April 1, 2021

Testimony of John P. Doyle, Jr., Preti Flaherty on behalf of
Maine Health Care Association
in Opposition to LD 739, An Act Regarding Credible Allegations of Fraud
by MaineCare Providers

My name is John Doyle of the Preti Flaherty law firm, appearing before you today in my capacity as counsel to the Maine Health Care Association.

The MHCA and its members oppose LD 739, An Act Regarding Credible Allegations of Fraud by MaineCare Providers, for several reasons:

First, the bill would deprive Maine's nursing facilities – and all other MaineCare providers – of the fundamental right to judicial review of Department audit actions that seek to recover significant sums from these provider, following an assertion of "credible allegations of fraud."

Second, a permanent take back of MaineCare funds would be imposed following the Department's leveling of a mere allegation of fraud, which the Department deems to be "credible."

Third, in addition to their fundamental unfairness, these changes would dramatically alter the negotiation positions between Department officials and providers when dealing with highly complex audits and recoupment proceedings. The bill would upset a carefully crafted set of statutes, administrative rules, and procedures that have governed the handling of MaineCare audits and reimbursement for many years.

The provisions of 22 M.R.S. § 1714-E that LD 739 seeks to amend were first enacted in 2011, and set forth the Department's authority to suspend temporarily the payments under Medicare where there has been a "credible allegation of fraud." This section was enacted to fulfill certain requirements of the Affordable Care Act, popularly known as Obamacare, Federal Public Law 111-148, that was enacted in 2010.

Subsection (1) of § 1714-E reflects this legislative intent and history:

> ***1. Suspension of payments.*** *The department shall suspend payment in whole or in part to a MaineCare provider when a suspension is necessary to comply with Section 6402(h)(2) of the federal Patient Protection and Affordable Care Act, Public Law 111-148 and 42 Code of Federal Regulations, Part 455.*

A copy of the full text of § 1714-E is attached, along with pertinent excerpts from the ACA.

Subsection (2) of § 1714-E states that MaineCare providers have the right to administrative appeals within the Department, and subsection (6) requires the Department to carry out rulemaking:

> *…to define "credible allegation of fraud" and to provide exception and appeal procedures as required by and in accordance with the requirements of federal law and regulations.*

These rules are now set forth at length in the MaineCare Provider Manual – Ch. 1, § 1.22 and 1.23. The appeal steps carried out internally within the Department include the following:

- Informal review – typically carried out by the Department's Audit Division;
- An administrative hearing before a Department Hearing Officer; and
- As a third stage, an opportunity to have the decision reviewed by the Commissioner.

Of critical importance, current law, and the Department's own procedures, §1.23 of Chapter One of the MaineCare Benefits Manual, provide that:

> *If the provider is dissatisfied with the final decision [of the Department] an appeal may be taken to the Superior Court pursuant to the Administrative Procedure Act.*

This right to an appeal to Superior Court, before any offset of funds can take place, is mandated by subsection (4) of § 1714-E, which states:

> ***4. Final determination; offset.*** *Upon a final determination that fraud has occurred and that money is owed by the MaineCare provider to the department, and 31 days after exhaustion of all administrative appeals and any judicial review available under Title 5, chapter 375, the department may retain and apply as an offset to amounts determined to be owed to the department any payments to the provider that were suspended by the department pursuant to this section. The amount retained pursuant to this subsection may not exceed the amount determined finally to be owed.*

Emphasis added.

Under existing law, DHHS has the authority to retain and apply the funds gained through the suspension to the amounts claimed to be owed to the Department only following the completion of these many steps and, when the provider seeks judicial review, only following the completion the judicial review processes under the Administrative Procedure Act (the "APA"). The APA provides many important protections to all who are regulated by state agencies. For example, 5 M.R.S. § 11007 (4) authorizes Superior Court judges to

> *C. Reverse or modify the decision if the administrative findings, inferences, conclusions or decisions are:*
> *(1) In violation of constitutional or statutory provisions;*
> *(2) In excess of the statutory authority of the agency;*
> *(3) Made upon unlawful procedure;*
> *(4) Affected by bias or error of law;*
> *(5) Unsupported by substantial evidence on the whole record; or*
> *(6) Arbitrary or capricious or characterized by abuse of discretion*

Under the Bill, these protections would be gone and the Department would be empowered to permanently retain MaineCare funds it is holding under the suspension:

- When "an allegation of fraud has been established" – whatever that means;
- Following the passage of 21 days – a change from 31 days in current law. The Administrative Procedure Act, 5 M.R.S § 11007 (4), and the Maine Rules of Civil Procedure, Rule 80C, each provide a 30 day window to seek judicial review of any final agency action); and
- Without the right to judicial review under the Administrative Procedure Act.

For these many reasons, we urge you to report LD 739 as "ought not to pass."