

MEDICATION ASSISTED TREATMENT AND THE AMERICAN DISABILITY ACT

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EXECUTIVE BRANCHES AND LEGISLATURES ENDORSE MAT

- In recent years, many state governors and legislatures have allocated more funding for the use of MAT. This also applies to presidents and Congress.
- The recommendations have included using money from opiate litigation to fund MAT; to establish pilot programs; and to encourage further education and training.

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RELAPSE RISKS UPON RELEASE FROM CUSTODY – JAIL SANCTIONS

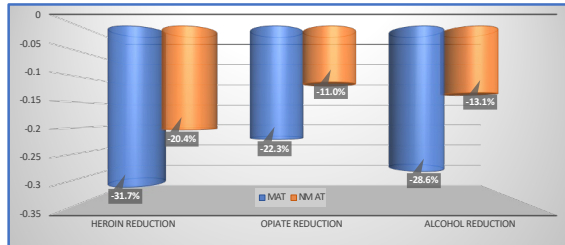
- People with OUD will quickly lose tolerance while incarcerated;
- Research shows approximately 65% of prison population has SUD;
- One study found a 12X increase in mortality risk in first two weeks after release; and,
- If person cannot get their medication in jail there is a substantial risk for relapse when released.

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OUTCOMES FROM THE MAT PILOT PROGRAM FOR ADULTS WITH OPIOID USE DISORDERS IN RURAL COLORADO



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MAT LOWERS RISK OF RELAPSE, DEATH, AND RECIDIVISM

- One study of English correctional facilities found that treatment with buprenorphine or methadone was associated with an 80/85% reduction in post release deaths—Smith v Aroostook, 376 F.Supp3rd 146,150 (2019)
- In a study with the Rhode Island correctional system, participants receiving methadone were more than twice as likely than forced withdrawal participants to return to a methadone clinic upon release. The Lancet, Rich et al, Volume 386, Issue 9991, July 2015
- Meta-studies showing that engaging in MAT while incarcerated means more continuing post release—that continuation is associated with reduced recidivism. Effectiveness of MAT in prisons and jails, Journal of Substance Abuse Treatment, Moore et al, Volume 99, April 2019

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WHAT LAWS ARE VIOLATED BY A BLANKET PROHIBITION OF MAT?

- 8th amendment-cruel and unusual punishment
- American with Disabilities Act
- Rehabilitation Act
- State Statutes prohibiting Discrimination based on Disability

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ADA CLAIMS

- The ADA prohibits discrimination by state and local governments.
- To prevail on a claim for discrimination, an individual must prove that he or she:
 - Has a "disability";
 - Is "otherwise qualified" to participate in or receive the public entities benefits including services, programs, or activities; and
 - Was either excluded from participation in, or denied the benefits, or was otherwise discriminated against because of disability.
- By a public entity

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DEFINING DISABILITY

- § 35.108 Definition of "disability."
 - (a)(1) Disability means, with respect to an individual:
 - (i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
 - (ii) A record of such an impairment; or
 - (iii) Being regarded as having such an impairment as described in paragraph (f) of this section.
 - ADA Regulations, Part 35.
 - Sec. 35.108 Definition of Disability (b) (1) (2) Physical or mental impairment includes,drug addiction, and alcoholism.

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DEFINITION OF MAJOR LIFE ACTIVITIES

- Major life activities include, but are not limited to: (i) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, writing, communicating, interacting with others, and working; and
- 35.108(C)(1)(i)

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SUD IS A DISABILITY

- PEOPLE USING/NEEDING MAT ARE “INDIVIDUALS WITH A DISABILITY”
- It is well established that drug addiction constitutes an “impairment” under the ADA and that drug addiction necessarily substantially limited the major life activities of “employability, parenting, and functioning in everyday life.” *MX Group, Inc. v. City of Covington*, 293 F.3d 326, 336 (6th Cir. 2002)
- Residents of substance abuse facility were individuals with a disability. *US v. City of Baltimore*, 845 F. Supp. 2d 640 2012)

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PUBLIC ENTITIES

- An individual with a disability must also establish that the discriminatory acts were performed by a public entity. For our purposes, this includes jails, prisons, and court systems.
- *Pennsylvania Dep’t of Corr. v. Yesky*, 524 U.S. 206, 210 (1999) ADA applies to correctional programs; entitled to adequate medical care.
- *People v. Brathwaite*, 11 Misc. 3d 918, 816 N.Y.S.2d 331 (Crim. Ct., Kings Cnty. 2006) (Brooklyn’s alternative sentencing program falls under Title II’s definition of “state service or program.”);
- *Evans v. State*, 667 S.E.2d 183, 186 (Ga. App. 2008) (Drug Ct. in Georgia is a “public entity” under the ADA)

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LEGAL THEORIES FOR ADA VIOLATIONS

- The law recognizes two types of illegal discrimination.
 - Disparate treatment- refers to intentional discrimination, where people in a protected class are deliberately treated differently. This is the most common type of discrimination. So denying parole/health services because of a SUD is subject to this analysis.
 - Disparate impact -refers to discrimination that is unintentional. This can involve making a service available to everyone regardless of disability status, but individuals in a protected class, like disability, are negatively affected. For instance, a college makes available pre-recorded video study courses online but the videos lack closed captioning making it impossible for deaf and hard of hearing individuals to access and benefit from the online study courses. (National Network-Information, Guidance and Training on the ADA, 2022)
- Reasonable Accommodation -A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. 28 CFR 35.130(b)(7).

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SMITH V AROOSTOOK COUNTY
376 F.SUPP3RD 146 (2019)

- Plaintiff Smith's Motion for Preliminary Injunction:
- Facts: Plaintiff Brenda Smith had a history of opioid misuse, diagnosed with opioid use disorder. Her doctor prescribed twice-daily dose of buprenorphine as part of a medication-assisted treatment program. Plaintiff convicted of theft of \$40 from a self-checkout at Walmart, received 40-day jail sentence.
- Sheriff refuses to allow for medication in the jail. Jail had an opioid withdrawal protocol, but it did not include MAT, even though state would allocate funding. Jail only provided counseling.
- Issue: Does refusal to allow Ms. Smith to continue taking her medication during her jail term violate the American Disabilities Act & the 8th Amendment?
- Holding: Motion for preliminary injunction granted. Defendants violated the ADA both for disparate treatment and denial of reasonable accommodation by denying 'meaningful access' to jail's health care services.

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SMITH V AROOSTOOK, CONTINUED

- Court reasoning: Plaintiff has been in active recovery for ten years. She regained custody of 4 children, secured stable housing, employment, high school diploma and college credits. It was five years since last relapse. Her prior attempts to stop using Suboxone were unsuccessful.
- National data: Overdose death rates reduced through use of MAT people in custody. Rather than 'opioid replacement drugs' jail used medical service that monitors withdrawal and counsels. The withdrawal protocol is not a treatment for opioid use disorder.
- MAT is necessary of Ms. Smith's continued well being. Forced withdrawal of MAT will cause severe and painful withdrawal symptoms.
- Jail administrators' attitudes toward MAT were consistent with stigma myths surrounding the treatment-one testified that she was "bored" by the MAT studies.

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M.C.V JEFFERSON COUNTY (N.D.NEW YORK)
MAY, 2022

- 2 plaintiffs sued the County and the Sheriff due to the policy of banning MOUD for non pregnant individuals in their custody. Both were prescribed Methadone prior to incarceration.
- The court issued an injunction against continuing the ban. The court also approved a class action.
- In determining that it appeared that plaintiffs would prevail on the merits, the court stated: Plaintiffs' evidence establishes that OUD is a chronic brain disease and that opioid withdrawal has been recognized as an "objectively" serious medical condition by other courts in this Circuit. Plaintiffs have further established that defendants are on ample notice that forcibly withdrawing them from medically necessary treatment for OUD; i.e., MOUD, will expose them to the serious harms of withdrawal and the danger of relapse.

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CASE INVOLVING PROBATION UNITED STATES V. UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA, NO. 2:22-CV-00709-MSG (E.D. PA.)

- DOJ sued the entire Pennsylvania Court System. One reason was that one county issued an order :
 - “requiring all individuals under the court’s supervision to be “completely clean” of any “opiate based treatment medication regardless of whether or not these drugs are prescribed,” within 30 days of being sentenced.
 - This suit included the court’s Accelerated Rehabilitative Disposition, Probation, Parole, Intermediate Punishment, and Drug Court programs.
- Under the settlement agreement, UJS courts will pay \$100,000 to victims, and encourage all its component courts to adopt new policies and train personnel on the ADA’s anti-discrimination requirements regarding OUD and report on their compliance efforts.

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PESCE V COPPINGER, 355 F3RD. SUPP 35 (2018)

- Plaintiff struggled for several years with SUD. He tried rehab 4 times, had overdosed six times. Also had been prescribed Suboxone and Vivitrol. Never successful until he went into a Methadone program 2 years prior; since then, no positive tests and employed.
- The Essex County, MA Jail has a blanket ban on methadone and buprenorphine. Prisoners undergo forced withdrawal
- The Court found Pesce likely will be successful on his claims that the jail policy violates the ADA and the 8th Amendment. The Court enjoined the application of the blanket ban
- The opioid-related death rate in Massachusetts is 120 times higher for people released from jails and prisons as compared to the rest of the adult population.

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CASE INVOLVING PAROLE BOARD

- In 2021, the Massachusetts Parole Board settled a case with the DOJ:
 - The parole board only permitted the use of Vivitrol.
 - The settlement required that a parole applicant with an SUD will be assessed by an addiction specialist authorized to prescribe all three types of MOUD. The doctor will prescribe the appropriate MOUD, if needed.
 - The parole board agrees that it will not express a preference for, or mandate one form of MOUD over another. US Attorney’s Office, Dec. 17, 2021

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ADDITIONAL CASE LAW

- DiPiero v Hurwitz (D. Mass 2019) A federal prison prohibiting use of methadone ordered to provide MAT.
- Crews v Sawyer (D. Kan 2019) Federal prison banned suboxone. Prisoner received MAT as soon as the case was filed.
- Rokita v The Pennsylvania Dept. of Corrections 273 A.3rd 1260. Prisoner has SUD, but no prescription for MAT. Defendant refuses to examine for, or provide him with MAT. Defendant only provides MAT for persons close to being paroled and other limited circumstances. Court rules that plaintiff can proceed on his 8th Amendment and ADA claims.

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8TH AMENDMENT CLAIMS

- Under the Eighth Amendment, the government has an "obligation to provide medical care for those whom it is punishing by incarceration." Estelle v. Gamble, 429 U.S. 97, 103, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).
- After all, a prison "inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." Id. Plainly, the denial of medical treatment can pose serious risks; but even in "less serious cases," the "denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose." Id.
- The Supreme Court of the United States has thus held that the denial of medical care to a prison inmate constitutes a violation of the Eighth Amendment where it amounts to "deliberate indifference to serious medical needs of prisoners." Id. at 104, 97 S.Ct. 285.
- Rokita v. The Pa. Dep't of Corrs., 273 A.3d 1260, 1265 (Pa. Cmmw. Ct. 2022)

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DEFENSES REJECTED BY THE COURTS

- Total ban
- Providing Vivitrol only
- Only allowing for pregnant women
- Diversion
- Banning Probationers and/or Parolees

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WHEN CAN YOU DENY MAT

- The person is not receiving the medication as part of a treatment for a diagnosed substance use disorder.
- A licensed practitioner, with the appropriate training and knowledge, has not examined the person and issued an authorized prescription
- The person fails to comply with other valid requirements of the program—therapy, testing, etc.
- The medication is being abused or diverted

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SETTING UP AN MAT PROGRAM

- Obtain the Planning and Implementation Manual for MAT for OUD in Jails and Prisons (National Council for Behavioral Health)
- Visit other programs
- Have written policies
- Drug test
- Use addiction medicine specialists

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STEPS TO REDUCE MEDICATION DIVERSION

- Jails have employed several strategies to reduce medication diversion, including:
 - Counseling patients on diversion protocol and having patients sign a patient contract that clearly explains the rules and responsibilities of taking MAT and the consequences of medication diversion.
 - Dispensing medications in areas with video surveillance.
 - Housing all MAT patients together in one housing unit or facility.
 - Choosing medications (buprenorphine/naloxone combination instead of mono-buprenorphine) and formulations that are more difficult to divert (such as a crushed buprenorphine tablet instead of a film or a methadone diskette mixed with water).

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STEPS TO REDUCE MEDICATION DIVERSION, CONT.

- Requiring patients to drink, eat or talk and open their mouths, in the presence of correctional or health care staff after ingesting medication.
- Conducting random urine drug screening to confirm people who are prescribed MAT are taking it.
- Using automatically unlocking pill boxes that only unlock at pre-set times and only dispense a designated amount of medication.
- Conducting medication inventory weekly, at a minimum, and ensuring procedures are in place to control diversion and accounting of all medications. Separating medication lines for MAT injectable medications
- ***Planning and Implementation Manual For MAT, Pages 39-40

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APPA CODE OF ETHICS

- I will render professional service to the justice system and the community at large in effecting the social adjustment of the offender
- I will uphold the law with dignity, displaying an awareness of my responsibility to offenders while recognizing the right of the public to be safeguarded from criminal activity.
- I will cooperate with my co-workers and related agencies and will continually strive to improve my professional competence through the seeking and sharing of knowledge and understanding
- I will encourage policy, procedures and personnel practices, which enable others to conduct themselves in accordance with the values, goals and objectives of the APPA.

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SPECIAL THANKS

- Want to thank my friends and colleagues, Hon. Brian MacKenzie (retired) and Hon. Patrick Bowler (retired) for sharing their knowledge and materials on this subject matter.

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THANK YOU

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MIGRATIONS FOR OTHER LAW DISCIPLINE TRAINING