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TESTIMONY OF OAMSHRI AMARASINGHAM, ESQ.

Secure Forensic Facility in the Capitol Area

JOINT STANDING COMMITTEES ON
APPROPRIATIONS AND FINANCIAL AFFAIRS and
HEALTH AND HUMAN SERVICES

January 5, 2017

Senator Hamper, Representative Gattine, and members of the Committee on Appropriations and Financial Affairs; Senator Brakey, Representative Hymanson, and members of the Committee on Health and Human Services, greetings. My name is Oamshri Amarasingham, and I am the Advocacy Director for the American Civil Liberties Union of Maine, a statewide organization committed to advancing and preserving civil liberties guaranteed by the Maine and U.S. Constitutions.

Since 2013, the Department of Health and Human Services ("the Department") and the administration have proposed four distinct facilities to house forensic patients ordered to the care of the Department.[1] Three separate committees have vetted and rejected the three legislative proposals, in part because the Department has never provided detailed information about staffing, rights of patients, and finances. For these same reasons, the ACLU of Maine has opposed these bills and we oppose the current proposal to create a step-down facility. We are further concerned about the Department and the administration's attempt to circumvent the legislative process and question their legal authority to create a new facility without legislative approval.

We cannot support the so-called step-down facility because we do not know what it is. The Department has failed to answer the most basic questions about the facility: What is the distinction between Riverview, the step-down facility, and a community placement? What will be the process for transferring patients to the facility? What are the rights of patients to ask for a transfer or object to a transfer? What level of care will be provided? Who will staff the facility? How many medical and security staff will be required? How much will running the facility cost? How will the step-down facility address Riverview's CMS funding problems?

The lack of transparency raises significant civil liberties concerns for the substantive and procedural due process rights of patients. If the facility is built, a process for transferring patients from Riverview into the step-down facility will be determined, or the facility will stand empty. If the legislature does not write the rules, then either the courts or the Department will. The legislature has the authority and the obligation to craft the process by which patients are

[1] L.D. 1515, 126th Legislature (2013); L.D. 1428, 127th Legislature (2015); L.D. 1577, 127th Legislature (2016); Secure Forensic Rehabilitation Facility (2016).

transferred from one facility to another. If the legislature does not act and the Department remains silent, the facility could rightfully become the subject of expensive litigation as patients ask courts to answer these questions.

We are also troubled by the suggestion that a private prison healthcare company could be contracted to run the facility. Mental health facilities run by private prison companies in other states, such as Florida, have terrible human rights records. Since the abuse of patients at Riverview already cost the Department CMS funding, the legislature should be extremely wary of any proposal to contract with a for-profit, private prison company.

Finally, we question the Department and the administration's legal authority to construct a new facility and implement a new program without public input and legislative approval. As discussed in the attached memo, the legislature, not the executive branch, is charged with approving and financing new programs, like the step-down facility proposed by the Department. We do not believe the project can move forward without backing from the legislature.

MEMORANDUM

To: Senator Hamper, Representative Gattine, Joint Standing Committee on Appropriations and Financial Affairs;
Senator Brakey, Representative Hymanson, Joint Standing Committee on Health and Human Services
From: ACLU of Maine
Date: January 5, 2017
RE: Authority of the Governor and DHHS to Build a Step-Down Facility

We have researched whether the Governor and/or the Department of Health and Human Services ("the Department" or "DHHS") has authority to build a step-down facility outside of Augusta without public input and legislative approval.

We have concluded that the Governor and the Department must seek legislative approval before building inside the Capitol Area or outside of it. First, the step-down facility would almost certainly be considered a "new program" under 5 MRSA § 1582 and 5 MRSA § 1667 and the Department does not have the authority to begin a new program without legislative approval, *see* 5 MRSA § 1582(1). Second, the Department does not have the authority to use money previously allocated by the Legislature for a different purpose to build this facility without the Legislature's approval. Finally, while the Governor has the authority to use the Capital Construction and Improvement Reserve Fund, 5 MRSA § 1516-A, he does not appear to have authority to use those funds to purchase land or buildings outside of Augusta. We also believe that there are constitutional Separation of Powers at stake but do not address those in this memo.

I. The Department Must Have Legislative Approval Before It Begins a New Program

As a starting point, the Department does not have the authority to build a facility without legislative approval because it is a "new program" and under the law, it must be approved by the legislature:

> A state department may not establish a new program or expand an existing program beyond the scope of the program already established, recognized and approved by the Legislature until the program and the method of financing are submitted to the Department of Administrative and Financial Services, Bureau of the Budget for evaluation and recommendation to the Legislature and until the funds are made available for the program by the Legislature.

5 MRSA § 1582(1). "Programs" are defined elsewhere in Maine law as the entire departmental plan submitted as part of the budgeting process.[1] Thus, if the Department did not previously submit a plan to create a new facility through the appropriations process in the last session, it cannot now create a new program without legislative approval. We are not aware of any plan submitted to and approved by the legislature to build a step-down facility.

II. The Department Does Not Have Fiscal Authority to Build a Step-Down Facility Without Legislative Approval; The Governor's Authority Is Limited to Spending in Augusta.

Article V, part 3, section 4 of the Maine Constitution states that "[n]o money shall be drawn from the treasury, except in consequence of appropriations or allocations authorized by law." The Governor and the Department's ability to spend money on this new facility, therefore, hinges on the meaning of "appropriations or allocations authorized by law."

The Maine Attorney General's Office discussed what "allocations authorized by law" means in its March 2005 opinion to the Joint Standing Committee on Appropriations and Financial Affairs. *See* Opinion No. 05-22005 WL 4542875 (Me. A.G. Mar. 17, 2005). There, the Attorney General noted that before 1963, this section read: "No money shall be drawn from the Treasury, but by warrant of the Governor and Council and in consequence of appropriations made by law." Opinion No. 05-22005 WL 4542875, at *2 (Me. A.G. Mar. 17, 2005) (emphasis added). The language was changed in a 1963 amendment to the constitution to the language quoted in the first paragraph of this section. *Id.* The Attorney General went on to note that although "[t]he terms 'appropriation' and 'allocation' are not currently defined in the Maine Constitution or in the Maine Revised Statutes, and no such definitions existed in 1963 when this particular

[1] *See* 5 MRSA § 1667 ("Not later than June 1st of each year, the Governor shall require the head of each department and agency of the State Government to submit to the Bureau of the Budget a work program for the ensuing fiscal year. Such work program shall include all appropriations, revenues, transfers and other funds, made available to said department or agency for its operation and maintenance and for the acquisition of property, and it shall show the requested allotments of said sums by quarters for the entire fiscal year, classified to show allotments requested for specific amounts for personal services, capital expenditures and amounts for all other departmental expenses...) Any change in allotments for line items must not exceed $45,000 for any quarter. *Id.*

section of the Maine Constitution was amended to its present form," *id.*, at the time of the amendment,

> the word "allocation" was also being used in other contexts in Maine law, including: allocations by the Governor and Council from the Construction Reserve Fund, pursuant to 5 M.R.S.A. § 1503, and from the State Contingent Account, pursuant to 5 M.R.S.A. § 1507; as well as the allocation of bond proceeds, *e.g.*, P. & S.L. 1959, ch.175, § 6. Although the legislative history of the 1963 amendment to Article V does not reveal the specific reason for his recommendation, it is likely that the Attorney General suggested inclusion of the phrase "allocations authorized by law" in section 4 of Article V, part 3 to capture these other methods by which the Legislature authorizes expenditure of funds that come into the State treasury.

Id. at *3. Today, the allocations authorized by law are the same as mentioned above: for the Governor, by use of the State Contingent Fund, the Capital Construction and Improvements Reserve Fund, or a specific bond; and for the Department, through the budget allocation process.

A. Appropriations or Allocations Authorized by Law to the Department

The Department's funding for this facility could only come through legislative appropriations. *See, e.g., KHK Assocs. v. Dep't of Human Servs.*, 632 A.2d 138, 140 (Me. 1993) (finding "both the Maine Constitution and statutory law require that contracts such as this be subject to funding by the legislature" where contract at issue provided for private company's building of facility to DHHS's specifications and subsequent lease of facility to DHHS). The Department has said that it would pay for the step-down facility by using unspent funds that were appropriated to the Department. However, the Department cannot move money from other budget line items to build a step-down facility without legislative oversight. Maine law is very clear that money appropriated to a department should only be spent for the purpose for which it was appropriated.

First, 5 MRSA § 1581, which describes the appropriations bill that must be submitted to the Legislature for approval, states that it "must provide specific amounts for personal services, capital expenditures and amounts for all other departmental expenses. Appropriations for the acquisition of property must be in such detail under each department or agency as the Governor-elect or the Governor determines." While the

Governor may determine that there does not need to be much detail, this language suggests that the purchase must at least be broken out as a line item.

Next, Maine law states that any money appropriated to a department in the budget process but not used for the purpose for which money was appropriated, "may be transferred at any time prior to the closing of the books to any other appropriation or subdivision of an appropriation made by the Legislature for the use of the same department or agency for the same fiscal year" but that transfer is "subject to review by the joint standing committee of the Legislature having jurisdiction over appropriations and financial affairs," 5 MRSA § 1585, where the amount of the transfer is over $45,000, 5 MRSA § 1667. Additionally, "[f]inancial orders describing such transfers must be submitted by the Bureau of the Budget to the Office of Fiscal and Program Review 30 days before the transfer is to be implemented." 5 MRSA § 1585.

5 MRSA § 1667, which lays out the budgeting process, requires that each department provide a work program to the Bureau of Budget by June 1 of every year that "include[s] all appropriations, revenues, transfers and other funds, made available to said department or agency for its operation and maintenance and for the acquisition of property, and it shall show the requested allotments of said sums by quarters for the entire fiscal year, classified to show allotments requested for specific amounts for … capital expenditures and amounts for all other departmental expenses." *Id.* (emphasis added). The statute specifically states that "funds not expended for this budget item may not be transferred between line categories." *Id.* And, even if the Department were able to show that part of its funds were somehow already earmarked for the type of patient the step-down facility will house, the Department cannot "contract any obligation on behalf of the State in excess of the appropriation" given by the Legislature, 5 MRSA § 1583, without committing a Class E crime. *Id.*

The statutory law is thus clear that, to the extent that the Governor and the Department intend to pay for this facility with money already appropriated to the Department for other items related to patients with mental health issues, the Legislature must approve any change to the expenditure by the Department.

B. Appropriations Allocated by Law to the Governor

As discussed above, the Governor is authorized by statute to use funds from the Capital Construction and Improvements Reserve Fund, 5 MRSA § 1516-A (the "Capital Fund"), the Contingent Account, 5 MRSA § 1507, or from specific bonds. To build a step-down facility, the Governor would have to depend on the Capital Fund.[2] The Governor may use the funds in the Capital Fund, 5 MRSA § 1516-A, and there is no limit to the amount of money he may use from it. The Capital Fund "may be used solely for capital projects that construct, renovate or improve state facilities." *Id.* at § 1516-A(1). There is no mention in the statute regarding any supervision of the Governor's use of the Fund, except that he would likely need approval from the Department of Administration and Financial Services. *See* 5 MRSA § 1541(2) (stating that DAFS has the authority "[t]o examine and approve all contracts, orders and other documents, the purpose of which is to incur financial obligations against the State Government"). The Governor has not indicated that the Capital Fund is the source of money from which he intends to build a facility, and we do not know how much money is in that fund. The Governor could theoretically use money from this fund to build the step-down facility in Augusta, Bangor, or on other state-owned property, but any operation of the facility would necessarily need legislative oversight to fund it. The building could sit empty if it were built without the approval to operate.

III. Neither the Department nor the Governor Have Authority to Buy or Build a Facility Outside of Augusta Without Legislative Approval.[3]

A. The Department's Authority to Acquire Land for a New Facility

"The head of any ... department of the State Government ... not otherwise exempted by law, who contemplates any public improvement, must first obtain the

[2] The other two sources are unlikely sources of money. First, the Continent Fund, 5 MRSA § 1507, may only be used for, among other purposes, "emergencies," *id.* at § 1507(4), purchase of real estate in Augusta, *id.* § 1507(3), or for construction projects that go over budget, *id.* § 1507(2). Even if the governor could slot the step-down facility into one of the enumerated categories, he is limited to using $300,000 of the Contingent Account for any project. *Id.* Given the cited price tag of $3-5 million, the Governor's use of the Contingent Account would not be sufficient to fund a step-down facility. Second, although the legislature has authorized the Governmental Facilities Authority to issue "securities in an amount not to exceed $33,000,000 outstanding at any one time for a psychiatric treatment facility," we have not found evidence that such bonds have been issued, or that the step-down facility would qualify as a "psychiatric treatment facility."

[3] While the Governor has indicated that he intends for the new step-down facility to be built at Dorothea Dix, until ground is broken, there is still the possibility that he will attempt to buy or build a facility on land not owned by the State.

approval of the Director of the Bureau of General Services for such work."[4] 5 MRSA § 1742. Although we have not seen such a request for approval of the new step-down facility, we expect that the Bureau of General Services would grant the Governor's request. As discussed above in Section I of this memo, because this would be considered a new project (there is no line item in the 2016-17 budget for any construction of a step-down facility or moving forensic patients out of Riverview) it would require legislative approval.

Additionally, the Department is prohibited from entering into "lease purchase or other similar agreement[s]" of more than $2,000 where "the State would become the ultimate owner of buildings or equipment" without legislative approval. 5 MRSA § 1587. The question remains whether this statute merely prohibits the purchase of a land with building on it, or whether the state's purchase of land whereby it would eventually own a building would also be prohibited under this section.

B. The Governor's Authority to Acquire Land for a New Facility

The Governor is explicitly allowed to buy or take by eminent domain land in the "Capitol Area," *see* 1 MRSA § 814. We did not find any other language in Maine statutes that specifically allows or prohibits the Governor from purchasing other property, but under the canon of statutory construction *expressio unius*, the specific provision for his purchase of property in the Capitol Area suggests he is not in fact authorized to purchase property outside of the Capitol Area. *See Wescott v. Allstate Ins.*, 397 A.2d 156, 169 (Me. 1979) ("The maxim-expressio unius est exclusio alterius is well recognized in Maine as in other states. It is a handy tool to be used at times in ascertaining the intention of the lawmaking body.")

III. Other Considerations

The Governor could lease a building for the new step-down facility without ever intending to own the building, thereby evading any implicit restrictions on the purchase of land or lease-purchase of land. However, the Capital Construction and Improvements

[4] A public improvement "mean[s] and include[s] the construction, major alteration or repair of buildings or public works now owned or leased or constructed, acquired or leased by the State or any department, officer, board, commission or agency of the State, or constructed, acquired or leased, in whole or in part with state funds." 5 MRSA § 1741.

Reserve Fund, 5 MRSA § 1516-A, would not then be available to the Governor because it would not be a purchase or improvement of a state facility.

If the Governor attempts to build a facility in another city, it will necessitate that city's planning board approval, and will cost more money. The Governor's insistence that he cannot waste any more money and therefore must build elsewhere is contradicted by the additional cost it will take to start this process over in another town. Nor is it clear what additional costs would be incurred by the Department appearing before municipal bodies to testify.

Even if the Governor builds a new step-down facility, the administration has not addressed serious concerns that could hamper the operation of the facility from its inception. The following considerations are ripe for legislative input whether or not the facility is built in Augusta or elsewhere:

- Which forensic patients are eligible to move into this new facility, and how will that determination be made? Currently, 15 MRSA § 104-A dictates the court procedure by which a forensic patient at Riverview may petition to be released or discharged from Riverview. However, the statute only addresses whether the patient stays at Riverview or is released into the community. This new step-down facility is described as an intermediate facility that is not covered by this statute. The Department should expect that patients at Riverview will sue to be admitted to the new facility, and without legislation or APA rulemaking, courts will be left to figure out who is eligible to live in the new facility.
- Who will run the new step-down facility? The legislature may enact legislation to limit who runs the facility (for example, prohibiting for-profit businesses that have long histories of patient abuse and neglect from running the facility), or at the very least institute strict oversight of the facility if it is to be run by a for-profit business.
- How, if at all, will this new facility address CMS's concerns that led to Riverview's de-certification?

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Testimony of Maine AFL-CIO on proposed Secure Forensic Mental Health Facility
January 5, 2016
Sarah Bigney

Good afternoon Senator Hamper, Representative Gattine, Senator Brakey, Representative Hymanson, and members of the Joint Committees on Appropriations and Financial Affairs and Health and Human Services. My name is Sarah Bigney and I represent the Maine AFL-CIO.

Through our affiliates, we represent the front line workers at Riverview Psychiatric Center; mental health workers, acuity specialists, nurses, and other staff that care for some of our state's most vulnerable patients dealing with mental illness. They work very hard under difficult circumstances to provide the best care possible.

We are here today to raise serious concerns about the lack of information provided by the Department of Health and Human Services about the proposed forensic mental health unit.

The workers at Riverview agree that another facility providing additional beds with a step down level of care is needed for their patients who no longer require hospital level care. However, the lack of details of how this facility will be run and how treatment will be provided is disturbing.

What we do know is that the Department plans to contract out the operation of this facility, and the workers at Riverview are opposed to this move. They take care of these patients every day. They know them, and they work hard to see them improve and succeed.

To have this sister facility to Riverview run by a separate entity does not make sense, and compromises the continuity of care that the patients would receive by having the facility run by the state.

There are so many unanswered questions with this proposal. What type of facility is this? How will it be run? What are the standards of care and treatment? Who will staff it? The administration has yet to answer these questions.

Deciding to privatize a state mental health facility is a major policy decision that should be made by the Legislature. It is you who are given oversight and responsibility for the operation of our mental health system. You are responsible for the care of some of our state's most vulnerable individuals. They look to you to protect them and ensure they are provided the best treatment and care possible.

There are plenty of services that the state contracts out to private companies, and many of those make sense. There are also some things we believe should be run by the state, and this care of the mentally ill who are in state custody is absolutely one of them. For many of the same reasons that the Legislature's Criminal Justice Committee unanimously rejected a bill to privatize Maine prisons in 2012, our state hospital and care of this vulnerable population should also remain state run.

There are important questions about what a contract with a private provider would look like, especially as it could potentially be a for-profit company. Would the contractor demand guaranteed minimum bed occupancy rates? This would create an incentive to keep people in the facility rather than rehabilitate them.

How long would the contract be for? Would there be strong requirements for programming and rehabilitation? We have seen understaffing at Riverview for years, but the Legislature took action to address that last session. Would there be strong staffing level requirements? What happens if the contractor fails to staff the facility to required levels? Will the contract allow for public access to public information? Will it guarantee a profit margin? What would happen if the State decides the contractor is not meeting its obligations? How much will it cost?

What's even more concerning is that we know that a private, for-profit prison company is standing by to bid on this contract. Correct Care Solutions is a spin-off of GEO, the nation's second largest private prison corporation.

This move to privatize our state forensic mental health care is part of a disturbing national trend. When private prison companies saw their ability to expand into more prisons shrinking, they decided that mental health was their new way to increase profits. It is being called the "Treatment Industrial Complex."

The results have not been good. Correct Care runs three of six state hospitals in Florida. According to a report by Grassroots Leadership's from February 2016 titled "Incorrect Care," Florida's mental health hospitals are under federal scrutiny for high rates of violence and patient deaths. I've brought copies of this report for you to read. A recent in-depth expose by the Tampa Bay Times and the Herald Tribune on Florida's state hospitals revealed and documented cases of patient abuse, understaffing, lack of transparency, and a

dramatic increase in violence and patient deaths. It is safe neither for the patients nor the staff.

http://www.tampabay.com/projects/2015/investigations/florida-mental-health-hospitals/

In Texas, GEO opened the Montgomery County Mental Health Treatment Facility, now run by Correct Care, which is privately operated but state funded. Grassroots Leadership reports that issues arose quickly, and that within the first year GEO was fined $53,000, half of the original penalty, after state inspectors found serious violations of patient care, reporting, and accountability requirements.

Since then, Texas has twice rejected GEO/Correct Care's bids to operate a second hospital in that state because of the failures of the first experiment. In 2012, the state dropped plans to privatize Kerrville State Hospital because a commission found it would not save money or improve patient care. In 2015, the state canceled a plan to allow Correct Care to privatize Terrell State Hospital after an audit found it was not financially in the best interests of the taxpayers.

https://www.texasobserver.org/state-rejects-geo-cares-bid-to-privatize-psychiatric-hospital/

https://www.texastribune.org/2015/03/25/hhsc-ditches-plan-privatize-terrell-state-hospital/

There are too many unanswered questions at this point. We ask you as the Legislators with oversight of Riverview and of Maine's mental health system to demand more information, and to put forward proactive legislation to ensure the best outcomes for patient care, work place safety, and public accountability.