DISABILITY RIGHTS MAINE

March 17, 2023
Senator Joseph Baldacci, Chair
Representative Michele Meyer, Chair
Committee on Health and Human Services
Cross Office Building, Room 209
Augusta, Maine 04333

Re: LD 445 "Resolve, Directing the Department of Health and Human Services to Apply for a Waiver from the Federal Government for the Medicaid Limitation on Payment to a Facility with More than 16 Inpatient Beds for Psychiatric Treatment.

Dear Senator Baldacci, Representative Meyer, and Members of the Committee on Health and Human Services:

My name is Mark Joyce. I am a managing attorney at Disability Rights Maine, Maine's protection and advocacy agency for people with disabilities and am also class counsel in the class action lawsuit that resulted in what is known as the AMHI Settlement Agreement.

LD 445 directs the Maine Department of Health and Human Services (DHHS) to apply to the federal government for a waiver of certain Medicaid rules that prohibit the use of Medicaid funding in psychiatric hospitals and any facility that has more than 16 beds. This is known as the "IMD Waiver."

Attached is a Q&A that provides specific information about the waiver and DRM's position.

DRM opposes the passage of this bill in its current form because it does not prohibit the DHHS from building more psychiatric beds either with any waiver funds or the state funds that would be freed up due to the waiver being in place.

The bill also does not ensure that any waiver application be in compliance with the provisions of the AMHI Settlement Agreement with regards to the building of any facility above an 8 bed limit.

There is simply not enough data to support the position that there is currently a need for more psychiatric beds.

As the attached DRM Q&A points out:

- According to a 2020 news article: "The state has an official capacity of 500 licensed psychiatric beds but many are not in use"

- DHHS keeps no real time daily reporting concerning the following data regarding these 500 beds:

    - The location of each of these beds.
    - Whether the bed is occupied or not.
    - If not occupied is it available for a referral, including from emergency rooms.
    - If it is not occupied and is going to remain unoccupied for any period of time, what is the reason.

- DHHS also keeps no real time daily reporting data on individuals who are referred from emergency rooms to psychiatric hospitals *that have available beds* but refuse admission.

If the problem is that the current number of licensed beds are not being efficiently utilized, for whatever reason from staffing to inappropriate refusal of referrals from emergency rooms, building more beds would not solve the problem and would instead be diverting significant amounts of money that could have been used more effectively in the community mental health system.

The AMHI Settlement Agreement also prohibits the DHHS from developing any home which exceed an 8 person limit (excluding hospices, shelters and nursing homes). The agreement was later amended to allow the DHHS to seek a waiver of this provision. The DHHS has sought and obtained these waivers on a number of occasions.

This bill does not include a provision that would clarify that any waiver application would still need to comply with this provision of the AMHI Settlement Agreement.

For these reasons, we respectfully request that this Committee vote ought not to pass on LD 445.

Sincerely,

Mark C. Joyce
Managing Attorney

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MaineCare and the IMD Waiver: Questions and Answers

Q: What is Medicaid?

A: Medicaid is a joint federal and state program that provides free or low-cost health coverage to millions of Americans, including some low-income people, families and children, pregnant women, the elderly, and people with disabilities. The federal government provides a portion of the funding for Medicaid and the State provides the other portion. The guidelines for the program are set by the federal government. Medicaid programs vary from state to state and sometimes have different names.

Q: Does Maine have this program, and if so, what is it called?

A: Yes, Maine participates in the Medicaid program and it is called "MaineCare".

Q: Does the federal government pay for all the costs of MaineCare (Medicaid)?

A: No. Maine pays 37% of the cost of traditional Medicaid and 10% of the cost of Medicaid expansion.

Q: Who determines what types of health care services will be covered for people that get their health insurance through MaineCare?

A. The federal government determines what types of health care services will be covered under MaineCare. These rules are often called "State Plans."

Q: What if a state wants Medicaid to cover the healthcare costs of something that is not listed in the "State Plan"?

A: The state can ask the federal government for a "waiver" of parts of the State Plan in order to provide health care coverage for that service.

Q: Is this what the "IMD Waiver" is about?

A: Yes. Under the current State Plan in Maine, if a person is using Medicaid as their health insurance plan, their health insurance will not cover the costs while they are receiving treatment in a psychiatric hospital or any facility that has more than 16 beds.

Proposals have been made that this rule be "waived" so these patients can have their MaineCare health insurance cover these costs.

DRM opposes the granting of this waiver.

Q: Why would DRM oppose a new rule that would offer health care coverage to Maine's poorest and most vulnerable population just because they are receiving such health care services at a certain hospital? Wouldn't the fact that this population is in the hospital mean

they need that health care coverage even more?

A. DRM does not oppose ensuring that healthcare insurance coverage is accessible to all Mainers. DRM's concern is that this federal money will be used to build more institutional beds. DRM opposes creating more institutions. DRM does not oppose the adequate funding necessary to ensure that the inpatient beds that are already available have the resources to provide high quality treatment to the patients who will be admitted to them.

Q. Wait a minute. Doesn't Maine need more inpatient psychiatric beds? I hear that people are stuck in the Emergency Rooms for weeks at a time with no open bed.

A. That may not necessarily be the case. In an October 20, 2020 article in the Portland Press Herald, the Maine DHHS noted that Maine has a capacity of 500 licensed beds but that many are not in use. The article states: "The state has an official capacity of 500 licensed beds for psychiatric use, according to the Maine Department of Health and Human Services, but many of the beds are not in use."

Q. You mean that people could be stuck in the ED but there actually might be a psychiatric bed they could go to?

A. Yes.

Q. How often does this happen?

A. It is impossible to know because the state does not keep any data on this issue. In 2021 LD 1968 *An Act To Ensure Appropriate Placement of Defendants with Mental Illness and Intellectual Disabilities* was presented in the Legislature and it included a provision to track such data as follows:

> Requiring real-time reporting to the Department of Health and Human Services of available treatment beds in psychiatric facilities and community-based residential treatment facilities in order to highlight and address the challenges of serving individuals in need of treatment. At least once every 24 hours, each facility must submit information about its admissions, including the number of available beds, the number of occupied beds, the number of staffed beds and an explanation for any beds that are not in use. The department must make this information available on its publicly accessible website.

Q. Did it become law?

A. No, that part of the bill did not become law.

Q. Has DRM ever heard of someone who was stuck in the ED even though there might have been an available bed?

A. Yes. DRM recently represented a woman who had spent 62 consecutive days in an emergency room being told there were no available inpatient psychiatric beds to which she could be transferred to during that entire time. On day 63 DRM became involved in her case. The next day she was transferred to an inpatient psychiatric bed.

Q. So the issue may not be building more beds, but rather ensuring those who need access to the ones already in existence can get them?

A. That would seem to be the case.

Q. Then would DRM be opposed to the granting of this Waiver if no more psychiatric in-patient beds were built during the waiver period?

A. No, DRM would not be opposed if no more psychiatric beds were being built during the length of the Waiver.

Q. Would there be anything that would change DRM's position?

A. DRM is not opposed to reviewing any innovations or ideas that might improve the quality of the mental health system. However, until accurate, in the moment data, is being kept regarding the reasons why individuals can't access available psychiatric beds, it is impossible to assess any arguments for an increase in the number of those beds, particularly when we have experience with people being in the ED for months and then suddenly being able to access an inpatient bed only after DRM gets involved in their case.

Q. DRM is also class counsel in the AMHI class action lawsuit. How would the IMD waiver affect the Consent Decree.

A. The AMHI Settlement Agreement is an agreement that is still binding on the state and which lays out a vision for a "comprehensive mental health system". The pillars of that system include the following:

> This settlement agreement requires that "[a]ll services within the comprehensive mental health system shall be oriented to supporting class members *to continue to live in the community and to avoid hospitalization* (emphasis added)
>
> The housing to be developed, recruited, newly funded or supported under this Agreement shall be located where the other community services described in this Agreement are reasonably available. Except for hospices, shelters and nursing homes, no homes which exceed an *eight person capacity* may be used or developed [DHHS can ask for a wavier of this 8 bed limit]. (emphasis added)

Therefore, if no more psychiatric beds were being created during this waiver period and the building of any housing over 8 beds was required to go through the process in the Settlement Agreement, then DRM would not object to the granting of the waiver as being in potential conflict with the AMHI Settlement Agreement.

Q. Would there be any other concerns DRM may have with regards to the Waiver?

A. Yes, as Maine would be using non-federal state funds for a portion of the costs that are being billed in institutional settings, that the waiver should ensure that there be, at least, a corresponding increase in state funding for community based services, including in the AMHI consent decree funds which are part of the base annual budget.