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Memorandum

To: Christopher Lockwood
Maine Municipal Association

From: Paul McDonald
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Date: July 14, 2014

Re: **DHHS Office for Family Independence ("DHHS")**
General Assistance Program Guidance

INTRODUCTION

On June 13, 2014, DHHS issued a document entitled General Assistance Program Guidance (the "Guidance"). The Guidance provides, among other things, that DHHS will no longer reimburse municipalities for General Assistance benefits they provide to applicants "who are not lawfully present in the United States." According to the Guidance, if a municipality does provide General Assistance benefits to "unlawfully present" applicants, it will do so entirely at its own expense with no state reimbursement. The Governor has subsequently declared that if a municipality does not comply with the Guidance, DHHS shall withhold *all* General Assistance reimbursements to that municipality. The Maine Attorney General's Office, however, has taken the position that the Guidance is invalid under both the Maine and United States Constitutions, and has warned that municipalities that comply with the Guidance are at risk of lawsuits from non-citizens and others who are denied General Assistance benefits based on the Guidance.

The Guidance and the Governor's statement have left municipalities with a difficult choice. On the one hand, if municipalities continue to provide General Assistance benefits to otherwise eligible applicants regardless of immigration status, they risk being denied reimbursement for those payments, as well as having their General Assistance reimbursements cut off entirely. On the other hand, if municipalities

comply with the Guidance, they may be subject to costly and burdensome lawsuits by aggrieved applicants.

The purpose of this memo is to analyze these risks and certain legal issues implicated by the Guidance. It evaluates the potential consequences to Maine's municipalities of either choosing to follow the Guidance or continuing to provide General Assistance benefits to all Maine residents regardless of immigration status. In summary, this memo reaches the following conclusions:

(a) The legality of certain aspects of the Guidance, particularly questions surrounding whether the Guidance was required to and did comply with the rulemaking procedures of the Maine Administrative Procedure Act, will hopefully be determined in the pending lawsuit brought by cities of Portland and Westbrook and the Maine Municipal Association (the "Lawsuit");

(b) If the Guidance is upheld in the Lawsuit, then municipalities that continue to grant General Assistance to otherwise eligible applicants regardless of immigration status are likely to see their General Assistance reimbursements proportionately reduced by DHHS;

(c) The Governor's statement that DHHS will withhold *all* reimbursement to municipalities that do not follow the Guidance is likely invalid, so long as municipalities check and document the immigration status of all applicants and submit this information to DHHS on new reimbursement forms that DHHS has promulgated; and

(d) There is enough uncertainty regarding the constitutional implications of the Guidance that municipalities could be sued by otherwise eligible applicants who are denied General Assistance benefits based on the Guidance.

BACKGROUND

A. The Guidance and the Governor's June 20 Letter

The Guidance relies upon section 411 of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996, also known as PRWORA or the Welfare Reform Act. PRWORA significantly reduced access to federal means-tested public benefits for noncitizens (aka "aliens"), and contained various provisions affecting state and local public benefits. The provision at issue is now codified at 8 U.S.C. § 1621 ("Section 1621"). Section 1621 provides that certain categories of aliens are not eligible for any state or local public benefits unless the state enacts a law after the date of PRWORA affirmatively providing for such eligibility. *See* 8 U.S.C. § 1621(d). Maine has not enacted such a law. The Guidance uses the terms "lawfully present" and "unlawfully present" to define the categories of aliens who are restricted from receiving

state and local benefits, and provides examples of the categories of aliens within each. While Section 1621 does not use those terms,[1] DHHS has stated that the Guidance is intended simply to apply the same eligibility requirements as Section 1621. A copy of the Guidance is attached hereto as **Exhibit A**.

On June 20, 2014, Governor LePage sent a letter to Town Administrators, stating that not only would DHHS withhold reimbursement for General Assistance provided to ineligible aliens, but that it would "cut off all General Assistance reimbursement" to any municipality that failed "to comply with the law." A copy of the Governor's June 20 Letter is attached as **Exhibit B.**

B. DHHS' Previously Proposed Rule 17P and the AG's Memo

The Guidance is similar to a prior rule that was proposed by DHHS on December 18, 2013 ("Proposed Rule 17P"), but never adopted. Proposed rule 17P sought to prevent certain aliens from receiving General Assistance by aligning the eligibility requirements with those of the Temporary Assistance for Needy Families program ("TANF") and the Supplemental Nutrition Assistance Program ("SNAP"), both joint federal/state programs.[2] Under Proposed Rule 17P, individuals who were not eligible for federal or state TANF or SNAP benefits due to citizenship status would not be eligible for General Assistance benefits.[3]

On May 16, 2014, the Attorney General's Office issued a memorandum (the "AG's Memo"), which stated that the Attorney General's Office could not approve Proposed Rule 17P (then known as General Assistance Rule 17A) because, among other things, it was unconstitutional. A copy of the AG's Memo is attached as **Exhibit C**. The AG's Memo identified three problems with Proposed Rule 17P which, in the opinion of the Attorney General, rendered it legally invalid. These included: (1) that it constituted an unfunded mandate on local governments in violation of the Maine Constitution; (2) that it exceeded DHHS' limited statutory authority regarding General Assistance eligibility; and (3) that it violated the equal protection clauses of the United States and Maine constitutions. Because the AG's Office did not approve Proposed Rule 17P, it did not go into effect. DHHS issued the Guidance approximately one month later.

C. The AG's June 24 Statement

On June 24, 2014, in response to the Guidance and the Governor's June 20 Letter, the Attorney General's Office issued a statement entitled "Statement of the Attorney General Regarding General Assistance Guidance," (the "AG's June 24

[1] Instead, Section 1621 generally refers to "qualified aliens" and "non-qualified aliens." With a few exceptions, non-qualified aliens are not eligible to receive state and local benefits. 8 U.S.C. § 1621.

[2] SNAP was formerly known as the Food Stamp program.

[3] The eligibility requirements for TANF and SNAP are similar, but not identical, to the eligibility requirements of Section 1621 and the Guidance.

Statement"). A copy of the AG's June 24 Statement is attached as **Exhibit D.** The AG's June 24 Statement asserted that the Guidance was invalid for some of the same reasons identified in the AG's Memo with respect to Proposed Rule 17P, including that it was unconstitutional and beyond DHHS' authority to issue. The AG's June 24 Statement warned that, due to the legal issues surrounding the Guidance, municipalities who denied General Assistance benefits to aliens, legal or otherwise, would be put "at risk of lawsuits everywhere they turn." *See* Exhibit D.

ANALYSIS

The consequences to municipalities of complying or not complying with the Guidance depend upon the validity and potential constitutional implications of the Guidance and Section 1621, which are addressed below.

A. The Maine Administrative Procedure Act

A key question concerning the validity of the Guidance is whether it constitutes a "rule" within the meaning of the Maine Administrative Procedure Act (the "APA"). If the Guidance is, in fact, a rule, then DHHS was required to follow the formal rulemaking procedures of the APA, which it did not do. As defined by the APA, a rule includes guidelines, statements of policy, and other statements of general applicability that are issued by an agency or other body of state government, that are intended to be judicially enforceable, and that implement, interpret, or make specific the law administered by the agency. 5 M.R.S.A. § 8002(9). The APA excludes from the definition of rule the following: "Any form, instruction or explanatory statement of policy that in itself is not judicially enforceable, and that is intended solely as advice to assist persons in determining, exercising or complying with their legal rights, duties or privileges." 5 M.R.S.A. § 8002(9).

The APA requires that, prior to adoption, the agency issuing a rule must: (1) give public notice and hold a public hearing on the rule; (2) prepare a written statement explaining the factual and policy basis for the rule; (3) file the rule with the Secretary of State; and (4) obtain approval of the rule from the Attorney General's Office. *Id.* § 8052. DHHS did not follow any of these procedures prior to issuing the Guidance.

Whether the Guidance is a rule and whether DHHS was required to follow the APA's procedures in issuing the Guidance is the central issue in the Lawsuit brought by the cities of Portland and Westbrook and the MMA. Among the factors the Court will have to consider in deciding whether the Guidance is a rule are the facts that: (1) the Guidance fundamentally changes long-standing DHHS policies regarding General Assistance reimbursement; and (2) DHHS itself initially followed the APA's rulemaking procedures in seeking to alter that policy. On the other hand, DHHS will likely argue that the Guidance is simply its interpretation of the language of Section 1621 and is not itself intended to be judicially enforceable. Because this issue will hopefully be resolved through the Lawsuit, further analysis is not within the scope of this memorandum.

B. Lack of Statutory Authority

The AG's Memo and the AG's June 24 Statement contend that the Guidance constitutes a limitation on General Assistance eligibility, which exceeds the statutory authority granted to DHHS by the Maine General Assistance statute, 22 M.R.S.A. §§ 4301–4326 (the "GA Statute"). The GA Statute assigns primary responsibility to municipalities for determining eligibility for General Assistance by requiring them to adopt ordinances setting forth eligibility standards. *Id*. § 4305. In addition, the statute defines "eligible person" as "a person who is qualified to receive general assistance from a municipality *according to standards of eligibility determined by the municipal officers*…" *Id.* § 4301(3) (emphasis added). The GA Statute's reimbursement provision then states that DHHS "*shall* reimburse" municipalities for a specified portion of the General Assistance payments made pursuant to a municipality's ordinance in compliance with the GA Statute. *Id.* § 4311 (emphasis added). The statute contains no reference to DHHS itself determining eligibility standards. Therefore, an argument may be made that DHHS lacks statutory authority to determine General Assistance eligibility generally, and that the statute mandates reimbursement for payments made pursuant to a municipality's ordinance. However, DHHS will likely argue that the Guidance does not itself alter General Assistance eligibility, but merely restates the eligibility restrictions that are already applicable by virtue of Section 1621, and that compliance with federal law is implied in the GA Statute.[4] This issue will hopefully be resolved in the Lawsuit.

In addition, the scope of DHHS's statutory authority question plays a significant role in determining whether DHHS may withhold *all* General Assistance reimbursement to non-compliant municipalities, as set forth in the Governor's June 20 Letter. As noted above, the GA Statute states that DHHS "*shall reimburse*" municipalities for a specified portion of the proper General Assistance payments made by municipalities. *Id.* § 4311. It does not grant discretion to DHHS to withhold reimbursement for payments to eligible applicants simply because a municipality may have made other payments that do not comply with the Guidance. Accordingly, any decision by DHHS to withhold *all* reimbursement to a municipality would exceed DHHS' statutory authority and violate the Maine GA Statute.

The GA Statute does permit DHHS to suspend reimbursement to a municipality that is in violation of the GA Statute until the municipality reaches compliance, though noncompliance with Section 1621 would not constitute a violation of the GA Statute justifying suspension of reimbursement. However, DHHS has issued a new General Assistance Reimbursement Report form which contains the following information request: "Total # of not "Lawfully Present" non-citizens, as defined in DHHS guidance that were assisted and for whom reimbursement is being requested _____." The new

[4] DHHS' lack of statutory authority was a central basis on which the AG's Memo refused to approve Proposed Rule 17P. DHHS will likely argue that this issue played a greater role with respect to Proposed Rule 17P than it does with respect to the Guidance, inasmuch as Proposed Rule 17P represented an exercise of the State's discretion regarding General Assistance eligibility and not simply the application -- according to DHHS -- of a federal statute.

form is attached as **Exhibit E**. Since DHHS is authorized by the GA Statute to promulgate reimbursement forms pursuant to 22 M.R.S.A. § 4311(2), failure to provide the information requested by the new form could be construed as a violation of the GA Statute sufficient to justify a total suspension of reimbursement. Therefore, until such time as the rule-making and procedural issues are addressed through the Lawsuit, municipalities would be prudent to provide the requested information to the best of their ability. While DHHS would likely withhold proportional reimbursement on the basis of this information, DHHS could not legally withhold *all* reimbursement where a municipality has complied with the GA Statute by providing the requested information, as noted above.

Implementing the Guidance may pose significant challenges to municipalities. Therefore, municipalities should feel free to reach out to DHHS for assistance; DHHS has stated that municipalities may contact the General Assistance program with questions at 1-800-442-6003. Presumably, DHHS will assist municipalities in making individual eligibility determinations. Municipalities may also detail on the reimbursement form any difficulties they experience in complying with the Guidance.

C. Unfunded Mandate

The AG's Memo also found Proposed Rule 17P to constitute an unfunded mandate in violation of the Maine Constitution, Article IX, Section 21. That section provides that the State "may not require a local unit of government to expand or modify that unit's activities so as to necessitate additional expenditures from local revenues unless the State provides annually 90% of the funding for these expenditures from State funds not previously appropriated." Me. Const. art IX, § 21. The AG's Memo found that Proposed Rule 17P constituted an unfunded mandate because it "would require local officials to expand the scope of their General Assistance eligibility determinations by verifying immigration status," which would entail an added burden on municipal resources without any additional state reimbursement. *See* AG's Memo at p. 2.

This argument has less force when applied to the Guidance than to Proposed Rule 17P, however, because even if State action fits the definition of a mandate, the State is not required to fund "costs incurred by local units of government to comply with a federal law or regulation … except to the extent that the State imposes requirements or conditions that exceed the federal requirements." 30-A M.R.S.A. § 5685(3)(D). In other words, where State action merely requires municipalities to comply with federal law, the State is not required to contribute to the costs of compliance. This is known as the federal-mandate exception. Here, DHHS will argue that the Guidance merely enforces compliance with Section 1621, and therefore the federal-mandate exception applies. For this reason, it is unlikely that the unfunded-mandate doctrine would play a significant role in a lawsuit or appeal challenging the Guidance.

D. Equal Protection Clause

The Attorney General has also raised concerns that complying with the Guidance may cause municipalities to violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Equal Protection Clause provides: "No state shall … deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1. The Maine Constitution contains a similar provision. Me. Const. art. I, § 6-A.

In order to establish an equal protection violation, "a plaintiff must show state-imposed disparate treatment compared with others similarly situated…." *Bruns v. Mayhew*, 750 F.3d 61, 66 (1st Cir. 2014). The Supreme Court has held that alienage, like race and nationality, is a suspect classification, and therefore a state action that categorizes people according to alienage raises concerns of invidious discrimination. *Graham v. Richardson*, 403 U.S. 365, 372 (1971). Such actions are subject to what is known as strict judicial scrutiny, and will be struck down unless the government proves the action is necessary to achieve a compelling governmental interest. *Id.* On the other hand, because the U.S. Constitution grants to Congress widespread authority to regulate immigration, *Congress* may enact laws that distinguish between citizens and aliens so long as those laws are rationally related to a legitimate government interest, a much lower standard. *Mathews v. Diaz*, 426 U.S. 67, 82 (1976).

This case presents a hybrid situation: a state action that is authorized by a federal statute. No Supreme Court case has yet addressed this precise situation or opined on the equal-protection implications of Section 1621. Nevertheless, three federal appeals court decisions have addressed states' decisions to reduce or eliminate benefits to aliens pursuant to other provisions of PRWORA, including a 2014 decision from the First Circuit in a case challenging Maine's discontinuation of MaineCare benefits to Medicaid-ineligible aliens. *See Bruns v. Mayhew*, 750 F.3d 61 (1st Cir. 2014); *Korab v. Fink*, 748 F.3d 875 (9th Cir. 2014); *Soskin v. Reinertson*, 353 F.3d 1242 (10th Cir. 2004). Each case upheld the states' actions. In *Korab* and *Soskin*, the courts found that the discretion granted by Congress to states in PRWORA justified application of the lower standard of review, and upheld the statute because Congress has a legitimate interest in ensuring that aliens do not burden the public benefits system.[5]

These precedents are not Supreme Court authority and are distinguishable in certain respects from the present situation. Accordingly, they do not foreclose the possibility of a lawsuit being brought on equal protection grounds to challenge Section 1621 and/or the Guidance. The Supreme Court itself stated in *Graham v. Richardson* that "Congress does not have the power to authorize the individual States to violate the

[5] *Bruns* avoided the question by holding that the state had not discriminated on the basis of alienage, but rather on the basis of federal Medicaid eligibility, which it considered to be a benign classification that did not raise equal-protection concerns. *Bruns* therefore did not decide whether state action discontinuing state-funded benefits to PRWORA-ineligible aliens on the basis of alienage would violate the Equal Protection Clause.

Equal Protection Clause," and that a "congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene [the] explicit constitutional requirement of uniformity." *Graham*, 403 U.S. at 382. The Supreme Court could determine that Section 1621 does not further any legitimate national interest because it offers to states the option -- through the enactment of legislation -- of continuing to provide all manner of state and local benefits, and therefore does not serve any uniform national policy.[6]

Insofar as there is no controlling precedent from the Supreme Court or the First Circuit on this issue, an otherwise eligible alien that is denied General Assistance on the basis of his or her immigration status may well bring a claim against the municipality denying the benefit on the grounds that the municipality violated the Equal Protection Clause.[7] Thus, it can be said with assurance that municipalities that follow the Guidance face the possibility of lawsuits brought by aliens denied General Assistance, perhaps with the support of advocates for low-income and immigrant communities. Of course, as noted above, there are persuasive legal arguments, based on analogous decisions, which a municipality could muster to defeat such a claim. Nevertheless, the burden and expense of a lawsuit would itself be a significant drain on municipal resources.

It is also important to note that unequal application of an otherwise unobjectionable law can itself create an Equal Protection violation. Therefore, municipalities should seek to inquire of the immigration status of *all* applicants, as selectively inquiring could itself constitute an equal protection violation.

E. Tenth Amendment

A further potential issue with the Guidance concerns the Tenth Amendment to the United States Constitution. The Tenth Amendment addresses the balance of powers between the federal government and the states, and provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Notwithstanding this seemingly straightforward principle, the Supreme Court has observed that "the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases." *New York v. U.S.*, 505 U.S. 144, 155 (1992).

Under the Tenth Amendment, Congress may not commandeer the legislative or administrative processes of a state by directly compelling it to enact and enforce a

[6] This is particularly true given that Section 1621 lacks an enforcement mechanism -- i.e., Congress did not provide for any penalties against non-compliant states -- which further minimizes the practical effect of Section 1621 on national immigration policy.

[7] Such a lawsuit could be brought either in state or federal court, as the presence of federal constitutional claims gives rise to federal-court jurisdiction.

regulatory program. *New York v. U.S.*, 505 U.S. at 161. In other words, the Tenth Amendment prohibits Congress from commanding states to administer a federal regulatory scheme. *City of New York v. U.S.*, 179 F.3d 29, 33 (2d Cir. 1999). Moreover, "Congress cannot circumvent that prohibition by conscripting the State's officers directly." *Printz v. U.S.*, 521 U.S. 898, 935 (1997). However, while Congress is prohibited in this manner from regulating the states' regulation of third parties, Congress may properly regulate the states themselves. *S. Carolina v. Baker*, 485 U.S. 505, 514–15 (1988). And while Congress cannot commandeer a state's legislature to enact a federal regulatory program, federal action is not improper simply because it results in states having to pass new laws. *S. Carolina v. Baker*, 485 U.S. 505, 514–15 (1988).

Section 1621 provides that a state may extend eligibility for state or local benefits to non-qualified aliens only through the affirmative step of enacting laws specifically providing for such eligibility. It could be argued that this language constitutes impermissible micromanagement of a state's legislature and is, therefore, unconstitutional under the Tenth Amendment. The law is not settled on this point.

On the one hand, Congress' authority to regulate immigration is broad and has been found sufficient to sustain other provisions of PRWORA that grant discretion to states to take action through legislative means. Furthermore, the Supreme Court in *S. Carolina v. Baker* held that the fact that "a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect." *Baker*, 485 U.S. at 514–15. On the other hand, unlike *Baker*, Section 1621 specifically *directs* states to pass laws in a very particular fashion, whereas in *Baker* the requirement of new legislation was simply an incidental result of otherwise proper Congressional regulation. For this reason, Section 1621 may present a stronger case for improper commandeering of a state legislature than *Baker*.

Once again, it is impossible to say with certainty what the outcome of a lawsuit challenging Section 1621 on Tenth Amendment grounds would be. Even if Section 1621's prohibition on providing state and local public benefits to non-qualified aliens is a proper regulation of the state itself, Section 1621's explicit direction to enact legislation is constitutionally suspect and has not been directly addressed by the Supreme Court. Thus, the Tenth Amendment provides a further basis on which an aggrieved applicant who is denied General Assistance benefits by a municipality complying with the Guidance could bring a lawsuit against the municipality.

AVAILABLE OPTIONS AND THEIR LIKELY CONSEQUENCES

While the Lawsuit is pending, and if the Guidance is upheld, a municipality is presented with the following choices:

(a) Continue to provide benefits to all eligible applicants regardless of immigration status as before, in which case:

(i) DHHS will likely withhold reimbursement proportional to the amount of General Assistance provided to non-qualified aliens; and

(ii) DHHS may attempt to withhold *all* reimbursement to non-compliant municipalities, though this action would likely be held to be invalid assuming the municipality complies with the GA Statute; or

(b) Comply with the Guidance, in which case:

(i) The municipality could be subject to suit in state or federal court by otherwise eligible General Assistance applicants challenging the validity of the municipality's action.

Regardless of which course of action municipalities choose, municipalities would be prudent to check and document the immigration status of *all* applicants, as doing otherwise could: (1) constitute an equal protection violation, if municipalities only selectively inquired into immigration status; and (2) be construed as a violation of the GA Statute as it pertains to reimbursement procedures, which could justify a suspension of all General Assistance reimbursement to that municipality.

Also, as noted above, to the extent municipalities have difficulties implementing the Guidance, DHHS has stated that municipalities may contact the General Assistance program at 1-800-442-6003.

Finally, a municipality could attempt to bring a preemptive suit against DHHS to resolve questions beyond the rulemaking issues to be addressed by the Lawsuit brought by the cities of Portland and Westbrook and the MMA, including the Equal Protection and Tenth Amendment implications of the Guidance and Section 1621. Municipalities also have a right to appeal DHHS decisions to withhold reimbursement pursuant to 22 M.R.S. § 4323. Municipalities should consult with independent legal counsel prior to taking any such legal action in order to determine, among other things, the likelihood of success.