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MAINE COUNTY COMMISSIONERS ASSOCIATION

November 5, 2020

Via Email: Mary.A.Lucia@Maine.gov

Mary Lucia
Policy Development Coordinator
Maine Department of Corrections
111 State House
Augusta, ME 04333-0111

Re: ***Rulemaking regarding Standards for County and Municipal Detention Facilities
Comments of Maine County Commissioners Association***

Dear Ms. Lucia:

On behalf of the Maine County Commissioners Association (MCCA or Association), which represents county commissioners from around the State of Maine, we write to express our serious concerns regarding the above-noted rulemaking (Proposed Rule No. 2020-P204) as well as the process followed in bringing these rules forward. We believe adoption of many of the proposals outlined in the rulemaking are either not authorized by law or impose unreasonable, unfunded mandates on county and municipal detention facilities (Detention Facilities), and hence unreasonably burden the property taxpayers of Maine.

Request for hearing. As an initial matter, both as an individual and on behalf of the individual members who comprise the Association, I/we respectfully request a public hearing be held with regard to this rulemaking in accordance with 5 MRSA §8052(1).

Stakeholder Group. MCCA is well aware that the Commissioner maintains an Advisory Committee, in part to advise with regard to Detention Facility standards. However, it is our understanding that the Committee has not issued a consensus approval of the proposed standards contained in this rulemaking, which is telling. Given the complexity of the issues involved, our Association urges the Commissioner to discontinue the present rulemaking and

instead, establish and lead a committee of jail administrators, sheriffs, and county commissioners to advise on the standards suggested in this rulemaking. It seems more appropriate to develop a clear document acceptable to all parties rather than follow a rulemaking process to receive comments and input from sixteen counties, jail administrators, and other interested parties with the potential for a final policy that is not acceptable to all.

Procedural deficiencies. By law, the Commissioner of the Department of Corrections (Commissioner) has authority to establish standards on Detention Facilities, and such standards must be established pursuant to the Maine Administrative Procedures Act (APA). *34-A MRSA §1208*. The Maine APA requires that agency rulemakings must be promulgated according to certain notification standards. *5 MRSA §8053*. The Maine APA in turn requires agencies to list the **substantive** state or federal statutes authorizing the rulemaking. *5 MRSA §8053(3)(E)*. That was not done in this case, which is significant given the limitations on the Commissioner's authority under State law with regard to detention facility standards, as noted below.

Scope of Commissioner's Authority. The Commissioner has authority to establish standards for Detention Facilities with respect to "safe, healthful, and secure facilities." *34-A MRSA §1208(1)*. Standards that go beyond such statutory mandate are outside the Commissioner's authority and may not be adopted by rule. In this case, we believe there is an important distinction between, on the one hand, a "standard" involving the conduct of staff or operations of a Detention Facility, and on the other hand, a "standard" involving the imposition of expensive and wholly new programs or services. The former type of standard appears to be a reasonable exercise of the Commissioner's delegated authority from the Legislature. The latter type of standard, by contrast, does not. Given that the Legislature itself has limited authority to impose unfunded mandates on itself or local governments, it stands to reason that the Legislature cannot in turn delegate to the Commissioner an authority it does not have in the first place. Moreover, it is not reasonable to assume that the Legislature intended to delegate authority to a single individual to impose any "standard" on Detention Facilities, without any guidelines and without any reasonable standards. For these reasons, we do not believe the Commissioner has authority to impose, without limitation, expensive new programs or services on Detention Facilities under the guise of the Commissioner's authority to impose "standards."

Substantive Comments. Turning to the specific elements of the proposed rule, MCCA has a number of policy and legal concerns as noted below.

- **Use of Force.** With regards to use of force, there are no reasonable reasons to enact standards more restrictive than the federal standard. Use of force criteria is very specific to the facts and circumstances of each individual case. To add additional criteria above the federal standards places both the individual and the officer at a disadvantage to de-escalate a situation, for example, in situations where an individual is bullying or harming another prisoner or is inciting actions that are harmful to groups. There are too many instances where unforeseen circumstances that do not fit squarely within a rigid policy, and if the policies prevent an officer from taking prudent steps to protect

individuals or groups, the unintended consequence is that people may be more likely to get injured.

- **Section J.10.** This provision is too rigid. It leaves no latitude to consider the present existing conditions. Presently, under the COVID-19 pandemic, viral particles are spread by exposure to a contaminated individual. At the same time, Detention Facilities are designed to be space-efficient and do not allow for internal social distancing required. In such circumstances, if Detention Facilities are required to allow a prisoner's personal space to be violated by individuals with unknown health conditions, the risk of viral spread goes up, potentially allowing for super-spreader incidents.
- **Sections K.19 and 20.** From a fiscal standpoint, these provisions are highly problematic as written, exceed the Commissioner's authority to set "standards," and should not be under the aegis of Detention Facilities. Rather, these categories, programs and personal assistance belong within the Department of Health and Human Services (DHHS) per their State created charge. Even though prisoners may be housed in Detention Facilities, they remain citizens of the State and therefore should be entitled to the services of DHHS. This would prevent the duplication of effort and cost. With regard to prescription medication in particular, over 75% of jail inmates are prescribed and ingest daily some psychotropic drug; mental illness is not a jail treatable health condition and requires the assistance of DHHS per their rules, regulations and laws.

Trial Period. If any of the new standards are to be enacted and given the scope and potential costs involved, we believe it is imprudent to adopt them on a permanent basis without facilitating a trial period. Practically speaking, neither the Detention Facilities nor the Department of Corrections (Department) can predict the costs and effects of these proposed standards without allowing time for planning, education, and the development of internal protocols. In this regard, any standards that are ultimately adopted through this rulemaking should be established on a trial basis for a period of 14 months after which the Detention Facilities will report back to the Department with regard to the costs and other impacts of the new standards. At that point, the Department would have discretion to issue another rulemaking with regard to these or other standards, informed by the data collected during the trial period.

Unfunded Mandate. In any year, raising the costs of operating Detention Facilities is difficult for local property taxpayers who must foot the bill. As the Department knows, any cost increase – unless funded by the State – requires an increase in county taxes which are in turn collected through property taxes. Moreover, given statutory limitations on the ability of counties to increase taxes related to Detention Facilities, there is a further risk that adding new costs cannot be funded at all, or will require cutbacks in other necessary services placing prisoners, employees, and the public at risk.

Comments of MCCA re DOC Rulemaking P204

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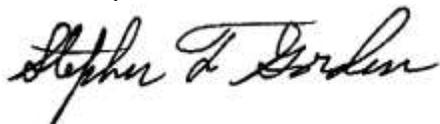
If the proposals set forth in this rulemaking in Section J.21 were adopted, for example, each Detention Facility would be required to hire more staff and provide more services in order to comply. That is a given. To put these costs in context, one full-time position (with benefits and necessary expenses) translates into an estimated cost of \$90,000 to \$110,000 annually. If each county jail added a single staff member due to these proposed rules, the cost statewide would be \$1,260,000 to \$1,540,000. Additionally, by mandating that Detention Facilities undertake the cost of providing new medical services, such as abortions, birth control, and counseling, the anticipated result would be an increase in the cost of contract with the medical providers serving Detention Facilities. Providing follow-up care would increase costs even further. Considering anticipated staffing and contract costs to provide the new services mandated by the rule, MCCA estimates new costs statewide of between **\$1,960,000 - \$4,340,000** per year.

During normal times, raising property taxes to fund these services is difficult. During this pandemic, the challenges rise exponentially. Local and county governments are already being forced to make difficult decisions regarding services to cut, so it becomes all the more untenable to be faced with new and costly services necessitating further cuts to local services, or raising property taxes on property owners who are struggling to afford them.

Moreover, we believe that the imposition of new costs and services by rule constitutes an unfunded mandate pursuant to 30-A MRSA §5685.

Conclusion. The Maine County Commissioners Association appreciates the opportunity to provide comments with regard to this rulemaking, and based on our comments, we respectfully request that the Department terminate the pending rulemaking and convene a stakeholder group to consider the issues raised by this rulemaking. This approach offers the best hope of developing workable and affordable standards.

Sincerely,



Stephen F. Gorden
President

Cc: Randall Liberty, Commissioner
Dr. Ryan Thornell, Deputy Commissioner
Ryan Andersen, Manager of Correctional Operations
Sheriff Troy Morton, President, Maine Sheriffs' Association
Christine Landes, President, Maine Municipal Association
Mary Anne Turowski, Governor's Office