

# A Continuum of Care: The Criminal Justice Role in Treatment

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# Legal Action Center

- Forty-seven year old national policy and law organization
- Policy and legal work to expand opportunities, end discrimination against, and protect the privacy of people with:
  - Substance use disorders
  - Criminal records
  - HIV/AIDS
- Aim to expand access to substance use disorder treatment in the criminal justice system and elsewhere and focus the criminal justice system more on health, not punishment.
- [www.lac.org](http://www.lac.org)

# Scope of the Problem: Enormous and Horrifying

- Incarcerated individuals are seven times more likely than the general population to experience substance use and mental health disorders and other chronic illnesses.<sup>i</sup>
- More people with SUDs are in the criminal legal system ( $\approx$  6 million) than in treatment (2.3 million).<sup>ii</sup>

<sup>i</sup> National Institute of Corrections, “Solicitation for a Cooperative Agreement—Evaluating Early Access to Medicaid as a Reentry Strategy,” Federal Register 76, no. 129 (2011): 39438-39443.

<sup>ii</sup> “Behind Bars II: Substance Abuse and America’s Prison Population,” Feb. 2010. National Center on Addiction and Substance Abuse at Columbia University. [www.centeronaddiction.org/addiction-research/reports/substance-abuse-prison-system-2010](http://www.centeronaddiction.org/addiction-research/reports/substance-abuse-prison-system-2010)

# National Statistics

- Bureau of Justice Statistics: Between half and three-quarters of incarcerated people have an addiction problem and more than half are mentally ill.<sup>iii</sup>
- Illness for illness, the Marshall Project describes incarcerated individuals as “the sickest people in the country.”

<sup>iii</sup> Schwatzapfel, Beth and Hancock, Jay. “Out of Prison Uncovered: Medicaid for ex-prisoners saves money and lives, but millions are released without it.” Dec. 6, 2016. The Marhsall Project, Access online at:

<https://www.themarshallproject.org/2016/12/06/out-of-prison-uncovered#.ys19HhRZK>

# Racial – and Racist – Impact

- Most of those incarcerated are people of color: they have higher arrest, prosecution and conviction rates than whites.
- African American and Hispanic adults are respectively 5.9 and 3.1 times as likely to be incarcerated as whites.<sup>iv</sup>

<sup>iv</sup>U.S. Bureau of Justice Statistics, Prisoners in 2016, 8 tbl.6 (Jan. 2018). Accessed at: <https://www.bjs.gov/content/pub/pdf/p16.pdf>

# New York State Statistics

- New York State Department of Corrections and Community Supervision data: 83% of incarcerated individuals need substance use disorder treatment upon release.<sup>v</sup>
- Forty percent of individuals in New York City jails are mentally ill, even as the total number of incarcerated individuals has decreased.<sup>vi</sup>

<sup>v</sup> Identified Substance Abuse, State of New York Department of Correctional Services (Dec. 2007)

<sup>vi</sup> Mayor's Task Force on Behavioral Health and the Criminal Justice System: Action Plan (Dec. 2014)

# The Stakes Could Not Be Higher

- The lack of treatment access post-incarceration is costly, contributing to emergency room use,<sup>vii</sup> homelessness, and lost productivity.
- Most important, the lack of health care interventions costs lives:
  - There is a 12-fold increase in the risk of death during the first two weeks post-release from incarceration.<sup>viii</sup>
  - Individuals leaving prisons and jails are 130 times more likely than the average person to die of an overdose in that time period.<sup>ix</sup>

<sup>vii</sup> A High Risk of Hospitalization Following Release from Correctional Facilities in Medicare Beneficiaries: A Retrospective Matched Cohort Study, 2002 to 2010 (Sept. 2013). Available from <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4069256/pdf/nihms-586569.pdf>

<sup>viii</sup> Ingrid A. Binswanger, et al., “Release from Prison—A High Risk of Death for Former Inmates,” *New England Journal of Medicine* 356, no. 2 (2007): 157–165.

<sup>ix</sup> Beletsky, Leo and LaSalle, Lindsay and Newman, Michelle and Paré, Janine and Tam, James and Tochka, Alyssa, *Fatal Re-Entry: Legal and Programmatic Opportunities to Curb Opioid Overdose Among Individuals Newly Released from Incarceration* (July 1, 2015). *Northeastern University Law Journal*, Vol. 7, No. 1, pp. 155-215 (2015); Northeastern University School of Law Research Paper No. 235-2015. Available at SSRN: <https://ssrn.com/abstract=2628297>

# COVID-19 Raises the Stakes Even Higher

- It is estimated that over 100,000 people in carceral settings nationwide have become infected with COVID-19.
- A recent [analysis](#) published in *JAMA* found that, from March 31st through June 6th, COVID-19 cases in U.S. federal and state prisons were 5.5 times higher—and death rates three times higher—than in the general population.
- Currently all of the country's [fourteen largest known clusters of COVID-19 cases](#) are correctional facilities.
- Exacerbates racial and health disparities
- Critically important to keep as many people out of incarceration as possible



# The Opportunity

- While quality of care inside prisons and jails needs improvement, reentry into the community is consistently the key point of systemic breakdown and therefore presents perhaps the greatest opportunity for major reform.

# MOUD Prohibition Can be Illegal

- **Americans with Disabilities Act (ADA)** prohibits states & local governments – including courts – and employers from discriminating based on disability.
  - **Courts that prohibit MOUD or set arbitrary dose/duration limits can violate ADA.** Read *Legality of Denying Access to Medication-Assisted Treatment in the Criminal Justice System*, at [www.lac.org/MAT-advocacy](http://www.lac.org/MAT-advocacy).
  - DOJ has said so – letter to NY Attorney General. <https://lac.org/departments-of-justice-addresses-mat-discrimination/>
- **U.S. Constitutional right to substantive due process** – prevents government from interfering in fundamental right to control own medical care.

# Litigation Challenging Denial of MOUD in Corrections

- Eight recent successful cases challenging the denial of medications for opioid use disorder treatment (MOUD) in correctional settings:
  - *Pesce v. Coppinger*: Essex County, Massachusetts – Middleton House of Corrections
  - *Smith v. Aroostook*: Aroostook County, Maine – Aroostook County Jail
  - *Smith v. Fitzpatrick*: Aroostook County, Maine – Maine Department of Corrections/Aroostook County Jail
  - *Kortlever v. Whatcom County*: Whatcom County, Washington – Whatcom County Jail

# Litigation, Cont'd

- *DiPierro v. Hurwitz*: Federal Bureau of Prisons
- *Crews v. Sawyer*: Federal Bureau of Prisons
- *Sclafani v. Mici*: Massachusetts Department of Corrections
- *Godsey v. Sawyer*: Federal Bureau of Prisons

# Defendant MOUD Policies

Generally, each of the defendants had a MOUD policy that included the following:

- MOUD was prohibited in the jails and prisons.
- Individuals entering custody who were on MOUD were forced to go through withdrawal.
- There was an exception for pregnant women.

# Plaintiffs: Summary of Facts

- Generally, all of the plaintiffs' experiences with opioid use disorder and MOUD included:
  - Struggling to find treatments that worked;
  - Finally achieving active recovery after being prescribed MOUD;
  - Facing or already experienced forced withdrawal upon entering the relevant facilities to serve their sentences;
  - Fearing the physical and psychological pain of forced withdrawal; and
  - Fearing the consequences of withdrawal post release, including the heightened risk for relapse, overdose, and death.

# Court Ruling on 8<sup>th</sup> Amendment Claims

In *Pesce*, the court held that the plaintiff demonstrated that his 8<sup>th</sup> Amendment rights were likely violated.

- The only treatment that has worked for plaintiff is methadone;
- The jail knew of the plaintiff's needs for methadone; however, based on its policies of denying everyone MOUD, it would be deliberately indifferent to the plaintiff's needs;
- Other medication is not interchangeable with methadone;
- Plaintiff's doctor prescribed methadone.

\*The court in *Smith v. Aroostook* ruled only on the ADA claim and not the 8th Amendment claim.

\*\*In *Smith v. Fitzpatrick*, although the case was briefed, the parties ultimately settled.

# Defendant ADA Arguments and the Courts' Ruling

## *Defendants'* ADA arguments:

- Plaintiffs are not excluded from medical services, they just want different services;
- Disagreement is not discrimination.

The courts in *Pesce* and *Smith v. Aroostook* held that the plaintiffs demonstrated that their ADA rights were likely violated.

- The jail denied plaintiffs' requests for methadone/buprenorphine without considering their specific medical needs or the doctor's treatment plan for plaintiff;



# Defendant ADA Arguments and the Courts' Ruling, Cont'd

- There is no justification for denial because there a number of ways to safely provide methadone/buprenorphine;
- The jail provided methadone to an incarcerated pregnant woman without issue and so the jail is capable of making the accommodation;
- Jail medical staff had no interest in learning about MOUD.

# Successful Outcomes for Plaintiffs in All Eight Cases

- In two of the cases (*Pesce v. Coppinger* and *Smith v. Aroostook County*), the courts granted the plaintiffs preliminary injunction
  - The facilities in those counties – Middleton House of Corrections and Aroostook County Jail – were compelled to provide MAT to the plaintiffs for the full periods of their incarceration (60 days and 40 days, respectively).
  - Decision in *Smith v. Aroostook County* was appealed to and later upheld by the U.S. First Circuit Court of Appeals

# Successful Outcomes for Plaintiffs in All Eight Cases

- Three of the cases settled with the jails/prisons agreeing to provide MAT
  - *Smith v. Fitzpatrick* – Settlement Agreement
    - The Maine Department of Corrections agreed to order, dispense, and administer buprenorphine or an equivalent medication to Mr. Smith throughout his sentence.
  - *Kortlever v. Whatcom County* – Settlement Agreement
    - Class defined as Non-pregnant people with OUD who are incarcerated, or who will be incarcerated, at the Whatcom County Jail.
    - Agreement to implement written policies for MAT (mainly buprenorphine maintenance and induction) and Medically Assisted Withdrawal applicable to the county jail in addition to guidelines for training and implementation.

# Successful Outcomes for Plaintiffs in All Eight Cases, Cont'd

- *DiPierro v. Hurwitz; Crews v. Sawyer; Godsey v. Sawyer* – Settlement Agreements
  - Prior to a judicial ruling, the BOP agreed to provide MAT to the plaintiffs for the duration of their stays in the BOP.
- *Sclafani v. Mici* – Settlement Agreement
  - The Massachusetts Department of Corrections agreed to provide the three named plaintiffs with MAT for the duration of their incarceration, in Mass. DOC prisons.

# What Has Been the Impact of These Decisions?

- Federal, state and local corrections decisionmakers are now on notice
- Greater momentum for policy and practice change?
  - Recent legislative and executive activity at the state, local and federal levels
  - Additional focus on how to finance care behind the walls
- Potential for greater engagement with treatment experts in the community
- Possible implications for health care, child welfare, and other systems
  - Department of Justice Opioid Initiative

# Department of Justice Opioid Initiative

Major civil rights initiative to end discriminatory barriers to SUD treatment across systems

# Department of Justice Opioid Initiative

## Health Care Settings

- **DOJ Settlement with Charlwell Operating Nursing Facility, LLC (Charlwell House, 2018).** The Department of Justice (DOJ) entered into a settlement with Charlwell House, a health and rehabilitation center, in which Charlwell agreed not to discriminate against people on the basis of their OUD, implement a policy and staff training for providing MOUD, pay a \$5,000 fine, and more. This case came to the attention of DOJ after Charlwell House refused admission to a woman because she was receiving Suboxone to treat her OUD. Charlwell House had a practice of screening out prospective patients based on their treatment with MOUD.

# Department of Justice Opioid Initiative, cont'd

- **DOJ Settlement with Selma Medical Associates, Inc. (Selma Medical, 2018).** The DOJ entered into a settlement with Selma Medical, a primary and specialty care facility, in which Selma Medical agreed to cease violation of the ADA by not discriminating against people on the basis of their OUD, implement a policy and staff training for providing MOUD, pay fines totaling \$40,000, and more. The DOJ concluded after investigation, that in refusing to provide primary care services to the complainant and others because of their use of MOUD, Selma Medical violated the ADA.



# Department of Justice Opioid Initiative, cont'd

- **DOJ Agreement with Athena Health Care Systems (Athena, 2019).** The DOJ entered into an agreement with Athena, a company that operates 16 skilled nursing facilities in Massachusetts. The DOJ found that Athena facilities refused to admit people taking buprenorphine, who were seeking admission for unrelated health reasons, in violation of the ADA. As part of the agreement, Athena agreed to implement a non-discriminatory policy, train admissions staff about OUD, and pay a penalty of \$10,000.

# Department of Justice Opioid Initiative, cont'd

- **DOJ Agreement with Massachusetts General Hospital (MGH, 2020).** The DOJ entered into an agreement with MGH, after MGH decided that a patient was ineligible to receive a lung transplant because of their treatment with MOUD. After investigation, the DOJ found that MGH violated the ADA when it made its transplant eligibility determination based on the patient's OUD. In addition to paying the patient and his mother \$250,000 as relief for emotional distress and out of pocket expenses, as part of the agreement MGH was required to implement a non-discriminatory policy and train medical staff involved in decisions about transplants about OUD and the ADA.

# Department of Justice Opioid Initiative

## Child Welfare Settings

- **Department of Justice Letter to New York Attorney General (2017).** The U.S. Attorney in the Southern District of New York sent a letter to the New York Attorney General's office, explaining why courts that prohibit MAT as a condition of child custody or visitation may be discriminating in violation of the Americans with Disabilities Act.

# Department of Justice Opioid Initiative

- **U.S. Department of Health and Human Services Office for Civil Rights (OCR) Voluntary Resolution Agreement with West Virginia Department of Health and Human Resources Bureau for Children and Families (DHHR) (2020).** The DOJ entered into a Voluntary Resolution Agreement (Agreement) with DHHR after an investigation of DHHR preceded by a complaint from a couple that was denied custody of their niece based on one's use of medically prescribed Suboxone and history of OUD, in violation of the ADA and Rehabilitation Act. DHHR agreed to cease discrimination against individuals with disabilities, including OUD, in child placement and other services, as well as ensure that any grant sub-recipients and contactors also comply with the ADA and Rehabilitation Act. Other terms of the agreement include revision of policies, staff training, evaluating any concerns regarding safety based on actual risk and not speculation or stereotypes, creating a grievance procedure for resolution of complaints alleging disability discrimination, two years of monitoring by OCA regarding compliance with the Agreement, and more.

# Recommendations to Improve MOUD Access for the Justice-Involved

- Ensure people receive high quality SUD care, including all forms of MOUD, during incarceration and as they reenter the community

# Recommendations to Improve MOUD Access for the Justice-Involved

- Develop policies and practices that support uninterrupted Medicaid coverage as people move throughout the criminal justice system and between the criminal justice system and the community

# Recommendations to Improve MOUD Access for the Justice-Involved

- Promote diversion to health care, including SUD care, wherever possible and as early as possible, including pre-charge

# Recommendations to Improve MOUD Access for the Justice-Involved

- Ensure judges, probation or parole officers and other law enforcement officials allow people under their supervision to receive appropriate SUD care, including MOUD



# Recommendations to Improve MOUD Access for the Justice-Involved

- Utilize peers to assist in enrollment, provide navigation and increase health literacy

# Drivers of Reform: Continued Work to Respond to the Overdose Crisis

- Recent legislative and executive activity at the state, local and federal levels
  - Work is happening around the country
  - Continued need to:
    - Focus on improving coverage for and access to SUD care, including MOUD, in the community
    - Maintain strong patient privacy protections
    - Eliminate discriminatory policies facing people with SUD histories

# Drivers of Reform: Need to Increase Funding for MOUD in Prisons and Jails

- Additional focus on how to finance care behind the walls
  - Work in New York to seek a section 1115 waiver of the Medicaid inmate exclusion
  - The federal Medicaid Reentry Act, which would allow federal Medicaid to finance needed health care, including SUD care, during the last 30 days of incarceration

# Drivers of Reform: Recent Court Decisions on MOUD in Corrections

- As discussed above: Seven cases with positive outcomes for Plaintiffs who, upon their incarceration, were forced to withdraw, or were facing forced withdrawal, from their addiction medication
- Successful ADA and 8<sup>th</sup> Amendment arguments
- Included state-run and federal Bureau of Prison facilities
  - Practice change at those facilities

# What Will Be Next?

- Following MOUD/corrections court decisions, federal, state and local corrections decisionmakers are now on notice
  - Greater momentum for policy and practice change?
- Potential for greater engagement with treatment experts in the community
- Possible implications for health care, child welfare, and other systems
  - Department of Justice Opioid Initiative

We Are Here to Help

Legal Action Center

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