change in 2018: *Pesce v. Coppinger* (Fed. court, District of MA)
  - Jeffrey Pesce in recovery w/ methadone for 2 years after struggling to find effective treatment
  - Drove himself to treatment with suspended license when usual ride fell through; pulled over for driving 6 MPH over speed limit; faced 60-day jail sentence
  - No methadone in Essex County House of Corrections. Feared: (i) withdrawal would interrupt recovery and progress reconnecting with son; (ii) relapse and overdose.
  - Sued in federal court, arguing: jail's no-methadone policy violated ADA & 8th Amendment (prohibiting cruel & unusual punishment). Sought preliminary injunction – methadone for him.

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Litigation

- Pesce v. Coppinger, cont'd….
  - He won! Court granted preliminary injunction and found:
  - Likely to succeed in proving that the jail violated ADA & 8th Amendment by not providing him methadone throughout incarceration

- Significance?
  - For Pesce himself – got life-saving treatment while incarcerated
  - Middleton House of Corrections – started path toward provision of methadone
  - First court decision in country addressing these issues
  - Spurred other cases (to be discussed)
  - Generated awareness among policy makers and correctional officials nationwide

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Cases After *Pesce*

1. *Smith v. Aroostook County* (D. Maine, 1st Cir.) – jail
2. *Smith v. Fitzpatrick* (D. Maine) – jail & prison
3. *Kortlever v. Whatcom County* (D. Wash.) – jail, class action
4. *DiPierro v. Hurwitz* (D. Mass.) – Federal Bureau of Prisons (BOP)
5. *Crews v. Sawyer (D. KS)* – BOP
6. *Sclafani v. Mici* (D. MA) – MA Dept. of Corrections & 2 prisons
7. *Godsey v. Sawyer (W.D. WA)* – BOP
8. *Finnigan v. Medrick (N.D. IL)* – jail
9. *PG v. Jefferson County (N.D.N.Y.)* - jail

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Jail/Prison Policies Challenged

Generally, each jail/prison had a policy that included the following:

- **Methadone & buprenorphine prohibited** in the jail and prison facilities
- **Forced withdrawal** for individuals entering custody on methadone & buprenorphine
- Exception for pregnant women

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The Plaintiffs

- Had struggled to find effective treatment; withdrawal programs and naltrexone had not worked
- Finally achieved active recovery with methadone or buprenorphine
- Faced forced withdrawal upon incarceration -- feared physical and psychological pain of withdrawal and consequences of withdrawal post release, including the heightened risk for relapse, overdose, and death

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Legal Claim #1: ADA/Rehabilitation Act

Failing to provide MOUD – standard of care – denied Plaintiffs access to jails'/prisons' medical programming on basis of disability. Violated ADA.*

Title II of the ADA:

- Prohibits state & local governments from discrimination based on disability. OUD (and other SUDs) are generally a disability.
- ADA is violated when 1) person has a disability, and 2) is denied the public entity's services/programs/activities, 3) because of their disability.

**DiPierro v. Hurwitz, Crews v. Sawyer & Godsey v. Sawyer* – *3* cases against BOP instead alleged violation of (i) Rehabilitation Act § 504 -- similar to ADA but for federally-funded/operated programs, and (ii) Administrative Procedures Act (5 U.S.C. § § 704 & 706), allowing challenges to unlawful agency actions, findings, and conclusions that are arbitrary, capricious, an abuse of discretion, or otherwise unlawful.

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Legal Claim #2: 8th Amendment

Failing to provide MOUD was ***deliberate indifference*** to plaintiffs' medical needs, in violation of the Eighth Amendment.*

Eighth Amendment of the United States Constitution:

- Prohibits cruel and unusual punishment.
- In context of prison medical services, prison officials violate the Eighth Amendment when:
  - Incarcerated individual has serious medical need (OUD is a serious medical need), and
  - Officials are knowingly, purposefully, and *deliberately indifferent* to the serious medical need.

**P.G.v. Jefferson County* – pretrial detainee brought a 14th Amendment claim

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What Relief did Plaintiffs Seek?

- **Permanent and Preliminary Injunction** – for their own medication; in *Kortlever v. Whatcom County* (class action) MOUD for all current and future incarcerated persons with OUD, where appropriate;
- **Declaration** that the jails/prisons violated relevant laws;
- **Money Damages**; and
- **Costs and Attorney's Fees.**

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What did the Courts Say?

- Preliminary injunctions granted in 3 cases :
  - *Pesce v. Coppinger* (MA), *Smith v. Aroostook County* (ME), *P.G. v. Jefferson County* (NY)
    - Jails were ordered to provide MOUD during plaintiffs' incarceration
    - *Smith* was affirmed by 1st Circuit Court of Appeals

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What did the Courts Say?

Courts found that the jails likely violated ADA:

- Jails denied plaintiffs' requests for methadone/buprenorphine without considering their specific medical needs or doctor's treatment plan
- No justification for the denial because there many ways to safely provide methadone/buprenorphine
- The jail provided methadone to an incarcerated pregnant woman without issue, so was capable of making the accommodation
- Jail medical staff's testimony showed they had no interest in learning about MOUD

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What did the Courts Say?

Courts found that one jail likely violated 8th Amendment (*Pesce*):

- Methadone was the only treatment that had worked for plaintiff & Plaintiff's doctor has prescribed it
- The jail knew of the plaintiff's needs for methadone; however, based on its policies of denying everyone MOUD, it was deliberately indifferent to the plaintiff's needs

Courts found that one jail likely violated 14th Amendment (*P.G.*):

- Defendants were acting with deliberate indifference to a serious medical need amounting to constitutionally inadequate medical care. Court rejected defendant's argument that there is no constitutional right to methadone treatment.

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What did the Courts Say?

Courts rejected defendants' arguments that:

- Managed withdrawal and non-MAT programs are at least subpar care
- Jail didn't need to provide preferred treatment (MOUD)
- Counseling and Vivitrol work just as well as Buprenorphine/Methadone
- As to safety and security of the facilities, the court should defer to the jail administrators
- MOUD is prohibited because it is dangerous and likely to be diverted

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What did the Courts Say?

- **Courts found – irreparable harm:**
  - Without MOUD, plaintiffs would suffer irreparable harm through painful withdrawal, possible relapse, and possible death

  - **Rejected defendants' arguments that:**
    - No irreparable harm because jail would give medications to treat withdrawal
    - Plaintiff was incarcerated previously without MAT and returned to treatment and could do so again

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What did the Courts Say?

- **Courts found – balance of the equities favored plaintiff:**
  - Though defendants argued that the administrative/cost burden was too high, the courts held that there was an even greater burden on plaintiffs if they were denied MOUD than on the jails if they provided MOUD
  - There are a number of means through which to safely provide MOUD
    - Other jails do it

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Settlements

Five other cases settled:

- Agreed to provide methadone/buprenorphine to the plaintiffs throughout their incarceration
- *Kortlever v. Whatcom County* – the class action – agreed to (and then did) create and implement:
  - Written policies for MOUD, mainly buprenorphine maintenance and induction and medically assisted withdrawal; as well as
  - Guidelines for training and implementation
- Applies to all non-pregnant people who have an OUD and are incarcerated or will be incarcerated at the Whatcom County Jail

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Department of Justice's Work Increasing Access to MOUD

- 2017 – DOJ started working to remove discriminatory barriers to treatment. Included:
- Investigation of MA jails/prisons – failure to provide MOUD could violate ADA
- 2021 - Investigation of NJ jail found reasonable cause to believe jail violated 8th Amendment of Constitution by not providing MOUD
  - Categorically denying MOUD is a failure to provide adequate medical care for a serious medical condition, in violation of the Eighth Amendment
- Increased access to MOUD in other settings: Family regulation, skilled nursing facilities, and primary care doctors

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Department of Justice's Work Increasing Access to MOUD

- February 2, 2022 Letter of Findings against the Unified Judicial System of Pennsylvania (UJS)
- The findings establish that entire court systems - trial judges, drug courts, probation, mental health courts - violate the ADA by prohibiting medications for opioid uses disorder
- Conditions of settlement: policies that comply with the ADA, training and educating court staff about OUD and non-discrimination laws, compensating the complainants, and more
- Feb 25, 2022: DOJ filed a complaint against the UJS in the federal court of the Eastern District of Pennsylvania for violating the ADA

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Implications

- Growing body of legal precedent
- Policy makers and correctional officials have taken note
- Litigation + policy changes will require more uniform provision of MOUD in jails/prisons
- Health is prioritized
- It’s great that you’re all here to learn how about MOUD

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Questions?

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Resources at www.lac.org

- Legal Action Center's MAT Advocacy Toolkit

https://www.lac.org/resource/mat-advocacy-toolkit

  - Cases Involving Discrimination Based on Treatment with Medication for Opioid Use Disorder (MOUD)
  - Myths and Facts
  - Intake form for people seeking access to MOUD in criminal legal system

- Or call 212-243-1313

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