

STATE OF MAINE  
CUMBERLAND, SS.

SUPERIOR COURT  
CIVIL ACTION  
Docket No.

MAINE MUNICIPAL ASSOCIATION,  
CITY OF PORTLAND, and  
CITY OF WESTBROOK,

Petitioners

v.

MAINE DEPARTMENT OF HEALTH  
AND HUMAN SERVICES, and

MARY MAYHEW, COMMISSIONER,  
MAINE DEPARTMENT OF HEALTH  
AND HUMAN SERVICES

Respondents

**PETITION FOR REVIEW UNDER RULE 80C  
with  
COMPLAINT FOR DECLARATORY  
JUDGMENT AND INJUNCTIVE RELIEF**

NOW COME the Petitioners, Maine Municipal Association, the City of Portland, and the City of Westbrook (“Petitioners”), by and through undersigned counsel, pursuant to Rule 80C of the Maine Rules of Civil Procedure, and under the provisions of Title 5 M.R.S. § 11001 et seq. of the Maine Administrative Procedure Act hereby petition this Honorable Court for review of the attached Maine Department of Health and Human Services, Office for Family Independence (“DHHS”) decision set forth in the General Assistance Program Guidance operating memorandum dated June 13, 2014 (the “Operating Memorandum,” attached hereto as Exhibit

A). Further, pursuant to Rule 80C(i) of the Maine Rules of Civil Procedure, this petition for review is joined with a claim for declaratory judgment and a request for injunctive relief under the Uniform Declaratory Judgments Act, 14 M.R.S. § 5951 et seq.

**COUNT I**  
**Petition for Review**  
**[5 M.R.S. § 11001 et seq.; M.R.Civ. P. 80C]**

Pursuant to 5 M.R.S. § 11002(2), Petitioners state as follows:

**A. Parties Seeking Review**

1. The Maine Municipal Association (“MMA”) is a non-profit voluntary membership organization, whose membership includes Maine cities, towns, and other municipal or quasi-municipal corporations, including other entities meeting the “political subdivision” definition of Maine law. The Maine Legislature has declared MMA to be “. . . an instrumentality of its member municipal and quasi-municipal corporations . . . .” 30-A M.R.S. § 5722(9).

2. MMA provides an array of professional services to its member municipalities and other local governmental entities in Maine, including advocacy, education and information, professional legal and personnel advisory services, as well as group insurance and self-funded programs. Its membership includes 487 municipalities, each of which are required to operate Municipal General Assistance programs pursuant to 22 M.R.S. § 4301 et seq. MMA therefore has a compelling interest in representing and protecting the rights and responsibilities of its member municipalities in relation to the administration of municipal general assistance programs, which provide general assistance benefits for basic necessities to eligible persons. Furthermore, Maine statute mandates that each municipality operate its general assistance program pursuant to municipal ordinance, 22 M.R.S. § 4305. The MMA model ordinance for

this purpose has been approved by DHHS, and is referenced by the DHHS as the recommended ordinance for any municipality's implementation of this statutory mandate.

3. The City of Portland is a municipal corporation existing under the laws of the State of Maine and located within the County of Cumberland, State of Maine. The City of Portland is a member of MMA.

4. The City of Westbrook is a municipal corporation existing under the laws of the State of Maine and located within the County of Cumberland, State of Maine. The City of Westbrook is a member of MMA.

5. Petitioners Maine Municipal Association, City of Portland, and City of Westbrook are aggrieved parties under the DHHS Operating Memorandum (Exhibit A), and seek review of procedural infirmities of the Operating Memorandum and related correspondence from the Office of the Governor, which were not adopted by appropriate agency rulemaking procedure under the Maine Administrative Procedure Act.

**B. Nature of Agency Action to be Reviewed**

6. Under the DHHS Operating Memorandum of June 13, 2014 (Exhibit A), DHHS determines that statutorily required DHHS reimbursements to municipalities pursuant to General Assistance programs administered in accordance with 22 M.R.S. § 4301 et seq., will be denied in a targeted and proportionate manner to any and all municipalities which do not implement the Operating Memorandum protocol for determining eligibility for General Assistance to lawfully present aliens in the United States. In particular, the Operating Memorandum states that "to be in compliance with Federal law, the State of Maine Department of Human Services will no longer provide reimbursement to a municipality for General Assistance provided to aliens who are not lawfully present in the United States." Exhibit A.

7. The Operating Memorandum provides that General Assistance Administrators in each municipality must now ask all applicants if they are United States citizens and must require any non-citizen applicant to verify status as a person lawfully present in the United States. Pursuant to the Operating Memorandum, the DHHS issued a new reimbursement form on or before June 24, 2014 for municipalities to use when submitting reimbursement requests for General Assistance expenditures “beginning Monday, June 16, 2014” in order to implement this policy. The amended reimbursement form requires municipal administrators to identify on the form the “Total # of not ‘Lawfully Present’ non-citizens as defined in the DHHS guidance that were assisted and for whom reimbursement is being requested.”

8. The determination of “lawfully present alien” status or “unlawfully present alien” status for persons in the United States is not part of the statutory criteria for eligibility under the Municipal General Assistance law, 22 M.R.S. § 4301 et seq. Such determinations made by a General Assistance administrator would not be in all cases readily ascertainable substantively under federal law, and would significantly increase program costs given the population served by General Assistance, which often involves persons – both citizens and non-citizens – who may have fled life-threatening circumstances without documentation, or who do not have the means to readily verify lawfully present alien status. In addition, some unlawfully present aliens are awaiting completion of federal process for obtaining lawful alien status, and it would thus be unclear whether such persons would be eligible or ineligible for General Assistance program benefits. By statute, 22 M.R.S. § 4305(3)(C), General Assistance benefits must be “furnished or denied to all eligible applicants within 24 hours of the date of submission of an application.” General Assistance benefits are also administered, by statute, often on an emergency basis, subject to 22 M.R.S. § 4310. Thus, the Operating Memorandum would require that any such

potentially difficult and complicated determinations about federal “lawful” or “unlawful” alien status be made within 24 hours. These issues complicate the implementation of the Operating Memorandum policy and procedure, and jeopardize overall reimbursement to the municipality.

9. The Operating Memorandum also indicates that the “DHHS will be conducting periodic audits of Municipalities beginning October 2014, to review the compliance with this operating memo.”

10. Further, on June 20, 2014, the Office of the Governor delivered correspondence to all municipalities, expressing the Office of the Governor’s determination that the Operating Memorandum be applied such that “[i]f DHHS finds that a municipality fails to comply with the law, it will cut off General Assistance reimbursement to that community.” Where the DHHS Operating Memorandum describes a targeted and proportionate withholding of reimbursement, the Governor’s correspondence describes a total withholding of reimbursement. DHHS has not stated that it will refuse to implement the Governor’s directive, and therefore presumably it will act consistent with that directive. A true and correct copy of this correspondence is attached hereto as Exhibit B.

11. Municipalities must make immediate 24-hour or emergency eligibility determinations, often in very severe or life-threatening circumstances for applicants. Under the Operating Memorandum and the related correspondence from the Office of the Governor, if a municipality were to err on the wrong side of determining eligibility because of a complicated “lawfully present alien” status issue, while rendering the statutorily mandated 24-hour or emergency eligibility determination, then that error would jeopardize the municipality’s right to its statutorily authorized reimbursement.

12. On June 17, 2014, the Office of the Attorney General, State of Maine (“Attorney

General”), issued correspondence to MMA, stating that the Operating Memorandum (referred to by the Attorney General as the “General Assistance Program Guidance” document) contained requirements that “were not adopted through the rulemaking process” and stating that the document contains substantive rules that by definition are not “judicially enforceable” unless adopted as substantive rules pursuant to the rulemaking chapter of the Maine Administrative Procedure Act. A true and correct copy of this correspondence is attached as Exhibit C.

13. After the DHHS issued the Operating Memorandum, the Attorney General also issued a “Statement of the Attorney General Regarding General Assistance Guidance” dated June 24, 2014. A true and correct copy of this document is attached as Exhibit D.

14. The correspondence and Statement of the Attorney General explained that earlier in the year, the DHHS had proposed a substantive rule which the Attorney General described (in Exhibit C) as “remarkably similar” to the terms of the Operating Memorandum. That proposed rule “went through an extensive public hearing process” (Exhibit C), and pursuant to 5 M.R.S. § 8056 of the Maine Administrative Procedure Act the proposed rule was sent to the Attorney General’s Office for review. Exhibit C (fourth paragraph). In that review, “[i]n January of 2014, the Office of the Attorney General advised DHHS that there were serious constitutional issues with the rule they were proposing.” Exhibit D. Then, when the proposed rule was presented to the Attorney General for final approval, “the Attorney General’s memo[ramum] of May 16, 2014, drafted by nonpartisan staff, describe[d] in detail three distinct and serious legal and constitutional concerns with the rule.” Exhibit D. The Attorney General explained that “[t]he administration sent a last minute substantive change to the Attorney General’s Office, but this too failed to comply with the law.” Exhibit D. Thus, the Attorney General did not approve the rule or substantive changes submitted by the DHHS that sought to remedy the issues identified

by the Attorney General, and ultimately, the DHHS-proposed rule was not adopted.

15. The Statement of the Attorney General (Exhibit D) points out the above-referenced events, and states further: “The fact remains that the executive branch lacks authority to promulgate a change in General Assistance eligibility, whether by rule or by edict or by form. Since there is no authority for this change, there is also no authority for the administration to withhold funds.” Exhibit D.

16. Currently no provision exists within the Municipal General Assistance Act or the Maine General Assistance Policy Manual that limits an applicant’s eligibility for GA benefits based on immigration status or that requires municipalities to determine an applicant’s eligibility status. In sharp contrast, the Maine Public Assistance Manual, 10-144 CMR Ch. 331, ch. II and Maine Food Supplement Certification Manual, 10-144 CMR Ch. 301, FS-111-2 and FS-444-1, contain specific provisions addressing eligibility for benefits consistent with federal law. In December 2013, DHHS issued a proposed rule amending the General Assistance Policy Manual to render the TANF and SNAP rule eligibility criteria applicable to general assistance. Only after the Attorney General opined that the proposed rule was invalid on a number of grounds, did DHHS “decide” that a rule was not necessary to effectuate a change to the Maine General Assistance Policy Manual, even though DHHS previously addressed these similar eligibility issues in formal rules applicable to TANF and SNAP.

17. The Operating Memorandum is also not entirely consistent with the federal law it purports to enforce, because it makes no provision for aspects of the federal definition of qualified alien status, such as an alien or child of an alien who, under 8 U.S.C. § 1641(c), is the subject of domestic violence. Such individuals would likely not be able to document “lawfully present alien” status, although they are within the federal definition of “qualified alien” in 8

U.S.C. §§ 1621 & 1641. Yet these individuals also could be – and often are – individuals who apply for municipal General Assistance benefits in issue.

18. Any DHHS denial of any and all reimbursements for non-compliance with the Operating Memorandum would also be in contravention of existing properly promulgated DHHS rules, set forth in the DHHS General Assistance Manual, governing the DHHS process of withholding reimbursement to a municipality. There is no provision in the promulgated rules for the withholding of all reimbursement in the manner contemplated by the Office of the Governor’s correspondence of June 20, 2014 (Exhibit B) stating that DHHS will cut off all reimbursement for non-compliance.

19. The substantive and conflicting differences between the DHHS, the Office of the Governor, and the Attorney General regarding General Assistance program operations on the issue of eligibility for non-citizens of the United States place the Petitioners, including all municipal members of MMA, in an irreconcilable predicament. The DHHS (in conjunction with pronouncements from the Office of the Governor) has determined to cut *all* State reimbursement for General Assistance benefits unless municipalities undertake substantive policy changes which 1) are complicated, costly, and not easily implemented, 2) have not been adopted by substantive rulemaking pursuant to the Maine Administrative Procedure Act, or determined to be within DHHS’s delegated authority for determining a municipality’s right to reimbursement of benefits, and 3) the Attorney General has advised would be unconstitutional policy if implemented, and could thereby subject municipalities to litigation and legal exposure for violations of the Constitution or state and federal law.



**C. Grounds and Demand for Relief**

20. The agency action of the DHHS as set forth in the Operating Memorandum (Exhibit A) and the determination of the Office of the Governor as forth in the June 20, 2014 correspondence (Exhibit B) contain substantive policies and operational changes that were required to comport with rulemaking authority and procedures for regulatory agency rulemaking under the Maine Administrative Procedure Act, 5 M.R.S. §§ 8001 et seq.

21. Because the determinations of the DHHS and the related correspondence from the Office of the Governor did not comply with the rulemaking procedures of the Maine Administrative Procedure Act, under 5 M.R.S. § 11007(C) the Operating Memorandum, including the DHHS audit and a presumptive denial of reimbursement for all General Assistance if noncompliance is found, is:

- i) In violation of constitutional and statutory provisions, as alleged above;
- ii) In excess of the statutory authority of DHHS;
- iii) Made upon unlawful procedure;
- iv) Affected by bias or error of law;
- v) Unsupported by substantial evidence on the whole record; and
- vi) Arbitrary or capricious, or characterized by abuse of discretion.

WHEREFORE, Petitioners respectfully request that this Honorable Court vacate the Operating Memorandum and any related directives of the DHHS or the Office of the Governor, and remand the matter to DHHS for formal rulemaking proceedings in compliance with the Maine Administrative Procedure Act, 5 M.R.S. § 8001 et seq., in the event DHHS chooses to pursue any regulatory changes within DHHS's agency authority.

**COUNT II**  
**Declaratory Judgment and Injunctive Relief**

22. Petitioners repeat and reallege the allegations of Paragraphs 1 through 21 above, as if fully set forth herein.

23. Petitioners City of Portland and City of Westbrook will incur substantial and burdensome administrative costs in the operation of their respective General Assistance programs, in order to comply with the policy and administrative changes contained in the Operating Memorandum.

24. If the City of Portland does not comply with the terms of the Operating Memorandum on and after June 16, 2014, and the DHHS thereby determines to deny reimbursement of General Assistance benefits under the reimbursement mandate of 22 M.R.S. § 4311, the City of Portland could lose over \$8 million per fiscal year in reimbursements to which it would otherwise be entitled under the law. The City of Portland would also incur substantial additional costs and expenses, including the significant increased costs of administration to determine the status of each applicant, training, the costs associated with enacting a municipal ordinance amendment, and other consequential damages.

25. The City of Westbrook has, thus far in fiscal year 2014, assisted through its General Assistance program 220 households for a total of 626 individuals, including children, with total expenditures of approximately \$550,000. If the City of Westbrook does not comply with the terms of the Operating Memorandum on and after June 16, 2014, and the DHHS thereby determines to deny reimbursement of General Assistance benefits under the reimbursement mandate of 22 M.R.S. § 4311, the City of Westbrook could lose all or a significant portion of reimbursements to which it would otherwise be entitled under the law. The City of Westbrook

would also incur substantial additional costs and expenses, including the significant increased costs of administration to determine the status of each applicant, training, the costs associated with enacting a municipal ordinance amendment, and other consequential damages.

26. Petitioner MMA will incur administrative burdens and costs in order to comply with the policy and administrative changes set forth in the Operating Memorandum, including potential revisions to the model municipal ordinance and the allocation of significant resources to assist municipalities with implementing the complicated “lawfully present alien” status determination.

27. DHHS denial of reimbursement of *all* State reimbursement for lack of compliance with any term of the Operating Memorandum would constitute a violation of the Municipal General Assistance statute, 22 M.R.S. § 4301 et seq. Under 22 M.R.S. § 4311, a municipality is entitled to reimbursement when it is “. . . in compliance with all requirements of this chapter” (emphasis added). The statute delegates to municipalities, not to the DHHS, the power to “establish standards of eligibility, in addition to need,” as provided in the Municipal General Assistance chapter of Title 22 [22 M.R.S. § 4305]. Such standards of eligibility are established by municipal ordinance. 22 M.R.S. § 4305. The statute does not mandate as an eligibility criterion a determination of residency, citizenship, or “lawfully present alien” status under federal law, and expressly does not require documentation of residency as an eligibility criterion because many individuals entitled to General Assistance benefits do not have established resident addresses or may have fled prior residency for safety or life-threatening reasons. Accordingly, these eligibility criteria do not exist in the General Assistance ordinances of Portland, Westbrook, or the model General Assistance Ordinance developed by MMA and endorsed by DHHS.

28. A DHHS denial of any and all reimbursements for non-compliance with the Operating Memorandum would therefore violate the Municipal General Assistance statute, 22 M.R.S. § 4301 et seq.

29. A DHHS denial of any and all reimbursements for non-compliance with the Operating Memorandum would also be in contravention of existing properly promulgated DHHS rules, set forth in the DHHS General Assistance Manual, governing the DHHS process of withholding reimbursement to a municipality.

30. A DHHS denial of any and all reimbursements would cause irreparable economic injury to Petitioners, if an injunction is not granted against the DHHS to avoid wrongful denial of statutory State reimbursement to municipalities.

31. The injury to the Petitioners and municipalities in the form of lost entitlement to reimbursements would be irreparable. Petitioners and municipalities who cannot afford administratively to comply with the terms of the Operating Memorandum, or who for the legal reasons reflected in the Attorney General's opinion do not wish to be exposed to lawsuits claiming a violation of the Constitution or of state and federal laws, therefore face irreparable injury to their General Assistance programs. That irreparable injury outweighs any harm to the DHHS in either refraining from denial of reimbursements that are due under existing statutory eligibility criteria or delaying implementation of policy changes until the changes are appropriately promulgated through the rulemaking process established under the Maine Administrative Procedure Act.

32. The injury to MMA in the form of increased administrative costs and resources to develop model municipal ordinance amendments, to develop and provide training for operations required by the terms of the Operating Memorandum, and to assist municipalities with

implementation of the Operating Memorandum, constitutes irreparable injury; that irreparable injury outweighs any harm to the DHHS in either refraining from denial of reimbursements that are due under existing statutory eligibility criteria or delaying implementation of policy changes until the changes are appropriately promulgated through the rulemaking process established under the Maine Administrative Procedure Act.

33. The Petitioners have demonstrated a likelihood of success on the merits of the issue, and the public interest would not be adversely affected by injunctive relief.

**WHEREFORE**, Petitioners respectfully request that this Honorable Court:

1) **DECLARE** that all terms of the Operating Memorandum are null and void for failure to comply with formal rulemaking proceedings in accordance with the Maine Administrative Procedure Act, 5 M.R.S. § 8001 et seq.;

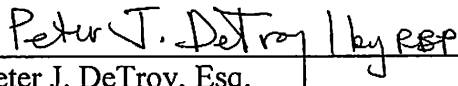
2) **DECLARE** that all municipalities which operate a General Assistance Program pursuant to 22 M.R.S. § 4301 et seq. are not required to comply with the terms of the Operating Memorandum or the related correspondence from the Office of the Governor;


3) **DECLARE** that the terms of the Operating Memorandum, including the policy and operational changes it contains, require substantive rulemaking procedures under the Maine Administrative Procedure Act, 5 M.R.S. § 8001 et seq., in order to be judicially enforceable requirements for municipal reimbursement of benefits under the Municipal General Assistance law;

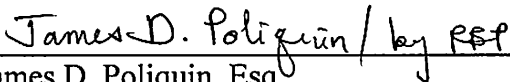
4) and **ENJOIN** the DHHS from enforcement of the terms of the Operating Agreement or any policy or operational change contained in it, before appropriate rulemaking is complete under the Maine Administrative Procedure Act, 5 M.R.S. § 8001 et seq., resulting in an approved

and adopted agency rule and regulation.

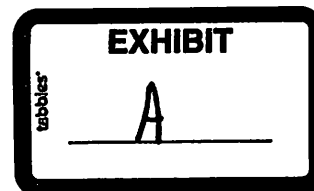
DATED: July 10, 2014

  
Peter J. DeTroy, Esq.

  
Russell B. Pierce, Jr., Esq.

  
James D. Poliquin, Esq.  
Attorneys for Petitioners

NORMAN, HANSON & DeTROY, LLC  
Two Canal Plaza  
P.O. Box 4600  
Portland, Maine 04112-4600  
(207) 774-7000



# Maine Department of Health & Human Services

## Office for Family Independence

### *General Assistance Program Guidance*

June 13, 2014

On August 22, 1996 President Clinton signed into law "The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-193)", also known as PRWORA. As a result of this law, an alien who is not lawfully present in the United States is not eligible for state or local public benefits unless the state passes a new law after 8/22/96 affirmatively making them eligible. See 8 U.S.C. § 1621. Maine has not enacted such a law. To be in compliance with Federal law, the State of Maine Department of Human Services will no longer provide reimbursement to a municipality for General Assistance provided to aliens who are not lawfully present in the United States.

To ensure only eligible individuals receive reimbursement, General Assistance Administrators should now be asking all clients if they are US citizens. Some municipalities already ask for this information. If an individual indicates they are not a citizen then the GA Administrator will need to ask what the immigration status is of that individual. Should an individual indicate they are not lawfully present in the U.S., then that individual is not eligible for General Assistance. If the individual who is a non-citizen is verified to be lawfully present e.g., Legal Permanent Residents, Asylees and Refugees, then they would be eligible for General Assistance.

GA applicants must apply for all other available resources which include benefits administered by the DHHS; non-citizens must provide DHHS with their immigration status documents when the individual applies for Food Supplement, TANF or MaineCare assistance. GA administrators will contact the local DHHS office, as some do already, to confirm legal non-citizenship status of GA applicants.

#### **Examples of lawfully present aliens:**

- Refugees
- Those who have been granted asylum
- Legal Permanent Residents
- Valid visa holders
- Valid Form I94 holders

#### **Examples of unlawfully present aliens**

- Expired visa holders
- Pending Asylum /Pending Refugee non-citizens
- Expired Form I94 holders
- In the United States without any documentation

The DHHS reimbursement form is being revised. There will be a new question to which Municipalities will be asked to provide the number of non-citizens that they are including in their monthly reimbursement request. DHHS will be conducting periodic audits of Municipalities beginning October 2014 to review the compliance with this operating memo. Shortly to follow this operating memo, DHHS will be emailing all municipalities an electronic copy of the amended monthly General Assistance reimbursement form. This newly amended form should be used when submitting a reimbursement request for GA expenditures beginning Monday June 16, 2014.

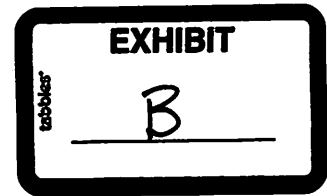
Municipalities who have questions about implementing this guidance should contact the GA program at 1-800-442-6003.





Paul R. LePage  
GOVERNOR

STATE OF MAINE  
OFFICE OF THE GOVERNOR  
1 STATE HOUSE STATION  
AUGUSTA, MAINE  
04333-0001



June 20, 2014

Dear Town Administrator:

By now, you have received a letter of guidance from the Maine Department of Health and Human Services regarding enforcement of the federal law that prohibits giving General Assistance to illegal aliens. In addition, you may have received contradictory information from Attorney General Janet Mills and the Maine Municipal Association about the guidance from DHHS.

It is not my job to advise you what to do in this circumstance, but I do want to take this opportunity to explain more about my Administration's decision.

Since 1996, when President Clinton and the Republican Congress together enacted sweeping welfare reforms, it has been illegal under federal law for states to provide General Assistance to illegal aliens. The same federal law acknowledges that states could make a legislative decision to offer General Assistance to illegal aliens, but only if they passed new laws after 1996. The Maine Legislature never passed such a law.

DHHS worked with the Office of the Attorney General for months on a proposed rule to exclude certain non-citizens from General Assistance. That proposed rule initially was approved by the Attorney General's office, but Attorney General Mills then said the rule was unconstitutional. We went back and tailored our proposed rule to meet the Attorney General's concerns and to stay within the boundary of federal law, but she turned us down again.

We found it inexplicable that the state's top law enforcement official would encourage municipalities to violate federal law. After further investigating the issue, it became clear that a rulemaking process was not necessary to implement existing federal law. Confident with its legal standing and given the Attorney General's intransigence, DHHS provided guidance based on the federal prohibition.

Some have claimed this marks a policy change that should go through the legislative process. Well, it did: our elected Congress enacted this law in 1996, and it remains on the books today. The Maine Legislature has had every opportunity in the past 18 years to pass a law mandating that municipalities provide General Assistance to illegal aliens. They have chosen not to. I fail to understand how DHHS's enforcement of an existing federal law somehow reflects a desire to ignore the will of the people.

During my administration, we have worked to eliminate Maine's status as a sanctuary state. I started by repealing Governor Baldacci's executive order that prevented state employees from asking about



PRINTED ON RECYCLED PAPER

TTY USERS CALL 711

[www.maine.gov](http://www.maine.gov)

PHONE: (207) 287-3531 (Voice)

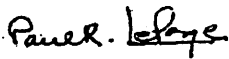
FAX: (207) 287-1034

immigration status. We also aligned Maine's state welfare payments (TANF) with federal law by eliminating coverage for certain non-citizens.

Enforcing the federal prohibition is another common-sense measure to make sure local taxpayer dollars are helping Mainers, U.S. citizens or those living here with legal status. I expect the head of each municipality to communicate with DHHS to certify in writing compliance with federal law.

If DHHS finds that a municipality fails to comply with the law, it will cut off all General Assistance reimbursement to that community. I encourage you to send any questions on how to comply as soon as possible to DHHS officials so they may help you.

Sincerely,



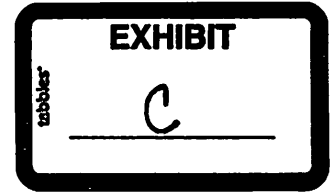
Paul R. LePage  
Governor

JANET T. MILLS  
ATTORNEY GENERAL



TEL: (207) 626-8800  
TTY USERS CALL MAINE RELAY 711

STATE OF MAINE  
OFFICE OF THE ATTORNEY GENERAL  
6 STATE HOUSE STATION  
AUGUSTA, MAINE 04333-0006



415 CONGRESS ST., STE. 301  
PORTLAND, MAINE 04101  
TEL: (207) 822-0260  
FAX: (207) 822-0259

14 ACCESS HIGHWAY, STE. 1  
CARIBOU, MAINE 04736  
TEL: (207) 496-3792  
FAX: (207) 496-3291

June 17, 2014

Geoff Herman, Director  
State and Federal Relations  
Maine Municipal Association  
60 Community Drive  
Augusta, Maine 04330

Dear Geoff:

I have just seen a copy of the memorandum entitled "Maine Department of Health & Human Services, Office for Family Independence, General Assistance Program Guidance," dated June 13, 2014.

This "Guidance" purports to require General Assistance Administrators working for the 490 towns and cities in Maine to exclude from General Assistance those individuals who are "not lawfully present in the U.S." The Guidance does not define that term and does not refer to any of the many specific federal statutes or regulations on immigration status; it simply gives examples of those the DHHS considers to be "lawfully present" and those it considers "unlawfully present." The Guidance leaves it up to the local administrator to review documentation and to determine the legal status of each applicant for General Assistance.

DHHS does not cite any statutory authority for its Guidance, other than a federal statute which has been on the books for nearly sixteen years and which has not been enforced against the State of Maine. While the Guidance directs GA Administrators to disqualify "unlawfully present" immigrants from General Assistance, subject to subsequent audit for compliance, these new requirements were not adopted through the rulemaking process. Under 5 MRS §8002(9), "Rule" means the whole or part of every regulation, standard, code, statement of policy, or other agency guideline or statement of general applicability...that is or is intended to be judicially enforceable..." The law further states: "A rule is not judicially enforceable unless it is adopted in a manner consistent with this chapter."

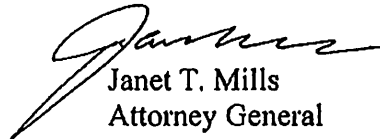
The Guidance is remarkably similar to a proposed substantive rule which went through an extensive public hearing process this spring and which was the subject of a memorandum from this Office on May 16, 2014. That memorandum found three serious legal issues surrounding that proposed rule. The primary difference between that rule and

this Guidance is that the Guidance purports to require GA Administrators to make sufficient findings about the immigration status of all applicants to determine which are "unlawfully present." As a practical matter, the logistics of determining immigration status is a daunting task for each municipality. The additional responsibility arguably imposes a mandate on the towns that is not funded by the state and not passed by a 2/3ds vote of the Maine Legislature. Determining the status of children, of victims of disaster, and of persons fleeing domestic violence without the benefit of paperwork poses other obvious problems of documentation. Exercising any discretion puts a town at serious risk of a lawsuit for selective enforcement.

I fully understand the Catch-22 the Guidance puts the municipalities in. Because of the legal issues discussed above, this Office views the Guidance dated June 13, 2014, as advisory in nature. We are likely to advise DHHS, when performing any "periodic audits" referred to in their Guidance beginning in October, that they should not threaten to penalize municipalities for noncompliance with the memo.

Thank you for your concerns.

Yours very truly,



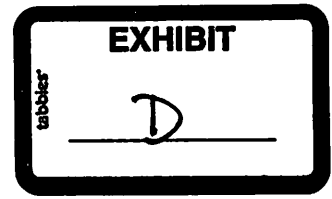
Janet T. Mills  
Attorney General

JANET T. MILLS  
ATTORNEY GENERAL



TEL: (207) 626-8800  
TTY USERS CALL MAINE RELAY 711

STATE OF MAINE  
OFFICE OF THE ATTORNEY GENERAL  
6 STATE HOUSE STATION  
AUGUSTA, MAINE 04333-0006



415 CONGRESS ST., STE. 301  
PORTLAND, MAINE 04101  
TEL: (207) 822-0260  
FAX: (207) 822-0259

14 ACCESS HIGHWAY, STE. 1  
CARIBOU, MAINE 04736  
TEL: (207) 496-3792  
FAX: (207) 496-3291

Statement of the Attorney General Regarding General Assistance Guidance  
June 24, 2014

In January 2014, the Office of the Attorney General advised DHHS that there were serious constitutional issues with the rule they were proposing. Nevertheless public hearings proceeded and DHHS sent the rule to the Attorney General's Office for final approval. The Attorney General's memo of May 16, 2014, drafted by nonpartisan staff, describes in detail three distinct and serious legal and constitutional concerns with that rule. The administration sent a last minute substantive change to the Attorney General's Office, but this too failed to comply with the law.

The fact remains that the executive branch lacks authority to promulgate a change in General Assistance *eligibility*, whether by rule or by edict or by form. Since there is no authority for this change, there is also no authority for the administration to withhold funds.

If the administration desires to change policy based on an 18-year old federal statute, it must do so in accordance with the Maine Constitution and law, with transparency and public input, and without shifting the burden onto cash-strapped towns. In many respects, the federal statute on which the Governor relies, which has never been enforced to our knowledge and which even lacks an enforcement mechanism, represents an intrusion into states' rights and a questionable expansion of Congress' authority under Article 1, section 8 of the United States Constitution.

Even if this policy were lawfully adopted, however, the towns are justifiably concerned about how it would be carried out in a consistent and lawful manner across Maine's nearly 500 municipalities. If you ask one person for his or her immigration status, you have to ask everyone for that information. Yet people who seek General Assistance—the person fleeing domestic violence, the victim of human trafficking, the asylum seeker awaiting federal approval, the family who lost their home to fire or to war—are least likely to have this paperwork on hand during a crisis. Denying emergency benefits to children of immigrants, legal or otherwise, might run afoul of Supreme Court rulings as far back as 1977 and 1982. But the Governor's edict makes no such fine distinctions and therefore puts towns at risk of lawsuits everywhere they turn, depleting scarce property tax revenues provided for police, fire, rescue and schools.

Of course, if the state does decide to take any ill-advised action, towns have a right to appeal any decision under 22 MRS 4323, and any applicant has a right to appeal a denial of General Assistance benefits under 22 MRS 4322.

###