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By Certified Mail – Return Receipt Requested

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Michelle Probert
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Re: Maine’s Failure to Satisfy Its Legal Obligations Under State and Federal Law to Protect Children Enrolled in MaineCare from Lead Poisoning

Dear Commissioner Lambrew, Director Shah and Director Probert:

In January 2019, the Maine Department of Health and Human Services (DHHS) and the Maine Center for Disease Control and Prevention (CDC) issued a report to the 129th Maine Legislature’s Committee on Health and Human Services concerning the status of childhood lead poisoning prevention in Maine. In that report, DHHS and CDC indicated that the legal requirement that all one- and two-year-old children enrolled in MaineCare be tested for lead is “far from being met.” For instance, just over half (54%) of one-year-olds and just over a third (36%) of two-year olds covered by MaineCare were tested for blood lead in 2017. These findings are corroborated by data presented in a March 2019 report prepared by the Maine Affordable Housing Coalition (MAHC) concerning lead poisoning screening in Maine.

The state’s past and ongoing failure to meet its legal obligation to test all one- and two-year-old children enrolled in MaineCare has direct, adverse and long-term effects on the health of the children who are lead poisoned but not tested, and on the social and economic well-being



of the families of those children and the state of Maine. We understand that there has been much work to do to rebuild DHHS after many years of neglect and outright hostility to the department by the previous Administration. However, the debilitating and costly impacts of lead poisoning require DHHS, CDC and the Office of MaineCare Services (OMS) to take immediate actions to bring the state into compliance with the legal mandate to test all one- and two-year-old children enrolled in MaineCare, to protect Maine's most vulnerable population from insidious, but entirely preventable harm. The severity of the harm to young children from lead poisoning is universally recognized and does not allow for any further delay in the state meeting its legal obligations under state and federal law.

Conservation Law Foundation protects New England's environment for the benefit of all people. Founded in 1966, CLF is a non-profit, member-supported organization with offices located in Maine, Massachusetts, Vermont, Rhode Island and New Hampshire. CLF uses the law, science and the market to create solutions that protect public health, preserve natural resources and sustain a vibrant economy. CLF has been a leading advocate for healthy communities in Maine and throughout New England and is engaged in numerous efforts to address the threat of emerging contaminants, including lead, throughout New England.

The Environmental Health Strategy Center is a Maine-based charitable nonprofit working to create a world where all people are healthy and thriving, with equal access to safe food and drinking water, and products that are toxic-free and climate-friendly. EHSC protects public health by fighting for safe food and drinking water, toxic-free products, and good green manufacturing jobs.

Toxics Action Center is an environmental health nonprofit that works side-by-side with communities to clean up and prevent pollution at the local level in Maine and across New England. Toxics Action Center has been working to close the loopholes in our toxics regulations, strengthen drinking water protections, and support community groups fighting for the right to clean drinking water and lead-free communities.

I. Maine is Legally Obligated Under State and Federal Law to Test All One- and Two-Year-Olds Enrolled in MaineCare for Lead Poisoning.

Under Maine's Lead Poisoning Control Act (LPCA), 22 M.R.S. §§ 1314 *et seq.*, it is the state's goal to eradicate childhood lead poisoning through the elimination of potential sources of environmental lead. 22 M.R.S. § 1314-A.¹ To help the state achieve its goal, the LPCA requires the DHHS Commissioner to establish a lead poisoning risk assessment and blood lead level

¹ In 1991, the Legislature set a goal of eradicating childhood lead poisoning by 2010. *See* 22 M.R.S. § 1314-A. In June 2019, the Legislature updated the goal to eradicating childhood lead poisoning by 2030. *See* Public Law 2019, Chapter 479, *An Act to Strengthen the Lead Poisoning Control Act*, § 1.



testing program to assess lead poisoning risks to children and test blood lead levels in children. 22 M.R.S. § 1317-D(1). The program “must require the testing of blood lead levels of all children covered by the MaineCare program at 1 and 2 years of age.” 22 M.R.S. § 1317-D(3). Subsection D(3) expressly references the requirement under federal law, discussed below, that all one- and two-year-old children enrolled in MaineCare be tested for lead poisoning. Under subsection D(6), the lead testing program “must include payment by the department for blood lead level testing and related services and diagnostic evaluations when a child’s parent is unable to pay and does not have health coverage for testing and services.” 22 M.R.S. § 1317-D(6). Under the LPCA, DHHS is also required “to ensure that state law relating to lead poisoning satisfies minimum requirements of federal law in all respects.” 22 M.R.S. § 1323.

Under the federal Medicaid Act, 42 U.S.C. §§ 1396 *et seq.*, all states that elect to participate in the Medicaid program receive federal financial assistance to pay for the medical treatment of specific groups of needy individuals. In order to receive these federal funds, states are required to formulate a plan that meets federal requirements. 42 U.S.C. § 1396-1. The Centers for Medicare and Medicaid Services (CMS) is the federal agency responsible for overseeing the Medicaid program in each state, including approval of changes to state plans. Maine participates in Medicaid and has developed the required state plan. Like all states participating in Medicaid, Maine is required to test all one- and two-year-old children for lead poisoning. This longstanding legal obligation is set forth in a number of federal statutory and regulatory provisions and guidance documents.

II. Maine has Breached, and is Breaching, Its Legal Obligation to Test All One- and Two-Year-Olds Enrolled in MaineCare for Lead Poisoning.

In January 2019, DHHS and CDC issued a report to the 129th Maine Legislature’s Committee on Health and Human Services entitled “Update on Childhood Lead Poisoning Prevention in Maine.”² In this report, DHHS and CDC acknowledge that Maine is legally obligated to perform blood lead testing of all one- and two-year-old children enrolled in MaineCare, and admit—without qualification—that the state is not meeting its legal obligations. For instance, DHHS and CDC admit in the report that “[b]lood lead testing remains low among one- and two-year-old children enrolled in MaineCare, and the statutory mandate for universal testing of this population of children is far from being met.” *See* “Update on Childhood Lead Poisoning Prevention in Maine,” at 8, 40. The report also admits that “the LPCA mandates that all one- and two-year-old children covered by MaineCare be tested for lead in the blood. Maine falls far short meeting of this mandate—just over half (54%) of one-year-olds and only about one third (36%) of two-year-olds covered by MaineCare were tested for blood lead in 2017.” *Id.* at 4.

² *See* <https://www.maine.gov/dhhs/documents/Childhood-Lead-Poisoning-Prevention-Annual-Report-2018-Jan2019.pdf>.



The findings presented in the DHHS-CDC report are corroborated by data and information presented in a March 2019 report prepared by the Maine Affordable Housing Coalition (MAHC) entitled “Comparative Assessment of Lead Poisoning Screening Practices in Maine & New England.”³ The MAHC report indicates that:

[f]or children enrolled in MaineCare, though, federal law requires lead testing be conducted at age 1 and age 2, and Maine is far out of compliance. From 2013 to 2016, the percentage of 1-year-old children that were screened was approximately 52% and the number of 2- year-old children screened was even lower, at around 37%.

See “Comparative Assessment of Lead Poisoning Screening Practices in Maine & New England” at 11. The report finds that “[a]s it relates to MaineCare, the state of Maine is not achieving the universal screening standard required by federal law.” *Id.*⁴ Further, the report estimates that, as a result of Maine’s low screening rates (of children enrolled in MaineCare and children not enrolled in MaineCare), hundreds of lead poisoned children in Maine go undiagnosed every year. *Id.* at 24-25.

While our focus in this letter is on Maine’s past and ongoing breach of its longstanding legal obligation to test all one- and two-year-olds enrolled in MaineCare for lead poisoning, it is important to note that an additional childhood lead screening obligation was recently enacted. Last summer, Governor Mills signed into law L.D. 1116, *An Act to Strengthen the Lead Poisoning Control Act*, which requires that Maine test all one- and two-year-old children for blood lead levels. See Public Law 2019, Chapter 479. This law does nothing to change Maine’s preexisting and longstanding obligation to test all one- and two-year-olds enrolled in MaineCare, but rather expands the state’s obligations with respect to lead screening. The law will take time and resources to fully implement. However, given that Maine has consistently breached its longstanding obligation to screen all one- and two-year-olds enrolled in MaineCare for lead poisoning, we are concerned about the state’s ability to satisfy its new obligation to screen all one- and two-year-old children in Maine.

³ See <https://mainehousingcoalition.org/wp-content/uploads/2019/03/Lead-Screening-Report-Final-Full-Report-2.pdf>.

⁴ The report also indicates that “[i]t will be important to examine the reasons providers are not complying with federal mandates.” See “Comparative Assessment of Lead Poisoning Screening Practices in Maine & New England” at 11. Providers that receive federal funds through Medicaid and provide services to children enrolled in MaineCare may face liability in connection with children they fail to screen for lead poisoning.

III. Maine’s Breach of Its Legal Obligation to Test All One- and Two-Year-Olds Enrolled in MaineCare for Lead Poisoning is Causing Adverse Health Effects and Economic Losses.

As DHHS and CDC noted in the January 2019 report to the Legislature, childhood lead poisoning “is one of the major environmental health threats for children in Maine.” *See* “Update on Childhood Lead Poisoning Prevention in Maine,” at 2. In that report, DHHS and CDC acknowledged that “[i]n young children, exposure to lead causes brain damage that can result in learning and behavioral problems. There is now national scientific consensus that there is no safe level of lead in a child’s body.” *Id.* More specifically, according to CDC, it can “have a very serious and permanent effect on a child’s growth and development,” and can cause learning disabilities, behavioral problems, hearing damage, language or speech delays, attention deficits and lower intelligence.⁵ These harmful, long-lasting effects are most significant and pronounced in children under six years old because they are still growing and developing. Childhood lead poisoning can also result in reduced motor skills. *See* Needleman, et al., “The long-term effects of exposure to low doses of lead in childhood: An 11-year follow-up report,” *N. Eng. J. Med.*, 1990, 322(2), 83-88; *see also* Mason, et al., “Pb Neurotoxicity: Neuropsychological Effects of Lead Toxicity,” *Biomed. Res. Int.*, 2014.

The lifelong health effects on the growth and development of our children are troubling enough, but lead poisoning also results in significant social and economic costs, now and in the future. Treating poisoned children generates enormous and long-lasting health care costs annually, amounting to tens of millions of dollars nationwide. *See* Gould, “Childhood Lead Poisoning: Conservative Estimates of the Social and Economic Benefits of Lead Hazard Control,” *Environ. Health Perspect*, 2009 (117)(7): 1162-67. That study also concluded that the annual amount to provide special education to each poisoned child is nearly \$15,000, and that ADHD caused by lead poisoning costs \$267 million every year for drug and counseling therapy and parental work loss. *Id.*

There are also massive costs associated with the poorer education outcomes and lost future earning potentials of poisoned children. For instance, a study in Maine concluded that each new cohort of babies born annually in Maine could expect to earn as an aggregate \$270 million less over their lifetimes as a result of the cognitive and neurological deficits related to lead poisoning. *See* Davis, “Economic Assessment of Children’s Health and the Environment in Maine,” *Maine Policy Review*, 2010, Vol. 19, Issue 1, 36-41.

⁵ *See, e.g.*, Maine CDC, “Childhood Lead Poisoning: What’s so bad about lead?”, <https://www.maine.gov/dhhs/mecdc/environmental-health/cohp/lead/parents.shtml>.



As Maine U.S. Senator Angus King and 16 other U.S. Senators recently indicated in an letter to CMS, the failure to screen all Medicaid-eligible children is a “public health crisis.”⁶ The letter highlights the serious and grave risk lead exposure poses to the health of children, and calls on CMS to provide information on what it’s doing to fill data gaps and increase screening rates.


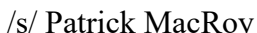

In closing, we recognize that DHHS and CDC are undertaking certain activities to identify lead-poisoned children, to identify and abate lead hazards and to prevent lead poisoning, as outlined in the January 2019 report. However, the state’s past and ongoing failure to screen one- and two-year-old children enrolled in MaineCare, as documented by DHHS and CDC, is causing adverse health effects and economic costs and requires immediate action. More to the point, Maine is not complying with the law.

Among the steps that DHHS, CDC and OMS should consider taking to improve MaineCare lead screening rates and address the breaches outlined above are: establishing financial incentives for MaineCare providers to conduct lead screening (including, but not limited to, increasing Medicaid reimbursements for lead screening and establishing incentive and/or bonus payments for lead screening), creating and implementing performance incentives for MaineCare providers to conduct lead screening (including, but not limited to, report cards for lead screening rates); and educating and providing technical support to MaineCare providers who are unaware of, or unwilling to fulfill, the lead screening requirements.

While these and other solutions to this longstanding public health problem have been available to the state’s public health agencies for years, there has been strikingly little action taken to improve screening rates. DHHS, CDC and OMS must take immediate action to bring the state into compliance with its legal obligations, to protect Maine’s most vulnerable children.

Thank you for your consideration. We look forward to hearing from you.

Sincerely,

		
_____ Phelps Turner Senior Attorney Conservation Law Foundation	_____ Patrick MacRoy Deputy Director Environmental Health Strategy Center	_____ Dana Colihan Community Organizer Toxics Action Center

⁶ See, “King Demands Improvements to Lead Exposure Screening for Children”, <https://www.king.senate.gov/newsroom/press-releases/king-demands-improvements-to-lead-exposure-screening-for-children>.



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