

MAINE STATE LEGISLATURE

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127th MAINE LEGISLATURE

FIRST REGULAR SESSION-2015

Legislative Document

No. 1391

H.P. 941

House of Representatives, May 6, 2015

An Act Regarding the Treatment of Forensic Patients

(AFTER DEADLINE)

Approved for introduction by a majority of the Legislative Council pursuant to Joint Rule 205.

Reference to the Committee on Criminal Justice and Public Safety suggested and ordered printed.

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

ROBERT B. HUNT
Clerk

Presented by Representative MALABY of Hancock.
Cosponsored by Senator KATZ of Kennebec and
Representatives: HARLOW of Portland, HEAD of Bethel, SANDERSON of Chelsea,
VACHON of Scarborough, Senator: BRAKEY of Androscoggin.

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

2 **Sec. 1. 15 MRSA §§106 and 107** are enacted to read:

3 **§106. Involuntary medication of incompetent defendant**

4 **1. Definition.** As used in this section, "commissioner" means the Commissioner of
5 Health and Human Services or the commissioner's designee.

6 **2. Notice required; contents.** At any time after a defendant has been found
7 incompetent to proceed and has been committed to the custody of the commissioner
8 under section 101-D, subsection 5, the commissioner shall notify the court, prosecuting
9 attorney and attorney for the defendant if the commissioner has determined that the
10 defendant is not consenting to or responding to treatment and is unlikely to be restored to
11 competency without the administration of antipsychotic medication over the defendant's
12 objection. The commissioner shall provide this notice only if there is no basis for
13 involuntarily medicating the defendant other than to restore the defendant's competency.
14 The commissioner shall state in the notice whether the commissioner believes that:

15 A. Medication is necessary to render the defendant competent;

16 B. Medication is substantially likely to render the defendant competent;

17 C. Medication is substantially unlikely to produce side effects that would
18 significantly interfere with the defendant's ability to assist in the defendant's defense;

19 D. No less intrusive means of treatment are available; and

20 E. Medication is medically appropriate and is in the defendant's best medical interest
21 in light of the defendant's medical condition.

22 The commissioner shall also state in the notice whether less intrusive means of treatment
23 have been attempted to render the defendant competent.

24 **3. Court authorization.** The following provisions govern court authorization for
25 the involuntary medication of a defendant under this section.

26 A. Upon receipt of the notice under subsection 2, the prosecuting attorney shall
27 assess whether important state interests are at stake in restoring the defendant's
28 competency and shall promptly notify the commissioner of the result of that
29 assessment. If the prosecuting attorney determines that important state interests are at
30 stake, the prosecuting attorney shall file a motion seeking court authorization for
31 involuntary medication of the defendant, and the court shall conduct a hearing within
32 30 days of the filing of the motion, unless the court extends the time for good cause.

33 B. The court, in determining whether a defendant should be medicated over the
34 defendant's objection, shall consider whether:

35 (1) Important state interests are at stake in restoring the defendant's competency;

36 (2) Involuntary medication will significantly further important state interests, in
37 that the medication proposed:

1 (a) Is substantially likely to render the defendant competent to stand trial;
2 and

3 (b) Is substantially unlikely to produce side effects that would significantly
4 interfere with the defendant's ability to assist the defense counsel in
5 conducting the defendant's defense;

6 (3) Involuntary medication is necessary to further important state interests;

7 (4) Any alternate less intrusive treatments are likely to achieve substantially the
8 same results; and

9 (5) The administration of the proposed medication is medically appropriate, as it
10 is in the defendant's best medical interest in light of the defendant's medical
11 condition.

12 **4. Potential penalty not relevant.** In determining under subsection 2 or 3 whether
13 the proposed treatment is medically appropriate and is in the defendant's best medical
14 interest, the potential penalty to which the defendant may be subject if the defendant is
15 convicted of any charged offense is not a relevant consideration.

16 **5. Findings; order.** If the court finds by clear and convincing evidence that the
17 involuntary administration of antipsychotic medication to a defendant under this section
18 is necessary and appropriate, it shall make findings addressing each of the factors in
19 subsection 3, paragraph B and shall issue an order authorizing the administration of
20 antipsychotic medication to the defendant over the defendant's objection in order to
21 restore the defendant to competency. When issuing the order, the court may order that
22 medication may be administered by more intrusive methods only if the defendant has
23 refused administration by less intrusive methods. The court may order that the
24 commissioner report to the court within a reasonable period following entry of the order
25 as to whether the authorized treatment remains appropriate.

26 **6. Application.** This section applies only if the prosecuting attorney seeks an order
27 of involuntary medication for the purpose of rendering a defendant competent to proceed.

28 **§107. Involuntary medication of patient**

29 **1. Definitions.** As used in this section, unless the context otherwise indicates, the
30 following terms have the following meanings.

31 A. "Commissioner" means the Commissioner of Health and Human Services.

32 B. "Department" means the Department of Health and Human Services.

33 C. "Gravely disabled" means unable to provide for basic needs for food, clothing or
34 shelter because of a mental illness or disorder.

35 D. "Patient" means a person held in a hospital under section 101-D or 103.

36 E. "Psychiatrist" includes a physician assistant working under the supervision of a
37 psychiatrist and a psychiatric nurse practitioner.

1 **2. Administration of psychiatric medication over objection prohibited;**
2 **exceptions.** A patient may not be administered psychiatric medication over the objection
3 of the patient except:

4 A. As ordered by the court under section 106;

5 B. In accordance with an advance health care directive;

6 C. For a patient under guardianship, as authorized by the guardian; or

7 D. For a patient who is not under guardianship, for whom no advance health care
8 directive is known to be in effect and for whom no administration of medication
9 under section 106 has been ordered, as provided in subsection 3.

10 **3. Involuntary medication on nonemergency basis.** A hospital may seek to initiate
11 involuntary medication of a patient under this section on a nonemergency basis only if all
12 of the following conditions have been met:

13 A. A psychiatrist has determined that the patient has a mental illness or disorder;

14 B. A psychiatrist has determined that, as a result of the patient's mental illness or
15 disorder, the patient is gravely disabled and lacks the capacity to consent to or refuse
16 treatment with psychiatric medication or the patient is a danger to self or others;

17 C. A psychiatrist has determined that the patient should be treated with psychiatric
18 medication and has prescribed one or more psychiatric medications for the treatment
19 of the patient's mental illness or disorder, has considered the risks and benefits of and
20 treatment alternatives to involuntary medication and has determined that the need for
21 treatment outweighs the risks and side effects;

22 D. The patient has been advised of the risks and benefits of and treatment
23 alternatives to the psychiatric medication and refuses or is unable to consent to the
24 administration of the medication;

25 E. The patient is provided a hearing before a hearing officer. The hearing must be
26 held not more than 14 days after the filing of the notice by the hospital pursuant to
27 paragraph G with the department's office of administrative hearings, unless counsel
28 for the patient agrees to extend the date of the hearing;

29 F. The patient is provided counsel at the department's expense at least 7 days prior to
30 the hearing under paragraph E;

31 G. The patient and counsel are provided with written notice of the hearing under
32 paragraph E by the hospital at least 7 days prior to the hearing. The written notice
33 must:

34 (1) Set forth the patient's diagnosis, the factual basis for the diagnosis, the basis
35 upon which psychiatric medication is recommended, the expected benefits,
36 potential side effects and risks of the medication to the patient and treatment
37 alternatives to medication, if any;

38 (2) Advise the patient of the right to be present at the hearing, the right to be
39 represented by counsel, the right to present evidence and the right to cross-

1 examine witnesses. Counsel for the patient must have access to all medical
2 records and files of the patient; and

3 (3) Inform the patient of the patient's right to file an appeal in Superior Court of
4 a decision of the commissioner authorizing involuntary treatment.

5 Failure of the hospital to provide timely or adequate notice pursuant to this paragraph
6 may be excused only upon a showing of good cause and the absence of prejudice to
7 the patient. In making this determination, the hearing officer may consider factors
8 including, but not limited to, the ability of the patient's counsel to prepare the case
9 adequately and to confer with the patient, the continuity of care and, if applicable, the
10 need for protection of the patient or institutional staff that would be compromised by
11 a procedural default;

12 H. The hearing officer at the hearing under paragraph E determines by clear and
13 convincing evidence that:

14 (1) The patient has a mental illness or disorder;

15 (2) As a result of that illness or disorder the patient is gravely disabled and lacks
16 the capacity to consent to or refuse treatment with psychiatric medication or the
17 patient is a danger to self or others if not medicated;

18 (3) There is no less intrusive alternative to involuntary medication; and

19 (4) The need for treatment outweighs the risks and side effects;

20 I. The hearing officer at the hearing under paragraph E recommends to the
21 commissioner that an order authorizing administration of involuntary medication be
22 issued;

23 J. The commissioner issues an order authorizing administration of involuntary
24 medication. The decision whether to issue an order authorizing administration of
25 involuntary medication rests with the commissioner. An order authorizing
26 administration of involuntary medication provides authority to undertake procedures
27 and administer medication to monitor and manage side effects, all consistent with
28 medical standards of care; and

29 K. The historical course of the patient's mental illness or disorder, as determined by
30 available relevant information about the course of the patient's mental illness or
31 disorder, is considered when it has direct bearing on the determination of whether the
32 patient, as the result of a mental illness or disorder, is a danger to self or others or is
33 gravely disabled and lacks the capacity to consent to or refuse treatment.

34 **4. Emergency action.** Nothing in this section prohibits a physician from taking
35 appropriate action in an emergency, as defined by the department in rules adopted
36 pursuant to Title 34-B, section 3003 and in accordance with procedures contained in
37 those rules.

38 **5. Effective date and expiration of order.** An order authorizing involuntary
39 medication pursuant to subsection 3 is effective 24 hours after it is issued and expires one
40 year after the date of the order, unless a new authorization is given pursuant to the
41 procedures set forth in subsection 7 or authorization is terminated early based on a

1 significant change to the patient's medical condition such that the need for treatment no
2 longer outweighs the risks and side effects pursuant to the procedures set forth in
3 subsection 8.

4 **6. Effect of subsequent consent.** A patient's subsequent informed consent does not
5 abrogate an order authorizing involuntary medication under this section.

6 **7. Extension.** To extend an authorization that is in effect allowing involuntary
7 medication under this section, the hospital shall, no later than 21 days prior to the
8 expiration of the authorization, file with the department's office of administrative hearings
9 and provide the patient and the patient's counsel with a written notice indicating the
10 hospital's intent to extend the authorization under the existing decision.

11 A. A patient who is the subject of a filing under this subsection must be given the
12 same due process protections as specified in subsection 3. The hearing on any
13 request to extend an order for involuntary medication must be conducted prior to the
14 expiration of the authorization that is in effect. If the hospital wishes to add a basis to
15 an existing decision authorizing involuntary medication, the notice required by
16 subsection 3, paragraph G must also specify the additional basis and the conduct
17 within the past year that supports that additional basis. The hospital must prove the
18 additional basis and conduct at the hearing as specified in subsection 3, paragraph H.
19 If the hearing officer determines that the requirements for the extension of an
20 authorization described in paragraph B have been met, the hearing officer must
21 recommend an extension of the authorization to the commissioner. While the hearing
22 officer may consider evidence of behavior during the period of involuntary
23 medication, no new acts need be alleged or proven in order to support an extension of
24 the authorization that is in effect.

25 B. The commissioner may order an extension of an authorization under this
26 subsection. An order extending an authorization that is in effect must be granted
27 based on clear and convincing evidence that the patient has a mental illness or
28 disorder that requires treatment with psychiatric medication and that, but for the
29 medication, the patient would revert to the behavior that was the basis for the prior
30 order authorizing involuntary medication, coupled with evidence that it is unlikely
31 that the patient would be able or willing to manage the patient's own medication and
32 treatment regimen.

33 C. An extension under this subsection is valid for one year after the date of the
34 hearing under paragraph A.

35 **8. Early termination.** To request early termination of an authorization allowing
36 involuntary medication, the patient or the patient's designated representative shall file a
37 request with the department's office of administrative hearings, along with copies of
38 documents from the patient's hospital record, or from another medical source,
39 demonstrating that there has been a significant change to the patient's medical condition.
40 The hearing officer shall determine within 14 days whether the documents are sufficient
41 to show such a change, and, if so, shall schedule a hearing to determine whether the
42 change in medical condition is such that the benefits of the authorized treatment no longer
43 outweigh the risks and side effects.

1 A. A hearing under this subsection must be held no more than 14 days after the
2 hearing officer's determination, unless the patient or the patient's designated
3 representative agrees to extend the date of the hearing. The authorization remains in
4 effect unless it is terminated following the hearing.

5 B. The patient, the patient's designated representative, if any, and the hospital must
6 be provided with written notice of the hearing under this subsection at least 7 days
7 prior to the hearing. The written notice must:

8 (1) Advise the patient of the right to be present at the hearing, the right to present
9 evidence and the right to present and examine witnesses; and

10 (2) Inform the patient of the patient's right to file an appeal in Superior Court of
11 a decision of the commissioner determining that the benefits of the authorized
12 treatment continue to outweigh the risks and side effects.

13 C. For purposes of a request for early termination of an authorization under this
14 subsection, the patient may name as the patient's designated representative a lay
15 advisor provided by the hospital, a lawyer provided by the patient at the patient's own
16 expense or another representative who is selected by the patient and who is willing
17 and able to assist in the proceeding.

18 D. If, following a hearing under this subsection, the hearing officer determines by
19 clear and convincing evidence that the benefits of authorized treatment no longer
20 outweigh the risks and side effects, the hearing officer must recommend termination
21 of the authorization to the commissioner. The commissioner may order termination
22 of the authorization.

23 9. Final agency action. An order issued by the commissioner under subsection 3,
24 paragraph J, subsection 7, paragraph B or subsection 8, paragraph D is a final agency
25 action.

26 10. Rules. The department may adopt rules to implement this section. Rules
27 adopted pursuant to this subsection are routine technical rules as described in Title 5,
28 chapter 375, subchapter 2-A.

29 **SUMMARY**

30 This bill allows the Commissioner of Health and Human Services to administer
31 medication to a defendant who has been found incompetent to proceed without the
32 defendant's consent if a court finds that certain standards have been met. It allows the
33 commissioner to authorize a hospital to administer medication to a defendant who has
34 been found incompetent to proceed or to a person who has been committed to the custody
35 of the commissioner following acceptance of a negotiated insanity plea or following a
36 verdict or finding of insanity without that defendant's or person's consent if certain
37 standards are met, subject to appeal to the court.