

# MAINE STATE LEGISLATURE

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# 127th MAINE LEGISLATURE

## FIRST REGULAR SESSION-2015

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Legislative Document

No. 1216

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H.P. 834

House of Representatives, April 2, 2015

**An Act To Improve the Authority of Guardians of Persons with  
Intellectual Disabilities or Autism**

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Reference to the Committee on Judiciary suggested and ordered printed.

A handwritten signature in cursive script that reads "R B. Hunt".

ROBERT B. HUNT  
Clerk

Presented by Representative FARNSWORTH of Portland.  
Cosponsored by Representatives: GATTINE of Westbrook, HAMANN of South Portland,  
PETERSON of Rumford, STEARNS of Guilford, STUCKEY of Portland, TUCKER of  
Brunswick.

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

2 **Sec. 1. 34-B MRSA §5604, 2nd ¶**, as amended by PL 2011, c. 542, Pt. A, §127,  
3 is further amended to read:

4 The rights and basic protections of a person with an intellectual disability or autism  
5 under section 5605, subsection 1 may not be restricted or waived by that person's  
6 guardian, except as permitted by rules adopted pursuant to this section or by order of the  
7 Probate Court.

8 **Sec. 2. 34-B MRSA §5604, last ¶**, as enacted by PL 2011, c. 186, Pt. A, §17, is  
9 amended to read:

10 The department has authority to adopt rules to implement this section except that the  
11 rules do not govern probate court proceedings. Rules adopted pursuant to this paragraph  
12 are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

13 **Sec. 3. 34-B MRSA §5604**, as amended by PL 2011, c. 657, Pt. EE, §7, is further  
14 amended by adding at the end 2 new paragraphs to read:

15 Nothing in this section may be interpreted to limit the Probate Court's authority and  
16 jurisdiction to determine if an action taken or not taken by a guardian is within the  
17 permissible powers of the guardian, as limited by the rights established in section 5605,  
18 subsection 1.

19 Nothing in this section may be interpreted to limit the Probate Court's authority and  
20 jurisdiction to expand the powers of a guardian to permit the restriction or waiver of the  
21 rights of a person with an intellectual disability or autism as outlined in section 5605,  
22 subsection 1.

23 **Sec. 4. 34-B MRSA §5604-A, sub-§5** is enacted to read:

24 **5. Probate Court authority not limited.** Nothing in this section limits the Probate  
25 Court's authority pursuant to section 5604.

26 **Sec. 5. 34-B MRSA §5605**, as amended by PL 2013, c. 500, §1, is repealed and  
27 the following enacted in its place:

28 **§5605. Rights and basic protections of a person with an intellectual disability or**  
29 **autism**

30 **1. Rights and basic protections.** A person with an intellectual disability or autism  
31 is entitled to the following rights and basic protections. These rights and protections may  
32 be waived or limited only in compliance with section 5604.

33 A. A person with an intellectual disability or autism is entitled to dignity, privacy  
34 and humane treatment.

1 B. A person with an intellectual disability or autism is entitled to religious freedom  
2 and practice without any restriction or forced infringement on that person's right to  
3 religious preference and practice.

4 C. A person with an intellectual disability or autism is entitled to private  
5 communications.

6 (1) A person with an intellectual disability or autism is entitled to receive, send  
7 and mail sealed, unopened correspondence. A person who is a provider may not  
8 delay, hold or censor any incoming or outgoing correspondence of a person with  
9 an intellectual disability or autism, nor may any such correspondence be opened  
10 without the consent of the person or the person's legal guardian.

11 (2) A person with an intellectual disability or autism is entitled to reasonable  
12 opportunities for telephone and Internet communication.

13 (3) A person with an intellectual disability or autism is entitled to reasonable  
14 visitations during reasonable hours.

15 D. A person with an intellectual disability or autism engaged in a work program that  
16 requires compliance with state and federal wage and hour laws is entitled to fair  
17 compensation for labor in compliance with regulations of the United States  
18 Department of Labor.

19 E. A person with an intellectual disability or autism may not be denied the right to  
20 vote.

21 F. A person with an intellectual disability or autism is entitled to the possession and  
22 use of that person's own clothing, personal effects and money, except when  
23 temporary custody of clothing or personal effects by a provider is necessary to protect  
24 the person or others from imminent injury.

25 G. A person with an intellectual disability or autism is entitled to nutritious food in  
26 adequate quantities, and meals may not be withheld for disciplinary reasons.

27 H. A person with an intellectual disability or autism is entitled to receive prompt and  
28 appropriate medical and dental treatment and care for physical and mental ailments  
29 and for the prevention of any illness or disability, and medical treatment must be  
30 consistent with the accepted standards of medical practice in the community, unless  
31 the religion of the person with an intellectual disability or autism so prohibits.

32 (1) A person with an intellectual disability or autism may not be subject to the  
33 use of medication as punishment, for the convenience of staff, as a substitute for  
34 habilitation or in unnecessary or excessive quantities.

35 (2) For a person with an intellectual disability or autism who resides in an  
36 institutional setting and who does not have a guardian or who has the State as a  
37 guardian:

38 (a) Medication may be administered only at the written order of a physician;

39 (b) Daily notation of medication received by a person with an intellectual  
40 disability or autism must be kept in the records of that person;

1                   (c) Periodically, but no less frequently than every 6 months, the drug  
2 regimen of each person with an intellectual disability or autism must be  
3 reviewed by a physician or other appropriate monitoring body, consistent  
4 with appropriate standards of medical practice; and

5                   (d) All prescriptions must have a termination date.

6                   (3) Prior to instituting a plan of experimental medical treatment or carrying out  
7 any surgical procedure, express and informed consent must be obtained from the  
8 person with an intellectual disability or autism, unless the person has been found  
9 to be legally incompetent, in which case the person's guardian may consent.

10                  (4) Before making a treatment or surgical decision, the person with an  
11 intellectual disability or autism must be given information, including, but not  
12 limited to, the nature and consequences of the procedure, the risks, benefits and  
13 purposes of the procedure and the availability of alternate procedures, unless the  
14 person has been found to be legally incompetent, in which case the person's  
15 guardian must be given such information.

16                  (5) The person with an intellectual disability or autism or, if legally incompetent,  
17 that person's guardian may withdraw express and informed consent at any time,  
18 with or without cause, before treatment or surgery.

19                  (6) Notwithstanding the absence of express and informed consent, emergency  
20 medical care or treatment may be provided to a person with an intellectual  
21 disability or autism who has been injured or who is suffering from an acute  
22 illness, disease or condition if delay in initiation of emergency medical care or  
23 treatment would endanger the health of the person.

24                  (7) Notwithstanding the absence of express and informed consent, emergency  
25 surgical procedures may be provided to a person with an intellectual disability or  
26 autism who has been injured or who is suffering from an acute illness, disease or  
27 condition if delay in initiation of emergency surgery would substantially  
28 endanger the health of the person.

29                  I. A person with an intellectual disability or autism may not be sterilized, except in  
30 accordance with chapter 7.

31                  J. A person with an intellectual disability or autism is entitled to reasonable  
32 opportunities for behavioral and leisure time activities that include social interaction  
33 in the community, as set out in section 5610.

34                  K. A person with an intellectual disability or autism is entitled to reasonable  
35 opportunities for appropriate physical exercise, including the reasonable use of  
36 available indoor and outdoor facilities and equipment.

37                  L. A person with an intellectual disability or autism may not be subject to corporal  
38 punishment or any form of inhumane discipline or seclusion as a form of discipline.

39                  M. A provider of residential services may establish house rules in a residential unit  
40 owned or operated by the provider. A person with an intellectual disability or autism  
41 receiving services who resides in the residential unit is entitled to participate, as  
42 appropriate, in the formulation of the house rules. A house rule must be uniformly

1 applied to all residents of the residential unit where the rules apply. A copy of the  
2 house rules must be posted in a residential unit where the rules apply and a copy of  
3 the rules must be given to all residents who receive services and, if any resident is  
4 under guardianship, to the guardian of the resident receiving services.

5 N. A person with an intellectual disability or autism who is not a patient in a  
6 psychiatric unit of an acute hospital or a psychiatric hospital as defined in section  
7 3801, subsection 7-B is entitled to behavior modification and management and  
8 supports that comply with the following.

9 (1) A person with an intellectual disability or autism may not be subjected to a  
10 behavior modification or behavior management program to eliminate dangerous  
11 or maladaptive behavior without first being assessed by a physician to determine  
12 if the proposed program is medically contraindicated and that the dangerous or  
13 maladaptive behavior could not be better treated medically.

14 (2) Support programs may contain both behavior modification and behavior  
15 management components.

16 (3) The following practices are prohibited as elements of behavior modification  
17 or behavior management programs:

18 (a) Seclusion;

19 (b) Corporal punishment;

20 (c) Actions or language intended to humble, dehumanize or degrade the  
21 person;

22 (d) Restraints that do not conform to rules adopted pursuant to this section;

23 (e) Totally enclosed cribs or beds; and

24 (f) Painful stimuli.

25 (4) Behavior modification and behavior management programs may be used  
26 only to correct behavior more harmful to the person than the behavior  
27 modification and behavior management program.

28 (5) If the State is the person's guardian or if no guardian has been appointed for  
29 the person, then behavior modification and behavior management may be used  
30 only:

31 (a) On the recommendation of the person's personal planning team;

32 (b) For an adult 18 years of age or older, with the approval, following a case-  
33 by-case review, of a review team composed of a representative from the  
34 department, a representative from the advocacy agency designated pursuant  
35 to Title 5, section 19502 and a representative designated by the Maine  
36 Developmental Services Oversight and Advisory Board. The advocacy  
37 agency representative serves as a nonvoting member of the review team and  
38 shall be present to advocate on behalf of the person. The department shall  
39 provide sufficient advance notice of all scheduled review team meetings to  
40 the advocacy agency and provide the advocacy agency with any plans for  
41 which approval is sought along with any supporting documentation; and

1                   (c) For a child under 18 years of age, with the approval, following a case-by-  
2 case review, of a review team composed of a representative from the  
3 advocacy agency designated pursuant to Title 5, section 19502, a team leader  
4 of the department's children's services division and the children's services  
5 medical director or the director's designee. The advocacy agency  
6 representative serves as a nonvoting member of the review team and shall be  
7 present to advocate on behalf of the person. The department shall provide  
8 sufficient advance notice of all scheduled review team meetings to the  
9 advocacy agency and provide the advocacy agency with any plans for which  
10 approval is sought along with any supporting documentation. Until rules are  
11 adopted by the department to govern behavioral treatment reviews for  
12 children, the team may not approve techniques any more aversive or intrusive  
13 than are permitted in rules adopted by the Secretary of the United States  
14 Department of Health and Human Services regarding treatment of children  
15 and youth in nonmedical community-based facilities funded under the  
16 Medicaid program.

17                   **2. Restraints.** A person with an intellectual disability or autism is entitled to the  
18 following basic rights and protections. These rights may be waived or limited only in  
19 compliance with department rules. The Probate Court may not limit or waive these rights  
20 even if a guardian has been appointed.

21                   A person with an intellectual disability or autism is entitled to be free from restraint  
22 unless:

23                   A. The restraint is a short-term step to protect the person from imminent injury to  
24 that person or others; or

25                   B. The restraint has been approved as a behavior management program in  
26 accordance with this section.

27                   A restraint may not be used as punishment, for the convenience of the staff or a guardian  
28 or as a substitute for habilitative services. A restraint may impose only the least possible  
29 restriction consistent with its purpose and must be removed as soon as the threat of  
30 imminent injury ends. A restraint may not cause physical injury to the person receiving  
31 habilitative services and must be designed to allow the greatest possible comfort and  
32 safety.

33                   Daily records of the use of restraints pursuant to paragraph A must be kept, which may be  
34 accomplished by meeting reportable event requirements.

35                   Daily records of the use of restraints pursuant to paragraph B must be kept, and a  
36 summary of the daily records pertaining to the person must be made available for review  
37 by the person's planning team, as defined in section 5461, subsection 8-C, on a schedule  
38 determined by the team. The review by the personal planning team may occur no less  
39 frequently than quarterly. The summary of the daily records must state the type of  
40 restraint used, the duration of the use and the reasons for the use. A monthly summary of  
41 all daily records pertaining to all uses of restraints must be relayed to the advocacy  
42 agency designated pursuant to Title 5, section 19502.





1           This bill also clarifies the rights of persons with intellectual disabilities or autism, as  
2 well as provides that, although the Department of Health and Human Services has  
3 authority to oversee certain types of behavioral interventions and related actions, that  
4 authority may not be used to limit the authority of guardians.