

STATE OF MAINE

—
IN THE YEAR OF OUR LORD
TWO THOUSAND AND FIFTEEN

—
H.P. 941 - L.D. 1391

An Act Regarding the Treatment of Forensic Patients

Emergency preamble. Whereas, acts and resolves of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, this legislation needs to take effect as soon as possible in order to provide an environment that is safe and secure for hospital staff and to reduce costs associated with lost work time due to injuries to staff; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

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

Sec. 1. 15 MRSA §§106, 107 and 108 are enacted to read:

§106. Involuntary medication of incompetent defendant

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

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

A. Medication is necessary to render the defendant competent;

- B. Medication is substantially likely to render the defendant competent;
- C. Medication is substantially unlikely to produce side effects that would significantly interfere with the defendant's ability to assist in the defendant's defense;
- D. No less intrusive means of treatment are available; and
- E. Medication is medically appropriate and is in the defendant's best medical interest in light of the defendant's medical condition.

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

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

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

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

- (1) Important state interests are at stake in restoring the defendant's competency;
- (2) Involuntary medication will significantly further important state interests, in that the medication proposed:
 - (a) Is substantially likely to render the defendant competent to proceed; and
 - (b) Is substantially unlikely to produce side effects that would significantly interfere with the defendant's ability to assist the defense counsel in conducting the defendant's defense;
- (3) Involuntary medication is necessary to further important state interests;
- (4) Any alternate less intrusive treatments are unlikely to achieve substantially the same results; and
- (5) The administration of the proposed medication is medically appropriate, as it is in the defendant's best medical interest in light of the defendant's medical condition.

4. Findings; order. If the court finds by clear and convincing evidence that the involuntary administration of psychiatric medication to a defendant under this section is necessary and appropriate, it shall make findings addressing each of the factors in subsection 3, paragraph B and shall issue an order authorizing the administration of psychiatric medication to the defendant over the defendant's objection in order to restore the defendant to competency. When issuing the order, the court may order that medication may be administered by more intrusive methods only if the defendant has refused administration by less intrusive methods. The court may order that the

commissioner report to the court within a reasonable period following entry of the order as to whether the authorized treatment remains appropriate.

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

§107. Involuntary medication of patient

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

A. "Commissioner" means the Commissioner of Health and Human Services or the commissioner's designee.

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

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

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

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

A. As ordered by the court under section 106;

B. In accordance with an advance health care directive;

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

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

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

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

B. A psychiatrist has determined that, as a result of the patient's mental illness or disorder, the patient poses a substantial risk of harm to self or others or there is a reasonable certainty that the patient will suffer severe physical or mental harm as manifested by recent behavior demonstrating an inability to avoid risk or to protect the patient adequately from impairment or injury;

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

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

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

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

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

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

(2) Advise the patient of the right to be present at the hearing, the right to be represented by counsel, the right to present evidence and the right to cross-examine witnesses. Counsel for the patient must have access to all medical records and files of the patient; and

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

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

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

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

(2) As a result of that illness or disorder the patient poses a substantial risk of harm to self or others or there is a reasonable certainty that the patient will suffer severe physical or mental harm as manifested by recent behavior demonstrating an inability to avoid risk or to protect the patient adequately from impairment or injury if not medicated;

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

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

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

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

K. The historical course of the patient's mental illness or disorder, as determined by available relevant information about the course of the patient's mental illness or disorder, is considered when it has direct bearing on the determination of whether the patient, as the result of a mental illness or disorder, poses a substantial risk of harm to self or others or there is a reasonable certainty that the patient will suffer severe physical or mental harm as manifested by recent behavior demonstrating an inability to avoid risk or to protect the patient adequately from impairment or injury.

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

5. Effective date and expiration of order. An order authorizing involuntary medication pursuant to subsection 3 is effective 24 hours after it is issued and expires one year after the date of the order, unless a new authorization is given pursuant to the procedures set forth in subsection 7 or authorization is terminated early based on a significant change to the patient's medical condition such that the need for treatment no longer outweighs the risks and side effects pursuant to the procedures set forth in subsection 8.

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

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

A. A patient who is the subject of a filing under this subsection must be given the same due process protections as specified in subsection 3. The hearing on any request to extend an order for involuntary medication must be conducted prior to the expiration of the authorization that is in effect. If the hospital wishes to add a basis to an existing decision authorizing involuntary medication, the notice required by subsection 3, paragraph G must also specify the additional basis and the conduct within the past year that supports that additional basis. The hospital must prove the additional basis and conduct at the hearing as specified in subsection 3, paragraph H. If the hearing officer determines that the requirements for the extension of an

authorization described in paragraph B have been met, the hearing officer must recommend an extension of the authorization to the commissioner. While the hearing officer may consider evidence of behavior during the period of involuntary medication, no new acts necessarily need to be alleged or proven in order to support an extension of the authorization that is in effect.

B. The commissioner may order an extension of an authorization under this subsection. An order extending an authorization that is in effect must be granted based on clear and convincing evidence that:

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

(2) As a result of that illness or disorder the patient poses a substantial risk of harm to self or others or there is a reasonable certainty that the patient will suffer severe physical or mental harm as manifested by recent behavior demonstrating an inability to avoid risk or to protect the patient adequately from impairment or injury if not medicated;

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

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

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

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

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

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

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

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

C. For purposes of a request for early termination of an authorization under this subsection, the patient may name as the patient's designated representative a lay

advisor provided by the hospital, a lawyer provided by the patient at the patient's own expense or another representative who is selected by the patient and who is willing and able to assist in the proceeding. If the hearing officer determines that a hearing is warranted, the patient must be provided counsel at the department's expense at least 7 days prior to the hearing.

D. If, following a hearing under this subsection, the hearing officer determines by clear and convincing evidence that the benefits of authorized treatment no longer outweigh the risks and side effects, the hearing officer must recommend termination of the authorization to the commissioner. The decision whether to terminate the authorization of involuntary treatment rests with the commissioner, who shall act within 48 hours upon the hearing officer's recommendation.

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

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

§108. Court-ordered independent examinations

Before making a determination under section 106 or 107, a court may order an independent psychiatric or medical examination of the patient. The Department of Health and Human Services, within 30 days after receiving a request from the Administrative Office of the Courts, shall reimburse the Judicial Department for the full amount of fees paid by the Judicial Department to providers of psychiatric and medical examinations of forensic patients ordered by the court.

Emergency clause. In view of the emergency cited in the preamble, this legislation takes effect when approved.