

*This Issue Brief IS **NOT A LEGAL OPINION** but represents the product of policy and regulatory research and discussions with experts in the field.*

## Issue in Brief: Avoiding Legal Liability for Discontinuing Medication for Opioid Use Disorder (MOUD)

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In September 2018, the Maine Department of Corrections settled a ground-breaking lawsuit by agreeing to not discontinue the plaintiff's buprenorphine, which had been prescribed by her physician, when she reported for incarceration.<sup>i</sup> In the intervening four years, there have been dozens of successful lawsuits against individual officials, individual staff, local jails, and state and federal prisons who have denied or limited access to medication for opioid use disorder (MOUD) to inmates. While most of these lawsuits have been filed by individual plaintiffs, there have been at least two successful class actions.<sup>ii</sup>

Courts have found constitutional violations under the Eighth and Fourteenth Amendments on grounds of deliberate indifference, and under Rehabilitation Act Section 504 and the Americans with Disabilities Act (ADA) Title II on grounds of discrimination against persons with OUD. Many other courts have addressed individual staff violations under state tort law, such as for wrongful death.<sup>iii</sup> Most recently, New Mexico's protection-and-advocacy organization sued the state's Corrections Department and two officials on behalf of all their constituents with OUD.<sup>iv</sup> That case alleges discrimination in violation of Patient Protection and Affordable Act Section 1557 in addition to the constitutional, Section 504, and ADA claims.

A wide range of carceral policies have generated legal liability or resulted in settlement, including those that require "cold turkey" withdrawal,<sup>v</sup> authorize only comfort medications for withdrawal,<sup>vi</sup> mandate tapered withdrawal from MOUD,<sup>vii</sup> offer only an alternative to MOUD,<sup>viii</sup> permit only a single MOUD,<sup>ix</sup> or limit MOUD to only certain populations, such as those pending release or pregnant persons.<sup>x</sup> Notably, the absence of an affirmative policy regarding MOUD has resulted in judicial oversight,<sup>xi</sup> as has denial of MOUD to someone who did not even have a prescription.<sup>xii</sup>

The federal executive branch has taken action consistent with these court findings: the Department of Justice' Civil Rights Division<sup>xiii</sup> and Office of Justice Programs Bureau of Justice Assistance<sup>xiv</sup> both issued guidance in 2022 that jails and prisons that do not provide continuing access to MOUD may be liable for discrimination under the ADA. The Justice Department has also investigated and sometimes sued entities—including a jail,<sup>xv</sup> a parole board,<sup>xvi</sup> two court systems,<sup>xvii</sup> and many others across sectors<sup>xviii</sup>—that have a one-size-fits-all approach to SUD-related medical needs.

The current state of case law suggests that denying MOUD as a blanket policy is legally impermissible. Rather, courts typically determine liability based on whether a jail or prison has taken reasonable measures to address the risk of the serious harm presented by withdrawal.<sup>xix</sup> Liability generally turns on whether the carceral institution has (1) conducted an individualized assessment—including for safety or

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diversion concerns—and (2) adhered to the standard of care, particularly where the proper care has been previously established by the detainee’s provider in the community.

In sum, jails and prisons that by policy do not provide, minimally, continuing access to the appropriate MOUD at the appropriate dosage face significant risk of legal liability under both federal and state laws—and adverse health outcomes for those in their care.

## References

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- <sup>i</sup> Smith v. Fitzpatrick, 1:18-cv-00288 (D. Me. July 26, 2018).
- <sup>ii</sup> M.C. V. Jefferson Cnty., No. 6:22-CV-190, 2022 WL 1541462 (N.D.N.Y. May 16, 2022); Kortlever v. Whatcom Cnty., No. 2:18-cv-00823 (W.D. Wash. April 29, 2019).
- <sup>iii</sup> E.g., Coltrain v Mineral Cnty., No. 3:18-cv-00420 (D. Nev. Feb. 19, 2019).
- <sup>iv</sup> Disability Rights New Mex. v. Lucero et al, No. 1:22-cv-00954 (D. New Mex. Dec. 15, 2022).
- <sup>v</sup> E.g., Smith v. Aroostook Cnty., 376 F. Supp. 3d 146, 150 (D. Me.), aff'd, 922 F.3d 41 (1st Cir. 2019).
- <sup>vi</sup> E.g., Pesce v. Coppinger, 355 F. Supp. 3d 35 (D. Mass. 2018).
- <sup>vii</sup> E.g., DiPierro v. Hurwitz, No. 1:19-cv-10495 (D. Mass. June 7, 2019).
- <sup>viii</sup> E.g., Crews v. Sawyer, No. 19-2541-JWB, 2020 WL 1528502 (D. Kan. Mar. 31, 2020).
- <sup>ix</sup> E.g., Strickland v. Delaware Cnty., No. CV 21-4141 (E.D. Pa. Apr. 19, 2022).
- <sup>x</sup> E.g., P.G. v. Jefferson Cnty., No. 5:21-CV-388, 2021 WL 4059409 (N.D.N.Y. Sept. 7, 2021).
- <sup>xi</sup> E.g., Finnigan v. Mendrick, No. 21-CV-341, 2021 WL 736228 (N.D. Ill. Feb. 24, 2021).
- <sup>xii</sup> E.g., Rokita v. Penn. Dep't of Corr., 273 A.3d 1260 (Pa. Commw. Ct. 2022).
- <sup>xiii</sup> Dep't of Justice, *The Americans with Disabilities Act and the Opioid Crisis: Combating Discrimination Against People in Treatment or Recovery* (April 5, 2022), available at [https://archive.ada.gov/opioid\\_guidance.pdf](https://archive.ada.gov/opioid_guidance.pdf).
- <sup>xiv</sup> Office of Justice Programs, *Managing Substance Withdrawal in Jails: A Legal Brief* (Feb. 2022), available at <https://bja.ojp.gov/doc/managing-substance-withdrawal-in-jails.pdf>.
- <sup>xv</sup> Dep't of Justice, *Investigation of the Cumberland County Jail* (Jan. 14, 2021), available at <https://www.justice.gov/opa/press-release/file/1354646/download>.
- <sup>xvi</sup> Settlement Agreement Between the U.S. and the Mass. Parole Board (Dec. 14, 2021).
- <sup>xvii</sup> U.S. v. Unified Judicial System of Penn., No. 22-cv-00709 (Feb. 24, 2022); Settlement Agreement Between the U.S. and the Mass. Trial Ct. (March 24, 2022).
- <sup>xviii</sup> E.g., Voluntary Resolution Agreement Between Dep't of Justice, Dep't of Health & Human Svcs, and Genesis Healthcare's Designated Nursing Home Facilities (Aug. 4, 2021), available at <https://www.hhs.gov/civil-rights/for-providers/compliance-enforcement/agreements/genesis-healthcares-designated-nursing-home-facilities-agreement/index.html>.
- <sup>xix</sup> E.g., Gordon v. County of Orange, 888 F. 3d 1118 (9th Cir. 2018).