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LD 521 An Act To Modify the Rule-making Process for Establishing County and Municipal Jail Standards

March 24, 2021

Chair Deschambault, Chair Warren, and members of the Joint Standing Committee on Criminal Justice and Public Safety, my name is Stephen Gorden and in addition to serving as chair of the board of commissioners for Cumberland County, I am writing today in my role as board president of the Maine County Commissioners Association. We appreciate the opportunity to provide testimony to the Committee in support of LD 521.

About MCCA. Briefly, the Maine County Commissioners Association was established in 1890 to assist Maine's county government in providing vital services to Maine citizens in a responsive, efficient, and credible manner. The Association is based in Augusta and currently represents 15 of Maine's 16 counties and is governed by a board with representation from each participating county.

Our position on LD 521. First, many thanks to Senator Baldacci for working with MCCA to bring forward this proposed legislation. We very much appreciate his assistance. Second, turning to the bill itself, we think it reflects reasonable guidelines that the Commissioner of Corrections should follow when instituting standards that county jails must follow with regard to the treatment of prisoners. Let us explain.

Under current law, the Commissioner of Corrections has broad discretion to adopt standards for county jails under 34-A MRSA §1208:

*The commissioner shall establish both mandatory and desirable standards for all county and municipal detention facilities, setting forth requirements for maintaining **safe, healthful, and secure facilities.***

Other than the highlighted text above, there is no further guidance in Maine statutes related to the Commissioner's authority to set jail standards. Given the apparent absence of guidelines for the Department to set jail standards, MCCA felt it was important to bring this issue before the Legislature. In particular, the essence of LD 521 is to provide additional legislative guidelines regarding the Commissioner's authority to establish county jail standards.

2020 rulemaking by DOC is illustrative. The absence of guidelines became apparent this fall when the Department of Corrections commenced a rulemaking that imposed new health standards on county jails, many of which reflect issues that had come forward in the 129th Legislature as bills. Had these issues not been cut short by the early adjournment of the Legislature a year ago, the Legislature would have considered these standards in light of needs and costs. More specifically, the Legislature would have considered whether the new standards imposed costs on local government, which would have required a mandate preamble. However, when left to rulemaking within the Department of Corrections, it is less clear whether the Department is required to consider costs or any other standards.

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With regard to the Department's recent rulemaking, MCCA had no philosophical opposition to providing services related to women's health and substance abuse treatment services, which are services that are in fact provided in county jails. Rather, the Association expressed concerns to the Department at the time that the standards were vague and, depending on how interpreted, could result in new services and new costs for county jails ranging from \$400,000 to over \$2 million per year. These additional funds are not available to most counties under current Maine law. For similar reasons, we understand that the County and Municipal Detention Facility Advisory Committee considered and ultimately declined to support the proposals that later were advanced in the Department's rulemaking. Nonetheless, over the objection of county commissioners and county sheriffs, the Department approved the rule and reached the surprising conclusion that these new standards would have "no fiscal impact." This was particularly surprising because, if the services being added to the jail standards were fully in place, and would therefore have no fiscal impact, why did the Department need to adopt new rules outlining them? We have no explanation for this.

LD 521 provides for common sense guidelines on county jail standards. Importantly, this bill is not aimed at undoing this fall's recent rulemaking. Rather, it is aimed at correcting a potential deficiency in the statutory guidelines governing how jail standards are adopted in Maine. Under the bill, there are four new guidelines proposed:

1. Standards must be "evidence-based." This concept seems obvious and should be non-controversial. Moreover, identical language already exists in *34-B MRSA §1208-B(1)*, which is a companion provision governing the establishment of jail standards.
2. Standards must reflect "best-practices for the administration and operation of jails." Like the foregoing provision, this concept also seems obvious and should be non-controversial. Moreover, this language is also provided in *34-B MRSA §1208-B(1)*, the companion provision governing the establishment of jail standards.
3. Standards must "minimize the imposition of additional costs," which is not currently expressly provided in statute, but needs to be. The Maine Constitution restricts the ability of the Legislature to impose costs on local governments – which includes counties – without a super-majority vote of both Houses. The idea that a state agency, whose authority is delegated from the Legislature, could impose local requirements without considering costs seems contrary to the Maine Constitution, and practical realities. More on this in a moment.
4. Standards should be adopted through substantive rulemaking. While there is some ambiguity in current law about whether jail standards must go through substantive rulemaking, this bill would remove any question. We think this provision is appropriate given current restrictions on the ability of counties to spend local funds on the operation of jails, absent legislative approval. In this regard, we think it is critical to give the Maine Legislature the final say over the imposition of jail standards that could increase costs, particularly because the Legislature is the only body with authority to allow counties to increase local spending to meet any such new requirements.

State law limits the ability of counties to spend more money on jails. As I shared with this Committee back in January, counties are severely limited in their ability, under state law, to spend local money on jails. Most units of Maine government have spending limitations in place under "LD 1" that restrict annual spending increases to the rate of increase in average household wages, plus a growth factor. However, this limitation can be overcome by vote of the governing body of the unit of government, including for schools, municipalities, and counties. Uniquely, however, county jail expenditures are carved out of this structure, and county governing bodies cannot exceed local expenditure caps through a local vote. In short, the cap on local jail expenditures is a "hard" cap that cannot be overcome.

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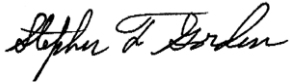
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What does this mean, in practical terms? Because most counties are at or near these statutory spending caps, any new requirement on a jail that requires more local expenditures cannot be implemented without reducing or eliminating some other cost or service. It is that simple. Otherwise, county jails are put in the position of being responsible for services that they simply cannot afford to provide.

The solution to this problem rests partly with reform of these jail spending limitations, which would require a legislative fix. It also demands that the development of jail standards for county jails consider costs, and work to minimize costs. This is the essence of LD 521 and its inclusion of cost-based standards and a substantive rulemaking process that brings the Maine Legislature – which can relieve counties of these expenditure limits – directly into the conversation.

Conclusion. We hope this information is helpful to the Committee as it considers LD 521, and we hope the Committee will see fit to give this bill an “ought to pass” report.

Respectfully submitted,



Stephen Gorden
President

cc: Commissioner Brian Hobart, Chair, MCCA Legislative Committee
James I. Cohen, Verrill Dana, LLP, MCCA Legislative Counsel