# The ADA and its Implications for Patients with OUD

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### Learning Objectives

 Review evidence-based treatment with medications for opioid use disorder (MOUD)
 Describe the Americans with Disabilities Act (ADA)
 Discuss landmark cases and settlements to ensure ADA compliance by covered entities

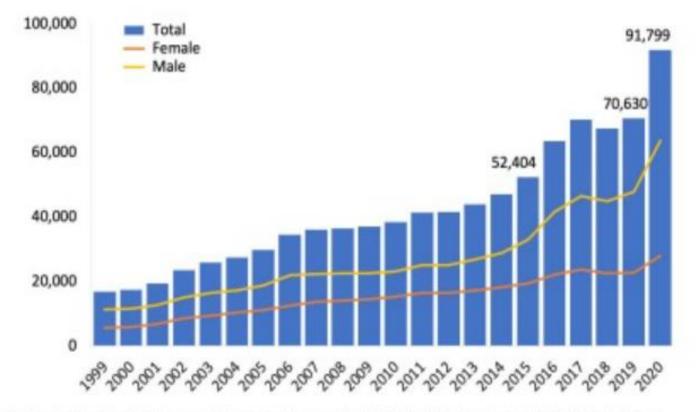


# **Guiding Principles**

- Opioid use disorder (OUD) is a chronic medical condition
- ADA gives civil rights protections to individuals with disabilities
- OUD is a disability
- Discrimination based on MOUD is a violation of the ADA
- Physicians need to advocate for patients to ensure compliance by public entities with the ADA



### Figure 1. National Drug-Involved Overdose Deaths\* Number Among All Ages, by Gender, 1999-2020

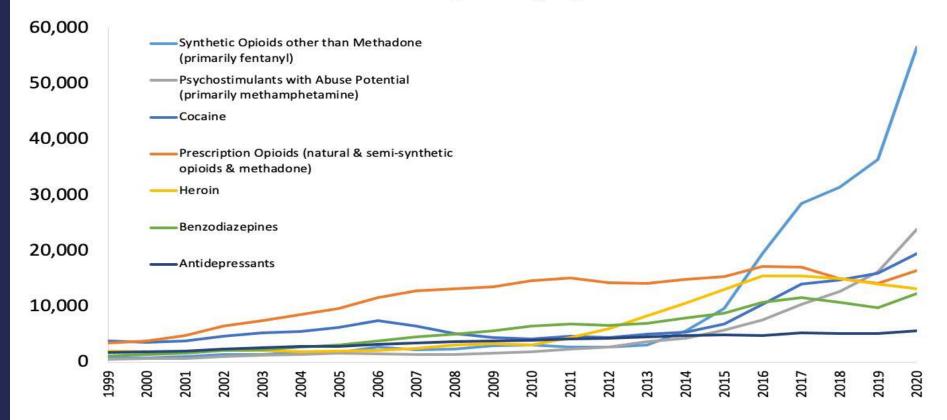


\*Includes deaths with underlying causes of unintentional drug poisoning (X40–X44), suicide drug poisoning (X60–X54), homicide drug poisoning (X85), or drug poisoning of undetermined intent (Y10–Y14), as coded in the International Classification of Diseases, 10th Revision. Source: Centers for Disease Control and Prevention, National Center for Health Statistics. Multiple Cause of Death 1999-2020 on CDC WONDER Online Database, released 32/2021.



Source: National Center on Drug Abuse. https://nida.nih.gov/research-topics/trends-statistics/overdose-death-rates

### Figure 2. National Drug-Involved Overdose Deaths\*, Number Among All Ages, 1999-2020



\*Includes deaths with underlying causes of unintentional drug poisoning (X40–X44), suicide drug poisoning (X60–X64), homicide drug poisoning (X85), or drug poisoning of undetermined intent (Y10–Y14), as coded in the International Classification of Diseases, 10th Revision. Source: Centers for Disease Control and Prevention, National Center for Health Statistics. Multiple Cause of Death 1999-2020 on CDC WONDER Online Database, released 12/2021.





Source: Substance Abuse and Mental Health Services Administration. Medications for Opioid Use Disorder. Treatment Improvement Protocol (TIP) Series 63 Publication No. PEP21-02-01-002. Rockville, MD: Substance Abuse and Mental Health Services Administration, 2021.

	Methadone	Buprenorphine	Naltrexone
Mechanism of Action			
Benefits for Withdrawal			
Mortality Benefits			
FDA Approval for OUD			

(TIP) Series 63 Publication No. PEP21-02-01-002. Rockville, MD: Substance Abuse and Mental Health Services Administration, 2021.

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Mechanism of Action	Full mu receptor agonist	Partial mu agonist	Mu receptor antagonist
Benefits for Withdrawal			
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FDA Approval for OUD			



Source: Substance Abuse and Mental Health Services Administration. Medications for Opioid Use Disorder. Treatment Improvement Protocol (TIP) Series 63 Publication No. PEP21-02-01-002. Rockville, MD: Substance Abuse and Mental Health Services Administration, 2021.

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Benefits for Withdrawal	Treats cravings and withdrawal		Does <b>not</b> treat withdrawal, minimal treatment of cravings
Mortality Benefits			
FDA Approval for OUD			



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FDA Approval for OUD			



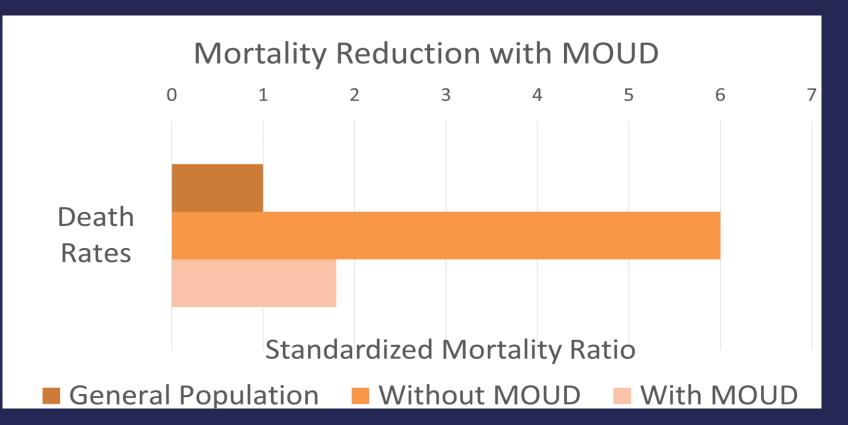
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FDA Approval for OUD	Treatment of OUD		Relapse Prevention



Source: Substance Abuse and Mental Health Services Administration. Medications for Opioid Use Disorder. Treatment Improvement Protocol (TIP) Series 63 Publication No. PEP21-02-01-002. Rockville, MD: Substance Abuse and Mental Health Services Administration, 2021.

### Addressing the Opioid Overdose Crisis: MOUD **Must** Be Part of the Solution



Dupouy J. et al Mortality Associated With Time In and Out of Buprenorphine Treatment in French Office-Based General Practice: A 7-year Cohort Study. Ann. Fam. Med. 2017. 15(4): 355-358.

Evans E. et al Mortality Among Individuals Accessing Pharmacological Treatment for Opioid Use Disorder in California, 2006-2010. Addiction. 2015. 110 (6): 996-1005.

Sordo L. et al Mortality Risk During and After Opioid Substitution Treatment: Systemic Review and Meta-Analysis of Cohort Studies. BMJ. 2017. 357:j1550.

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Describe the Americans with Disabilities Act (ADA)

Discuss landmark cases and settlements to ensure ADA compliance by covered entities





Source: <u>CDC</u>



### **Anti-Discrimination Laws**

Anti-discrimination laws protect the rights of people who use drugs or have substance use disorders to access treatment, healthcare, housing, work, and more.

Anti Discrimination Laws	Applicability
Americans with Disabilities Act (ADA)	-State and local governments (includes jails, prisons, courts, etc.) -Places of public accommodation (hospitals, recovery homes, skilled nursing facilities) -Employers
Rehabilitation Act of 1973	Federally funded entities
Affordable Care Act, Section 1557 (ACA)	Health care entities receiving federal funding
Fair Housing Act (FHA)	Housing and related services



# Who do the laws protect?

- People with disabilities
  - Impairment that substantially limits one or more major life activity/body function
- Substance use disorder is generally considered a disability
  - But laws do not protect illegal use of drugs
  - So only SUD not *currently* involving illegal use of drugs
  - Alcohol is protected whether past or present use
- However, even if someone currently uses drugs illegally, they cannot be denied health and treatment services because of their drug use



Protections Under

ADA, Rehabilitation Act, ACA

Prohibits discrimination against people with disabilities, including SUD (no current illegal use of drugs)

Prohibits denial of heath services because of drug use

Discrimination because people take MOUD



### What do the Laws prohibit?

Covered entities may not...

- Deny participation or services because of SUD
- Deny equal participation/services because of SUD
- Have admission criteria that screen out or tend to screen out people with SUD
- Have methods of administration that discriminate against people with SUDs
- Deny reasonable modifications for people with SUDs
- Deny health services due to current illegal use of drugs



### Discrimination v. Legitimate Decisions

- Decisions based on stigma, rather than objective, medical evidence = discrimination
- Failure to complete an individual assessment often indicates discrimination
- Total bans on MOUD are well established as discriminatory



# Department of Justice (DOJ) Guidelines for the ADA for Patients with OUD

### U.S. Department of Justice Civil Rights Division

The Americans with Disabilities Act and the Opioid Crisis: Combating Discrimination Against People in Treatment or Recovery

The opioid crisis poses an extraordinary challenge to communities throughout our country. The Department of Justice (the Department) has responded with a comprehensive approach prioritizing prevention, enforcement, and treatment. This includes enforcing the Americans with Disabilities Act (ADA), which prohibits discrimination against people in recovery from opioid use disorder (OUD) who are not engaging in illegal drug use, including those who are taking legally-prescribed medication to treat their OUD. This guidance document provides information about how the ADA can protect individuals with OUD from discrimination—an important part of combating the opioid epidemic across American communities. While this document focuses on individuals with OUD, the legal principles discussed also apply to individuals with other types of substance use disorders.

### 1) What is the ADA?

The ADA is a federal law that gives civil rights protections to individuals with disabilities in many areas of life. The ADA guarantees that people with disabilities have the same opportunities as everyone else to enjoy employment opportunities,<sup>1</sup> participate in state and local government programs,<sup>2</sup> and purchase goods and services.<sup>3</sup> For example, the ADA protects people with disabilities from discrimination by social services agencies; child welfare agencies; courts; prisons and jails; medical facilities, including hospitals, doctors' offices, and skilled nursing facilities; homeless shelters; and schools, colleges, and universities.

### 2) Does an individual in treatment or recovery from opioid use disorder have a disability under the ADA?

Typically, yes, unless the individual is currently engaged in illegal drug use. See Question 5.

The ADA prohibits discrimination on the basis of disability.<sup>4</sup> The ADA defines disability as (1) a physical or mental impairment that substantially limits one or more major life activities, •Describes how the ADA protects individuals with OUD, and other SUDs, from discrimination

• "The ADA protects people with disabilities from discrimination by social services agencies; child welfare agencies; courts; prisons and jails; medical facilities, including hospitals, doctors' offices, and skilled nursing facilities; homeless shelters; and schools, colleges, and universities."



Source: The United States Department of Justice. Civil Rights Division. The Americans with Disabilities Act and Opioid Crisis: Combating Discrimination Against People in Treatment or Recovery. April 5, 2022

### LAC Resources



MAT/MOUD Advocacy Toolkit

November 2022



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### To Whom it May Concern.

You have been presented this letter because you may be violating the Americans with Disabilities Act (ADA) by interfering with the right of individuals to receive physicianprescribed medication for opioid use disorder (OUD). This letter provides information about OUD, effective treatment, the reasons why interfering with a physician's recommended treatment violates the ADA, and resources for additional information

Medication for opioid use disorder (MOUD) is the standard of care for treating OUD. Treatment with MOUD involves the use of medications, such as buprenorphine (Suboxone) and methadone, to help normalize brain function and decrease symptoms of OUD such as cravings and withdrawal.1 MOUD can be used with other supportive services, such as behavioral therapy and peer support. However, medications provide substantial banefits on their own MOUD reduces illight drug use overdose.

### Sample Letters to Courts, Parole/ Probation, Jails/ **Prisons, or Child Welfare**

Agencies ust as it is inadvisable to deny for their illness."

### Federal Enforcement and National Support

The U.S. Department of Health and Human Services, Office for Civil Rights (OCR), has concluded that state court systems must comply with federal nondiscrimination laws prohibiting discrimination based on OUD. OCR describes a best practice for ADA compliance as, "Examining program eligibility and admission criteria to identify and Gabrielle de la Guieronnière Vice President of Health & Justice Policy eliminate discriminatory barriers . . . for individuals recovering from opioid use disorders, including treatment and recovery services."18 OCR also states that "covered child welfare agencies may not delay or deny parent-child visitation or reunification services to a parent receiving [MOUD], if the parent would be or is otherwise eligible to receive such services."\* OCR accordingly entered into a resolution agreement with West Virginia's child welfare agency after it violated these nondiscrimination requirements. For more information, see the Legal Action Center's (LAC) Cases Involving. Discrimination Based on Treatment with MOUD, which can be found at

### LAC LEGAL ACTION

### Legal Advocacy to Protect Health Care Access for People who Use(d) Drugs

People who use drugs or have substance use disorders often experience discrimination when trying to access health care. For example, someone diagnosed with opioid use disorder who takes medication to treat their OUD may be denied admission to a skilled nursing facility because of discriminatory and incorrect assumptions about OUD and MOUD.

Denial of care based on substance use often violates anti-discrimination laws and causes enormous harm. Ensuring that people have access to treatment for substance use and other health needs is crucial, particularly amid the country's overdose crisis where Black, Latinx, and indigenous people are dying at increasingly high rates.

This resource provides guidance on how lawyers and others can help advocate for people to access critical health care.

### THE FACTS

The denial of health care and stigma toward people who use or used drugs occurs in virtually every health care setting - even when the services someone needs have nothing to do with drug use. Health care providers often deny services based on illegitimate reasons, including stigma toward people who use drugs (PWUD), opinions that people are only in recovery if they are abstinent, or beliefs that PWUD are responsible for their health conditions or less worthy of care. Some health care facilities say that they lack capacity to serve PWUD or people with substance use disorders (SUDs) because they are too "challenging" or "high need."

### **Cases Involving Discrimination Based on Treatment with** Medication for Opioid Use Disorder (MOUD)



### June 6, 2022

This list highlights key cases, investigations, and government settlements/consent decrees involving denial of access to MOUD in various settings. It is not exhaustive.

### Criminal Legal System

### Jails and Prisons

Pesce v. Coppinger, 355 F. Supp. 3d 35 (D. Mass. 2018). The court held that it likely violates both the Americans with Disabilities Act (ADA) and Eighth Amendment of the U.S. Constitution to deny an incarcerated person access to MOUD without individual assessment and contrary to the treating provider's medical recommendation. The plaintiff, soon to be incarcerated in a Massachusetts jail, alleged that the defendant/jail's policy of denying incarcerated persons access to methadone for the treatment of opioid use disorder (OUD) violated Title II of the ADA and the Eighth Amendment. The court granted the plaintiff's motion for a preliminary injunction, holding that "absent medical or individualized security considerations underlying the decision to deny access to medically necessary treatment," the plaintiff was likely to succeed in his ADA claim. The court also held that the plaintiff was likely to succeed on his Eighth Amendment claim because the defendant was deliberately indifferent to his serious medical need in repeatedly ignoring the plaintiff's doctor's treatment recommendation. The court made these holdings despite the defendant's arguments that MOUD creates safety and diversion concerns

Smith v. Aroostook Cty., 376 F. Supp. 3d 146 (D. Me.), aff'd, 922 F.3d 41 (1st Cir. 2019). The court held that it likely violates the ADA to deny an incarcerated person access to MOUD without a particular assessment of the individual's need for medication. This decision granting the plaintiff's motion for preliminary injunction came after the plaintiff was going to be incarcerated in the county jail and requested access to her prescribed MOUD. The court did not find persuasive defendant's concerns about safety and diversion. The case was affirmed by the First Circuit

Kortlever v. Whatcom County (D. Wash. 2018). This class action lawsuit settled with an agreement to provide MOUD on class-wide basis. A class of current and future incarcerated persons at the Whatcom County Jail alleged that the jail's policy prohibiting MOUD violated the ADA and Eighth Amendment. The settlement included guidelines for training and implementation of written policies for MOUD - primarily buprenorphine maintenance and induction - as well as medically-assisted withdrawal.



### Learning Objectives

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✓ Describe the Americans with Disabilities Act (ADA)

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# Case 1: A Patient with OUD who needs physical rehab

- 24 year old male with OUD on buprenorphine
- Admitted for acute hypoxic respiratory failure due to COVID-19
- Now needs acute rehab for debility after being in the MICU
- Rehab declines patient due to patient OUD and being on buprenorphine



# Case 1: A Patient with CF and OUD (cont)

Settlement Agreements under the ADA

•SNIF cannot screen out an individual/a group of individuals (patients with OUD) from receiving health care services

Sample letter:

https://www.lac.org/assets/files/Advocacy-Guide\_v4-w-attach-a.pdf



Source: Operator of 21 Massachusetts Skilled Nursing Facilities Agrees to Resolve Allegations of Disability Discrimination. United States Attorney's Office. https://www.justice.gov/usao-ma/pr/operator-21-massachusetts-skilled-nursing-facilities-agrees-resolve-allegations

### **Discussion Questions**

- Is this a potential ADA violation?
  - > Yes. The settlements explain this.
  - Blanket policies denying admission to people taking MOUD in health care settings like recovery homes and skilled nursing facilities are illegal.
- What could you do to advocate for this patient if you were his doctor?
  - Educate the patient and other providers about the ADA to ensure compliance and file a complaint with e.g., assistant US attorney, so it can be investigated to determine if it is an ADA violation



### Opioid Use Disorder & Health Care: Skilled Nursing Facilities

People who take medication for opioid use disorder (MOUD), like methadone or buprenorphine, often experience illegal barriers to healthcare.

### Admission to Skilled Nursing Facilities

(including nursing homes and long-term care facilities)

People needing care at a skilled nursing facility (SNF) are often denied admission because they take methadone or buyrenorphine to treat opioid use disorder (OUD). The U.S. Department of Justice has stated that these practices are illegad discrimination.

### Signs of discrimination include

- SNF has a policy not to admit people taking methadone or buprenorphine
- SNF says someone must taper off of MOUD to be admitted
- SNF says it cannot provide the "type of services" someone with OUD needs
  SNF denies someone admission after commenting about their substance use

For help, call the Legal Action Center: (212) 243-1313 Visit LAC's MAT ADVOCACY TOOLKIT for materials that can help you advocate!

### How Skilled Nursing Facilities Can Provide Access to MOUD

SNFs can provide access to MOUD, and many do. Below are some ways SNFs may facilitate access to methadone and buprenorphine:

- The SNF can bring patients to their opioid treatment program (OTP) for methadone doses
  Methadone may be transported from an OTP to an SNF
- The patient's qualified practitioner in the community can prescribe buprenorphine
- An SNF qualified practitioner can prescribe buprenorphine with a federal waiver. 2021 federal guidance allows qualified practitioners to prescribe buprenorphine to up to 30 patients without satisfying counseling and training requirements
- SNFs may store and administer MOUDs the same way they do other controlled substances

For more information, visit NYS Office of Addiction Services and Supports: Medications for the Treatment of Opioid Use Disorder

This document is informational and does not constitute legal advice. © 2021 | Legal Action Center | <u>www.lac.org</u> 225 Varick Street, 4<sup>th</sup> Floor, New York, NY 10014 Phone: (212) 243-1313 | Fax: (212) 875-0286



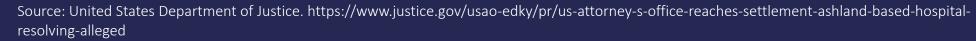
### Case 2: A Patient with OUD Seeking Care for Post-Traumatic Stress Disorder (PTSD)

- You are a PCP and have a patient with OUD on buprenorphine is seeking treatment for PTSD
- Refer patient to psychiatrist for management
- Calls outpatient psychiatry clinic to make an appointment
- Clinic demands for patient to be off MOUD for several months to establish care for PTSD



Case 2: A Patient with OUD Seeking Care for PTSD (cont.) - Settlement

- Cannot withhold medical care for patients for being on MOUD
- If lacking expertise to treat condition due to OUD: Do not have to treat OUD, but refer to a provider who can
- Clinic to provide nondiscriminatory care for patients with OUD and ensure compliance with the ADA



### **Discussion Questions**

- Is this an ADA violation?
  - > Yes. A recent settlement helps establishes this
- What avenues of advocacy can you think of for the patient to use?
  - > Let's discuss the physician's role as an advocate



### Case 3: Incarcerated Patient with OUD and Chest Wall Abscess

- Hospitalized for injection related chest wall abscess
- Receives appropriate medical management for his injection
- Diagnosed with severe OUD
- Desires buprenorphine to treat OUD
- Guards at bedside interrupt buprenorphine administration: "You know he can't have this in jail, right?"



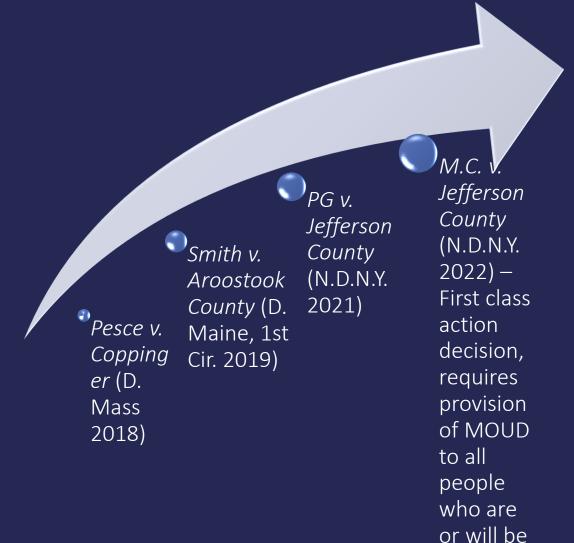
### **Discussion Questions**

- What are some complicating factors for this patient?
  - Barriers to treatment as carceral system is interfering with medical care
- Does the ADA still apply?
  - Yes. Incarcerated patients with OUD on MOUD are still protected by the ADA and the Eighth/14 Amendments
- How can you advocate for this patient?
  - Barriers require multistep approach



# The ADA for Incarcerated Patients on MOUD

- Discontinuation of MOUD = ADA violation
- Ex) Agreement between the United States of America and Lexington-Fayette Urban County Government Division of Community Corrections
- Not all jails or prisons are currently compliant with the ADA
  Continued advocacy is needed





in the jail

### Right to Health Care Under the 8<sup>th</sup> Amendment

- Eighth Amendment (1971): prohibits cruel and unusual punishment of incarcerated patients
- Supreme Court upheld protection to apply to health care: deliberate indifference to serious medical need
- Incarcerated patients should receive same standard of care as nonincarcerated patients
- MOUD is the standard of care for OUD

Source: Constitution of the United States. Eighth Amendment Eber GB Using the Constitution to Improve Prisoner Health. Am J Public Health. 2009. 99(9). 1541-1542. Substance Abuse and Mental Health Services Administration. Medications for Opioid Use Disorder. Treatment Improvement Protocol (TIP) Series 63 Publication No. PEP21-02-01-002.

32

### Avenues for Advocacy for Patients and Physicians

Education – Use LAC's resources found at <u>https://www.lac.org/major-project/legal-help-4-pwud</u>

### File Administrative Complaints:

- ADA file with DOJ at ada.gov or <u>https://beta.ada.gov/file-a-complaint/</u>
- **Rehabilitation Act** file with OCR: <u>https://www.hhs.gov/civil-rights/filing-a-complaint/index.html</u>
- FHA file with HUD: <a href="https://www.hud.gov/program\_offices/fair\_housing\_equal\_opp/online-complaint#\_How\_To\_File">https://www.hud.gov/program\_offices/fair\_housing\_equal\_opp/online-complaint#\_How\_To\_File</a>
- EMTALA file with agency that investigates complaints about hospitals in state where incident occurred. See Centers for Medicare & Medicaid Services list at <u>https://www.cms.gov/files/document/state-survey-agency-directory-june-2022.pdf</u>

Don't forget **state agency complaints** – including Attorneys General!

New York – Contact LAC for any discrimination based on SUD

North Carolina/Kentucky – Contact LAC for denial of healthcare based on SUD



### How to File a Potential ADA violation

A possible ADA violation occurs for a patient with OUD

Ensure violation based on discrimination, not on an individualized medical assessment

Document details (e.g., conversations, emails) and provide them when submitting a case

Submit a case for investigation of a potential ADA violation



### How to File a Potential ADA violation

Ensure that either:

 Patient signs release of information form OR de-identify data to be compliant with Health Insurance Portability and Accountability Act (HIPAA)

Optional:

• Discuss violation with the patient (patient can also file on their own behalf – the more complaints received, the more information that the assistant US attorney will have)

• Be available for assistant US attorney for follow up



### Considerations when filing ADA violation

- DOJ can investigate public entities and places of public accommodation (private hospitals, SNFs, etc.)
- Assistant US attorney represents the United States
- Monetary settlements are often smaller amounts
- Goal: To ensure public entities/places of public accommodation are compliant with ADA



# **Guiding Principles**

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- ADA gives civil rights protections to individuals with disabilities
- OUD is a disability
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- Physicians need to advocate for patients to ensure compliance by public entities with the ADA



### Acknowledgements

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- 1. Dupouy J, Palmaro A, Fatseas M et al.: Mortality associated with time in and out of buprenorphine treatment in french office-based general practice: A 7-year cohort study. *Ann Fam Med.* 2017; 15(4): 355-358.
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  Eber GB Using the Constitution to Improve Prisoner Health. Am J Public Health. 2009. 99(9). 1541-1542.
- 4. Evans E, Libo L, Min J et al.: Mortality among individuals accessing pharmacological treatment for opioid depedence in California, 2006-2010. Addiction. 2015; 110(6): 996-1005.
- 5. Legal Action Center. Cases involving discrimination based on treatment with medication for Opioid Use Disorder (MOUD) June 6, 2022. Available at https://www.lac.org/assets/files/Cases-involving-denial-of-access-to-MOUD.pdf Accessed November 16, 2022.
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- 10. The United States Department of Justice. Settlement agreement between the United States of America and Ashland Hospital Corporation D/B/A King's Daughter's Medical Center. Under the Americans with Disabilities Act. Available at https://www.justice.gov/crt/casedocument/file/1547661/download Accessed December 20, 2022.
- 11. The United States Department of Justice. Settlement agreement between the United States of America and Massachusetts General Hospital under the American with Disabilities Act. Available at https://archive.ada.gov/mass\_gen\_hosp\_sa.html Accessed November 16, 2022.
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- 13. U.S. Department of Justice Right Division: Introduction to the Americans with Disabilities Act. Available at https://www.ada.gov/topics/intro-toada/ Accessed November 16, 2022.
- 14. U.S. Department of Justice Right Division: The Americans with Disabilities Act and the opioid crisis: Combating discrimination against people in treatment or recovery. Available at https://archive.ada.gov/opioid\_guidance.pdf Accessed December 20, 2022.

