

MOUD IN CORRECTIONS

Recent Legal Developments and Implications

Presented By:

Sally Friedman, Esq.

Rebekah Joab, Esq.

April 23, 2020

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
 - Criminal records
 - HIV/AIDS
- Aims to expand access to alcohol/drug treatment in the criminal justice system and elsewhere

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 Opioid initiative

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.

Background

- 2017 - DOJ Opioid Initiative to remove discriminatory barriers to treatment
 - Included investigation of MA jails/prisons - possible ADA violation for not providing MOUD
 - In letters to State authorities & trainings, stated clearly that prohibiting MAT in justice and child welfare systems could violate ADA
 - Settlements with skilled nursing facilities and primary care doctor who barred people on methadone or buprenorphine

The Litigation Starts

- 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). ACLU was lawyer. Sought preliminary injunction - methadone for him.

The Litigation Starts

- *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

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

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**

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

Legal Claim #1: ADA/Rehabilitation Act

Failing to provide MOUD - standard of care - denied Plaintiffs access to the jails'/prisons' medical programming on basis of disability, in violation of 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, which is similar to ADA but for federally-funded/operated programs, and (ii) Administrative Procedures Act (5 U.S.C. § § 704 & 706), which allows challenges to unlawful agency actions, findings, and conclusions that are arbitrary, capricious, an abuse of discretion, or otherwise unlawful.

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.

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.**

What did the Courts Say?

- **Preliminary injunctions granted** in the 2 cases that didn't settle:
 - *Pesce v. Coppinger (MA) & Smith v. Aroostook County (ME)*
 - Jails were ordered to provide MOUD during plaintiffs' incarceration
 - *Smith* was affirmed by 1st Circuit Court of Appeals

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

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

What did the Courts Say?

Courts rejected defendants' arguments that:

- Managed withdrawal and non-MAT treatment programs are at least subpar care
- Jail didn't need to provide preferred treatment (MOUD) to meet the 8th Amendment standard of care
- 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

What did the Courts Say?

- **Courts found plaintiffs would suffer 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 plaintiffs would get medications to treat withdrawal
 - Plaintiff was incarcerated previously without MAT and returned to treatment and could do so again

What did the Courts Say?

- **Courts found the balance of the equities favored plaintiffs:**
 - Though the 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

Settlements

All the other cases settled - or are heading toward settlement:

- All 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

Implications

- The lawsuits keep coming - expect more
- Policy makers and correctional officials have taken note
- Litigation + policy changes will require more uniform provision of MOUD in jails/prisons
- People will get healthier; communities will be safer; crime will decrease; decreased diversion & disciplinary issues in prisons/jails
- It's great that you're all here to learn how about MOUD

Questions?

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)
 - Medication-Assisted Treatment in Drug Courts: Recommended Strategies
 - Myths and Facts
 - Intake form for people seeking access to MAT in justice system
-
- Or call **212-243-1313**

Keep up with the Legal Action Center
by following us on Facebook, Twitter,
LinkedIn & Instagram!

