

Janet T. Mills
Governor

Jeanne M. Lambrew, Ph.D.
Commissioner



Maine Department of Health and Human Services
Commissioner's Office
11 State House Station
109 Capitol Street
Augusta, Maine 04333-0011
Tel: (207) 287-3707; Fax: (207) 287-3005
TTY: Dial 711 (Maine Relay)

MEMORANDUM

TO: Joint Standing Committee on Criminal Justice and Public Safety
FROM: Department of Health and Human Services (DHHS)
DATE: April 15, 2021
RE: Additional Information re: LD 769

Maine DHHS respectfully submits additional information for the Committee's consideration to provide clarity from the public hearing and to address testimony from interested parties.

Background

Under current law, a defendant found incompetent to stand trial ("IST") may either be committed to the custody of the DHHS Commissioner "for placement in an appropriate program for observation, care and treatment of people with mental illness or persons with intellectual disability or autism," or issued a bail order that may or may not require the defendant be placed in an institution or residential program. 15 M.R.S. § 101-D(5). In either case, the standard for an IST defendant's competence to stand trial is governed by case law. *See Thursby v. State of Maine*, 223 A.2d 61, 66 (Me. 1966). The Maine Supreme Judicial Court has held that: "Competence to stand trial sufficient to meet the requirements of due process means that the accused is capable of understanding the nature and object of the charges and proceedings against him, of comprehending his own condition in reference thereto, and of conducting in cooperation with his counsel his defense in a rational and reasonable manner." *Id.* Mental illness is not a necessary predicate to an IST finding either under the statute or case law, nor is mental illness a barrier to the restoration of a defendant's competence. *See State v. Gerrier*, 2018 ME 160, ¶ 15, 197 A.3d 1083. While most defendants found IST are mentally ill, a small subset also demonstrate predatory violence distinct from their mental illness resulting in significant damage to themselves, other patients, and staff at the state psychiatric facilities.

Once a defendant is found IST, and regardless of whether the IST defendant is committed to the custody of the DHHS Commissioner for placement or released on bail, the goal is to achieve competence restoration. This will not change with the passage of LD 769. Further, for defendants who are eventually found not to be restorable to competence by the Court, the statute mandates that their charges are dismissed with no possibility of any continued placement in a correctional setting. 15 M.R.S. § 101-D(5)(A). That will not change with LD 769: IST defendants found non-restorable will not remain at the Maine State Prison's Intensive Mental Health Unit (IMHU).

The passage of LD 769 would complete a continuum of care for defendants found IST and who are restorable. Until the last few years all defendants found IST and restorable were exclusively sent to one of the secure state psychiatric facilities for competence restoration. At that time there was little consideration of the least restrictive environment for those defendants. In the last few

years it has been a DHHS priority to place defendants found IST and restorable who do not pose a risk to public safety and who are amenable and connected to treatment, to be restored to competence in the community. This is either achieved by the court issuing a bail order in the first instance, as permitted under 15 M.R.S. § 101-D(5)(B), or for IST defendants committed to the DHHS Commissioner's custody, placing those defendants in an "appropriate program" outside of an institutional setting. Those numbers are growing. The community-based competence restoration effort was done in recognition that secure hospitalization is not always needed for competence restoration and a less restrictive environment is preferable. Similarly, the passage of LD 769 would allow placement in the safest environment possible for the security and treatment of the very small subset of violent defendants found IST and restorable. Additionally, the continuum of care for defendants found IST and restorable allows for transfer to a less restrictive environment at any point that the more highly restrictive environment is no longer necessary. In other words, defendants found IST and restorable would return to one of the state psychiatric facilities at the point that the predatory danger has been stabilized.

It should be noted that competence restoration in specialty competence restoration mental health facilities in prisons happens routinely at the Federal level (i.e. in Bureau of Prisons Federal Medical Centers). Many states have such specialty facilities in state prisons/jails as well. DHHS is unaware of any case law that prohibits restoration of IST defendants in such facilities. Federal courts have also held that the decision to place an IST defendant facing federal charges in a Bureau of Prisons facility passes constitutional muster so long as the placement comports with due process concerns. *See United States v. Dalasta*, 856 F.3d 549 (8th Cir. 2017); *see also United States v. Martin Anthony Nino*, 750 Fed.Appx 589 (9th Cir. Mem. 2019), *cert. denied*, 140 S.Ct. 2517 (Mem. 2020) (suggesting that the Supreme Court of the United States did not find any compelling reason to disturb the 9th Circuit's decision upholding as constitutional the IST defendant's placement for restoration at a Bureau of Prisons facility).

While the placement of IST defendants in correctional settings at the Federal level and in other states may be routine, DHHS is not advocating that the passage of LD 769 make such practice routine in Maine. Competence restoration should happen in the least restrictive environment rather than require mandatory secure confinement for competence restoration. DHHS has already implemented the use of least restrictive environments all along the continuum of care for pre-trial defendants found IST and restorable (e.g., by having competency restoration occur in the community as described above). In LD 769, DHHS is arguing that the judicial and clinical oversight required for placement of defendants found IST and restorable at the IMHU eliminates any unidirectional, automatic scheme of secure confinement for those defendants anywhere along the continuum, but particularly regarding placement at the IMHU.

While allowing greater security, the IMHU at Maine State Prison, a unit separated from the general population, provides multidisciplinary treatment by a team that mirrors treatment teams at the state psychiatric facilities. Additionally, pre-trial defendants are already currently being placed at the IMHU, both via the jail transfer process for the purpose of the pre-trial defendant receiving mental health treatment (34-A M.R.S. § 3069-A), and via Court Orders authorizing the pre-trial defendant's commitment for observation and treatment in the context of a Title 15 evaluation (15 M.R.S. § 101-D(4); 34-A M.R.S. § 3069-B). The common theme between these two groups of pre-trial defendants is that they are placed at the IMHU when there is a need to

provide greater security due to highly dangerous behaviors. The IMHU does not have Correctional Officers, they instead employ Correctional Acuity Specialists (CAS). The CAS staff and other IMHU team members receive annual 40 hour week-long training specific to the IMHU, the mental health system, and their roles and responsibilities. DHHS staff have and will continue to work together with IMHU staff on the clinical management of defendants with dangerous behaviors and, with the passage of LD 769, will work with them on competence restoration protocols that mirror competence restoration efforts at the state psychiatric facilities. The existing Memorandum of Agreement between DHHS and the Department of Corrections (DOC) outlines procedures for referrals, returns to a state psychiatric facility, intensive case management services, consultation, peer review, and periodic site visits. That agreement would be amended to also include consultation and training with respect to competence restoration services.

Finally, DHHS agrees with Disability Rights Maine's suggestion that LD 769 include a "clear and convincing" standard. This would parallel existing language in 34-A M.R.S. § 3069-B, the statute governing the process for placement at the IMHU of pre-trial defendants who are subject to commitment for observation and treatment orders under 15 M.R.S. § 101-D(4).

In addition, the sunset provision suggested by Disability Rights Maine would allow DHHS and DOC to implement the provisions of this bill during a period of review examining its efficacy and fairness. It would also give opponents an opportunity to come back before the Legislature to renew any lingering concerns. We could agree to a review and sunset provision.

Conclusion

Passage of LD 769 would complete the continuum of care for defendants found IST and restorable. It is not a unique proposal in either state or federal systems. It envisions a bi-directional continuum of care with an emphasis on providing competence restoration in the least restrictive environment. Safeguards such as judicial and clinical oversight as well as a possible sunset provision would allow a period of study of its efficacy and fairness.