

Leveraging Legal Protections to Counter Discrimination Against People Who Use(d) Drugs: The Essential Role of Healthcare Professionals

47th Annual AMERSA Conference
November 3, 2023

The information in this presentation does not constitute legal advice or legal representation.



Workshop Facilitators

Kate Boulton, JD, MPH

Senior Legal Technical Advisor
Vital Strategies

Diane Johnston, JD

Senior Staff Attorney
Legal Action Center

Derek Carr, JD

Legal Technical Advisor
Vital Strategies

Simeon Kimmel, MD, MA

Boston University School of
Medicine and Boston Medical
Center

Disclosures

- **Kate Boulton and Derek Carr, employees of Vital Strategies, have no disclosures.**
- **Diane Johnston, an employee of Legal Action Center, has no disclosures.**
- **Simeon Kimmel discloses:**
 - NIDA 1K23DA054363-01, BUSM Career Investment Award
 - Consult for Bureau of Substance Addiction Services, DPH
- **Vital Strategies and Legal Action Center are non-profit organizations.**

Learning Objectives

1. Describe how federal anti-discrimination laws apply to people who use(d) drugs or who have a substance use disorder.
2. Recognize specific policies and practices that may constitute unlawful disability-based discrimination against people who use(d) drugs or who have a substance use disorder.
3. Identify strategies for substance use and addiction professionals to help counter unlawful discrimination against people who use(d) drugs or who have a substance use disorder.

Agenda

- **Setting the Context**
Anti-Discrimination Laws and People Who Use(d) Drugs
- **Large Group Activity**
- **Challenging the Discriminatory Denial of Care**
- **Small Group Activity**
- **Share Out and Reflections**

Vital Strategies

- Vital Strategies is a global health organization that believes every person should be protected by a strong public health system.
- Vital Strategies is the lead implementation partner for state-focused work in the Bloomberg Overdose Prevention Initiative.
- The Overdose Prevention Program brings a comprehensive approach to equitably and sustainably reduce overdose deaths in seven states where fatalities are among the highest in the country: Kentucky, Michigan, New Jersey, New Mexico, North Carolina, Pennsylvania, and Wisconsin.

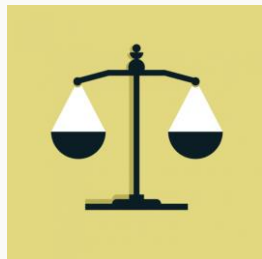
Breaking Barriers. Defending Dignity.

The Legal Action Center (LAC) uses legal and policy strategies to fight discrimination, build health equity, and restore opportunity for people with criminal records, substance use disorders, and HIV or AIDS.

How LAC Works



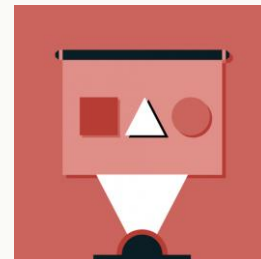
Direct Legal
Services



Impact
Litigation



Policy
Advocacy



Training,
Technical
Assistance &
Education



Coalitions &
Collaboration

Denial of Health Care

Two common forms of health care denial in virtually every health care setting:

- 1) People are denied health care because of their substance use – past or present
- 2) People are denied health care because they take medication to treat their substance use disorder (SUD), often MOUD

The result: people's health needs are sacrificed because of their drug use.

Increasing Access to Health Care

Legal Action Center & Vital Strategies' Overdose Prevention Program project – seeks to advance the legal rights of people who use drugs to access the full continuum of health care

- **Educational materials** for directly impacted communities and advocates.
- **Direct legal services and litigation** in select states.
- **Complaints to federal and state enforcement agencies**

Setting the Context

Anti-Discrimination Laws and People Who Use(d) Drugs

Federal Anti-Discrimination Laws



These laws protect **individuals with disabilities** from **discrimination**:

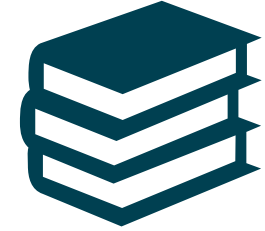
- **Americans with Disabilities Act (ADA)**: no disability discrimination by:
 - Employers (Title I)
 - States/local governments (Title II)
 - Health care providers (Title III – places of public accommodation)
- **Rehabilitation Act of 1973** – federally operated or assisted
 - Proposed HHS regulations
- **Affordable Care Act (Sec. 1557)** – federally funded health care
- **Fair Housing Act** – housing

Definition of “Disability”



- Physical or mental impairment
- That substantially limits one or more major life activities
 - SUD = Impairment
 - SUD can substantially limit major life activities like: caring for oneself, concentrating, thinking, working, and brain and neurological functioning
 - Individuals must show that *their* SUD substantially limits 1+ major life activities
- Courts generally find “disability” for past or current alcohol use disorder, past drug addiction

Definition of “Disability”



- Includes current and past disabilities – “record of”
- Exception: current illegal use of drugs
 - Not considered “disability”
 - But **protected from denial of health or drug rehabilitation services**
 - How recent makes drug use “current”?
- Includes people “regarded as” having a disability even if they don’t

Discrimination – What is it?

- Many ways to show discrimination, including –
 - Denying participation or the benefits of a service on the basis of disability.
 - Denying *equal* participation/benefits on the basis of disability
 - Admission criteria that screen out or tend to screen out people with disabilities
 - Methods of administration that discriminate against people with disabilities
 - Denial of reasonable modifications for people with disabilities
 - Denial of health services due to current illegal use of drugs
- Later, we'll use case studies to show how this plays out.....

Affirmative Defenses

- **Direct Threat**
 - Must show “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures...”
 - Requires an *individualized* assessment – reliance on assumptions, stereotypes, or speculation is insufficient.
- A requested reasonable accommodation would “**fundamentally alter**” a program or constitute an “**undue burden.**”

Protections Against Retaliation

- Entities may not discriminate against an individual because the individual:
 - Opposed any act or practice made unlawful by the ADA
 - Made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the ADA.
- Unlawful to coerce, intimidate, threaten, or interfere with an individual exercising their rights under the ADA, or for helping another individual exercise their rights under the ADA.
- Other federal anti-discrimination laws afford similar protections.

Other Relevant Laws

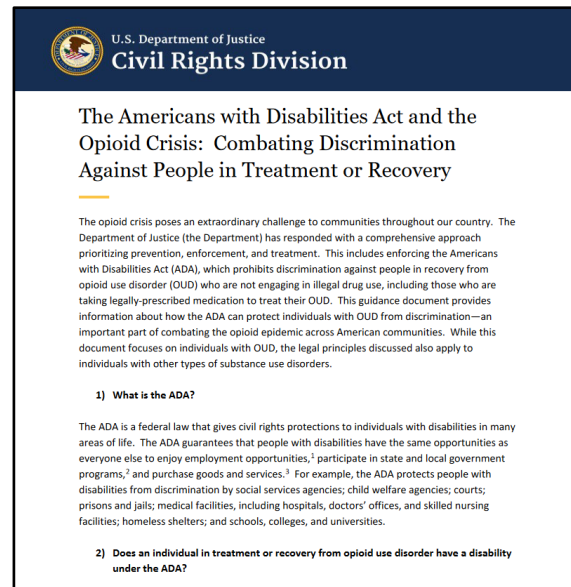
- State and local human rights laws – prohibiting discrimination
- State and local regulations
- State Constitution
- Federal Constitution
- Torts like malpractice / negligence

Department of Justice Guidance

The Americans with Disabilities Act and the Opioid Crisis: Combating Discrimination Against People in Treatment or Recovery (April 2022)

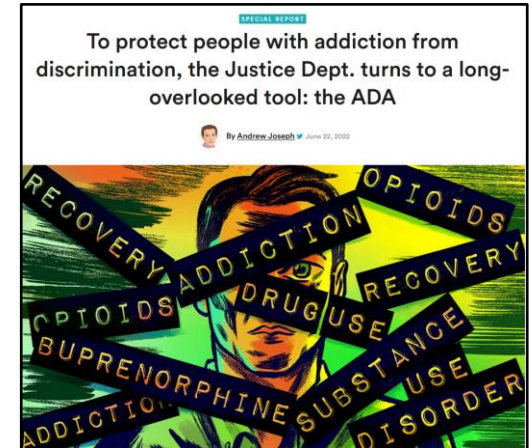
- An individual in treatment (including MOUD) or recovery from OUD typically has a disability under the ADA.
- Still a protected disability if condition would limit a major life activity *in the absence of* treatment/services.
- Current illegal drug use exclusion inapplicable to health services or services provided in connection with drug rehabilitation.
- Examples of unlawful discrimination by skilled nursing facilities, jails, medical providers, emergency departments, drug rehabilitation programs, government entities, and employers.
- Information about how to file complaints with US DOJ and US HHS Office for Civil Rights.

https://www.ada.gov/opioid_guidance.pdf



Recent DOJ Enforcement Actions Settlement Agreements

- **Skilled nursing facilities** in Massachusetts that denied admission to patients taking prescribed MOUD (2018, 2019, 2020, 2021).
- A **surgical group** in Massachusetts that refused to treat patients prescribed buprenorphine (2021).
- Massachusetts **Parole Board** (2021) and Massachusetts **Trial Court** (2022) for ordering people off MOUD and/or requiring participants to use specific forms of MOUD.
- A Colorado **nonprofit** that denied admission to its **residential, work, and social services program** based on use of prescribed MOUD (2022).
- The **Indiana State Nursing Board** for prohibiting nurses who take MOUD from participating in the nursing assistance program (2022).
- A **hospital-based outpatient behavioral medicine clinic** in Kentucky that turned away patients with OUD, including those using prescribed MOUD (2022).
- **Local jails** in Kentucky and New Jersey that did not provide MOUD and/or other SUD-related services (2022, 2023).
- **Alabama's state Medicaid agency** that denied Hepatitis C treatment to people who used alcohol or illicit drugs within the past 6 months or who were found to use alcohol or illicit drugs while receiving Hep C treatment (2022).



<https://www.statnews.com/2022/06/22/to-protect-people-with-addiction-from-discrimination-the-justice-dept-turns-to-a-long-overlooked-tool-the-ada/>

Questions?



Selected Case Studies

Large Group Discussion

Case Study: MOUD Continuation in Correctional Settings

Sandra takes methadone to treat OUD. She is sentenced to 90 days in jail for violating the terms of her probation. During in-take, jail staff inform Sandra that she must:

- **Scenario 1:** Stop taking methadone because the jail does not allow any MOUD.
- **Scenario 2:** Taper off methadone because MOUD is limited to pregnant people.
- **Scenario 3:** Transition to buprenorphine because the jail is not authorized to administer methadone for OUD.
- **Scenario 4:** Transition to buprenorphine because, after reviewing Sandra's medical history, the jail's physician determined that buprenorphine was medically more appropriate.
- **Scenario 5:** Stop taking methadone because her urine drug screen showed active illicit drug use, which makes her ineligible for the jail's MOUD program.
- **Are any of these scenarios legal?**

Case Study: MOUD Induction in Correctional Settings

Raymond is incarcerated after being convicted on drug-induced homicide charges. He was not on buprenorphine at the time of his incarceration but had taken the medication in the past for his OUD. Raymond requests admission into the prison's SUD treatment program, including agonist MOUD. The prison informs Raymond that:

- **Scenario 1:** He is ineligible for any MOUD because he did not have an active prescription when he entered the facility.
- **Scenario 2:** He is eligible only for detoxification followed by extended-release naltrexone because he did not have an active agonist MOUD prescription.
- **Scenario 3:** He is ineligible to receive MOUD because the urine drug screen conducted during his intake showed illicit drug use.
- **Are any of these scenarios legal?**

Case Study: Recovery Homes



Shane takes buprenorphine to treat their OUD. A drug court mandates that Shane must live in recovery housing. However, recovery homes in Shane's area:

- **Scenario 1:** Have policies that prohibit residents from using prescribed MOUD, saying they are “abstinence-based” and have nowhere to store the medication.
- **Scenario 2:** Have no written policies that explicitly prohibit the use of prescribed MOUD, but pressure residents to reduce their dosage and/or stop taking MOUD.
- **Scenario 3:** Require residents on MOUD pay an extra “service and storage fee.”
- **Legal?**

Prohibiting MOUD = Discrimination Because of Disability

- Growing body of case law and DOJ/HHS settlements and guidance that banning/restricting MOUD = discrimination. Decisions must be based on an individualized evaluation.
- Cases so far involve jails, nursing homes, doctors' offices, hospitals, residential work and social service programs.
- Parallel legal developments in employment and child welfare settings.
- Discrimination based on MOUD includes:
 - Outright prohibition of MOUD
 - Arbitrary dose / duration limits
 - Requirements to switch medication
 - Limitations on # of program participants who can take MOUD
 - Surcharges on people taking MOUD
- No case law or settlement agreements on MOUD initiation yet, but strong arguments that it's legally required.

Case Study: Skilled Nursing Facilities

- **Scenario 1:** Elizabeth has been treated with methadone for years. She is hospitalized after brain surgery and needs discharge to a SNF. More than 20 SNFs refuse to admit her - “we don’t admit people on methadone.”
- **Scenario 2:** Elizabeth experiences a non-fatal overdose and is admitted to a hospital, where she is inducted and stabilized on buprenorphine for OUD. When the hospital seeks to discharge Elizabeth to an SNF, the facilities refuse admission because she hasn’t been on MOUD long enough.
- **Legal? Does she have rights?**

Discrimination in SNFs/Nursing Homes

- **DOJ -- multiple settlements with skilled nursing facilities** in MA.
- MOUD exclusion violates Title III – ADA
 - Explicit policies (“no buprenorphine”) are facially discriminatory.
 - Animus & bias: “those patients have too many needs / smuggle in drugs”
- See LAC educational resource, [*Opioid Use Disorder & Health Care: Skilled Nursing Facilities.*](#)

Case Study: Home Care



- Shawn is in recovery from SUD.
- Hospitalized for diabetes-related infection and needs IV antibiotic treatment after discharge.
- Hospital typically discharges someone needing this care with a PICC line to complete antibiotic treatment at home.
- Hospital policy is to deny IV antibiotic home care to people with history of SUD. He can go to a nursing home or daily to an outpatient clinic for treatment.
- Shawn has mobility and transportation challenges. Wants to go home, so asks for reasonable modification of the policy. Hospital says “no.”
- **Legal?**

Denial of Home Care

- No known case law or government enforcement action yet
- **LAC alleging hospital violated ADA, Rehabilitation Act, and ACA** because:
 - Shawn was denied equal participation or benefits of hospital's services on basis of disability (past SUD)
 - Denial of reasonable modifications
- If **home care agency** denied services, could be liable for admission criteria that screen out people with a disability or using "methods of administration" that discriminate against people with disabilities

Case Study: Emergency Room



- Dani overdoses on heroin while using with her friends.
- Friends call 911.
- At the ER, staff administer naloxone, her respiratory function improves and she is rehydrated.
- After a couple of hours, ER discharges Dani with a list of local SUD treatment programs.
- Dani returns to active use within hours of ER discharge and dies of overdose from fentanyl.
- **Did the ER have a legal obligation to do more?**

Discrimination in Emergency Rooms

LAC report: Emergency: Hospitals Are Violating Federal Law by Denying Required Care for Substance Use Disorders in Emergency Departments. All substances, including alcohol.

Emergency Medical Treatment and Labor Act (EMTALA)

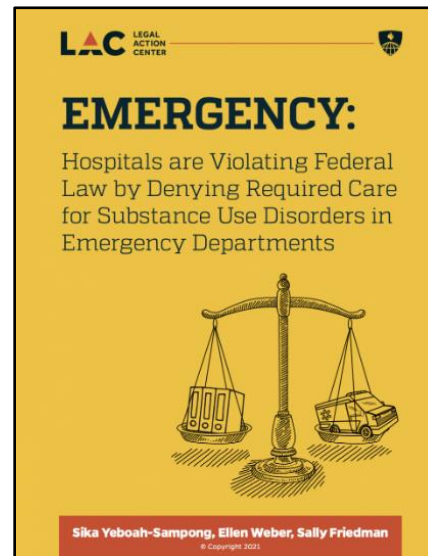
- Requires most EDs to provide certain services

ADA /Rehabilitation Act:

- Prohibits discrimination based on SUD history and recovery
- Prohibits denial of healthcare due to current illegal drug use

Title VI of the Civil Rights Act of 1964 (Title VI):

- Prohibits discrimination on basis of race or ethnicity



What Should ER Have Done Differently to Avoid Potential Legal Liability?

- 1) **Diagnostic assessment** for SUD
- 2) **Offer to administer** medication for OUD
- 3) **Meaningful connection (warm handoff)** to ongoing SUD care
- 4) **Naloxone** to help protect Dani against future overdose



Other Potential/Emerging Applications

- Pharmacies refusal to stock and/or dispense buprenorphine for OUD.
- Differences in emergency response practices for physical vs. behavioral health / substance use emergencies.
- State laws imposing excessive and medically unjustified restrictions on MOUD.
- Alcohol use disorder and access to liver transplants
- Differential treatment while inpatient: different color gowns, no visitor policies for people with SUD
- **What else comes to mind?**

Questions?



Challenging the Discriminatory Denial of Care

Advocacy Strategies

Opportunities to Challenge Unlawful Discrimination

- **Know the law and educate others**

Educate your patients and colleagues about what legal protections exist for people who use(d) drugs and how to invoke them.

- **Challenge those who violate anti-discrimination laws**

Advocate for your patients by informing those engaged in discrimination against PWUD about their legal responsibilities and demand change.

- **Document and track instances of discrimination**

Organized efforts can help identify systemic issues and provide the basis for administrative complaints, enforcement actions, and litigation.

- **Push enforcement agencies to prioritize enforcement of anti-discrimination protections for PWUD**

- **Support legislative, regulatory, and other policy change**

New laws and policies can reinforce or expand critical anti-discrimination protections to ensure PWUD can access health care and other supportive services.

Understand Your Advocacy Goals

- **Securing immediate assistance for your patient(s)**
- **Changing practice(s) at an *individual* level** (e.g., addressing discriminatory practices by a particular colleague)
- **Changing policies/systems at an *institutional* level** (e.g., changing hospital-wide policies and/or practices)
- **Effectuating broader policy and systems-level change**
 - Governmental policies (e.g., legislation and regulations)
 - Establishing legal precedent (e.g., impact litigation)

Providers Can Make a Difference!

- Providers are uniquely positioned to *identify these issues*. Most individuals don't know their legal rights are being violated.
- Cutting edge area – case law not well developed, but DOJ and OCR guidances and settlements can be influential.
- Advocacy strategies:
 1. Educate yourselves and others
 2. Informal advocacy
 3. Filing administrative complaints
 4. Lawsuits
- You can support this advocacy in big or small ways!



Education

- **Share resources** on this issue (see resources, below)
- **Develop partnerships** with:
 - Like-minded providers so you can mobilize and advocate
 - Non-provider advocates working on these issues
 - Harm reduction organizations
 - CBOs whose clients are facing SUD discrimination
 - Legal organizations, including medical-legal partnerships
- **Introduce this information to new audiences** (e.g., professional associations)

Education

- **Example:** A provider partner of Legal Action Center and Vital Strategies (Dr. Michelle Lofwall of UK) presented at the Kentucky Legal Aid Programs Statewide Conference.
- **Example:** Two addiction medicine providers presented on effective treatment to a PA-based MOUD in Jails Advocacy Network.

Informal Advocacy

- Use education, persuasion, and if necessary, the risk of legal liability, to get your patients access to the health care they're entitled to. It can work – for your patient and for broader policy and practice change.
- Can include or reference DOJ guidelines, LAC materials
- Attorney's guide has useful tips and a sample demand letter.
- LAC has helped people overcome discriminatory denial to SNFs this way.

Informal Advocacy

- Publishing a call to action
 - April 2023 JAMA Viewpoint: *Treating Opioid Use Disorder in Patients Who Are Incarcerated-Quandaries of a Hospitalist*
 - March 2023 Annals of Internal Medicine piece: *Ending Medical Complicity with Skilled-Nursing Facility Discrimination Against People with Opioid Use Disorder*
 - Helpful table on actions to combat discrimination by role (Provider, Hospital Administration, Patient, SNF)

Working with Attorneys

- Understand complementary areas of expertise that can advance the shared objective of challenging illegal discrimination
- Familiarize yourself with the different legal players, e.g., private, P&As, government
 - Different roles and goals
 - Enforcement authority and challenges
 - Engaging with plaintiffs and the challenges this can present
- How providers can help attorneys build a case

File Administrative Complaints

Tips for Filing Administrative Complaints

- You can file complaints on behalf of yourself or others.
- Include as much detail as possible when submitting complaints – you can file anonymously, but it is better to include contact information.
- Consider any applicable time limits.
- Don't despair if you don't receive a response – federal agencies review every submission even if they don't provide a response.

ADA violations

DOJ Office of Civil Rights

<https://www.ada.gov/file-a-complaint/>

Violations of the Rehabilitation Act or ACA non-discrimination protections

HHS Office for Civil Rights

<https://www.hhs.gov/ocr/complaints/index.html>

Fair Housing Act violations

Dept. of Housing and Urban Development

https://www.hud.gov/program_offices/fair_housing_equal_op/p/online-complaint

EMTALA violations

Agency that investigates complaints about hospitals in state where the incident occurred. (See CMS list at

<https://www.cms.gov/files/document/state-survey-agency-directory-january-2023.xlsx>)

**Consider state and local enforcement agencies too!
(e.g., state Attorneys General)**

Litigation

- Litigation is necessary to –
 - Establish case law
 - Raise overall awareness
 - Drive systems change
 - Provide relief to client (if other avenues are unsuccessful)
- Litigation challenging denial of MOUD in carceral settings has had major impact. Effort to do same in other settings.
- How can providers get involved in litigation? Why should they?

Questions?



Small Group Activity

- Break into **small groups of 3-5 people** each – try to include people you don't know!
- Each group should **identify and outline one to two examples of unlawful (or potentially unlawful) discrimination** against people who use(d) drugs and/or have a substance use disorder in healthcare or other supportive settings.
- Draw upon your group's collective experiences. To the extent possible, the outlined **examples should reflect real scenarios** that group members directly witnessed or heard about. **Are there scenarios that we haven't already discussed?**
- **You'll have 10 minutes to complete this task.** We recommend spending the first 3-5 minutes discussing ideas and the next 5-7 minutes outlining the examples.

Small Group Activity (cont.)

- **Exchange your scenarios with another group.** You may exchange scenarios multiple times if needed so long as you do not end up with your own examples.
- During the next 15 minutes, each group should **identify specific advocacy strategies and approaches** to address the identified instance(s) of discrimination.
- **Consider the benefits and drawbacks** of different approaches, **lessons learned** from prior experience and/or advocacy efforts, and the **contextual factors** that can guide advocacy strategies.

Large Group Share Out

- What are your **top one to two takeaways** from the small group exercise? Did you **encounter any new or unexpected scenarios** involving discrimination against people who use(d) drugs?
- How do you see yourself **applying what you've learned** in this workshop moving forward?
- What **additional information and/or resources** would enable you **to more effectively advocate** on behalf of people who experience discrimination due to current or past substance use?

Questions?



Legal Help for People Who Use(d) Drugs & Alcohol

<https://www.lac.org/major-project/legal-help-4-pwud>

- LAC Legal Advocacy Hub
- Resources on discrimination in settings including healthcare, employment, the criminal legal system, and family regulation system.
- Affected individuals, practitioners, advocates, and attorneys can **fill out an intake**

Legal Help for People Who Use(d) Drugs & Alcohol

Legal Services and Education to Enforce the Rights of People Who Use(d) Drugs and Alcohol

People with substance use disorders often face illegal discrimination. Federal law prohibits discrimination based on a person's substance use disorder when they are not "currently engaging in the illegal use of drugs." But even people that are currently using drugs illegally cannot be denied health services because of that illegal use.

LAC is committed to fighting such discrimination. Our team provides free legal services for people who are facing discrimination because of their drug or alcohol use or substance use disorder in settings including healthcare, employment, the criminal legal system, and the family regulation system. LAC can help individuals, advocates, and providers.

Click on a specific topic below to learn more, complete an intake, or review resources.

Access to MOUD/MAT
Resources / Intake Form

Addressing Discrimination in Health Care Settings
Resources / Intake Form

Know Your Rights in the Emergency Room
Resources / Intake Form

Additional Resources

US DOJ Guidance on the ADA and Opioids

https://www.ada.gov/opioid_guidance.pdf

Report complaints to US DOJ

<https://civilrights.justice.gov/report/>

Find your US Attorney's Office

<https://www.justice.gov/usao/find-your-united-states-attorney>

Legal Action Center MOUD Advocacy Toolkit

<https://www.lac.org/resource/mat-advocacy-toolkit>

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

https://www.lac.org/assets/files/Advocacy-Guide_v4-w-attach-a.pdf

Summary of Cases Involving Discrimination Based on Treatment with MOUD

<https://www.lac.org/assets/files/Cases-involving-denial-of-access-to-MOUD.pdf>

EMERGENCY: Hospitals Can Violate Federal Law by Denying Necessary Care for Substance Use Disorders in Emergency Departments

<https://www.lac.org/resource/emergency-hospitals-can-violate-federal-law-by-denying-necessary-care-for-substance-use-disorders-in-emergency-departments>

Be Empow(ER)ed! Know Your Rights to Addiction Care for Drug & Alcohol-Related ER Visits

https://www.lac.org/assets/files/BeEmpowered_final.pdf

A Guide to Hospitals' Legal Obligations for ED Patients with Substance Use-Related Conditions

https://www.lac.org/assets/files/Hospital-Administrator-Guide_v3.pdf

Opioid Use Disorder & Health Care: Recovery Residences & Skilled Nursing Facilities

- <https://www.lac.org/assets/files/Recovery-Home-MOUD-Info-Sheet-Feb-2022.pdf>
- <https://www.lac.org/assets/files/SNF-MOUD-Info-Sheet-June-2021-ak-formatted.pdf>

Contact Information

Kate Boulton

Vital Strategies

kboulton@vitalstrategies.org

Diane Johnston

Legal Action Center

djohnston@lac.org

Derek Carr

Vital Strategies

dcarr@vitalstrategies.org

Simeon Kimmel

Boston University School of Medicine
and Boston Medical Center

simeon.kimmel@bmc.org

