**MAINE DEPARTMENT OF CORRECTIONS**

**SUMMARY OF AND RESPONSES TO PUBLIC COMMENTS**

Chapter Number and Title of Rule: Chapter 1, Detention and Correctional Standards for Maine Counties and Municipalities

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The Department of Corrections proposed a revision of the above stated rule. There was a remote public hearing via Zoom on December 7, 2020. December 18, 2020 was the written comment deadline. The Department thanks all those who participated in the public comment part of the rulemaking process, whether the comments supported or opposed the proposed rule.

## I. BEFORE THE PUBLIC HEARING

Before the public hearing, written comments were received from five commenters as summarized and responded to below.

From Jan Collins, Assistant Director of the Maine Prisoner Advocacy Coalition

**Comment:** The commenter noted that there was no mention of the state statutory mandate that all jails have a Board of Visitors and suggested that since this is a statutory mandate, it should be part of the requirements in the revised rule.

**Response:** The Department agrees to adopt this suggestion. Therefore, the following has been added as a mandatory standard:

A.17. MANDATORY

The sheriff shall appoint a board of visitors for the jail, or in conjunction with one or more other sheriffs a joint board of visitors, to inspect the jail subject to reasonable restrictions required by the sheriff to ensure the security of the jail and to make recommendations to the sheriff with respect to inmates who are mentally ill.

*Evidence of Compliance: Records of appointment of board members and of visits by the board.*

As well, the statutory section containing this mandate, 30-A MRSA section 1651 has been added as an Appendix to the standards.

From Teshia Cates, Compliance Manager for the Somerset County Jail

**Comment:** The commenter noted that one appendix, the Attorney General Protocol for the Investigation of Deaths, Probable Deaths, and Missing Persons, was out of date. .

**Response:** The Department agrees and, therefore, has substituted the current protocol (dated October 31, 2019) for the prior protocol.

From Sheriff Troy Morton on behalf of the Maine Sheriffs' Association (MSA)

**Comment:** The proposed rule meets the statutory definition of a "major substantive" rule, but it has been labeled as a "routine technical" rule.

**Response:** The commenter is incorrect about this. Under Title 5, section 8071, rules authorized by the Legislature after January 1, 1996 may be either routine technical rules or major substantive rules. While section 8071 describes the characteristics of routine technical rules versus major substantive rules, it is the Legislature itself which determines whether a particular rule authorized by it after January 1, 1996 is a routine technical rule or a major substantive rule. This determination is made right in the authorizing legislation. All state agency rules which were authorized by the Legislature on or before January 1, 1996 are treated as routine technical rules. The above stated rule was initially authorized by the Maine Legislature before January 1, 1996. See Title 34-A section 1208, enacted by Public Law 1983, chapter 583. See also Title 34-A section 1208-A, enacted by Public Law 1989, chapter 321. While there is another statutory provision which was enacted after January 1, 1996 which also authorizes this rule, in that provision the Legislature determined this is a routine technical rule. See Title 34-A section 1208-B.

**Comment:** A public hearing was not scheduled, as required for proposals of major substantive rules.

**Response:** As noted above, this is not a major substantive rule. However, in response to a number of requests for a public hearing, one was scheduled.

**Comment:** The legal notice indicates that there is no financial impact on municipalities or counties when, in fact, the proposed rule will have a substantial financial impact on municipal and county budgets.

**Response:** Under Title 5 section 8057-A, a state agency, when preparing a proposed rule, is to estimate the fiscal impact of the rule to the best of its ability. Based on information known to the Department at the time, it was determined that there would be no fiscal impact. Specifcally, it was determined that everything that the proposed rule would require is already being done by the jails or could be implemented without incurring additional cost.

From Stephen Gorden (President) on behalf of the Maine County Commissioners Association (MCCA)

**Comment:** Although the MCCA recognizes that there is an advisory committee that provided the Commissioner with advice with respect to these standards, it did not provide a consensus approval, and, therefore, the MCCA is requesting that the rulemaking process be discontinued and that a committee of jail administrators, sheriffs, and county commissioners be established to advise the Commissioner and develop standards that are acceptable to all.

**Response:** As the MCCA recognized, there is already an advisory committee (established under Title 34-A section 1208), and it has already provided its advice to the Commissioner. This committee is required to have sheriff and county commissioner representatives, as well as other representatives. Although the committee was unable to come to a consensus, the Commissioner did consider the range of opinions in putting forward these proposed standards. Therefore, the Department declines to adopt this suggestion.

**Comment:** If these standards are adopted, it should be on a trial basis only, with the jails reporting back to the Department after 14 months as to the costs and other impacts. After that, the Department could initiate another rulemaking process based on the feedback.

**Response:** The Department declines to adopt this suggestion. If there are unforeseen impacts that require a change to the rule, the stakeholder group established in the statute will be able to suggest additional rulemaking.

**Comment:** The rulemaking is procedurally deficient as there was no listing of the substantive federal and state statutes authorizing the rule.

**Response:** This was corrected and the rulemaking process restarted.

**Comment:** The Commissioner's rulemaking authority under Title 34-A secton 1208 is limited to standards related to maintaining "safe, healthful, and secure facilities" and these standards go beyond that authority by mandating expensive and wholly new programs and services.

**Response:** The Department believes that all of these proposed standards come within that statutory authority and that they also come within the rulemaking authority under Title 34-A secton 1208-B, which refers to, among other things, standards for the "management of prisoners" and "mental health and substance use disorder programs."

**Comment:** The use of force standards are more restrictive than the federal law in that extra criteria are added.

**Response:** It is unclear in what way the commenter believes these standards are more restrictive than federal law or what "extra criteria" are being referred to. The Department does not agree with these characterizations and declines to change these standards.

**Comment:** Standard J.10 (which concerns visits to inmates) is too rigid and leaves no latitude to consider existing conditions, specifically the ways in which COVID is spread.

**Response:** The comment does not seem to relate to the content of standard J.10 (which was not proposed for any significant change). More likely, the commenter is referring to proposed Standard J.11, the substance of which, as a result of this and other comments, is being repealed as confusing and in seeming contradiction to Standard J.15, which provides the necessary latitude. Note: standard J.11 will now be part of a reorganization of the visits standards and will include only nonmandatory content that is presently found in other standards.

**Comment:** Standards K.19 and K.20 exceed the Commissioner's authority and require the jails to duplicate the efforts of the Department of Health and Human Services (DHHS), which is the entity

that should be providing these services. 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 should be addressed by DHHS.

**Response:** This comment seems to relate more to standard K.19 as the comments seem related to its content, instead of the content of standard K.20. In any event, as discussed above, these standards do not exceed the Commissioner's authority. As a matter of both constitutional law and state statute (Title 30-A section 1561), jail inmates are entitled to adequate medical care, which includes care for mental illness. Moreover, there is nothing in these standards that prevents the jails from coordinating this care with DHHS and/or community mental health services agencies.

**Comment:** These standards, specifically standard K.21 (the comment refers to standard J.21, but it is clearly about K.21), constitute an unfunded mandate, which is forbidden by state statute. It will entail additional staffing and additional costs in medical services contracts, expecially because this standard is mandating new medical services, such as abortions, birth control, and counseling.

**Response:** The commenter does not explain why extra staffing would be required as a result of standard K.21 (or any other standard). As for medical services contracts, the care and services outlined in this standard are already being provided by the jails (or should already be being provided) under their current contracts. As a matter of both constitutional law and state statute (Title 30-A section 1561), jail inmates are entitled to adequate health care, which includes pregnancy-related care. The "new" services mentioned by the commenter are actually less expensive than the cost of care for a pregnant inmate. Further, there is nothing in these standards that prevents the jails from coordinating this care with DHHS and/or community family planning agencies. The jails could use medical furloughs as allowed under Title 30-A section 1556 for convicted inmates and seek court-ordered pre-trial release for detained inmates, thus relieving the jails of the costs associated with pregnancy termination. The jails arranging for counseling by community family planning agencies via remote platforms, like Zoom and Teams, would also mean there would be no cost to the jails. Note: as a result of this and other comments received about this standard, it has been reworded slightly by adding "when medically indicated" to paragraph f. and by adding "when clinically indicated" to paragraph i. As a result of the review by the Attorney General's Office, the phrase "including, if appropriate, by referral to these services in the community" has been added to paragraph e.

From Susan Wiswell, a member of the York County Jail Board of Visitors, and a retired R.N.

**Comment:** The new use of force standards (C.28 - C.31) are timely, proactive, and well done.

**Response:** Thanks.

**Comment:** Regarding J.10 - J.18, in-person visits pose a risk of another COVID-19 outbreak at the jail, as well as the risk of transfer of contraband; video visits do not pose either risk.

**Response:** Standards J.15 and J.18 (which relates to video visits), as reworded in response to this and other comments, provide the necessary latitude to deal with the risk of COVID being spread

through in-person visits and with the risk of contraband transfer. See also the response to the MCCA's comment on this topic.

**Comment:** Standard K.18 (which requires policies and procedures and a program relating to communicable and infectious diseases) is very good.

**Response:** Thanks.

**Comment:** Standard K.19 (relating to chemically dependent inmates) and K.20 (relating to availablility of naloxone) are very good.

**Response:** Thanks.

**Comment:** The commenter is concerned that standard K.21 could require costly interventions, especially with respect to inmates with high-risk pregnancies complicated by addiction and wonders if private insurance and/or MaineCare could help with the costs.

**Response:** The care and services outlined in this standard are already being provided by the jails (or should already be being provided). As a matter of both constitutional law and state statute (Title 30-A section 1561), jail inmates are entitled to adequate medical care, which includes pregnancy-related care. There is nothing in the standard that prevents private insurance and/or MaineCare from being utilized if it is available.

## II. AT THE PUBLIC HEARING

At the public hearing, oral comments were received from numerous commenters. These comments were all recorded. Most of the commenters read from written comments and then forwarded those written comments to the Department after the hearing. This section of the summary of comments and responses addresses only those oral comments made at the hearing which were not followed up with the same comments in writing.

From Jonathan Berry, counsel to the Maine Sheriffs' Association (MSA), who noted that further comments from the MSA would be presented by Sheriff Troy Morton

**Comment:** As a general comment, the commenter stated that there is unanimous opposition to standards J.11, J.15, and K.21 as unfunded mandates. There is unanimous support of the other standards in principle, but there are some wording flaws. Note: the commenter did not elaborate on what those flaws might be or what standards they are found in.

**Response:** See the more specific responses below.

**Comment:** Further to standards J.11 and J.15 (visits standards), they will undermine safety, as they will lead to the introduction of contraband and then to the violence that follows the introduction of contraband.

**Response:** As a result of this and other comments, the proposed visits standards have now been reworked to give the jails the necessary leeway to deal with safety concerns, while still complying with state statute. Because of this, there is no longer any question of an unfunded mandate.

**Comment:** With respect to standard K.21 (the pregnancy prevention and management standard), this follows neither the work done with the Legislature nor with the advisory committee to the Department; is not evidence-based; is unprecedented in the country; and is inconsistent with the medical care statute as it requires discretionary care.

**Response:** The Department took into account the work done with the Legislature and the advisory committee when formulating the standard. It is unsure what the commenter means by not evidence-based. The Department does not agree that it is unprecedented to provide pregnancy services to inmates. The Department also does not agree that the standard and the statute are inconsistent. Finally, it does not agree that this standard represents an unfunded mandate (see the response to the similar comment made by Stephen Gorden on behalf of the MCCA).

**Comment:** Procedurally, the notice was wrong to state that there is no financial impact on the jails, as if they follow these new standards, they will be forced not to follow others due to funding issues.

**Response:** See the response to the similar comment made by Sheriff Troy Morton on behalf of the MSA.

**Comment:** Procedurally, this should be treated as a major substantive rule.

**Response:** See the response to the similar comment made by Sheriff Troy Morton on behalf of the MSA.

**Comment:** Procedurally, Title 30-A, section 1208-B should not have been cited in the notice as a basis of the rule, as it expired in 2016 (i.e., all standards adopted under that statute needed to be in place by 2016).

**Response:** While it is true that the initial standards required by that statute needed to be in place by 2016, the Department does not agree that this statute cannot be a basis for amendments to those standards. Otherwise, whatever was in place in 2016 would be forever "carved in stone," unable to be amended or repealed no matter how much facts, science, or circumstances had changed. Even if the commenter is correct, Title 30-A section 1208 (also cited in the notice) provides ample basis for all the proposed changes.

From Dawn DiBlasi, Somerset County Administrator

**Comment:** The Somerset County Jail's health care services budget just went out to bid and went from a cost of $900,000 yearly to $1,500,000 yearly based on current population in the jail (level 1). If the population goes up to level 2, the contract will increase to $2,000,000, and if it goes up to level 3, it will increase to $2,500,000. All this without adding the services mandated by the proposed standards.

**Response:** The Department is sympathetic and is working with the sheriffs to help get the jails more funding, but these increases were not caused by a rule change.

## III. AFTER THE PUBLIC HEARING

After the public hearing, written comments were received from many commenters as summarized and responded to below. Where written comments are duplicates of those made by the commenter orally at the hearing, they are marked with an asterisk. Note: some commenters sent in more than one set of comments, and each set is responded to separately.

**Comment:** Numerous individuals wrote to express their support for Standard K.21 by commenting that they were supporting the rule "mandating pregnancy prevention and services to incarcerated people" and stating: "Sexual and reproductive health care is basic health care and must be available to people who are incarcerated. For too long, incarcerated people have not received the care they need while pregnant to take care of themselves and remain healthy throughout their pregnancies."

Those individuals are: Alexa Pappas, Amanda Murphy, Amy Cookson, Amy Partridge-Barber, Andrea Gammon, Ann Miller (who also stated that staying healthy while incarcerated is critical to being able to restart life after release), Ann Schaer, Ashley Ouellette, Becky Hunt (who also stated that she is an Ob-Gyn and is frustrated at not being able to provide the same care to her incarcerated patients as to her other patients and who also stated that incarcerated women have been denied essential health care, which endangers them), Bernadette Schilling, Catherine Benoit Norris (who added "postpartum and throughout their lives" to "throughout their pregnancies"), Charlotte Warren, Danielle Cooledge, Deborah Showalter, Dennis and Susan Kepner (who also stated that it is important that women get the health care they need wherever they are, even in jail, and to refuse it is discriminatory), Dereka Ogden, Doris Luther, Elizabeth Cuprak (who also stated that eventually prisoners are returned to the community and it would be better if they are whole enough to make the adjustment), Emmah Doucette, Frank Valliere, Hannah Lord (who also stated that she is a doula and was allowed to support a pregnant person at a jail but not at the hospital), Hannahlore Trickett, Heather Flowers-Forhan, Jennifer Dunn, Jennnifer Porter, Jerri Stone, Jillian McLeod-Tardiff, Joel Brown, Joel Brownstein, John Albertini, Judith Cutler, Karin Cohen, Katie Simpson, Kaylan Scott (who also stated that this is a fundamental question of dignity and agency), Kurt Bechtel (who also stated that all persons deserve human rights no matter where they may live), Madison Louis, Martha Roberts, Maryann Smale, Meryl Pinque, Michelle and Stanley Moody (who also stated that to do other than proper health care seemed less than humane), Nancy Pfaff, Peggy York, Penelope Andrews, Rachel Pappano, Randi Smith, Richard Hart, Robert Pantel (who also stated that he had been a Firefighter/EMT in a town in Vermont with a prison for women and knew from personal, first hand experience that this is an important issue), Sara McGowan, Sarah Hansen, Stephanie Scherr, Suanne Williamslindgren, Susan Wind, Tawni Turcotte Shannon, Tessa Mandra (who also stated that there is no need to further dehumanize incarcerated people by blocking their fundamental needs), Thomas Rogers, and Tracy Mastro (who also stated that she had read the testimony of three other

persons– Tiffany Glidden, Kayla Kalel, and Dr. Kathryn Sharpless, an apparent reference to testimony by these persons in front of the Criminal Justice Committee in support of legislation on this topic -- and did not think it's right for women to endure such suffering while incarcerated and it's not constructive for them as individuals or as members of society). Note: the Department did not receive comments from Kayla Kalel.

Angelica Katz sent a variaton of this comment and stated that the proposed rule would benefit incarcerated persons, their families, their communities and the state because it would ensure they have access to sexual education and family planning services and, therefore, are able to make informed decisions upon their release. Joanne D'Arcangelo also sent a variaton of this comment and expressed support for the rule's inclusion of access to abortion. Kelli Johnson (who said that she had been incarcerated while pregnant and was later refused contraception) also supported adding family planning and pregnancy care mandates for incarcerated people, stating that many women end up conceiving immediately after release, which could be prevented if they were given the choice by being given the opportunity to have birth control during incarceration. Sherri Lysy also sent a variaton of this comment and stated that a lack of care for pregnant persons to help them to take care of themselves and stay healthy while incarcerated ensures a cycle of neglect for their children and that civil liberties are not just for the free.

**Response:** Thanks.

**Comment:** Joanne D'Arcangelo, who supported standard K.21, also expressed support for the standards addressing infectious and communicable diseases, naloxone, medication-assisted treatment, and excessive force, including chokeholds.

**Response:** Thanks.

**Comment:** The Maine Recovery Advocacy Project (via Garret Hade) presented a pettion electronically signed by 120 persons asking that standard K.19.b make mandatory an individualized treatment plan, including the opportunity to participate in medication-assisted treatment (MAT) for inmates with a substance use disorder as determined appropriate by the responsible health care provider.

**Response:** This standard, the wording of which has been changed in response to other comments (see below responses to the comments of Cheryl Mills and the ACLU of Maine), is mandatory.

**Comment:** The petition also asked that standard K.20 regarding the availability of naloxone also be made mandatory and that all staff and inmates (housed for more than 24 hours) be trained in the proper use and administration of naloxone.

**Response:** This standard, the wording of which has been changed in response to other comments, will be made mandatory, but the training suggestion is not accepted. See below response to the similar comment of Cheryl Mills.

**Comment:** Martin Chartrand expressed his support for the substance of the petition in a separate comment and added a recommendation that the rules be amended to require that every inmate who needs it be provided an individualized mental health treatment plan and that access to health care for inmates is prompt and direct.

**Response:** The Department believes the additional recommendation is covered adequately in the current standards.

From Carrie Kipfer, County Administrator for Lincoln County and member of the Two Bridges Regional Jail Authority.*

**Comment:** Jails are not the unilateral solution for making progress on the various social issues being addressed by these standards. Jails have in recent years taken on roles beyond the specific need of detaining persons accused of and convicted of crimes, such as providng addiction and mental health treatment, because local community social service agencies have not been able to provide adequate treatment.

**Response:** These standards cannot address any deficiencies in services being provided in the community. Regardless of why it happens, if persons who are incarcerated come into the jails in need of treatment, then as a matter of constitutional and statutory law it has to be provided.

**Comment:** With respect to standard K.21, pregnant inmates are already receiving quality care, but this willl expand the required services to include contraception, pregnancy option counseling, family planning services and pregnancy termination, all paid with taxpayer dollars.

**Response:** See the response to the similar comment made by the MCCA.

**Comment:** Standard J.11 makes in-person visits mandatory, instead of leaving it to the discretion of each jail, and would lead to increased staffing, liability exposure, and exposure to criminal acts committed during visits.

**Response:** As a result of this and other comments, the substance of this proposed standard is being repealed.

**Comment:** Standard K.19 will make medication-assisted treatment (MAT) compulsory. What the standard requires is essential for success but comes with a cost. While some of the costs are being funded by the state, when that funding is redirected, the counties will be expected to pick up the tab.

**Response:** MAT is not compulsory under this standard for all chemically dependent inmates or even for all those with a substance use disorder. The standard requires, in accordance with constitutional and statutory requirements, that chemically dependent inmates with a substance use disorder are clinically managed and that this clinical management include, among other things, an individualized treatment plan, something which jails have been or should have been providing already. (The commenter admits this is essential for success.) The standard, as it will be changed in response to

the comments of others (see the responses to the comments of Cheryl Mills and the ACLU of Maine), will state that as part of that treatment plan, inmates "must" receive MAT "if determined necessary" by the jail's health care provider. The decision to provide MAT, like the decision to provide other health care, will, therefore, be required to be based on medical necessity. This is already the federal and state legal standard, and, therefore, not an unfunded state mandate created by this rule. It should also be pointed out that jails are not constrained by this standard to provide MAT in every jail. Jails can agree that only some jails will provide it and that inmates will be transferred to those jails as necessary for this treatment. Note: future anticipated costs when/if state funding is redirected does not constitute an unfunded state mandate.

**Comment:** These standards are making jails provide services that are not their responsibility at a time when they are already struggling due to the tax cap formula used for their funding. For example, corrections officers and jail nurses are not the ones who should be providing sex education and family planning. DHHS and the Department of Education (DOE) should be doing this, as they have more appropriate training and resources.

**Response:** These necessary health care services become the responsibility of the jails when persons needing them become incarcerated. There is nothing in the standards specifying which staff are required to provide (or facilitate the provision) of these services. There is also nothing in the standards preventing the jails from coordinating the provision of these services with DHHS and/or DOE. (As for the tax cap jail funding formula, the standards cannot change this statutory formula. This is a matter that needs to be brought to the Legislature.)

From Cheryl Mills, a member of the Board of Visitors of the York County Jail

**Comment:** The commenter made the following general comments. There needs to be adequate funding from the legislature to support the changes to standards. Referencing Stephen Gorden's view (apparently expressed in testimony before the criminal justice committee of the Legislature) – the commenter agrees that jail populations need to be reduced by using summonses, diversion programs, and restorative justice. The jails should not be the answer for the homeless, the mentally ill, and those struggling with substance use disorder.

**Response**: The Department believes these standards do not require additional funding, but it certainly supports adequate funding for the jails. It also supports reducing jail populations. While the jails cannot be the answer for all of these problems, they do have to deal with mental illness and/or substance use disorder when incarcerated persons present with these issues.

**Comment:** With respect to standard C.28, there should no exceptions to these practices.

**Response:** It is unclear what the commenter means as there is no exception written into this standard.

**Comment:** The commenter is apparently suggesting that the "or" at the end of paragraph a. in standard C.29 be changed to an "and."

**Response:** This change would prevent a correctional officer from using deadly force in self-defense unless the person was also trying to escape. Thus, an officer being stabbed in a jail kitchen by an inmate who has no thought of escape would be in violation of the standard for defending himself or herself. The Department will not be making this change to the standard.

**Comment:** The written report provided for in C.29 (when there is a use of deadly force by a jail correctional officer) should be required to be submitted to the Department and the jail's Board of Visitors.

**Response:** The Department already has the means, by state statute, to obtain and review these reports and does obtain all pertinent documentation whenever there has been an inmate death for any reason, so there is no need for the Department to be mentioned in this standard. These situations are also reviewed by the Attorney General's Office. There are statutes that might impact whether these reports can be shared with a board of visitors and, therefore, the Department declines to require this.

**Comment:** Standard C.31 (the commenter cites to standard C.30, but the substance of the comment relates to standard C.31) is important, and there should be regular required training in implicit bias to ensure it is successfully implemented.

**Response:** Thanks. The Maine Criminal Justice Academy develops the training for corrections officers, both their initial training and some of their annual training. Implicit bias training would be a good suggestion for the Academy.

**Comment:** The commenter believes in-person contact visits requirements should be strengthened, not weakened. Studies show that jails with contact visits, which are recommended by the American Correctional Association, are safer than those with video visits only, as they can used as an incentive for good behavior and have mental health benefits for inmates. Contrary to other testimony, jails with video visits only, like the York County Jail, still have problems with drugs (due to officers bringing in drugs). Video visits may be necessary during a public health crisis or at the convenience of visitors, but they should not be the exclusive way to have visits.

**Response:** As the commenter notes, there was conflicting testimony about the visits standards. The Department has decided to leave them largely as proposed except for the repealing of the substance of one confusing proposed standard (J.11) and with some rewording and reorganization to make them clearer.

**Comment:** Standard K.18 should require that a jail's infectious and communicable disease plan be provided to the board of visitors, as well as to the Department and the Maine CDC.

**Response:** The Department will be adopting this suggestion.

**Comment:** Standard K.19 as it relates to the use of medication-assisted treatment should be changed from “may” to “must.”

**Response:** The Department will be adopting this suggestion and also changing “as” to “if” and “appropriate” to “necessary.” As pointed out by the ACLU of Maine in its comments, this is in line with federal law as decided in *Smith v. Aroostook County*, 376 F.Supp.3d 146 (2019) and also in line with state statute requiring the provision of necessary medical care. Note: compliance with the holding of a federal court does not constitute an unfunded state mandate.

**Comment:** Standard K.20 should be made mandatory and all staff, as well as inmates housed for more than 24 hours, should be required to be trained in the use of naloxone.

**Response:** As a result of this and other comments, it has been decided to make standard K.20 mandatory and also change “should” to “shall” and add a requirement that it be administered by staff trained in its use, unless trained staff is unavailable. This is not an unfunded mandate for a number of reasons, including that the jails are able to obtain naloxone at no cost and having the means available to prevent overdose deaths comes within the already existing legal standard for provision of necessary medical care. It has also been decided to add staff training in naloxone to the current nonmandatory standard for staff training in First Aid. Such training, which is not a mandate, takes only a few minutes and can be done at the same time as First Aid training. Further, there are community groups willing to provide this training at no cost. As well, the standard will no longer specify in which areas of a jail naloxone needs to be kept, only that it be “readily” available in the jail. However, the suggestion to require that inmates who are housed for more than 24 hours be trained in the use of naloxone is rejected as it would create logistical difficulties given the large numbers of inmates involved, it might create a security risk if inmates are allowed access to it, and it would be unnecessary in any jail in which staff are also trained in its use. Note: since “Narcan” is a brand name, the generic “naloxone” is now being used exclusively in the standard.

**Comment:** The commenter supports standard K.21, statting that for too long incarcerated women have received discriminatory treatment in the area of health care; providing contraceptive care and pregnancy termination are necessary to prevent unwanted pregnancy, the latter of which is a right that cannot be taken away by incarceration; not to provide the listed services is a violation of women’s constitutional rights.

**Response:** Thanks.

**Comment:** There should be a mandatory standard that all jails have a board of visitors. A jail’s board of visitors should follow the same standards and protocols as boards of visitors for Department prisons

**Response:** A mandatory standard is being added. See the response to the comment of Jan Collins. It will be left up to each board to sets its own standards and protocols.

From Ellen Grunblatt, MD (retired), LCPC, and member of the Franklin County Board of Visitors

**Comment**: Standard K.18 should include a requirement that a jail's board of visitors be informed of outbreaks of communicable diseases in the jail. Franklin County is doing this, but it should be mandatory.

**Response:** The Department is adopting this suggestion.

**Comment:** Standard K.19 as it relates to the use of medication-assisted treatment (MAT) should be changed from "may" to "must." MAT is the standard of practice for opioid use disorder. It prevents the very high risk of relapse and death upon release when inmates have simply been withdrawn from opioids while incarcerated.

**Response:** See the response to similar comments made by others.

**Comment:** Standard K.20 needs to be mandatory as naloxone is a lifesaver, and training in the use of naloxone, which is not burdensome, needs to be provided to all staff and to all inmates before release, which would be in keeping with the public health effort to make naloxone widely available in the community.

**Response:** See the response to the similar comment made by Cheyl Mills. More specific to the suggestion of training inmates before release (as opposed to the suggestion by Mills that inmates be trained if being housed for more than 24 hours), this would still create logistical difficulties given the even larger numbers of inmates involved, some of whom would be released so quickly that even a short training would be impractical, and so is not being incorporated into the standards.

**Comment:** The commenter strongly supports standard K.21 as it is discriminatory and cruel for incarcerated women not to receive health services according to their needs.

**Response:** Thanks.

**Comment:** There needs to be a board of visitors requirement in the standards, as they are mandated by statute but do not exist in most jails. They foster community buy-in and attention to jail conditions, increase understanding of the challenges faced by jails, ands focus community resources on improving jail conditions and preventing recidivism.

**Response:** A mandatory standard is being added. See the response to the comment of Jan Collins.

From Minique Gautreau, who says she has been a volunteer at the Penobscot Jail for 10 years

**Comment:** It is high-time the Department updated its standards with respect to access to substance use disorder treatment. Medication-assisted treatment (MAT) is the gold standard and we should standardize offering it in all corrections facilities in the state.

**Response:** It is unclear if the commenter supports the current proposal or wants to see it strengthened. In either case, see the responses to other commenters about MAT.

**Comment:** There should be mandatory annual training in conflict resolution and de-escalation for staff. It is required for teachers in the public schools who work with special ed students and ought to be required for jail staff too. It is a recipe for disaster to put vulnerable, psychologically fragile incarcerated persons under the auspices of staff who are often bullies.

**Response:** The Maine Criminal Justice Academy develops the training for corrections officers, both their initial training and some of their annual training. Conflict resolution and de-escalation training is already provided as part of many lesson plans in the Academy's initial training, and annual training would be a good suggestion for the Academy and/or the jails.

**Comment:** It should be mandated that the public is told in advance about meetings of the Board of Visitors since they are public meetings.

**Response:** This is mandated in detail in statute, as are other aspects of "public access" to bodies like boards of visitors. See Maine's Freedom of Access Act.

From Gina Glidden, who is incarcerated at the Southern Maine Women's Re-Entry Center, a facility of the Department

**Comment:** Allowing officers to use deadly force is unnecessary and scary, creating anxiety and a rift between officers and inmates. The commenter says she has never in the years she has been in jails and prisons seen a situation requiring the use of lethal force.

**Response:** The current standards already allow the use of deadly force, and all that is being added is the requirement that such use be in compliance with constitutional law. While the use of deadly force should not be common, the commenter has not been in a position of being able to witness all situations requiring the use of force.

**Comment:** In-person visits are extremely important, as they help inmates maintain their mental health and connections with loved ones, which plays a major role in transitioning back to the community. Also, mothers need to be able to hold their children, both for their sake and the sake of the children.

**Response:** See the responses to the other comments about the visits standards.

**Comment:** The commenter supports medication-assisted treatment (MAT), but believes Vivitrol should be made available as part of such treatment, and not just suboxone, so that the treatment fits the person.

**Response:** The standards do not limit the type of MAT that may be offered.

**Comment:** The commenter supports the communicable and infectious disease standard, saying that when COVID first hit Maine, everyone was in a panic, with no plan and no communication.

**Response:** Thanks for supporting this standard.

From Jan Collins, Assistant Director of the Maine Prisoner Advocacy Coalition*

**Comment:** This commenter echoed the general comments of Mills, also referenced Stephen Gorden's supoport for reducing jail populations, and added that more community programs would reduce the need for and cost of jail programs.

**Response:** See the response to the general comments of Cheryl Mills. Also, while more community programs are needed, that does not obviate the need for jail programs.

**Comment:** The commenter recommends the words "in circumstances where non-deadly force is appropriate" be deleted from the prohibition on chokeholds, etc. in standard C.28.

**Response:** This standard is about non-deadly force situations only and so removing those words would not make sense. What the commenter is apparently getting at is a recommendation that these techniques also not be allowed in deadly force situations, which is a recommendation more appropriately addressed to standard C.29. It has been determined not to add this prohibition to standard C.29. If an officer's life were at stake (e.g., if he or she were being choked) and the only means of self-defense he or she had was to use a chokehold or another of the techniques mentioned, then, as a matter of survival, the officer would obviously do so. This would not violate the law and will not be made a violation of standards. The same goes for other situations in which deadly force is allowed.

**Comment**: The commenter believes that, in keeping with decreasing the use of lethal force, standard C.29 should be changed so that deadly force may only be used for self-defense or defense of a third person and thus would delete paragraph b. and other provisions referencing escape situations.

**Response:** If this suggestion were to be accepted, then it would be a violation of standards to use deadly force to prevent the escape of the most dangerous inmates. Paragraph b. and the related wording are taken directly from Maine statute, so clearly the Legislature believes deadly force is sometimes necessary in escape situations. The Department will not be making this change to the standard. Note: it was noticed when reviewing this and other comments that paragraphs c. and d. in standard C.29 should actually be subparagraphs b.1. and b.2, so this has now been corrected.

**Comment**: The commenter recommends as well removing from standard C.29 the words "when the correctional officer reasonably believes such force is necessary."

**Response:** This wording is also taken directly from Maine statute. Contrary to the commenter's stated intent, if anything, removing this wording would actually make it easier to use deadly force. The Department declines to do this.

**Comment:** The commenter suggests adding wording to standard C.29 (the deadly force standard) to require that an officer attempt to use non-deadly force and de-escalation tactics and that the attempt be unsuccessful before using deadly force and also to require that the officer make reasonable efforts to advise the person that he or she is an officer attempting to de-escalate the situation.

**Response:** This is not required in law and is wholly impractical in deadly force situations, especially in self-defense situations. Doing all this before using deadly force while under a life-threatening attack would lead to officers (and others) being killed. Note: on a related matter, while standard C.28 (the non-deadly force standard) does mention verbal de-escalation, that standard also does not require its use in every situation, again because it is not required in law and is impractical in some non-deadly force situations. However, as a result of the review by the Attorney General's Office, wording has been added to standard C.28 requiring that if verbal de-escalation efforts are not made, the reasons are documented.

**Comment:** The written report provided for in C.29 should be required to be submitted to the Department and the jail's Board of Visitors.

**Response:** See the response to the same comment by Cheryl Mills.

**Comment:** Standards C.30 and C.31 are applauded, but there should also be required regular and mandatory implicit bias training.

**Response:** See the response to the same comment by Cheryl Mills.

**Comment:** The wording "as soon as practicable" in standards C.30 and C.31 is vague and "immediately" or a specific length of time should be substituted.

**Response:** Use of the word "immediately" does not reflect reality. Given the dangerous dynamics around use of force situations, immediate reporting is not always possible. Picking an agreed upon specific length of time is also not practical. The present wording will be kept.

**Comment:** The commenter echoes the comments made by Cherly Mills about visits and adds that standards J.10 and J.18 should be made mandatory.

**Response:** See the response to the comments made by Mills. Standard J.10 will be made mandatory, as it is already being followed by all of the jails. The Department does not believe standard J.18 should be mandatory, as not all jails have the capacity to provide video visits.

**Comment:** The commenter supports the additions to standard K.18, but she suggests that the plans required by this standard also be provided to the jail's board of visitors.

**Response:** See the response to the same suggestion made by Cheryl Mills.

**Comment:** The commenter suggests that standard K.19 as it relates to the use of MAT (medication-assisted treatment) be changed from "may" to "must." She adds that some jails already provide this and others do not and that whether someone is able to access medical treatment should not depend on which jail they are housed in and changing the wording would be in keeping with the State's policy

of reducing opioid deaths since inmates who have withdrawn from opiates have an increased likelihood of death after release due to a significantly decreased tolerance.

**Response:** See the response to the similar comments made by Cheryl Mills and the ACLU of Maine.

**Comment:** The commenter repeats the comments made by Cherly Mills with respect to standard K.20 (the naloxone standard).

**Response:** See the response to the comments made by Mills.

**Comment:** The commenter echoes the comments made by Cherly Mills with respect to standard K.21 (the pregnancy prevention and management standard).

**Response:** See the response to the comments made by Mills.

**Comment:** The commenter reiterates her earlier comment about a standard being included to require each jail have a board of visitors.

**Response:** See the response to her earlier comment and the similar comment made by Mills.

Note: this commenter also asked that an article written by a Maine State Prison inmate about MAT at the Prison be added to her testimony. However, there is nothing in the article about the jails or the jail standards, so it will not be responded to.

From Larry Dansinger

**Comment:** Regarding standard C.29, the word “deadly” should be removed. People are killed when it is totally avoidable and when most have no weapons at all. Jail staff should be trained much more to resolve conflicts without using force and should not carry deadly force weapons since they may be as likely to be used on officers as on inmates.

**Response:** It is not realistic to ban the use of deadly force by jail staff.

**Comment:** Officers should be restricted from using force unless all reasonable alternatives have been exhausted.

**Response:** The concept of “reasonableness” is built into the use of force standards, which are taken from Maine statute.

**Comment:** Ban the use of force for talking back or as punishment for misbehavior.

**Response:** Not using force for these reasons is implicit in the standards. It would be impossible to list individually every situation in which force may not be used. However, a general standard will be added banning the use of force for punishment.

**Comment:** Ban chokeholds, strangleholds, tying up and transporting people face down in a vehicle.

**Response:** Chokehold and strangleholds are addressed in the proposed standards. It is unclear what the comments means by "tying up." The Department has not heard of any incident of a person being transported face down in a vehicle.

**Comment:** Have first aid kits and immediately render medical assistance to anyone in custody who is injured or complains of an injuiry.

**Response:** This subject is already covered in current standards.

Note: the commenter would like all this to apply as well to the police and sheriff's deputies, but standards for use of force outside of the jail context are not within the Department's jurisdiction.

From George Hill, CEO and President of Maine Family Planning (via Laura Hill, Senior Associate at Moose Ridge Associates)

**Comment:** Standard K.21 should be adopted as proposed. The agency the commenter represents provides sexual and reproductive health care, training, and technical assistance in twelve counties and is also an advocacy agency. It works with formerly and presently incarcerated women, who, throughout their lives, tend to receive little support, education, and stigma-free and trauma-informed care. Most incarcerated women are there on drug-related charges and 80% are primary caregivers to children and many also suffer from racial and economic disparitites. They need evidence-based, comprehensive sexual and reproductive health care services based on best practices. Incarceraton does not end this need. Interruption of birth control, preventive care, and high-quality prenatal care during incarceration denies women the ability to make thoughtful, informed choices about their reproductive futures.

**Response:** Thanks.

From Ryan Pelletier, County Administator of Aroostook County, on behalf of the Aroostook County Commissioners*

**Comment:** As a general comment, the commenter points out that medical costs for inmates have been dramatically increasing over the past two years, with an increase of 37% in the jail's medical provider contract and a 25% increase in medical, surgical, hospital, and prescription expenses, while at the same time the jail's budget is statutorily capped at a 4% increase in the amount being able to be assessed in county taxes. This fuels deficit spending as the inmate population increases. Some of the standards would exacerbate these issues, leading to non-compliance and/or substantial increases in jail budgets. As another general comment, county jails were never meant to be medical, mental health, or substance use treatment facilities.

**Response:** As stated in response to other comments, the Department supports adequate funding for the jails, but it has no control over the statutory funding formula. Also, as stated in response to other comments, when persons with medical, mental health, and/or substance use issues become incarcerated, they are entitled to necessary care.

**Comment:** Although the Aroostook County Jail does provide in-person contact visits, the commenter is concerned about making standard J.11 mandatory, as it might be problematic in other jails due to security issues.

**Response:** The substance of this standard will now be repealed for the reasons given in response to other, similar comments.

**Comment:** The commenter opposes standard K.21, the standard relating to pregnancy prevention and management, as it is a prime example of a jail being forced to be a healthcare facility. It would be particularly difficult for jails in rural areas which do not have the same level of access to the types of services mandated by this standard. Aroostook County would have to pay more to hire new staff or to contract for services or to go outside of the county for access, causing an astronomical increase in costs, which should be borne by the State and not county taxpayers.

**Response:** Inmates are already legally entitled to necessary health care services, regardless of where a jail is located. Many of these services could be provided without using the jail's health care staff or physically going outside the county. For example, counseling services could be provided in-person or via teleconferencing by community family planning agencies. Telemedicine could be used to fulfill other parts of the standard.

**Comment**: We support the other proposed standards changes.

**Response:** Thanks.

From Sheriff Kevin Joyce of Cumberland County*

**Comment**: As general comments, the commenter notes that his jail is nationally accredited by the American Correctional Assocation and the National Commisision on Correctional Health Care, and he believes in the concept of continual improvement and necessary and well thought out standards changes, but objects to these standards materializing with little to no input from the sheriffs, many of whom have a great deal of experience in operating jails and are subject matter experts. Commenter also states that the medical services changes will financially impact the jails, causing unfunded mandates, with the impact being more consequential for some jails than others.

**Response:** These standards were developed with input from the county and municipal detention facility advisory committee and included input from sheriffs (and others). Further, the Commissioner was for many years the Kennebec County Sheriff. The Department disagrees about the financial impact.

**Comment:** Sheriffs have no objection to the changes to standards C.28 to C.31, which make sense and are in place in many jails already.

**Response:** Thanks.

**Comment:** Sheriffs object to standards J.11 and J.15. Visits keep inmates connected to their outside support systems and before COVID nearly every jail allowed for non-contact in-person visits and when the threat of COVID diminishes, we will go back to these. Many jails are using tablets to provide additional opportunities for contact between inmates and families and will continue to do so after COVID. Before COVID, allowing anything more than the occasional contact visit caused the Cumberland County Jail serious contraband issues, a lot of which went away when the switch was made to non-contact visits ten years ago and the contact visit room was repurposed due to space issues. Requiring such visits would mean an increase in staffing and the use of secure space the jail does not have and would lead to devasting consequensces due to illegal substances getting inside the jail.

**Response:** Repealing the substance of proposed standard J.11 and keeping revised standard J.15 as it is proposed will allow the jail to continue its preferred practices.

**Comment:** Inmates at the Cumberland County Jail get top-tier health care when determined to be medically necessary, but some aspects of standard K.21 are not well thought out. For example, emergency contraception is one thing, but regular contraception is an issue. Some individuals are only in the jail a few days, and those who are there longer should be abstinent.

**Response:** If an inmate is not in a jail long enough to be seen by a health care provider and get a medical order for contraceptives, the standard will not apply (but this should only apply to those staying for very short periods of time). For inmates staying longer, it is not just a matter of abstinence while in the jail; a gap in continuing contraceptives can lead to an unwanted pregnancy after release. Further, it is not realistic to believe that all sexual activity in a jail is factually and legally voluntary. Pregnancy often leads to medical issues and can also lead to mental health issues, especially if it was the result of involuntary sexual activity. Also, some women need to take contraceptives for hormone regulation or for other reasons besides birth control. Discontinuing contraceptives can exacerbate, or at the very least leave untreated, a variety of health care issues.

**Comment:** As another example, for a jail without full-time medical services, the commenter asks when would pregnancy testing occur and how would it be paid for.

**Response:** It would occur when the medical services staff was available to perform the testing, as would be the case with all other nonemergency medical care. The Department believes that such testing would not involve the incurring of any significant cost, which the jails, if they wished, could work with DHHS and community family planning services to cover.

**Comment:** If pregnancy termination is not medically necessary, but is elective, the commenter aks who will pay the medical, hospital, transportation, and staffing costs.

**Response:** If the procedure is "elective," it is unlikely that there would be any hospital costs, as pregnancy termination is most often done in the office of a community family planning practice. All of the other costs would still have been incurred if the pregnancy were not terminated as the inmate would then have required obstetrical services, with often more than one trip involved. Therefore, if anything, pregnancy termination is less expensive. Again, however, the jails could work with DHHS as well as community family planning agencies with respect to pregnancy termination costs.

**Comment:** The commenter asks whether specialized obstetrical services would include fertilization.

**Response:** It would not.

From Sheriff Dale Lancaster of Somerset County*

**Comment:** As a general comment, the commenter notes that his jail, which is one of the largest in the State, is nationally accredited. He also states that there is a potential substantial monetary impact from some of the proposed standards on the county taxpayer creating unfunded mandates.

**Response:** The Department disagrees about monetary impact and unfunded mandates.

**Comment**: There is a committee (an apparent reference to the statutorily established county and municipal detention facility advisory committee) comprised of sheriffs, jail administrators, Department representatives, county commissioners, and subject matter experts which was put in place to review the jail standards. This committee allows for in-depth discussion of standards, their practical implementation, potiential issues, and fiscal impacts. Corrections is evolving and best practices for those who are incarcerated will only be achieved through collaboration and partnership. In putting forward these latest standards, the Department bypassed the process by ignoring the work of the committee and making a unilateral decision, which leads to distrust. The committee should be allowed to continue its work so that a comprehensive and well thought out plan can be developed.

**Response:** The Department did not bypass the committee. While the committee agreed on some matters, it could not come to a consensus on others. The Commissioner did consider the range of opinions in putting forward these proposed standards.

From Stephen Gorden, Cumberland County Commissioner and President of the Maine County Commissioners Association* (The commenter notes that these comments are made in addition to those submitted before the hearing.)

**Comment:** To the commenter's knowledge, these issues were only debated before the Criminal Justice Committee of the Legislature, where there was contention, but were never passed by the full Legislature. To move them to another process (rulemaking) whereby those responsible for the jails

have no power to disagree, but only to accept, is discouraging and weighted, because it prevented both sides from presenting their case. The Department should hold a consensue-based rule development process, so that those responsible for jails (sheriff and county commissioners) can deteremine what are the requirements and their costs before any implementation.

**Response:** In addition to the statutory advisory committee process which is mentioned in several responses to other comments (including those previously submitted by this commenter), this very public comment process is the opportunity for all to present their case.

**Comment:** There are requirements put forth which have not been defined (i.e., comprehensive counseling and assistance), which means those responsible cannot plan, develop, cost, or put into effect such requirements and are left unable to create or price the additional service or defend their financial positions.

**Response:** "Comprehensive counseling and assistance" is not wording found in the proposed standards, so it is difficult to know what the commenter is referring to. "Counseling" is mentioned twice in standard K.21, once with respect to counseling about pregnancy options and a second time with respect to nutritutional guidance and counseling (as it relates to pregnancy). These are both types of counseling that can be provided by community family planning agencies, including by remote video platforms. Or they can be folded into the pregnancy counseling that should already be being provided at the jails, especially counseling about nutrition during pregnancy. It should be noted that of the average daily population of the jails in 2019 (1617) less than 16% were females (255), with only a small percentage of those being pregnant while incarcerated (exact figures are not known, but seem to be in the range of 16% of the 16%, or approximately 40). Further, it is reported that most pregnant females were able to be medically furloughed. The numbers are likely to be even less for 2020 as there was increased diversion from jail due to COVID.

**Comment:** The real problem is that the jails are being forced to be the "public service of last resort." Public health problems should be dealt with in the community by the State (i.e., DHHS), and not be moved to the jails to solve. Jails were neither designed nor intended to perform these health services functions, and they have neither the personnel nor funding to do so. For example, over 75% of those incarcerated are on prescribed psychotropic drugs, but jails are not mental health institutions and immediate professional help may not exist. The same goes for inmates with addiction and alcoholism issues, with homelessness issues, who are victims of human trafficking, or who need basic health services. There should be functioning facilities other than jails for such persons. Jails are for criminals and mixing these other categories of persons with them is unconscionable. Health care costs should not be transferred from the State to the counties just because someone is detained, especially if they are not yet convicted. The Department should be trying to work with DHHS to partner the health needs of the above categories of persons with the state-level services DHHS is responsible for.

**Response:** Persons come to the jails with health care needs, and although those might be better fulfilled elsewhere or by another agency, jails cannot, as a matter of law, fail to take responsibility for fulfilling them while those persons are incarcerated. The point of these standards is to regulate the

jails and not DHHS, over which the Department has no authority. While the Department cannot force DHHS to work with the jails, there is nothing in these standards that prevents the jails from trying to work with DHHS.

**Comment:** It would be better if prior to arrest a process of assistance and diversion were developed for those many persons that just do not belong in the jails.

**Response:** The Department does not disagree, but it has no authorirty to control who is arrested and who is diverted.

From Sheriff Troy Morton of Penbscot County on behalf of the Maine Sheriffs' Association (MSA), of which he is the President* (first letter)

**Comment:** The sheriffs of all sixteen counties have created and maintained humane jail conditions above and beyond established expectations. We adhere to best practices not because they are mandated but because it is the right thing to do. When the statutory advisory committee met to discuss national best practices for proposed inclusion in the jail standards, they were presented to and supported by all of the sheriffs. All of the sheriffs had adopted at least most, and in some cases all, of the proposed standards. However, the Department is now proposing additional, wide-sweeping standards changes not approved by the committee or any of the sheriffs. Some of these may not impact the larger, better-equipped jails, but they will present obstacles to the smaller jails, which may not be staffed to implement some of these undefined mandates. We ask that the Department work with the sheriffs to determine which of the proposed standards we can all agree on and which we may rework to best meet the needs of the jails.

**Response:** As noted in other responses, the Department understands the views of the sheriffs but intends to move forward with the standards as revised after consideration of all comments made.

From Sheriff Troy Morton of Penbscot County on behalf of the Maine Sheriffs' Association (MSA), of which he is the President* (second letter)

(Note: the Sheriff sent in two letters after the hearing, in addition to the one he sent before the hearing, all of which were noted as being submitted on behalf of the MSA. Although he said in the second of the post-hearing letters that he would be submitting a set of comments in his capacity as the Penobscot County Sheriff, he did not do so.)

**Comment:** The sherrif repeated the assertion made in the letter he sent prior to the hearing that this rule should have been labeled in the rulemaking notice as a major substantive rule and gone through that rulemaking process.

**Response:** See the response to the MSA's prior comment in this regard.

**Comment:** The sherrif repeated the assertion made in the letter he sent prior to the hearing that the Department was wrong to state in the rulemaking notice that this rule would have no financial impact. In fact, standards J.11, J.15. and K.21 especially are unfunded mandates that will impose significant financial and logistical burdens, which the individual sheriffs and others will speak to directly (though the vagueness of standard K.21 has made it impossible for the jails in the two most populous counties to estimate medical costs associated with this standard).

**Response:** See the response to the MSA's prior comment in this regard as well as the responses to other comments about fiscal impact and unfunded mandates.

**Comment:** The rule exceeds the Department's rulemaking authority. In particular, the reliance on Title 30-A section 1208-B is misplaced as the Department's rulemaking authority expired under that statute on Januray 1, 2016. Moreover, Title 30-A section 1208, which provides the authority to make rules to promote safe, healthful, and secure facilities, is not advanced by standards J.11 and J.15, as contact visitation directly corresponds with the introduction of contraband, which undermines safety and security. However, with the exception of standards J.11, J.15. and K.21, the MSA believes that drafting flaws could be remedied through further discussion prior to the adoption of the rule, as the MSA does support some of the standards as an intellectual matter (e.g., standards C.28 and C.29).

**Response:** The Department disagrees with this characterization of this rule. See also the response to the MCCA's and Jonathan Berry's comments about rulemaking authority. As for standards J.11 and J.15, these will be changed in ways that should alleviate the concerns expressed about safety and security, as explained in the responses to similar comments by others.

**Comment:** The rule is arbitrary and capricious and an abuse of discretion as shown by its not being consistent with the work of the legislative committee or the statutory advisory committee, as well as by its not being consistent with evidence-based best practices and not being utilized in county jails elsewhere in the country.

**Response:** See the responses to similar comments made by others. See also the comments by the Maine Medical Association referencing various national studies.

**Comment:** The sheriff echoed the comment of Bill Collins about the standard mandating medical care beyond what the state statute requires.

**Response:** See the response to that comment.

From Zeraph Dylan Moore, who stated that the following comment is based on interviews with persons formerly incarcerated at the Penobscot County Jail

**Comment**: The commenter agrees with the Maine Recovery Advocacy Project that the Department should mandate that the jails form an individualtized treatment plan for inmates with substance use disorder, which includes providing MAT (medication-assisted treatment) to those who need it. Jails are sadly the way society deals with persons with addiction, yet some jails do not offer

comprehensive, modern addiction treatment services and are releasing people from jail without changing the situations that brought them there in the first place. Offering MAT to every inmate who needs it is a step that can be taken to begin healing substance use disorders in the community and ending the cycle of harm. Also, every inmate who needs it should have an individualized mental health treatment plan. The commenter included stories from two former inmates, one of which recounted the pain of coming off methadone treatment while in the jail and the other of which recounted not receiving necessary mental health treatment in the jail, as well as witnessing other inmates being forced to go through withdrawal from substances use while in jail.

**Response:** Thanks and please see the responses to other comments about standard K.19. As for mental health treatment, current standards already cover this appropriately.

From Tiffany Glidden, who stated that she has been incarcerated while pregnant and also became pregnant after incarceration due to a lack of resources and guidance

Note: the commenter submitted her testimony in favor of legislation on the topic of access to sexual and reproductive health care during incarceration (LD 2085) as also her comment in support of proposed jail standard K.21.

**Comment:** After being released from incarceration, I went back into society without access to birth control or health insurance. Six months later, I had unprotected sex and got pregnant. The emotions I was feeling from being incarcerated for such a long time meant I was not thinking straight and no one from the jail helped me before my release with the resources I needed to transition back to society. I made the difficult decision to have an abortion because I feared reincarceration and again going through the difficulties I had experienced before being pregnant while incarcerated at the Kennebec County Jail and not getting the support, resources, and medical treatment I needed. I went to the jail not knowing I was pregnant and while addicted to drugs. During intake, two to three weeks after I arrived, I got urine and blood tests, which showed I was pregnant. They simply told me and then told me to go back to my cell. The medical provider did not check on my mental state upon receiving this news, let alone tell me anything about the risks and my options. I felt neglected and like just a number in the system. I want others like me to know that they have the right to make informed decisions about their bodies without interference or judgment and the right to have the same standard of care and education in the area of reproductive and sexual health as others in society do.

**Response:** Thanks.

From Michael Kebede, Esq., Policy Counsel for the American Civil Liberties Union of Maine (ACLU)*

**Comment:** As a general comment, the ACLU commends the Department on adopting certain crucial rules to advance the dignity and freedom of many Mainers. When the state takes away a person's ability to provide for themselves, it assumes the obligation to ensure that basic necessities of life, including health and safety, are provided for that person. Jails do not choose who is entrusted to their

care, but the goal is to see that they are treated with respect and dignity, regardless of why they are incarcerated. These standards can be an avenue to that goal, but there are some issues of substance and wording that the ACLU believes ought to be addressed.

**Response:** Thanks.

**Comment:** The ACLU supports standard K.21, as it will provide for uniform basic pregnancy-related health care in the jails, care which at present is uneven. While the jails are administered at the county level, those in the jails are there on behalf of the state since they are accused or convicted of violating a state law. Therefore, the care they receive needs to be uniform regardless of the jail in which they are housed.

**Response:** Thanks.

**Comment**: Standard C.28 (applying to chokeholds, etc.) is a good start, but its effectiveness is diluted since it only applies in circumstances where nondeadly force is appropriate. The ACLU worries that the exception will swallow the rule.

**Response:** The Department does not agree that the exception is an issue. Whether and under what other circumstances these techniques should be banned is being left up to each sheriff's discretion.

**Comment:** The ACLU supports standard K.18 and in particular its mention of tuberculosis and hepatitis. Jails should not be free to simply wait for those in their custody to no longer be their responsibility, as these diseases are progressive and the longer the wait before treatment begins, the more expensive the treatment is. Also, ignoring infectioius diseases puts the safety of staff, families of staff, and others in the facility at risk.

**Response:** Thanks.

**Comment:** Standard K.19 should be amended to change "may" to "shall." In a court case out of Aroostook County, the federal court found that denying access to medication-assisted treatment to inmates who suffer from opioid use disorder is illegal. However, not all jails are following this ruling. The Department can protect jails from liability for disability discrimination by requiring them to follow the law.

**Response:** The Department is adopting this suggestion by changing "may" to "must," as well as making other, related wording changes to this part of the standard in order to meet legal requirements. See the response to the similar comment of Cherly Mills.

Ashley T. Perry, Esq., who stated that she is a criminal defense attorney and member of the Franklin County Jail Board of Visitors, submitted comments that were virtually identical to those submitted by Jan Collins with respect to standards C.28 to C.31, with the exception of her elaboration on one comment about standard C.29 (below). The Department refers her to the responses to the comments of Jan Collins, as well as the response below.

**Comment:** Standard C.29 would allow an officer to use deadly force on an individual who does not have a dangerous weapon and may not, in fact, even be capable of deadly force, leaving too much discretion to an officer, and the standard relies too much on what the officer "reasonably believes." Instead of requiring an officer to use nondeadly force and de-escalation, which are just as effective, to prevent an escape, it allows an officer to jump right to deadly force, without considering the numerous other options that can be used to control the threat.

**Response:** The wording commented on in this standard, which has not been proposed for change, has been in the jail standards for years and is taken directly from Maine statute and is also consistent with constitutional law. Contrary to what the commenter asserts, the inclusion of the wording that deadly force is "only" to be used when the officer "reasonably believes" it to be "necessary" means that deadly force cannot be used unless the officer believes and believes reasonably that there are no other effective options that could be used. It is, moreover, not keeping with reality to say that nondeadly force and de-escalation are always equally effective as deadly force to prevent an escape. Further, the wording of the standard makes it clear that deadly force cannot be used in all escape situations, but only when the person trying to escape is likely to seriously endanger human life or to inflict serious bodily injury unless apprehended without delay.

From Robert Devlin, Kennebec County Administrator, on behalf of Kennebec County Commissioners

**Comment**: The Commissioners generally support the comments of the Maine Sheriffs' Assocation (MSA), but have some additional comments.

**Response:** See the responses to the comments of the MSA.

**Comment:** Much of what the standards mandate is simply basic healthcare that is provided as determined by the patient and their physician, but these additional requirements will add costs to the the healthcare contracts.

**Response:** If what is being mandated is basic health care, then it is already required by federal and state law and should already be being provided. Further, anything that is already mandated by federal and/or state law is not an unfunded state mandate created by this rule. The commenter does not specify the additional requirements he is referring to.

**Comment:** The standards should not dictate the level of care, as this should be a confidential decision between the patient and physician.

**Response:** The Department does not understand what the commenter is referring to.

**Comment:** The jail already provides counseling on several levels as determined by the patient and their caregiver. The standards add conditions that could add more costs to that service.

**Response:** The commenter does not specify the additional conditions he is referring to.

**Comment**: Our first objection is to the standard requiring contraceptive services while the patient is serving time in the jail and the implication that this remains the jail's responsibilities after release. We

do not provide this simply because inmates are not expected to engage in sexual activities while incarcerated.

**Response:** See the response to the similar comment by Sheriff Kevin Joyce. To be clear, the standard does not make the provision of contraceptive services the jail's responsibility after release. The jail is only required to make a referral to community family planning services upon release, if such a referral is requested.

**Comment:** We strongly object to the mandates that imply we are responsible for an inmate's health care after they are no longer in our custody.

**Response:** There are no such mandates.

**Comment:** The Department has artfully dodged the obvous question of an unfunded mandate. Additional costs, regardless of the amount, require a two thirds vote of the Legislature.

**Response:** See the responses to other comments about unfunded mandates.

From Doug Dunbar, who identified himself as a former inmate of three Maine jails*

**Comment**: The Department needs to ensure that there is a board of visitors for every jail as required by Maine statute, which has been in effect for 17 years and yet has been violated by many sheriffs, and the statute needs to be amended to ensure that the sheriffs are held accountable for having real, meaningful boards that are not just rubber stamps. Jails are closed, often secretive places that need more transparency and oversight. Jails are filled with the poor and ill, especially the mentally ill, many of whom are being punished, though presumed innocent, due to the shocking suffering they must endure.

**Response:** See the responses to other comments about adding a board of visitors standard to the rule. As for the statute, the Department cannot change that through rulemaking.

From Bill Collins, Penobscot County Administrator, on behalf of the Penobscot County Commissioners

**Comment:** The proposed rule meets the statutory definition of a "major substantive" rule, but it has been labeled as a "routine technical" rule.

**Response:** See the response to the same comment made by Sheriff Morton.

**Comment:** The rule will have a substantial financial impact on county budgets, specifically standards J.11, J.15, and K.21, which will impose labor, logistical, and medical costs.

**Response:** See the responses to similar comments made by others.

**Comment:** The rule exceeds the Department's rulemaking authority and is "arbitrary and capricious" and an abuse of discetion.

**Response:** The Department disagrees. See the response to the similar comment by MCCA.

**Comment:** The medical care statute states that medical care does not include medical treatment requested by a prisoner that a jail's medical provider determines to be unnecessary. The rule mandates access to discretionary medical treatment and eliminates the provider's determination of necessity.

**Response:** The Department disagrees with the commenter's conclusion. The proposed standards require that the jails make available health care services that are necessary; but whether a particular inmate receives an available service will still be within the sound medical judgment of the provider. So, for example, the standards require that medication-assisted treatment be made available, but whether a particular inmate who has a substance use disorder is a candidate for that treatment will depend on many factors, including any medical contraindications.

From Mary Bonauto, Esq., of GLBTQ Legal Advocates & Defenders

**Comment:** We support the elimination of practices that cut off air and blood flow to a person but do not support this standard (C.28) not applying to deadly force situations.

**Response:** See the responses to similar comments made by Jan Collins and the ACLU of Maine.

**Comment:** We support paragraphs (a) and (b) in standard C.29, but not paragraphs (c) and (d). Notably the same would be true of a recent American Bar Association report.

**Response:** The language at issue is taken directly from Maine statute. However, it may have been misunderstood as it was not configured in the standard properly. Paragraphs c. and d. do not provided separate bases for the use of deadly force, but set out conditons on the use of deadly force under paragraph (b). So, they should actually be subparagraphs b.1. and b.2, and this has now been corrected.

**Comment:** We agree with standards C.30 and C.31.

**Response:** Thanks.

**Comment:** We support in-person visits but would not require staff supervision during visits (standard J.15), as both those visiting and those being vsited are already screened and monitored in the jails.

**Response:** Staff supervision (now moved to standard J.11) is not mandatory, and the jails can decide how much of this to engage in.

**Comment:** We support standards K.18 to K.22, as those go to the goals of supporting the lives, health, and well-being of those entrusted to the care of the State. We also support MPAC on its points with respect to these standards.

**Response:** Thanks and see the responses to the comments of Jan Collins about these standards.

From Health Equity Alliance (HEAL) (formerly Down East AIDS Network) via Whitney Parrish, Director of Advocacy and Communications

**Comment:** Standard K.5.d (which concerns who may be informed of HIV test results) should be amended to eliminate correctional officers from the categories of person who may be told of an inmate's test results. While officers may have a connection to care and treatment, the consequences of a disclosure to those who do not require it can be very harmful. Disclosure beyond medical professionals should be left up to those professionals.

**Response:** This standard is not part of the proposed rule change. It has been in effect for many years, is in compliance with Maine statute, and has not proven harmful. Officers have such close and continuous contact with inmates that it is often necessary for them to know this information in order to be able to provide proper care.

**Comment**: The commenter suggests some wording changes to standard K.19 to make sure that all inmates needing care relating to substance use get it.

**Response:** The Department believes its wording is sufficiently inclusive.

**Comment:** HEAL seems to be suggesting that standard K.19 include a requirement for all inmates involved with substance use to get a naloxone kit while incarcerated and all inmates, regardless of substance use issues, to be offered such a kit at the time of release. The latter, as well as training in the use of naloxone, can be done by agreement with various community groups.

**Response:** See the responses to similar comments made by others (albeit in reference to standard K.20). It should be noted that standard K.19 does provide for aftercare plans, including by way of referrals for continuity of care in the community. The standard does not preclude the use of such agreements, but the Department declines to mandate them or the provision of a kit to every released inmate.

**Comment**: It should be required that all inmates and staff be trained with respect to naloxone. This training is essential and comes at no cost when done by community groups (except for staff time) and can be done virtually.

**Response:** See the responses to similar comments made by others.

From Holly Reid, who states that she is a pastor and registered nurse (note: the commenter seems to incorrectly believe that the jails are facilities of the Department of Corrections)

**Comment:** Strangleholds, carotid holds, etc. should be banned without exception. It is difficult to know when these techniques go from being restraint to being deadly force and they can easily lead to accidental death, especially since situations in which they are used are intense and adrenaline-filled. It is wrong to categorize them as nondeadly force.

**Response:** They are not being categorized as nondeadly force. It is because they are often deadly force that they are being banned in situations that call for only nondeadly force. Whether they can be used in deadly force situations is being left to the determination of the sheriffs.

**Comment:** The commenter supports the availabilty of medication-assisted treatment but believes access to this treatment should be consistent between facilities.

**Response:** The Department agrees.

**Comment:** The commenter supports the availability of naloxone, but believes all staff and inmates should be trained in its use. Overdoses can happen anywhere and inmates are often the first to discover an overdose.

**Response:** See the responses to similar comments made by others.

**Comment:** The commenter supports the language on contact visits, which are essential for mental and emotional health, lead to better decisions during incarceration, and more success upon reentry.

**Response:** See the responses to similar comments made by others.

**Comment:** The commenter supports standard K.21 having to do with women's health care.

**Response:** Thanks.

**Comment:** The commenter understands that there are concerns that some of the changes involve unfunded mandates. Lack of funding is not an excuse for not doing the right thing.

**Response:** The Department does not believe there are unfunded state mandates.

From Dan Morin, Director of Communications & Government Affairs, on behalf of the Maine Medical Association (MMA)

**Comment:** The MMA support standards K.19 to K.21. Incarcerated persons do not have the same choices when it comes to accessing health care as persons in the community do. They have no alternatives to what is provided to them while incarcerated. Therefore, they need to be provided essential and basic health care. Such care will keep them healthy or help them become healthier, making successful reintegration into the community possible.

**Response:** Thanks.

**Comment:** The MMA supports standard K.19 because, according to national studies, substance use disorder is found in more than half the inmate population, the most effective treatment is medication based, but because many jails and prisons do not make this available, overdose is the leading cause of death of formerly incarcerated persons, especially in the weeks immediately following release.

**Response:** Thanks.

**Comment:** The MMA supports standard K.21 because, according to national studies, incarcerated women's health care needs, including reproductive health care needs, which often are complicated by mental illness and substance use, are vastly underserved and this standard would require the provison of the necessary services.

**Response:** Thanks.

From Nicole Clegg, Senior Vice President of Public Affairs, Planned Parenthood of Northern New England, Planned Parenthood Maine Action Fund, and Planned Parenthood Maine Action Fund PAC

**Comment:** We support the proposals to make the plans to prevent and control outbreaks of coronavirus and other infectious and communicable diseases permanent, ensuring access to Narcan and medication-assistance treatment for people with substance use disorders, and requiring jails to have procedures to prevent the use of excessive force and ban chokeholds.

**Response:** Thanks.

**Comment:** The commenter supports the proposal mandating sexual and reproductive health care as an important step forward to ensuring that basic standards of care apply and are made accessible to incarcerated people, who deserve to be treated with respect and dignity as well as have the ability to make informed decisions about their personal health with their provider without outside interference. The primary health care need of incarcerated women between 18 and 45 is reproductive and sexual health. The need for this care is further compounded by the fact that the majority of women who enter correctional facilities have extensive trauma histories including sexual trauma, come from disadvantaged circumstances, and have high rates of mental health disorders and substance use disorder and are often at increased risk for unintended pregnancies or already have children under 18 years old. In addition to needing access to the full range of reproductive and sexual health care, people who are incarcerated must have access to education and medically accurate information about sexual and reproductive health and the steps they can take to protect their personal health. Note: the commenter attached a 2012 opinon from The American College of Obstetricians and Gynecologists on Reproductive Health Care for Incarcerated Women and Adolescent Females, which was one of the national studies referred to by the Maine Medical Association.

**Response:** Thanks.

From Kathryn Sharples, M.D. (as an attachment to the email from Nicole Clegg), who stated that she is an obstetrician-gynecologist who provides care for incarcerated pregnant women.

**Comment:** The doctor described a number of instances of lack of proper health care for incarcerated females that she knows of from her experience working in a Maine hospital. She stated that the rule

proposal addresses a concerning gap in the standards relating to the jails as currently there are no jail standards that address the health care needs specific to incarcerated females. She supports the rule proposal as it seeks to give the same usual, standard care to incarcerated females that any non-incarcerated females would receive when seeking care for pregnancy and family planning.

**Response:** Thanks.

From Peter Lehman

**Comment:** The commenter supports standards J.11, K.19, K.20, and K.21, but suggests that "may include" in K.19 be changed to "must include the opportunity to participate in" medication-assisted treatment and suggests that standard K.20 be made mandatory.

**Response:** See the responses to similar comments made by other commenters.