

MAINE STATE LEGISLATURE

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125th MAINE LEGISLATURE

FIRST REGULAR SESSION-2011

Legislative Document

No. 1548

S.P. 495

In Senate, May 5, 2011

**An Act To Update and Improve Maine's Laws Pertaining to the
Rights of Persons with Intellectual Disabilities**

Reference to the Committee on Health and Human Services suggested and ordered printed.

Joseph G. Carleton Jr.

JOSEPH G. CARLETON, JR.
Secretary of the Senate

Presented by Senator BRANNIGAN of Cumberland.

1 **Be it enacted by the People of the State of Maine as follows:**

2 **PART A**

3 **Sec. A-1. 22 MRSA §8101, sub-§4, ¶E**, as amended by PL 2007, c. 324, §13, is
4 further amended to read:

5 E. A residential facility under Title 34-B, ~~sections section~~ section 1431 ~~and 5601~~.

6 **Sec. A-2. 34-B MRSA §5601, sub-§1-B** is enacted to read:

7 **1-B. Behavior management.** "Behavior management" means systematic strategies
8 to prevent the occurrence of challenging behavior or to keep the person or others safe by
9 reducing the factors that lead to challenging behavior or otherwise limiting the person's
10 ability to engage in challenging behavior.

11 **Sec. A-3. 34-B MRSA §5601, sub-§1-C** is enacted to read:

12 **1-C. Behavior modification.** "Behavior modification" means teaching strategies,
13 positive support and other interventions to support a person to learn alternatives to
14 challenging behavior.

15 **Sec. A-4. 34-B MRSA §5601, sub-§2**, as enacted by PL 1983, c. 459, §7 and
16 amended by PL 2003, c. 689, Pt. B, §6, is repealed.

17 **Sec. A-5. 34-B MRSA §5601, sub-§5-A**, as enacted by PL 1993, c. 326, §4, is
18 amended to read:

19 **5-A. Person receiving services.** "Person receiving services" means a person with
20 mental retardation or autism receiving services from the ~~bureau~~ department or from an
21 agency or facility licensed or funded to provide services to persons with mental
22 retardation or autism except those presently serving sentences for crime.

23 **Sec. A-6. 34-B MRSA §5601, sub-§5-B** is enacted to read:

24 **5-B. Provider.** "Provider" means an entity, organization or individual providing
25 services to an adult with mental retardation or autism, funded in whole or in part or
26 licensed or certified by the department.

27 **Sec. A-7. 34-B MRSA §5601, sub-§6**, as amended by PL 1993, c. 326, §5 and
28 PL 2003, c. 689, Pt. B, §6, is repealed.

29 **Sec. A-8. 34-B MRSA §5601, sub-§6-A** is enacted to read:

30 **6-A. Restraint.** "Restraint" means a mechanism or action that limits or controls a
31 person's voluntary movement, deprives a person of the use of all or part of the person's
32 body or maintains a person in an area against the person's will by another person's
33 physical presence or coercion. "Restraint" does not include a prescribed therapeutic
34 device or intervention or a safety device or practice.

1 **Sec. A-9. 34-B MRSA §5601, sub-§6-B** is enacted to read:

2 **6-B. Safety device or practice.** "Safety device or practice" means a device or
3 practice that has the effect of reducing or inhibiting a person's movement in any way but
4 whose purpose is to maintain or ensure the safety of the person. "Safety device or
5 practice" includes but is not limited to implements, garments, gates, barriers, locks or
6 locking apparatuses, alarms, helmets, masks, gloves, straps, belts or protective gloves
7 whose purpose is to maintain the safety of the person.

8 **Sec. A-10. 34-B MRSA §5601, sub-§7**, as amended by PL 1993, c. 326, §5, is
9 further amended to read:

10 **7. Seclusion.** "Seclusion" means the solitary placement, involuntary confinement for
11 any period of time of a person receiving services in a locked room for any period of time
12 or specific area from which egress is denied by a locking mechanism or barrier.

13 **Sec. A-11. 34-B MRSA §5601, sub-§7-A**, as enacted by PL 1993, c. 326, §6, is
14 amended to read:

15 **7-A. Supports.** "Supports" are those means actions or that assistance that permits
16 empowers a person with mental retardation or autism to carry out life activities as the
17 person desires, build relationships and learn the skills necessary to meet the person's
18 needs and desires.

19 **Sec. A-12. 34-B MRSA §5601, sub-§7-B** is enacted to read:

20 **7-B. Therapeutic device or intervention.** "Therapeutic device or intervention"
21 means an apparatus or activity prescribed by a qualified professional to achieve proper
22 body position, balance or alignment or an action or apparatus that is designed to enhance
23 sensory integration.

24 **Sec. A-13. 34-B MRSA §5601, sub-§8**, as amended by PL 1993, c. 326, §7, is
25 further amended to read:

26 **8. Treatment.** "Treatment" means the prevention, or amelioration or cure of
27 physical and mental disabilities or illness of a person receiving services or any actions or
28 services designed to assist the person to maximize the person's independence and
29 potential.

30 **Sec. A-14. 34-B MRSA §5603**, as amended by PL 1993, c. 326, §8, is further
31 amended to read:

32 **§5603. Entitlement**

33 Each person with mental retardation or autism is entitled to the rights enjoyed by
34 citizens of the State and of the United States, unless some of these rights have been
35 limited or suspended as the result of court guardianship proceedings by a court of
36 competent jurisdiction.

1 **1. Person committed to the commissioner.** The rights and basic protections set out
2 in section 5605 of a person with mental retardation or autism who is committed to the
3 commissioner as not criminally responsible pursuant to Title 15, section 103 or as
4 incompetent to stand trial pursuant to Title 15, section 101-D may be limited or
5 suspended only if the commissioner submits to the applicable court a written treatment
6 plan that specifies each limitation of a right or basic protection and the treatment plan has
7 been approved by the court.

8 **Sec. A-15. 34-B MRSA §5604, sub-§2,** as amended by PL 2007, c. 356, §23 and
9 affected by §31, is further amended to read:

10 **2. Independence and productivity.** Providing habilitation, education and other
11 training to persons with mental retardation or autism that will maximize ~~their~~ each
12 person's potential to lead an independent and productive ~~lives~~ life and that will afford
13 opportunities for ~~outward mobility from institutions~~ full inclusion into the community
14 where each person lives; and

15 **Sec. A-16. 34-B MRSA §5604, sub-§4,** as enacted by PL 2007, c. 356, §23 and
16 affected by §31, is repealed.

17 **Sec. A-17. 34-B MRSA §5604,** as corrected by RR 2009, c. 1, §23, is amended
18 by adding at the end 2 new paragraphs to read:

19 The rights and basic protections of a person with mental retardation or autism under
20 section 5605 may not be restricted or waived by that person's guardian, except as
21 permitted by rules adopted pursuant to this section.

22 The department has authority to adopt rules to implement this section. Rules adopted
23 pursuant to this paragraph are routine technical rules as defined in Title 5, chapter 375,
24 subchapter 2-A.

25 **Sec. A-18. 34-B MRSA §5605, sub-§3,** as amended by PL 1993, c. 326, §9, is
26 further amended to read:

27 **3. Communications.** A person with mental retardation or autism is entitled to
28 private communications.

29 A. A person with mental retardation or autism is entitled to receive, send and mail
30 sealed, unopened correspondence. A person who ~~owns or is employed by a day~~
31 ~~facility or a residential facility~~ is a provider may not delay, hold or censor any
32 incoming or outgoing correspondence of any person with mental retardation or
33 autism, nor may any such correspondence be opened without the consent of the
34 person or the person's legal guardian.

35 B. A person with mental retardation or autism ~~in a residential facility~~ is entitled to
36 reasonable opportunities for telephone and Internet communication.

37 C. A person with mental retardation or autism is entitled to an unrestricted right to
38 visitations during reasonable hours, ~~except that nothing in this provision may be~~

1 ~~construed to permit infringement upon others' rights to privacy unless this right has~~
2 ~~been restricted pursuant to rules adopted pursuant to section 5604.~~

3 **Sec. A-19. 34-B MRSA §5605, sub-§5**, as amended by PL 1993, c. 326, §9, is
4 further amended to read:

5 **5. Vote.** A person with mental retardation or autism may not be denied the right to
6 vote ~~for reasons of mental illness, as provided in the Constitution of Maine, Article II,~~
7 ~~Section 1, unless under guardianship.~~

8 **Sec. A-20. 34-B MRSA §5605, sub-§6**, as amended by PL 1993, c. 326, §9, is
9 further amended to read:

10 **6. Personal property.** A person with mental retardation or autism is entitled to the
11 possession and use of that person's own clothing, personal effects and money, except ~~that,~~
12 ~~when temporary custody of clothing or personal effects by a provider is necessary to~~
13 ~~protect the person or others from imminent injury, the chief administrator of a day facility~~
14 ~~or a residential facility may take temporary custody of clothing or personal effects, which~~
15 ~~the administrator shall immediately return when the emergency ends or unless this right~~
16 ~~has been restricted pursuant to rules adopted pursuant to section 5604.~~

17 **Sec. A-21. 34-B MRSA §5605, sub-§7**, as amended by PL 1993, c. 326, §9, is
18 further amended to read:

19 **7. Nutrition.** A person with mental retardation or autism ~~in a residential facility~~ is
20 entitled to nutritious food in adequate quantities and meals may not be withheld for
21 disciplinary reasons.

22 **Sec. A-22. 34-B MRSA §5605, sub-§8, ¶C**, as amended by PL 1993, c. 326, §9,
23 is further amended to read:

24 C. Daily notation of medication received by each person with mental retardation or
25 autism ~~in a residential facility~~ must be kept in the records of the person with mental
26 retardation or autism.

27 **Sec. A-23. 34-B MRSA §5605, sub-§8, ¶D**, as amended by PL 1993, c. 326, §9,
28 is further amended to read:

29 D. Periodically, but no less frequently than every 6 months, the drug regimen of
30 each person with mental retardation or autism ~~in a residential facility~~ must be
31 reviewed by ~~the attending~~ a physician or other appropriate monitoring body,
32 consistent with appropriate standards of medical practice.

33 **Sec. A-24. 34-B MRSA §5605, sub-§8, ¶F**, as amended by PL 1993, c. 326, §9,
34 is repealed.

35 **Sec. A-25. 34-B MRSA §5605, sub-§10**, as amended by PL 1993, c. 326, §9, is
36 further amended to read:

1 **10. Social activity.** A person with mental retardation or autism is entitled to ~~su~~table
2 opportunities for behavioral and leisure time activities that include social interaction in
3 the community, as set out in section 5610. This right may be waived or restricted only
4 under the rules adopted pursuant to section 5604 or pursuant to a treatment plan approved
5 pursuant to section 5603, subsection 1.

6 **Sec. A-26. 34-B MRSA §5605, sub-§12,** as amended by PL 1993, c. 326, §9, is
7 further amended to read:

8 **12. Discipline.** Discipline of persons with mental retardation or autism is governed
9 as follows.

10 ~~A. The chief administrative officer of each facility shall prepare a written statement~~
11 ~~of policies and procedures for the control and discipline of persons receiving services~~
12 ~~that is directed to the goal of maximizing the growth and development of persons~~
13 ~~receiving services.~~

14 ~~(1) Persons receiving services are entitled to participate, as appropriate, in the~~
15 ~~formulation of the policies and procedures.~~

16 ~~(2) Copies of the statement of policies and procedures must be given to each~~
17 ~~person receiving services and, if the person has been adjudged incompetent, to~~
18 ~~that person's parent or legal guardian.~~

19 ~~(3) Copies of the statement of policies and procedures must be posted in each~~
20 ~~residential and day facility.~~

21 B. Corporal punishment or any form of inhumane discipline is not permitted.

22 C. Seclusion as a form of discipline is not permitted.

23 E. A provider of residential services may establish house rules in a residential unit
24 owned or operated by the provider. A person receiving services who resides in the
25 unit is entitled to participate, as appropriate, in the formulation of the house rules. A
26 house rule must be uniformly applied to all residents of the residential unit where the
27 rules apply. A copy of the house rules must be posted in a residential unit where the
28 rules apply and a copy of the rules must be given to all residents who receive services
29 and, if any resident is under guardianship, to the guardian of the person receiving
30 services.

31 **Sec. A-27. 34-B MRSA §5605, sub-§13,** as amended by PL 2007, c. 356, §25
32 and affected by c. 695, Pt. D, §3, is further amended to read:

33 **13. Behavioral support, modification and management.** ~~Behavioral treatment~~
34 Behavior modification and behavior management of and supports for a person with
35 mental retardation or autism ~~is~~ are governed as follows.

36 A. A person with mental retardation or autism may not be subjected to a ~~treatment~~
37 behavior modification or behavior management program to eliminate dangerous or
38 maladaptive behavior without first being ~~examined~~ assessed by a physician to ~~rule~~
39 out the possibility that the behavior is organically caused determine if the proposed

1 program is medically contraindicated and that the dangerous or maladaptive behavior
2 could not be better treated medically.

3 A-1. ~~Behavioral treatment~~ Support programs may contain both behavior
4 modification and behavior management components. ~~Behavior modification~~
5 ~~components consist of interventions designed to assist a person with mental~~
6 ~~retardation or autism to learn to replace dangerous or maladaptive behavior with safer~~
7 ~~and more adaptive behavior.~~ Behavior management components consist of
8 systematic strategies to prevent the occurrence of dangerous or maladaptive
9 behaviors by minimizing or eliminating environmental or other factors that cause
10 those behaviors.

11 A-2. The following practices are prohibited as elements of behavior modification or
12 behavior management programs:

13 (1) Seclusion;

14 (2) Corporal punishment;

15 (3) Actions or language intended to humble, dehumanize or degrade the person;

16 (4) Restraints that do not conform to rules adopted pursuant to this section;

17 (5) Totally enclosed cribs or beds; and

18 (6) Painful stimuli.

19 B. ~~Treatment~~ Behavior modification and behavior management programs involving
20 ~~the use of noxious or painful stimuli or other aversive or severely intrusive~~
21 ~~techniques, as defined in department rules, may be used only to correct behavior~~
22 ~~more harmful than the treatment program to the person with mental retardation or~~
23 ~~autism~~ than the program and only:

24 (1) On the recommendation of a ~~physician, psychiatrist or psychologist~~ the
25 person's personal planning team;

26 (2) For an adult 18 years of age or older, with the approval, following a case-by-
27 case review, of a review team composed of an advocate from the Office of
28 Advocacy; a representative ~~of~~ designated by the Office of Adults with Cognitive
29 and Physical ~~Disabilities~~ Disability Services; and a representative ~~of~~ designated
30 by the Maine Developmental Services Oversight and Advisory Board; and

31 (3) For a child under 18 years of age, with the approval, following a case-by-
32 case review, of a review team composed of an advocate from the Office of
33 Advocacy, a team leader of the department's children's services division and the
34 children's services medical director or the director's designee. Until rules are
35 adopted by the department to govern behavioral treatment reviews for children,
36 the team may not approve techniques any more aversive or intrusive than are
37 permitted in rules adopted by the Secretary of the United States Department of
38 Health and Human Services regarding treatment of children and youth in
39 nonmedical community-based facilities funded under the Medicaid program.

1 ~~The department may adopt rules as necessary to implement this paragraph. Rules~~
2 ~~adopted pursuant to this paragraph are routine technical rules as defined in Title 5,~~
3 ~~chapter 375, subchapter 2-A.~~

4 ~~C. Notwithstanding paragraph B, for a child under 18 years of age, treatment~~
5 ~~programs involving the use of seclusion or any noxious or painful stimuli, as defined~~
6 ~~in department rules, may not be approved.~~

7 **Sec. A-28. 34-B MRSA §5605, sub-§14-A**, as enacted by PL 2007, c. 573, §2, is
8 amended to read:

9 **14-A. Restraints.** A person with mental retardation or autism is entitled to be free
10 from a ~~physical~~ restraint unless:

11 A. The ~~physical~~ restraint is a short-term step to protect the person from imminent
12 injury to that person or others; or

13 B. The ~~physical~~ restraint has been approved as a ~~behavioral treatment~~ behavior
14 management program in accordance with this section.

15 A ~~physical~~ restraint may not be used as punishment, for the convenience of the staff or as
16 a substitute for habilitative services. A ~~physical~~ restraint may impose only the least
17 possible restriction consistent with its purpose and must be removed as soon as the threat
18 of imminent injury ends. A ~~physical~~ restraint may not cause physical injury to the person
19 receiving services and must be designed to allow the greatest possible comfort and safety.
20 ~~The use of totally enclosed cribs and barred enclosures is prohibited in all circumstances.~~

21 Daily records of the use of ~~physical~~ restraints identified in paragraph A must be kept,
22 which may be accomplished by meeting reportable event requirements.

23 Daily records of the use of ~~physical~~ restraints identified in paragraph B must be kept, and
24 a summary of the daily records pertaining to the person must be made available for
25 review by the person's planning team, as defined in section 5461, subsection 8-C, on a
26 schedule determined by the team. The review by the personal planning team may occur
27 no less frequently than quarterly. The summary of the daily records must state the type of
28 ~~physical~~ restraint used, the duration of the use and the reasons for the use. A monthly
29 summary of all daily records pertaining to all persons must be relayed to the Office of
30 Advocacy.

31 **Sec. A-29. 34-B MRSA §5605, sub-§14-B**, as enacted by PL 2007, c. 573, §3, is
32 repealed.

33 **Sec. A-30. 34-B MRSA §5605, sub-§14-C**, as enacted by PL 2007, c. 573, §4, is
34 repealed.

35 **Sec. A-31. 34-B MRSA §5605, sub-§15, ¶B**, as amended by PL 1987, c. 769,
36 Pt. A, §129, is further amended to read:

37 B. The commissioner is entitled to have access to the records of a ~~day facility or a~~
38 ~~residential facility~~ provider if necessary to carry out the statutory functions of the
39 commissioner's office.

1 **Sec. A-32. 34-B MRSA §5605, sub-§16** is enacted to read:

2 **16. Therapeutic devices or interventions.** Therapeutic devices or interventions
3 must be prescriptively designed by a qualified professional and applied with concern for
4 principles of good body alignment and circulation and allowance for change of position.
5 The department may adopt rules concerning the use of therapeutic devices or
6 interventions. Rules adopted pursuant to this subsection are routine technical rules as
7 defined in Title 5, chapter 375, subchapter 2-A.

8 **Sec. A-33. 34-B MRSA §5605, sub-§17** is enacted to read:

9 **17. Safety devices and practices.** A safety device or practice must be prescribed by
10 a physician. A safety device must be designed and applied with concern for principles of
11 good body alignment and circulation and allowance for change of position. The
12 department may adopt rules concerning the use and approval of safety devices or
13 practices. Rules adopted pursuant to this subsection are routine technical rules as defined
14 in Title 5, chapter 375, subchapter 2-A.

15 **Sec. A-34. 34-B MRSA §5605**, as amended by PL 2009, c. 100, §1, is further
16 amended by adding at the end a new paragraph to read:

17 The department may adopt rules as necessary to implement this section. Rules
18 adopted pursuant to this paragraph are routine technical rules as defined in Title 5,
19 chapter 375, subchapter 2-A.

20 **Sec. A-35. 34-B MRSA §5607, sub-§2**, as amended by PL 1993, c. 326, §11, is
21 further amended to read:

22 **2. Posting requirement.** A copy of this subchapter must be posted ~~in~~ by each
23 residential and day facility provider.

24 **Sec. A-36. 34-B MRSA §5608**, as amended by PL 1993, c. 326, §12 and c. 410,
25 Pt. CCC, §42, is further amended to read:

26 **§5608. Residential council**

27 Upon request of a person receiving services, ~~the chief administrative officer of a~~
28 residential facility provider shall initiate and develop offer an opportunity to a person
29 receiving services from the provider to organize a program of government residential
30 council to hear the views and represent the interests of all persons receiving services at
31 from the facility provider.

32 **1. Composition.** The ~~government~~ residential council of the persons receiving
33 services must be composed of residents elected by other residents ~~and staff advisors~~
34 ~~skilled in the administration of community organizations.~~ The residential council may
35 include allies elected by the residents.

36 **2. Duties.** The ~~government of the persons receiving services~~ residential council shall
37 work closely with the ~~division~~ Office of Adults with Cognitive and Physical Disability

1 Services and the Office of Advocacy to promote the interests and welfare of all residents
2 in the facility persons receiving services from the provider.

3 PART B

4 **Sec. B-1. Develop recommendations for changes in statutory language.**

5 The Department of Health and Human Services and the Maine Developmental
6 Disabilities Council, with the assistance of the Revisor of Statutes, shall review the Maine
7 Revised Statutes to identify those sections that use the term "mental retardation" or the
8 term "mentally retarded" and develop recommendations for removal of the terms or
9 substitutions of language that reflect the recommendations of the respectful language
10 working group in the report submitted by the Maine Developmental Disabilities Council
11 to the Joint Standing Committee on Health and Human Services pursuant to Resolve
12 2007, chapter 62. The department and the council shall invite the participation of the
13 Disability Rights Center in the development of those recommendations.

14 **Sec. B-2. Report and recommendations.** By December 7, 2011, the
15 Department of Health and Human Services and the Maine Developmental Disabilities
16 Council shall submit a report, including proposed legislation, to the Joint Standing
17 Committee on Health and Human Services regarding recommended changes for the
18 Maine Revised Statutes.

19 **Sec. B-3. Authority for legislation.** After receipt and review of the
20 recommendations submitted pursuant to section 2, the Joint Standing Committee on
21 Health and Human Services may submit legislation to the Second Regular Session of the
22 125th Legislature to implement the recommendations.

23 SUMMARY

24 This bill amends the laws regarding the rights of persons with intellectual disabilities.
25 It provides a legal mechanism for Maine courts to limit a person's rights if the person is
26 found not competent to stand trial or not guilty by reason of mental incapacity. It permits
27 the Department of Health and Human Services to adopt routine technical rules that clarify
28 when a guardian may limit, waive or restrict a person's rights and basic protections. It
29 permits persons receiving services to organize residential councils to enhance
30 communication between providers and residents. It clarifies the use of the terms
31 "restraint" and "seclusion."

32 The bill also directs the Department of Health and Human Services and the Maine
33 Developmental Disabilities Council, with the participation of the Disability Rights Center
34 and the assistance of the Revisor of Statutes, to review the Maine Revised Statutes and
35 identify the sections that use the terms "mental retardation" and "mentally retarded" and
36 report recommendations for changes, including proposed legislation, to the Joint Standing
37 Committee on Health and Human Services. The bill authorizes the committee to submit
38 legislation to the Second Regular Session of the 125th Legislature based on these
39 recommendations.