Maine State Legislature
OFFICE OF POLICY AND LEGAL ANALYSIS
13 State House Station, Augusta, Maine 04333-0013
Telephone: (207) 287-1670

TO: Joint Standing Committee on Health and Human Services

FROM: Erin Dooling, Esq., Legislative Analyst

DATE: April 30, 2021

SUBJECT: Analysis of LD 739, "An Act Regarding Credible Allegations of Fraud by MaineCare Providers"

This bill involves Maine's process relating to credible allegations of fraud by MaineCare providers.

Background

A "credible allegation of fraud" means "an allegation that the [Department of Health and Human Services] has verified, from any source, which has one or more indicia of reliability and which allegation, facts and evidence have been carefully reviewed by the Department, on a case-by-case basis."[1] When the Department receives an allegation of fraud it conducts a preliminary investigation to determine whether the allegation is credible. Allegations of fraud may come from any source, including, but not limited to, "fraud hotline complaints, claims data mining or patterns identified through provider audits, civil false claims cases and law enforcement investigations."[2] If the Department determines that the allegation is not credible the investigation ends.

If the Department determines, however, that the allegation is credible it is required under Maine and federal law to suspend payments in whole or in part to a MaineCare provider unless a good cause exception exists.[3] Good cause exists when, for example, law enforcement officials indicate that suspending payments might compromise an investigation, suspending payments might jeopardize member access to services or suspending payments is not in the best interests of

---

[1] 10-144 C.M.R. ch. 101, § 1.22-3(A) (2018); 42 C.F.R. 455.2 (2011).

[2] 10-144 C.M.R. ch. 101, § 1.22-3(A) (2018).

[3] 22 M.R.S. § 1714-E(1); Patient Protection and Affordable Care Act, P.L. No. 111-148, § 6402(h), codified at 42 U.S.C. § 1396b(i)(2)(C); 42 C.F.R. § 455.23 (2011).

the MaineCare program, among other reasons.[4] Absent good cause, the Department is required to suspend payments to a MaineCare provider. Payment suspension is a program integrity tool that is intended to prevent "more costly efforts of recouping monies already paid."[5] Once a provider's payments are suspended, the Department is required to provide notice to the provider and the provider is entitled to an appeal process on the Department's decision to suspend payment.[6] A provider may seek an informal review of that decision, an administrative hearing, arbitration in lieu of an administrative hearing, review of final agency action by the Superior Court and appeal to the Maine Supreme Judicial Court.[7]

LD 739

LD 739 proposes to amend Title 22, Maine Revised Statutes, section 1714-E(4).[8] This section is about the Department's ability to recover funds from a MaineCare provider using payments that were suspended as a result of a credible allegation of fraud. Current law provides that 31 days after all of the administrative and judicial appeals afforded to a MaineCare provider are exhausted, the Department can apply the funds it held onto from the suspended payments to recover the amounts determined to be owed to the Department.[9] LD 739 proposes to amend section 1714-E(4) in three ways.

1. Judicial review

LD 739 at line 7 removes the reference to judicial review. It is unclear exactly what effect removing judicial review from this subsection will have, but it potentially poses both practical and constitutional issues.

Read narrowly, this subsection would allow the Department to recoup money owed to it after only the administrative appeals are exhausted. Under the Maine Administrative Procedure Act, a MaineCare provider may have two more layers of review by appealing the Department's decision to the Superior Court and then to the Maine Supreme Judicial Court. Accordingly, the Department would be authorized to use the suspended payments to offset a MaineCare

[4] 10-144 C.M.R. ch. 101, § 1.22-3(G) & (H).

[5] 52 Fed. Reg. 48814 (Dec. 28, 1987).

[6] 10-144 C.M.R. ch. 101, §§ 1.22-3(B), (E) & (F); 1.23; 22 M.R.S. § 1714-E(2).

[7] 10-144 C.M.R. ch. 101, §§ 1.22-3(B), (E) & (F); 1.23.

[8] Title 22, Maine Revised Statutes, section 1714-E(4) was enacted pursuant to P.L. 2011, ch. 687, § 9 in order to "conform[] Maine law to federal requirements regarding suspension of payments to MaineCare providers upon determination of a credible allegation of fraud." L.D. 1888, Summary (125th Legis. 2011). This provision of law was amended during the committee process on LD 1888, but not in a way that affects any of the proposals currently before the Committee in LD 739.

[9] 22 M.R.S.§ 1714-E(4).

provider's debt when a final determination has not been made because judicial review would not yet have concluded.

A broader reading of the proposal to remove judicial review from this subsection is that it would remove the right of judicial review by a MaineCare provider who is dissatisfied with the Department's decision. Interpreting the proposal this way potentially creates a constitutional due process issue and is inconsistent with the due process protections outlined in the Maine Administrative Procedure Act. Judicial review is widely afforded to parties aggrieved by agency decisions across state government, but under this interpretation a MaineCare provider who had payments suspended due to credible allegations of fraud would only be allowed to pursue an administrative appeal process within the department.

2. Reducing timeline for the collection of funds

The bill at line 6 also proposes to change, from 31 days to 21 days, when the Department can collect a debt following the exhaustion of administrative appeals. Reducing the timeline to 21 days conflicts with another section of law governing the Department's ability to collect debts, which sets the time limit at 31 days after a final decision and all administrative appeals and any judicial review available has been exhausted.[10]

Also, as discussed above, it is unclear whether the bill proposes to remove the ability for a MaineCare provider to seek judicial review. If judicial review is still available, then 21 days poses a practical issue because someone has 30 days after a final agency decision to appeal to the Superior Court.[11] As a result, reducing the debt collection period to 21 days following the conclusion of administrative appeals would mean that the case may not be finished at the time the Department offsets funds.

3. Changes language about fraud

LD 739 at lines 4-5 proposes to amend the language referring to fraud in the context of making sure the determination of the Department is final before it can offset funds. Current law provides, in part, that for the Department to offset any amounts owed by a MaineCare provider from the suspended payment that it must be "upon a final determination *that fraud has occurred*," while this bill proposes that this offset occur "upon a final determination that *an allegation of fraud has been established*." This change is confusing, as I do not believe it in fact changes whether there would need to be a final determination, which is one of the factors triggering the Department's ability to collect a debt.

[10] 22 M.R.S. § 1714-A.

[11] 5 M.R.S. § 11002(3).

It is possible based on my understanding of some of the testimony presented at the public hearing that this proposal is an attempt to change the Department's burden of proof in an administrative hearing. A burden of proof is the standard that a party must demonstrate in order to prevail in an administrative or judicial proceeding. I do not believe the proposed language or its placement in statute is adequate to do that for two reasons.

First, it is unclear what "established" would mean in this context. It's possible to read this language as meaning something far less restrictive than I believe would be a desired outcome by the proponents of this bill. For example, establishing an allegation of fraud could be as simple as proving when the allegation of fraud was made, such as at the time of fraud hotline call. Under this interpretation the allegation of fraud could be established by demonstrating when the call occurred rather than any fraud itself, which doesn't appear to be the intent.

Second, this subsection does not establish the Department's burden of proof. Instead, it's focused on when and how the Department is able to offset funds from suspended payments. The current burden of proof in an administrative hearing, whether a "credible allegation of fraud" exists, is established in Department rule as directed by the federal government in the Affordable Care Act and in federal regulations. Changing the burden of proof on the Department to something other than a showing of a credible allegation of fraud would put the statute in conflict with the requirements of federal law.

Conclusion

In conclusion, this bill, as drafted, does not address many of the concerns raised at the public hearing and potentially poses both practical and constitutional issues. Moreover, the requirements in section 1714-E are intended to conform with federal law and changing those requirements risks putting Maine statute in conflict with federal law, in particular in relation to when the Department is authorized to suspend payments.