

Spring 2019 Health Law (Law 248)
Syllabus

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Office Hours: Thursdays from 1 pm to 4 pm, and by appointment.

Class Information

Regular Meeting Times: **Mondays, 3:35 p.m. to 6:15 p.m.** The class will not meet on Monday, January 7. The first regularly scheduled day of class is Monday, January 14, 2019.

Location: Room 240

Exceptions/special sessions: *Please mark your calendars:*

- **We will not meet** on Monday, **January 7**, Monday, **January 21** (Martin Luther King, Jr., Day), Monday, **February 18** (Presidents' Day), and Monday, **March 25** (Spring Break).
- Make up sessions for MLK Day and Presidents' Day have been scheduled by the Registrar for Monday, **April 22**, and Tuesday, April 23. These make ups will be held at our regular meeting time, in our regular classroom.
- We will make up the January 7 session on **Friday, February 15, from 1:00 pm to 3:40 pm**, in Room 240. This session will be recorded for those whose schedules conflict.
- During reading period, I will hold an optional review session. The Registrar has scheduled this session on **Wednesday, April 24, from 3:35 pm to 6:15 pm** in Room 240.

Credit Hours: 3.0¹

Course Overview

The health care “system” is a vast enterprise that is subjected to a vast array of regulatory inputs, including common law rules, administrative regulations, statutes, constitutional provisions, federalism principles, market forces, traditions, and professional norms, just to name a few. This course will provide an introduction to many of the areas of law that relate to the regulation and structure of, access to, and financing of health care in the United States.

¹ A “credit hour” at Berkeley Law is an amount of work that reasonably approximates four hours of work per week for 15 weeks. Relevant to our class, this would include a) classroom time, b) time spent preparing for class, and c) time spent studying for, and taking, final exams. For the purposes of these calculations, 50 minutes of classroom instruction counts as one hour, and the 15 weeks includes the exam period.

Because there may be significant changes to many areas of the law relevant to this course, the assignments on this syllabus may change throughout the semester. If our classroom pace requires me to make changes to the assignments after they have been posted, I will message you to let you know.

The course will be divided into five sections:

I. Introduction: Recurring Themes. There are certain considerations that should recur throughout a course on Health Law. We will spend the first class exploring some of these considerations.

II. Public Financing and Provision of Health Care. We will also study financial barriers to health care, focusing on publicly-financed systems of health care coverage (Medicare, Medicaid, CHIP, and the ACA).

III. Overcoming Barriers to Access to Health Care. We will discuss non-financial barriers, including discrimination based on wealth, class, race, gender, orientation; religious objections to the provision of certain health benefits; and confidentiality issues.

IV. Regulating the Quality of Care and Product Safety. In this section, we will examine the various ways in which health care providers, institutions, and others are regulated. This includes state-level administrative practitioner licensing and discipline systems, regulation of for-profit and non-profit corporations, regulation through tax exemptions, and regulation through tort liability.

V. Regulating the Business of Providers and Institutions. This section will focus on how the law has structured and is responding to new forms of organization within the health care enterprise; it will also cover the basic legal approaches to preventing fraud and abuse within the Medicare and Medicaid programs.

Course Materials

The required text is NICOLE HUBERFELD, KEVIN OUTTERSON, ELIZABETH WEEKS, THE LAW OF AMERICAN HEALTH CARE, SECOND EDITION (2018). References to this text in the syllabus are labelled “LoAHC.” Other materials listed in the syllabus will be available on the BCourses web site. In accordance with law school policy, I will post all reading assignments for the first three weeks of class to the bCourses page.

Course Website

All information related to this course is available at our course website:

<https://bcourses.berkeley.edu/courses/1467213>

Office Hours and Coffee

I will hold weekly office hours on Thursday afternoons from 1 pm to 4 pm . I encourage you to come by, either alone or in groups, to talk about your ideas, concerns, and questions, or simply to say ‘Hi.’ My office hours are “open,” meaning that anyone in our class may come and go as they please. If there are already students present when you arrive, please join in.

If you are unavailable during my office hours or would like to schedule a private discussion, please email me to set up an appointment.

You may also ask questions over email. Please note, though, that for substantive questions (as opposed to questions about course logistics), I would prefer to speak with you in person.

I would be delighted to get together with individuals and small groups of students informally over coffee, schedule permitting. My preference is that we not discuss substantive health law issues at these gatherings. Rather, my preference is to use these gatherings to discuss your interests, concerns, future goals, and so on. If you are interested, please email me with some dates and times you would be available.

Course Requirements

Attendance at all class meetings is expected. Should you need to miss a class, email me beforehand (or afterward, in the event of a true emergency). Note that under the Law School's [Academic Rules](#), "an instructor may, by written notice, exclude a student from the final examination on the basis of repeated unexcused absences or unpreparedness that have occurred after the instructor has given the student prior written notice that there may be such an exclusion."

Grades will be determined by performance on a take-home final exam. Class participation may be taken into account for grades on the margin.

Student Services schedules all exams, including accommodated exams, as the law school is committed to anonymous grading. Any student who seeks an accommodated or rescheduled exam for documented medical reasons or for religious observance should contact Student Services in 280 Simon Hall, 510-643-2744, ahirshen@law.berkeley.edu.

Learning Outcomes

In this course you should develop the following competencies:

- Knowledge and understanding of the basic rules and doctrines of Health Law;
- Knowledge and understanding of the values and policies underlying Health Law;
- Legal analysis and reasoning;
- Written and oral communication in the legal context; and
- Application of Health Law to real-world problems.

Other Classroom Policies and Expectations

Participation: Because of the wide range of topics and materials, I will use a variety of teaching approaches, including seminar-style discussion, lectures, group break-outs, and Socratic questioning. We will begin the semester using a panel system, with two to four people "on panel" each week. I will turn to the on-panel class members first; however, I will also take

volunteers after the panelists have had their say. My goal is to ensure that everyone has the opportunity to speak during class. There is no substitute for putting your thoughts into publicly-uttered words: often, it is only when you do so that you understand the limits of your knowledge.

Health Law is an area rife with arcane terms, acronyms, and slang. If I, or anyone else, uses a term or says something that you don't understand, please ask. Feel free to bring any lingering questions to me during office hours.

Laptop Use: You are permitted to use your laptops and other electronic devices in class to take notes and to participate in classroom polls. Please do not surf the web, send or receive emails, or chat—It's not that difficult for me to see that you are distracted.

Recording: I have asked Media Services to make a recording of each class session available on the class bCourses page.

Honor Code: I expect all students to abide by the Law School's [Academic Honor Code](#).

Difficult Subjects: The content of this course will include topics that are difficult for some people to confront or discuss. As professors, we cannot anticipate what those topics are, or who will be affected, but we can be sensitive and work with students who let us know of their needs. If there is a topic you are unable to discuss or need to be warned about, please notify me so we can make appropriate arrangements for your work. I will endeavor to be sensitive and considerate. However, I cannot prevent all students from being exposed to topics or ideas that they find objectionable or offensive.

If you are having trouble of any kind with our classroom environment, please let me know. My goal is to create a space in which all students feel included and comfortable.

Law 248: Health Law
Spring 2019
Reading Assignments

Class (Date)

I. Introduction

- 1 (Jan. 14) Overview, Course Administration, and Insurance Principles
LoAHC 1-13, 151-163, 21-42

II. Public Financing and Provision of Health Care

- 2 (Jan. 28) Medicare
The first portion of this class will begin with a discussion of the history of publicly financed health care in the United States. Then we will examine the structure and financing of the Medicare program, the eligibility requirements, and the benefits available under the program
LoAHC 45-89
- 3 (Feb. 4) Medicaid
The first portion of this class will examine the structure of the Medicaid program, the eligibility requirements under the traditional and ACA-expansion programs, and the benefits available under the program
The second part of this class will examine the role of litigation in ensuring access to Medicaid benefits
LoAHC 89-102, 122-149
- 4 (Feb. 11) The Affordable Care Act
LoAHC 200-230, 169-174, **103-121**
- 5 (Feb. 15) The Affordable Care Act, continued
NOTE: THIS CLASS MEETS ON A FRIDAY
The first part of this class will examine some of the efforts in the ACA to restructure the health care enterprise, focusing on efforts to use integration of care both to control costs and improve quality of care.
The second part will examine the recent decision by the Northern District of Texas in *Texas v. United States*, in which a federal district court struck down the entire Affordable Care Act.

III. Access to Care: Overcoming Barriers

- 6 (Feb. 25) The Emergency Medical Treatment and Labor Act (EMTALA)
This class will begin by examining the common law “No Duty” rule that governed provider-patient relationships, and then the problem of “patient dumping.”
We will then turn to the federal EMTALA statute, which focused on discrimination based on the inability to pay for emergency care.
Excerpt from *Riggs v. Budge* (posted to bCourses)
LoAHC 467-473, _____
- 7 (Mar. 4) Title VI of the Civil Rights Act, the Americans with Disabilities Act, and § 1557 of the Affordable Care Act
This class will begin by examining the social, professional, and legal bases for discrimination, which imposed barriers to access for many groups and individuals. We will then turn to the federal statutes that address specific forms of discrimination.
- 8 (Mar. 11) Protecting Privacy: HIPAA and State Common Law
Health care providers obtain, utilize, store, and transmit vast amounts of sensitive personal information. The misuse or release of this information can lead to devastating consequences. This class will examine the way in which privacy in the health care context is protected by federal and state laws.
LoAHC 611-650

IV. Regulating the Quality of Care and Product Safety

- 9 (Mar. 18) Regulating Providers and Managed Care Organizations
The quality of care delivered by providers is regulated by a variety of mechanisms. We will examine how tort law, contract law, state administration, information disclosure requirements, and reimbursement policy all serve to incentive quality care.
LoAHC 479-502, 504-512
In re Williams (posted to bCourses)
- 10 (Apr. 1) Regulating Quality Through Regulation of Speech and Coverage Mandates
One way to regulate the quality of health care is to directly regulate what treatments providers may offer or to mandate what treatments insurers must cover. Often, however, these mandates are challenged on the grounds that they violate constitutionally-guaranteed rights of Free speech or Free Exercise (or religion). This session will examine constitutional limitations on the regulation of providers and insurers based on First Amendment concerns.
Excerpts from *Pickup v. Brown*, *Wollschlaeger v. Florida*, and

National Institute of Family and Life Advocates v Becerra (posted to bCourses)

- 11 (Apr. 8) FDA Law: Ensuring the Safety and Efficacy of Drugs and Medical Devices
The FDA regulates products that account for approximately one quarter of U.S. economy. This class will examine the role the FDA plays in regulating drugs and devices under the Federal Food, Drug and Cosmetics Act and the Medical Device Amendments.
Readings to be posted to bCourses

V. Regulating the Business of Providers and Institutions

- 12 (Apr. 15) Health Care Service and Finance Configurations and Antitrust Law
New provider configurations such as Independent Practice Associations (IPAs) and Accountable Care Organizations (ACOs), and mergers between large entities present challenges to traditional regulatory structures, including federal antitrust law. This class will explore the role of antitrust law in the health care context.
LoAHC 409-456
Unites States v. CVS and Aetna CIS (posted to bCourses)

- 13 (Apr. 22) Regulation of For-Profit and Non-Profit Hospitals
This session will examine some of the regulatory issues relating to the organizational form of a hospital—For Profit, Not for Profit, and Public.
LoAHC 235-278

- 14 (Apr. 23) Fraud and Abuse: The False Claims Act, Anti-Kickback Statute, and Stark Laws
NOTE: THIS CLASS MEETS ON A TUESDAY
Large sums of money attract all varieties of con artists. The solvency of the Medicare and Medicaid programs depends in part on preventing large-scale fraudulent billing. The main federal statutory regimes that address this problem are the Anti-Kickback Statute, the Stark Laws, and the False Claims Act. We will focus on the Anti-Kickback Statute and the False Claims Act.
LoAHC 322-374