



# 127th MAINE LEGISLATURE

## FIRST REGULAR SESSION-2015

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Legislative Document

No. 1391

H.P. 941

House of Representatives, May 6, 2015

### An Act Regarding the Treatment of Forensic Patients

(AFTER DEADLINE)

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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 "R. 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.