

March 15, 2023

Senator Carney, Representative Moonen, and Members of the Joint Standing Committee on the Judiciary:

My name is Melissa Martin, and I am submitting testimony today on behalf of the Maine Coalition Against Sexual Assault (MECASA), the organization which represents and serves Maine's sexual violence prevention and response programs as well as Maine's Children's Advocacy Centers. MECASA initiates and advocates for victim-centered public policy; provides expert training, technical assistance, and resources for providers and partners; and funds the service providers in your communities.

MECASA is here today in support of **LD 765, An Act to Permit Recordings of Protected Persons to Be Admissible in Evidence**. Thank you to Senators Carney, Beebe-Center, Bennett, Dusen, and Representatives Henderson, Cloutier, Lee, Millett, Moonen, and Poirier.

As many of you may know, I previously represented survivors of sexual and domestic violence as a legal services attorney in civil cases. I want to give one case example to explain why making forensic interviews is vitally important in civil cases.

I represented the mother of two boys in a Motion to Modify a divorce judgment. The father of the boys had been investigated by law enforcement and child protective services at least three times because of sexual acts involving children.

The first time, right after he and my client separated, he was convicted of sexually assaulting his new girlfriend's daughter. He completed some counseling and supervised visits and was allowed to begin seeing his sons every other weekend.

Soon after, he was again investigated for possession of child pornography. He was charged and his sons were interviewed at a Children's Advocacy Center. The older son disclosed seeing the child pornography on his father's iPad. As a result of this disclosure and the pending criminal investigation, the father stopped having contact with his sons. Eventually though, the court in the criminal case ruled that a detective in the case had violated the father's Miranda rights before

obtaining a confession from him. The criminal case was dismissed. The father brought a case against the mother to re-start visits with his sons.

Upon being told they might start visits with their father again, the older son seemed upset and told his mother that his father has sexually assaulted him when he was younger. The older son was again interviewed at the Children's Advocacy Center. He disclosed that he saw his father masturbating in front of him when he was young and "asked for his help."

At this point, there was an experienced guardian ad litem involved in the family law case. My goal as the mother's attorney was to help keep the sons safe and avoid having them testify face to face with their father in open court. I also hoped to avoid having the guardian ad litem re-interview the sons about these incidents. The guardian ad litem, based on his training, also felt strongly that that was not something he should do.

In fact, there were two detailed, recorded interviews that could have been used as evidence or reviewed by the guardian ad litem. Unfortunately, the interviews were not admissible as evidence, and there was no path to make them available in a family matter case.

This is a disservice and retraumatizing to child survivors of sexual assault. This bill will fix that by making the forensic interviews available and admissible in family court cases so child victims do not need to retell the story they have already told.

Thank you for your consideration. We hope you will support LD 765 and would be pleased to answer any questions you might have.

About Maine's Sexual Assault Service Providers

One in five Mainers will experience sexual assault at some point in their lifetime.¹ Each year, 14,000 Mainers will experience sexual violence.²

Maine's sexual violence service providers provide free and confidential services across the state to victims/survivors of sexual harassment and sexual assault and those close to them, as well as to individuals who wish to increase their understanding of the issues. Just some of the services include a 24-hour statewide sexual assault helpline, crisis intervention and information, support groups, in-person accompaniment and advocacy through the medical and legal systems, and

¹ Dumont, R. & Shaler, G. (2015). *Maine Crime Victimization Report: Informing public policy for safer communities*. Muskie School of Public Service, University of Southern Maine.

² *Ibid.*

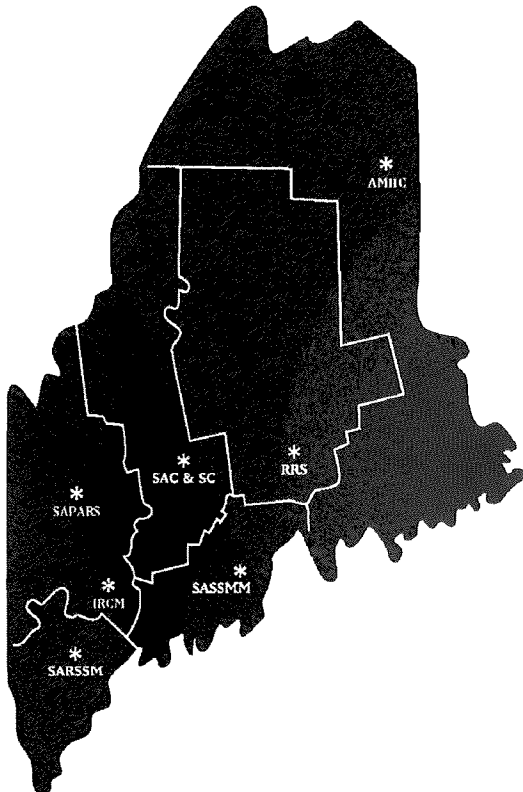
school- and community-based prevention education. Services are provided for a victim/survivor regardless of when they experienced sexual violence, and regardless of what type of sexual violence they experienced. Types of sexual violence include, but are not limited to, sexual harassment and gender-based bullying, child sexual abuse, elder sexual abuse, stalking, sex trafficking, and sexual violence within an intimate partner relationship.

24/7 Confidential
Maine Sexual Assault Helpline: 1-800-871-7741

mecasa

**MAINE COALITION AGAINST
SEXUAL ASSAULT**

info@mecasa.org | mecasa.org
207-626-0034



**STATEWIDE
SEXUAL ASSAULT HELPLINE
1-800-871-7741**

Free. Private. 24/7.

MAINE'S SEXUAL ASSAULT SUPPORT CENTERS

AMHC Sexual Assault Services (AMHC)

Serving Aroostook, Hancock, & Washington Counties •
amhcsexualassaultservices.org

Immigrant Resource Center of Maine

Serving Androscoggin & Cumberland Counties • ircofmaine.org

Rape Response Services (RRS)

Serving Penobscot & Piscataquis Counties • rrsonline.org

Sexual Assault Prevention & Response Services (SAPARS)

Serving Androscoggin, Oxford & Franklin Counties and the towns of
Bridgton & Harrison • sapars.org

Sexual Assault Crisis & Support Center (SAC & SC)

Serving Kennebec & Somerset Counties • silentnomore.org

Sexual Assault Response Services of Southern Maine (SARSSM)

Serving Cumberland & York Counties • sarsonline.org

Sexual Assault Support Services of Midcoast Maine (SASSMM)

Serving Eastern Cumberland, Sagadahoc, Knox, Waldo & Lincoln
Counties • sassmm.org

MORE SEXUAL VIOLENCE SERVICES

Maine TransNet • mainetrans.net • info@mainetransnet.org

Wabanaki Women's Coalition • wabanakiwomenscoalition.org
207-763-3478

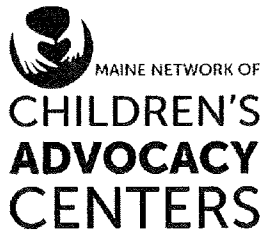
Aroostook Band of Micmacs, Domestic & Sexual Violence
Advocacy Center • 207-551-3639

Houlton Band of Maliseets, Domestic & Sexual Violence
Advocacy Center • 207-532-6401

Indian Township Passamaquoddy, Domestic & Sexual
Violence Advocacy Center • 207-214-1917

Passamaquoddy Peaceful Relations • 1-877-853-2613

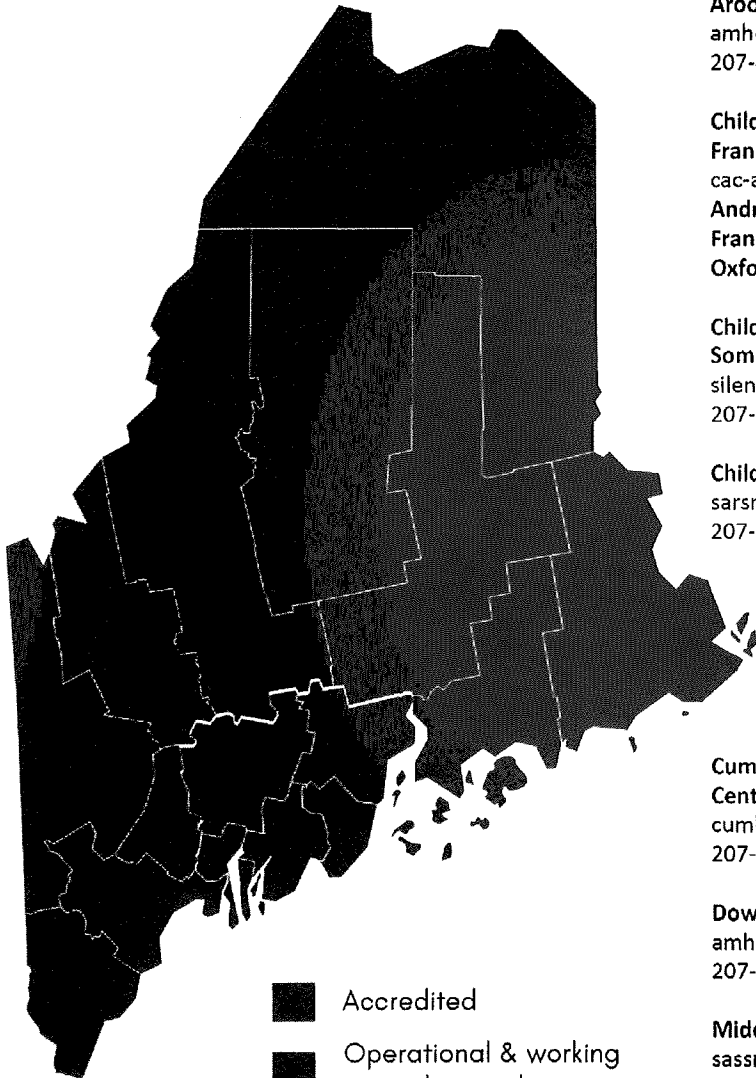
Penobscot Indian Nation, Domestic & Sexual Violence
Advocacy Center • 207-631-4886



MAINE NETWORK OF

**CHILDREN'S
ADVOCACY
CENTERS**

Maine's Children's Advocacy Centers



Accredited



Operational & working
toward accreditation

Aroostook County Children's Advocacy Center
amhcsas.org
207-472-6134

**Children's Advocacy Center of Androscoggin,
Franklin, and Oxford Counties**
cac-afo.org
Androscoggin: 207-784-0436
Franklin: 207-778-9777
Oxford: 207-739-1228

**Children's Advocacy Center of Kennebec &
Somerset Counties**
silentnomore.org/about-our-cac
207-861-4491

Children's Advocacy Center of York County
sarsmm.org
207-459-2380

**Cumberland County Children's Advocacy
Center**
cumberlandcountycac.org
207-879-6160

Downeast Children's Advocacy Center
amhcsas.org
207-255-3687

Midcoast Children's Advocacy Center
sassmm.org
207-522-7162

Penquis Children's Advocacy Center
penquiscac.org
207-974-2469

An Act to Permit Recordings of a Protected Person to Be Admissible in Evidence

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

Sec. 1. 16 MRSA §358 is enacted to read:

§358 Admissibility of recordings of protected persons

Bill Text	Explanation
<p><u>1. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.</u></p> <p><u>A. "Forensic interview" means a fact-finding conversation conducted by a forensic interviewer using an evidence-based practice.</u></p> <p><u>B. "Forensic interviewer" means an individual who meets the qualifications in subsection 2.</u></p> <p><u>C. "Forensic interview recording," referred to in this section as "recording," means the visual and audio recording of a forensic interview.</u></p> <p><u>D. "Protected person" means a person who at the time of a recording of a forensic interview:</u></p> <p><u>(1) Has not attained 18 years of age;</u></p> <p><u>(2) Is an adult who is eligible for protective services pursuant to the Adult Protective Services Act;</u></p>	<p>Currently in Maine, there are 7 Children's Advocacy Centers (CACs) serving the entire state.</p> <p>Children's Advocacy Centers focus on the coordination of investigation and intervention services by engaging a multidisciplinary team (MDT) to create a child-focused approach to child abuse cases. MDT team members include law enforcement officers, prosecutors, DHHS caseworkers, school personnel, and other community providers.</p> <p>Maine's CACs are places where children who have been abused, or who have witnessed abuse, can be interviewed by a specially trained forensic interviewer in a neutral, child-friendly environment. The full interview is video and audio recorded. Currently in Maine, these interviews are used mostly for investigatory purposes and in child protective proceedings, but they are generally not admissible in other court proceedings.</p> <p>The National Children's Alliance, the body responsible for accreditation of CACs, describes the range of services provided by children's advocacy centers as including:</p> <ul style="list-style-type: none"> •Multidisciplinary Team Response •Child and Family Friendly Facilities •Forensic Interviewing Services •Victim Advocacy and Support •Specialized Medical Evaluation and Treatment •Specialized Mental Health Services •Training, Education, and Support for Child Abuse Professionals •Community Education and Outreach <p>The definitions for a forensic interview, forensic interviewer, and forensic interview recording are taken from the National Children Alliance Standards for Forensic Interviews, which can be found here:</p>

	<p>https://www.regionalcacs.org/wp-content/uploads/2022/03/2023-Standards-RedBook.pdf</p> <p>The definition for protected person includes minors and adults with disabilities, who are also interviewed at CACs.</p>
<p><u>2. Qualifications of forensic interviewer.</u> In order to be qualified as a forensic interviewer, an individual must:</p> <p>A. <u>Be employed by a child advocacy center or affiliated with a child advocacy center;</u></p> <p>B. <u>Have completed a minimum of 32 hours of specialized instruction on an evidence-supported interview protocol;</u></p> <p>C. <u>Participate in ongoing education in the field of child maltreatment or forensic interviewing; and</u></p>	<p>Again, the qualifications for a forensic interviewer are also taken from the National Children’s Alliance Standards for Forensic Interviews, which can be found here: https://www.regionalcacs.org/wp-content/uploads/2022/03/2023-Standards-RedBook.pdf</p>
<p><u>3. Admissibility of recording.</u> A <u>recording of a forensic interview of a protected person is admissible as evidence and is an exception to the hearsay rule pursuant to the Maine Rules of Evidence, Rule 802 in the courts of this State if:</u></p> <p>A. <u>The interview was conducted by a forensic interviewer;</u></p> <p>B. <u>The interview is relevant pursuant to the Maine Rules of Evidence, Rule 401;</u></p> <p>C. <u>A relative of the protected person was not present in the room during the substantive phase of the interview;</u></p> <p>D. <u>An attorney for any party in a proceeding with the protected person was not present in the room with the protected person during the interview;</u></p>	<p>The standards of admissibility achieve three main goals: (1) aligning the admissibility of forensic interviews with well-established evidentiary principles of relevancy and authentication of recordings, (2) addressing specific concerns of having other persons besides the protected person and forensic interviewer present in the room during the interview, and (3) addressing Confrontation Clause concerns by having the child available for cross-examination.</p> <p>The following excerpt from <i>State v. Adams</i>, 2019 ME 132, explains why admitting forensic interviews does not violate the Confrontation Clause when the protected person is available to be cross-examined:</p> <p><i>[¶19] Adams also contends that the victim’s memory of the forensic interview and the incidents of abuse she described there was so limited at trial that he was unable to “reasonably cross-examine” her, and thus the admission of the recorded interview violated his constitutional right to confront a witness brought against him. See U.S. Const. amend. VI.</i></p>

E. The recording is both visual and audio;

F. The recording is a fair and accurate representation of the statements made by the protected person and has not been altered except for purposes of relevancy pursuant to the Maine Rules of Evidence, Rule 401; and

G. The protected person is available to testify or be cross-examined by any party in criminal matters.

[¶20] The Confrontation Clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI.

[¶21] When the declarant is available for cross-examination at trial, however, a defendant’s Sixth Amendment right to confront the witness is not compromised, regardless of the strength of the declarant’s memory. Gagne, 2017 ME 63, ¶35, 159A.3d316; Gorman, 2004 ME 90, ¶¶ 52-55, 854 A.2d 1164. “When the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.” Id. ¶ 55 (quoting Crawford [v. Washington, 541 U.S. 36], 59 n.9, 124 S.Ct. 1354 [(2004)]). Gagne, 2017 ME 63, ¶ 33, 159 A.3d 316 (alterations omitted).

What are other states doing?

Maine is currently out of step with the many states across the country. Almost every other state has some specific path to allow child statements outside of court into evidence, specifically in child sexual assault cases. For example, many states either have: (1) a blanket hearsay exception in child sexual assault cases for any out of court statement of a child; (2) the ability for the child to testify by closed circuit television; or (3) the ability of the child to testify by video deposition created outside of a courtroom setting.

Allowing the video of the forensic interview into evidence (with the requirement that the child be available for cross-examination in criminal cases) allows the most comprehensive evidence be made available to the fact finder.

Several other states have already expressly allowed forensic interviews into evidence, including but not limited to Alaska, Colorado, Florida, Indiana, Iowa, Louisiana, Nebraska, New Jersey, North Dakota, Rhode Island, South Carolina, Tennessee, West Virginia, and Wisconsin.

In addition, several state supreme courts have ruled similar statutes constitutional and concluded that if the child is available for cross-examination there is no

	violation of the Confrontation Clause. These states include but are not limited to—Arkansas, Connecticut, Kansas, Louisiana, Maryland, Nevada, North Dakota, South Carolina, Vermont, Virginia, Washington.
<u>4. Recordings of protected persons preserved.</u> A recording of a protected person that is made part of the court record must be preserved under a protective order of the court in order to protect the privacy of the protected person. The court shall maintain a copy of the recording as part of the court file for 20 years.	This section explains that a forensic interview admitted into evidence should be subject to a protective order of the court, instead of part of the regular, public court file based on the sensitive information contained in the recording.
<u>5. Certification of forensic interview recordings.</u> Forensic interview recordings are admissible as evidence in the courts of this State in accordance with subsection 3. The court shall admit copies of the recordings if certified by the forensic interviewer to be true and complete and to have met all requirements in subsection 3 and the forensic interviewer identifies the location of the interview and the identity of the individuals in the recording in the certification.	This section establishes that a foundation can be laid for the admission of a forensic interview recording through a signed certification that the forensic interview recording meets all the criteria laid out in the statute. This is a similar process that is used to certify medical records, which streamlines the admission of the records and saves judicial branch resources.
Sec. 2. 22 MRSA §4019, sub-§1, ¶B is amended to read: B. "Child advocacy center" or "center" means a community-based center that provides multidisciplinary services for children and families affected by child sexual abuse and other child abuse and neglect, <u>including a center in another jurisdiction.</u>	This section clarifies that interviews that meet all the criteria but are conducted at an out-of-state Children's Advocacy Center may be admissible under the same conditions. This is important because some child sexual abuse survivors whose court case happens in Maine may have been living out of state and therefore interviewed out of state at the time of the disclosure. Again, because this statute tracks a national model, the requirements of the statute often will still be met even if the interview occurred at a Children's Advocacy Center in another state.
Sec. 3. 22 MRSA §4019, sub-§1, ¶D is enacted to read:	This ensures the same definition of forensic interview applies both for admissibility into evidence and for

<p><u>D. "Forensic interview" has the same meaning as in Title 16, section 358, subsection 1, paragraph A.</u></p>	<p>accessibility of the records. The sections above address admissibility. This section and the sections below address who can access the forensic interviews.</p>
<p>9. Confidential records <u>except recordings of forensic interviews.</u> <u>The Except for recordings of forensic interviews, the</u> files, reports, records, communications and working papers used or developed in providing services under this section are confidential and are not public records for purposes of Title 1, chapter 13, subchapter 1. Information may be disclosed only to the following in order for them to carry out their duties:</p> <p>A. The department, department employees, law enforcement agencies, prosecuting attorneys, <u>assistant attorneys general who are involved in child protective cases,</u> medical professionals and other state agencies that provide services to children and families;</p> <p>B. The attorney for a child who is the subject of confidential records; and</p> <p>C. A guardian ad litem appointed under section 4005 for a child who is the subject of confidential records.</p>	<p>This section addresses access to records other than the forensic interviews. These records are minimal and include things such as the intake sheet and will generally not be used in litigation.</p>
<p>Sec. 5. 22 MRSA §4019, sub-§9-A is enacted to read:</p> <p><u>9-A. Recordings of forensic interviews confidential.</u> <u>The following provisions govern recordings of forensic interviews. Recordings of forensic interviews are confidential and are not public records for purposes of Title 1, chapter 13, subchapter 1. Information may be disclosed:</u></p>	<p>This section addresses access to the forensic interviews the main component of CAC records.</p> <p>This first section maintains existing language giving access to law enforcement, prosecutors, and all parties in a child protective proceeding.</p> <p>These are generally the parties that will be part of the initial MDT meetings and case meetings about a specific case. They are the agencies in charge of investigating and</p>

<p><u>A. To the department, department employees, law enforcement agencies, assistant attorneys general who are involved in child protective cases, prosecuting attorneys, medical professionals and other state agencies that provide services to children and families in order for them to carry out their duties;</u></p> <p><u>B. To the attorney for a child who is the subject of confidential records;</u></p> <p><u>C. To a guardian ad litem appointed under section 4005 for a child who is the subject of confidential records;</u></p> <p>More here?</p>	<p>making decisions about whether to file a criminal and/or child protective proceeding.</p> <p>The current statute does not specify: (1) how parties might access forensic interview recordings in civil proceedings, other than child protective proceedings such as family matter and guardianship cases: and (2) how a criminal defendant obtains access to a forensic interview recording in a criminal proceeding.</p>
<p><u>D. Title 19-A and 18-C Matters. In a matter under Title 18-C or 19-A, upon specific request for the recording of the forensic interview by the parties or on the court's own motion, a court may order disclosure of the recording of a forensic interview in accordance with section 4008, subsection 3, paragraph B if the court finds that access to the recording is necessary for the determination of an issue before the court and that the necessity of access to the recording outweighs the potential effect on the alleged victim. The court shall follow the following procedure.</u></p> <p><u>(1) Before ordering disclosure of the recording, the court shall require that the investigating law enforcement agencies, if any, have been given an opportunity to indicate their position on disclosure of the recording.</u></p>	<p>This section outlines a specific procedure for civil attorneys to gain access to a forensic interview recording in a civil case. This process mirrors the existing practice used to access other child protective records, which are also given strong protections.</p> <p>The protections outlined in this section include noticing the investigating law enforcement agency, having the court approve a motion and review the record before releasing to parties, and only admitting the forensic interview recording under seal.</p>

(2) If the court determines based on the pleadings that the recording is necessary for the determination of an issue before the court and that the necessity of access to the recording outweighs the potential effect on the alleged victim, the court shall order the department, pursuant to section 4008, subsection 3, paragraph B, to provide a copy to the court for in camera inspection. The court shall conduct an in camera review of the recording in order to make a determination about who should be entitled to view the recording.

(3) If the court determines that the recording should be disclosed, the court shall consider whether a guardian ad litem should be appointed in the case if one is not already appointed. If there is a guardian ad litem, the court shall consider whether to restrict access to the recording only to the guardian ad litem.

(4) The court shall issue a protective confidentiality order outlining who will be allowed to view the record, how the viewing will occur and where the viewing will occur. In making its determination, the court will weigh whether the parties are represented by counsel and whether restrictions on viewing the recording will be unduly prejudicial to any party. The recording may not be copied, reproduced or disseminated in any way.

<p><u>(5) If the recording is admitted pursuant to Title 16, section 358, subsection 3, the court shall admit the recording under seal.</u></p>	
<p><u>E. Criminal Matters. Criminal defendants are entitled to access to forensic interview recordings pursuant to M.R. Crim. P. 16. Before releasing the forensic interview recording, the prosecutor shall request that the court issue a protective confidentiality order outlining who will be allowed to view the record, how the viewing will occur and where the viewing will occur. In making its determination, the court shall weigh whether the defendant is represented by counsel and whether restrictions on viewing the recording will be unduly prejudicial to the defendant.</u></p>	<p>This section explains that criminal defendants are entitled to access based on existing rules of criminal procedure. This section also requires the prosecutor to request a protective order and gives the court a standard to review that request, including whether limitations to access will “unduly prejudice the defendant.”</p>