MOUD IN CORRECTIONS

Recent Legal & Policy Developments and Implications

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Working with communities to address the opioid crisis.

✧ SAMHSA’s State Targeted Response Technical Assistance (STR-TA) grant created the Opioid Response Network to assist STR grantees, individuals and other organizations by providing the resources and technical assistance they need locally to address the opioid crisis.

✧ Technical assistance is available to support the evidence-based prevention, treatment, and recovery of opioid use disorders.

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Working with communities to address the opioid crisis.

- The Opioid Response Network (ORN) provides local, experienced consultants in prevention, treatment and recovery to communities and organizations to help address this opioid crisis.
- The ORN accepts requests for education and training.
- Each state/territory has a designated team, led by a regional Technology Transfer Specialist (TTS), who is an expert in implementing evidence-based practices.
Contact the Opioid Response Network

✧ To ask questions or submit a request for technical assistance:

- Visit www.OpioidResponseNetwork.org
- Email orn@aaap.org
- Call 401-270-5900
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 & policy developments that affect correctional facilities’ obligations and capacity to provide medication for opioid use disorder (MOUD; also called MAT).

Part 1: Litigation overview:
- Recent court decisions & settlements; pending cases; what may come down the pike
- DOJ Opioid initiative

Part 2: Policy overview
- Areas of focus in the states and at the federal level
- Anticipating what may happen next

Thank you for attending -- and learning how to extend life-saving treatment in your facilities.
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 were successful. No real challenges to lack of ongoing treatment.

✶ 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.
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.
Sea change in 2018: Pesce v. Coppinger (Federal court, District of MA)

- Jeffrey Pesce successfully in recovery, on 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 Middleton House of Corrections. Feared withdrawal would interrupt recovery and progress reconnecting with his family, particularly his son; feared relapse and overdose.
- Sued in federal court, arguing that jail’s policy of not providing methadone violated ADA & 8th Amendment of Constitution (prohibiting cruel & unusual punishment). Represented by ACLU. Sought preliminary injunction – methadone for him.
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
- 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
3. Kortlever v. Whatcom County (D. Wash.) – jail, class action
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
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 them 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 – 2 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 \textit{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:
  1. Incarcerated individual has serious medical need (OUD is a serious medical need), and
  2. Officials are knowingly, purposefully, and \textit{deliberately indifferent} to the serious medical need.
What relief did plaintiffs seek?

- **Permanent and Preliminary Injunction** – for their own medication, and in Korlever 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 the Courts Said

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

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 the Courts Said

Courts found that one jail likely violated 8\textsuperscript{th} 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; and
- Vivitrol is not interchangeable with methadone.
What the Courts Said

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 the Courts Said

 Courts found: without MOUD, plaintiffs would suffer irreparable harm through painful withdrawal, possible relapse, and possible death.

 Rejected jails’ 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.
Courts found: balance of the equities favored plaintiff:

- Though the jails 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 to provide MOUD.

Now, for policy landscape....
Part 2
Policy Landscape
Areas of Focus for MOUD Policy Reform in Corrections

✦ Financing
  – Paying for care behind the walls, throughout the criminal justice system, and in the community
  – Leveraging Medicaid, private insurance, and discretionary federal and state dollars
    • Needed policy changes, particularly to finance MOUD care in prisons and jails, before dollars can flow

✦ Ensuring the provision of high-quality care
  – Building competency and capacity in corrections
  – Strengthening the community-based system of SUD care
  – Addressing co-occurring mental and physical health care needs

✦ Policy changes needed to make MOUD work in corrections
  – Utilizing lessons learned from facilities and jurisdictions to inform policy
  – Promoting meaningful systems change in criminal justice and health/SUD
Areas of Focus for MOUD Policy Reform in Corrections: Financing

🔹 Barriers related to Medicaid and other public programs
  – Heightened challenges in the 14 states that have not expanded Medicaid under the Affordable Care Act
  – Medicaid inmate exclusion provision which prohibits federal Medicaid dollars from financing health care behind the walls
    • Includes people being held pre-trial
    • Significant barrier to community-based providers doing in-reach due to lack of funding
    • Similar restrictions for Medicare, CHIP, VA and other benefits
  – State/local policies that impede continuity of coverage as people move throughout corrections and the community
    • Policies, including Medicaid termination, that create coverage and care disruptions
  – Coverage gaps disproportionately affecting justice-involved people
    • Lack of coverage of evidence-based services, medications and supports people need, including the full range of SUD/MH care at parity with other health care
    • Lack of culturally competent providers in the community

🔹 Challenges to leveraging federal and state discretionary dollars
Recent Areas of MOUD Policy Reform in the States (cont’d)

✧ Improving MAT access for justice-involved people

- Adopting policies that require the provision to high quality evidence-based SUD care, including all forms of MAT
- Adopting policies and practices that support uninterrupted Medicaid coverage
- Promoting training and adoption of practices that ensure corrections and other justice system officials allow people under their supervision to receive MOUD care
- Utilizing peers in recovery coaching, and to assist in enrollment, navigation and health literacy
- Promoting diversion to health care wherever possible
Recent Areas of MOUD Policy Reform in the States

- Building the capacity of the SUD care system
  - Promoting policies that allow for the opening of new opioid treatment programs
  - Utilizing innovative care delivery models (ex: hub and spoke)
  - Training new providers (ex: Project ECHO model)
  - Leveraging new federal discretionary dollars
  - Strengthening MAT provider network adequacy
Recent Areas of MOUD Policy Reform in the States (cont’d)

✧ Strengthening access to SUD and other care
  – Improving insurance coverage (private and public) of all three SUD medications
  – Strengthening MAT provider reimbursement rates
  – Enforcing federal and state SUD and MH parity laws
  – Utilizing Medicaid waivers and initiatives to address co-occurring health care needs
  – Strengthening the ability of primary care professionals and providers (including community health centers and hospitals) to address SUD care needs, including through telemedicine
  – Connecting people to MAT and other care following overdose
  – Promoting opportunities for other cross-systems work (including child welfare, social service, housing, etc.)
Recent Areas of Focus at the Federal Level

- Significant focus on various policy reforms that could increase the financing of MOUD care behind the walls
  - Regulatory activity at CMS:
    - Focus on improving Medicaid coverage of MOUD care
    - Awaiting CMS’s response to New York’s recent submission of a section 1115 waiver of the Medicaid inmate exclusion to cover certain SUD/MH care provided in the last 30 days of incarceration
    - Forthcoming convening of a CMS task force and subsequent development of recommendations on best practices for care access for justice-involved individuals
Recent Areas of Focus at the Federal Level

- Significant focus on policy changes required to finance MOUD care behind the walls
  - Activity in Congress:
    - Continued federal appropriations in response to the overdose crisis—ability to leverage some of these dollars
    - Pending legislation which would change federal policy or authorize new programming:
      - The CREATE (Community Re-Entry through Addiction Treatment to Enhance) Opportunities Act, legislation aimed at expanding MAT access in correctional facilities
      - The Medicaid Reentry Act, which would allow federal Medicaid to finance needed health care, including SUD care, during the last 30 days of incarceration
      - Federal legislation to restore certain coverage and benefits for people being detained pre-trial, the Equity in Pretrial Medicaid Coverage and Restoring Health Benefits for Justice-Involved Individuals Acts
      - Federal legislation to eliminate the Medicaid inmate exclusion provision, the Humane Correctional Health Care Act
      - Legislation to eliminate DEA waiver requirements to prescribe buprenorphine
What May Be Next

✧ Continued topic of discussion and potential policy change among state and federal policy-makers
✧ Many different strategies, vehicles, and mechanisms to consider
✧ Need for policy-makers to understand the lessons jurisdictions have learned to inform policy and practice
✧ Ways to better support meaningful systems change in criminal justice and health/SUD to improve access to care
QUESTIONS?

Visit LAC.ORG for more information about MAT
Keep up with the Legal Action Center by following us on Facebook, Twitter, LinkedIn & Instagram!