The Honorable Dannel Malloy
Office of the Governor
State Capitol
210 Capitol Avenue
Hartford, CT 06106

Roderick L. Bremby, Commissioner
Connecticut Department of Social Services
25 Sigourney Street
Hartford, CT 06106

December 6, 2017

Dear Governor Malloy and Commissioner Bremby:

We write on behalf of the Connecticut Coalition for Environmental Justice (CCEJ) to urge the Connecticut Department of Social Services (DSS) to rescind Regs. Conn. State Agencies §17b-262-865(4) and DSS's March 2015 Provider Bulletin to Dentists. The regulation states Connecticut "Medicaid does not cover . . . resin-based composite restorations to the molar teeth [of adults 21 and older]." Based on this regulation, in March 2015 DSS stopped their previous practice of allowing prior approval for composite fillings.[1] DSS went so far as to ask dentists who do not use mercury-based dental amalgam to tell their patients to "find a new dental home." Together, the policy espoused in Regs. Conn. State Agencies §17b-262-865(4) and DSS's March 2015 Provider Bulletin removes the ability of the dentist and patient to make a situationally-appropriate choice between resin-based composite and mercury-based dental amalgam.

This letter will highlight two highly problematic aspects of that policy. First, DSS has chosen to presume that it knows what's best for all Medicaid patients, inserting the state into private conversations between patients and their dentists. Second, as a result of this presumption, the policy-mandated increase in mercury-based dental amalgam will add to the amount of mercury in crematoriums, incinerators, and sewage facilities throughout Connecticut. This increases the cumulative chemical burden of those living nearby – populations that are disproportionately low-income communities of color. DSS has the authority to authorize the use of resin-based composite fillings for molar teeth while starting the process of rescinding Regs. Conn. State Agencies §17b-262-865(4) and the policy espoused in the March 2015 Provider Bulletin.[2] We urge DSS to exercise its authority to remove the restriction on composite fillings

[1] DSS, *Provider Bulletin 2015-15* (March 1, 2015).

[2] Nonemergency dental services. Regulations. C.G.S.A. § 17b-282c(b). ("The Commissioner of Social Services may implement policies and procedures necessary to administer the provisions of this section while in the process of adopting such policies and procedures as regulation, provided the commissioner prints notice of intent to adopt regulations in the Connecticut Law Journal not later than twenty days after the date of implementation. Policies and procedures implemented pursuant to this section shall be valid until the time final regulations are adopted.")

so that Medicaid patients can have a choice of treatment and a chance to reduce the chemical burdens in their communities.

I. Dental filling choice should be between the patient and their dentist.

In its brochure, *Fillings: The Choices You Have*, the Connecticut Department of Energy and Environmental Protection (DEEP) acknowledges that different people have different needs in terms of fillings, needs that often cannot be addressed by amalgam: "What you choose depends on your needs and the best way to repair the cavity in your tooth." That's why the state urges dental consumers to "make the right choice for you" and assures consumers that "[t]he final choice is yours."[3] The FDA position aligns with this policy of allowing the patient and dentist to choose the appropriate treatment:

> FDA recognizes that selection of an appropriate restorative material for an individual patient, and hence an appropriate treatment plan, is a complex matter that requires the expertise of the dental professional. In selecting the appropriate restorative material for an individual patient, the dentist routinely considers many factors, such as the patient's oral health, the material properties of the various options, and the patient's medical history, including whether the patient has a known allergy to mercury.
> 74 Fed. Reg. 38686, 38703 (Aug. 4, 2009).

Unfortunately, DSS has deprived Medicaid patients and their dentists of treatment choice. DSS has chosen mercury-based dental amalgam for them. A March 2015 *Provider Bulletin* informs dentists that "Medicaid will not pay for composite restorations in the molar teeth regardless of whether the practice markets itself as 'amalgam free'." Further, DSS directs amalgam free dentists to "have [their] patients call the Connecticut Dental Health Partnership (CTDHP) . . . to locate a new dental home."[4]

The three previous Provider Bulletins in 2014 and 2015 show that DSS provided for amalgam free offices to place composite fillings. In May 2014, DSS's policy allowed for amalgam free offices to "submit a prior authorization request for procedure D2999 with the comment that they are amalgam free and with an explanation of tooth number(s) and type of filling(s) that are needed. The office will be reimbursed at the amalgam filling rate."[5] In September 2014, DSS released a statement to amalgam free dental providers, announcing that no prior authorization was needed to place a composite filling in the first or second molar.[6] As late as February 2015, DSS noted that claims for composite fillings for first and second molars had

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[3] DEEP, *Fillings: The Choices You Have* at 2 (2006), http://www.ct.gov/deep/lib/deep/mercury/gen_info/fillings_brochure_one_page.pdf.

[4] DSS, *Provider Bulletin 2015-15* (March 1, 2015).

[5] CTDHP, *Provider Partners' Newsletter* (May 2014), https://www.ctdhp.com/documents/Provider%20Newsletter%205-12finalreview.pdf.

[6] "Effective October 1, 2014, composites will be covered for clients 21 and older provided by amalgam free offices. Prior authorization will not be required if a composite procedure code is billed and the tooth number is equal to 2, 3, 14, 15, 18, 19, 30, or 31." DSS Message Archive, *Attention Amalgam Free Dental Providers* (September 2014), https://www.ctdssmap.com/CTPortal/Information/MessagesArchive/tabid/148/Default.aspx.

been improperly denied and would be reprocessed, indicating that DSS still covered the use of composite fillings.[7]

The month after notifying dentists of this administrative error, DSS issued its provider bulletin telling dentists they could not participate in Medicaid if they are amalgam free. The bulletin referred to Regs. Conn. State Agencies § 17b-262-865(4), which states Medicaid does not cover "resin-based composite restorations to the molar teeth [of adults 21 and older]." This regulation had been in effect in 2014, so why was the change in policy suddenly necessary?

In response to the March 2015 bulletin and the policy enshrined in § 17b-262-865(4), Earthjustice sent a letter to Governor Malloy and Commissioner Bremby on December 17, 2015. This letter highlighted medical concerns associated with mercury-based dental amalgam, the violation of Medicaid regulations requiring that limitations on coverage must be reasonable, and the disproportionate effects that this regulation and policy have on low income communities of color in Connecticut.[8]

On January 5, 2016, Commissioner Bremby responded to the Earthjustice letter, offering several explanations as to why DSS changed their policy. First, DSS's letter explains that DSS's policy to exclude composite fillings from Medicaid came from the recommendations of the Dental Policy Advisory Council in 2010.[9] DSS claims that the 2015 DSS restriction on composite fillings aligns with the 2009 U.S. Food and Drug Administration (FDA) final rule on mercury-based dental amalgam fillings.[10] But even FDA's 2009 rule acknowledges concerns about amalgam use in some populations, including people with allergies and hypersensitivities to mercury,[11] people with other metals in their mouths that would come into contact with the amalgam,[12] and pregnant women.[13] So while the FDA's 2009 rule may explain some of the

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[7] "HP has identified a claims processing issue where composites billed by amalgam free dental offices for clients 21 and older for [first or second molar teeth] were denying in error and posting Explanation of Benefit (EOB) code 0608 . . . . The claims have been identified and reprocessed and will appear on your February 10, 2015 Remittance Advice (RA) . . . ." DSS Message Archive, *Attention Dental Providers* (February 2015), https://www.ctdssmap.com/CTPortal/Information/MessagesArchive/tabid/148/Default.aspx.

[8] Hannah Chang and Eve Gartner, Earthjustice, Letter to Governor Malloy and Commissioner Bremby (December 17, 2015).

[9] Commissioner Roderick L. Bremby, *Response letter to Earthjustice attorneys Hannah Chang and Eve Gartner* at 1 (Jan. 5, 2016).

[10] Commissioner Roderick L. Bremby, *Response letter to Earthjustice attorneys Hannah Chang and Eve Gartner* at 1-2 (Jan. 5, 2016).

[11] "FDA concludes that existing data indicate that certain individuals with a pre-existing hypersensitivity or allergy to mercury may be at risk for adverse health effects from mercury vapor released from dental amalgam." 74 Fed. Reg. 38686, 38693 (Aug. 4, 2009).

"Dental amalgam is associated with a risk of adverse tissue reaction, particularly in individuals with a mercury allergy, who may experience additional allergic reactions." 74 Fed. Reg. 38686, 38694 (Aug. 4, 2009).

"Contraindication: Do not use in persons with a known mercury allergy." 74 Fed. Reg. 38686, 38694 (Aug. 4, 2009).

"FDA concluded that various dermatological conditions or lesions of the skin, mouth, and tongue were attributed to direct or indirect contact with dental amalgam, and may have been related to a pre-existing hypersensitivity or allergy to mercury and/or other metals." 74 Fed. Reg. 38686, 38702 (Aug. 4, 2009).

[12] "Dental amalgam devices may corrode under certain conditions, including when they are placed in direct contact with other metals. If a dental amalgam device corrodes, it will lose its strength and will need to be replaced. Corrosion also increases the amount of mercury vapor a dental amalgam device releases." 74 Fed. Reg. 38686, 38695 (Aug. 4, 2009).

Precaution: Do not place the device in direct contact with other types of metals. This labeling precaution recommendation will alert dental professionals of a potential material incompatibility between dental amalgam and other metal restoratives that may be present in the mouth, such as stainless steel, titanium, base metal alloys, and noble metal alloys. It will help ensure that a dental amalgam device is not placed in contact with a metal that will cause the device to corrode." 74 Fed. Reg. 38686, 38695 (Aug. 4, 2009).

origins of the regulation, recommendations from 2010 do not explain the exclusion of amalgam free dental providers and the decision to stop covering composite fillings between February and March of 2015.

Second, DSS alleges the superiority of mercury-based dental amalgam fillings compared with composite fillings.[14] This, too, is unconvincing. Even if mercury-based dental amalgam had no detrimental health effects, there are plenty of reasons that composite fillings may be as safe or safer than mercury-based dental amalgam. For example, the World Health Organization (WHO) argues that using resin-based composite fillings rather than mercury-based dental amalgam fillings causes "less tooth destruction and . . . a longer survival of the tooth itself."[15] Tooth survival and structure, WHO cautions, may be a more important consideration than the longevity of the filling material.[16] While DSS is understandably concerned about "deterioration of the filling,"[17] amalgam fillings do not outlast composite fillings in all situations[18] – underscoring the point that filling choice should be individualized, not prescriptive.

Further, although DSS emphasized that composite fillings "leach bisphenol A (BPA) for the life of the filling,"[19] BPA leaching is negligible - and choosing a dental filling should be a private conversation between a patient and their dentist. Indeed, "a typical dental restoration . . . contains less than 5 μg of BPA for older materials and less than 500 ng of BPA for current materials. Even if all of the BPA is leached out in 1 year, the annual release is still less than 1% or 0.1% of the baseline of BPA intake in the United States."[20]

DSS's letter did eliminate one possibility for the change in policy: it wasn't because of the comparative costs. DSS's letter states that "[u]nder CMAP, payment rates for amalgam and composite fillings are the same, therefore cost is not a factor in this coverage decision."[21] Unfortunately, cost may be a factor for many low-income people who, for medical, environmental, or other personal reasons, need a composite filling. A person waiting for prior authorization for a resin-based composite filling will likely need to take more time off work for a subsequent dental appointment; those who can't do that would need to pay out of pocket for the filling or forgo treatment altogether.[22]

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[13] "The developing neurological systems in fetuses and young children may be more sensitive to the neurotoxic effects of mercury vapor. Very limited to no clinical information is available regarding long-term health outcomes in pregnant women and their developing fetuses, and children under the age of six, including infants who are breastfed." 74 Fed. Reg. 38686, 38706-07 (Aug. 4, 2009).

[14] Commissioner Roderick L. Bremby, *Response letter to Earthjustice attorneys Hannah Chang and Eve Gartner* at 2-3 (Jan. 5, 2016).

[15] World Health Organization, *Future Use of Materials for Dental Restoration* at 16 (2011).

[16] World Health Organization, *Future Use of Materials for Dental Restoration* at 27 (2011).

[17] Commissioner Roderick L. Bremby, *Response letter to Earthjustice attorneys Hannah Chang and Eve Gartner* at 3 (Jan. 5, 2016).

[18] N.J.M. Opdam et al. *12-year Survival of Composite vs. Amalgam Restorations*. 89 J. Dent. Res. 10, 1064-66 (2010).

[19] Commissioner Roderick L. Bremby, *Response letter to Earthjustice attorneys Hannah Chang and Eve Gartner* at 2 (Jan. 5, 2016).

[20] Liang Chen and Byoung In Suh, *Bisphenol A in Dental Materials: A Review*, 1 JSM Dentistry 1004, 3 (2013), https://www.jscimedcentral.com/Dentistry/Articles/dentistry-1-1004.pdf.

[21] Commissioner Roderick L. Bremby, *Response letter to Earthjustice attorneys Hannah Chang and Eve Gartner* at 3 (Jan. 5, 2016).

[22] The procedure for prior authorization is stated in Regs. Conn. State Agencies § 17b-262-866.

As the state shoulders the same cost regardless of the filling type, dental patients are explicitly told they have agency in choosing their dental fillings, and Connecticut-licensed dentists are trained to help patients make the best choices for their individualized dental care, why does DSS insist on patronizing both patients and dentists by mandating a one-size fits all approach?

II. The environmental effects of mercury-based dental amalgam are disproportionately felt by communities of color.

Mercury-based dental amalgam enters the environment in a myriad of ways. For example, dental mercury enters air via cremation,[23] dental clinic emissions,[24] and sewage sludge incineration;[25] water via dental clinic releases[26] and human waste[27]; and soil via landfills,[28] burials,[29] and fertilizer derived from sewage sludge.[30] The United States Geological Survey (USGS) reported that as of 2014, the last available year with data, mercury-based dental amalgam was the second largest domestic use of mercury. Mercury-based dental amalgam was also the leading source of mercury into publicly owned water treatment facilities.[31]

When mercury from dental amalgam enters wastewater or other waterways, "microorganisms can change elemental mercury into methylmercury, a highly toxic form that builds up in fish, shellfish and animals that eat fish."[32] In Connecticut, many subsistence fishermen are from low-income communities and communities of color, and these fishermen are among the most affected by increased mercury content in local fish and shellfish.[33]

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[23] OSPAR Commission, Overview assessment of implementation reports on OSPAR Recommendation 2003/4 on controlling the dispersal of mercury from crematoria (2011), http://www.ospar.org/documents/dbase/publications/p00532/p00532_rec_2003-4_overview_report.pdf.

[24] *See generally* KA Ritchie et. al., *Mercury vapour levels in dental practices and body mercury levels of dentists and controls*, 197 British Dental J. Volume 10 (Nov. 27, 2004); *also see* Mark E. Stone et al., *Mercury vapor levels in exhaust air from dental vacuum systems*, 23 Dental Materials 5 (May 2007).

[25] U.S. Geological Survey, *Changing Patterns in the Use, Recycling, and Material Substitution of Mercury in the United States* at 23 (2013).

[26] U.S. Geological Survey, *Changing Patterns in the Use, Recycling, and Material Substitution of Mercury in the United States* at 23, Fig. 7 (2013).

[27] Skare, I. &Engqvist, A. *Human exposure to mercury and silver released from dental amalgam restorations*. 49 Arch. Environ. Health 5, 384 (1994); Association of Metropolitan Sewerage Agencies, *Evaluation of domestic sources of mercury*, Washington, DC: National Association of Clean Water Agencies, at 10-11 (2000).

[28] U.S. Geological Survey, *Changing Patterns in the Use, Recycling, and Material Substitution of Mercury in the United States* at 23, Fig. 7 (2013).

[29] U.S. Geological Survey, *Changing Patterns in the Use, Recycling, and Material Substitution of Mercury in the United States* at 23, Fig. 7 (2013).

[30] *See* Alexis Cain et al., *Substance Flow Analysis of Mercury Intentionally Used in Products in the United States*, 11 J. of Industrial Ecology 3 (Apr. 23, 2007).

[31] USGS, *2014 Minerals Yearbook: Mercury* at 48.1 (Feb. 2016) https://minerals.usgs.gov/minerals/pubs/commodity/mercury/myb1-2014-mercu.pdf.

[32] EPA, *EPA Will Propose Rule to Protect Waterways by Reducing Mercury from Dental Offices* (Sept. 27, 2010), http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/a640db2ebad201cd852577ab00634848!OpenDocument.

[33] Theresa Sullivan Barger, *Unhealthy mercury levels persist in Connecticut waterways and fish*, New Haven Register (April 19, 2013) (citing research by Dr. Mark Mitchell, co-chairman of the Environmental Health Task Force for the National Medical Association), http://www.nhregister.com/connecticut/article/Unhealthy-mercury-levels-persist-in-Connecticut-11425745.php.

Mercury-based dental amalgam also enters the environment through cremation. When a person with dental amalgam fillings is cremated, the mercury in the fillings volatilizes.[34] In urban settings, crematoriums can be a significant source of environmental mercury.[35] As cremations often occur in the same neighborhoods where the deceased had resided, any mercury released from their cremation affects the air quality of their community. As cremation is increasing in popularity and Medicaid recipients don't have the option of choosing non-mercury based fillings, this means that the policy of only providing Medicaid patients with mercury-based amalgam contributes to an overall increased level of mercury in neighborhoods with high numbers of people on Medicaid, which are disproportionately low-income communities of color. The mercury increase may be slight – we don't currently have neighborhood by neighborhood data on the interplay between dental policy and mercury emissions in Connecticut – but it is just one more addition to the myriad of ways low-income communities of color face cumulative and disproportionate chemical burdens based on historic and present state policy choices.[36] If DSS changed their dental policy to allow Medicaid patients to choose their best treatment option with their dentists, the state would remove one policy-based addition to these communities' chemical exposure.

III. DSS should allow Medicaid to cover composite fillings.

Nationwide, dentists are placing 2-3% fewer mercury-based dental amalgam fillings each year.[37] Connecticut dentistry reflects this nationwide trend; an estimated 50% or more of Connecticut dentists do not use dental amalgam in their practices.[38] Recognizing the importance of individualized dental care, the City of Harford's Court of Common Council passed a resolution in 2015 urging DSS to rescind the restriction on filling choice and to allow all qualified dentists to offer Medicaid services.[39] Instead of welcoming this trend and choosing to help reduce the amount of mercury in dental offices, DSS has chosen to explicitly support the use of mercury in dentistry and decrease access to dental care by restricting Medicaid patient's choices of both dentists and dental decisions.

The choice of what type of filling to use is complex and personal, and should not be mandated by a one-size fits all prescription. Dentists and patients should be given the ability to choose between mercury-based dental amalgam and resin-based composite fillings. As the reimbursement rate for each filling is the same, allowing patients and dentists to use composite fillings will not increase state costs. Instead, removing the ban on composite fillings will give

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[34] Montse Mari and José L. Domingo, *Toxic Emissions from crematories: A review*, 36 Environment Int'l 131, 132 (Oct. 2010), https://www.researchgate.net/profile/Montse_Mari/publication/26888045_Toxic_Emissions_from_Crematories/links/54353dc70cf2dc341dafb6d6/Toxic-Emissions-from-Crematories.pdf.

[35] Montse Mari and José L. Domingo, *Toxic Emissions from crematories: A review*, 36 Environment Int'l 131, 136 (Oct. 2010).

[36] *See generally* Toxics Action Center, *Toxics in Connecticut: A Town by Town Profile* (2007), https://toxicsaction.org/wp-content/uploads/TAC-toxics-in-connecticut.pdf.

[37] 82 Fed. Reg. 27154, 27159 (June 14, 2017).

[38] City of Hartford Court of Common Council Resolution 43 at 26 (Sept. 16, 2016), http://www.hartford.gov/images/TownClerk/Certified_Resolutions_September_14_2015.pdf.

[39] City of Hartford Court of Common Council Resolution 43 at 26 (Sept. 16, 2016).

Medicaid patients and their dentists agency to choose the correct material and procedure for individualized circumstances without worrying about coverage options. Removing the ban will also allow non-amalgam dental practices to participate in Medicaid again, greatly increasing patient choice. Further, allowing patients to choose composite fillings will reduce the overall level of mercury in Connecticut and will particularly lower the amount of mercury in low-income communities of color.

On behalf of all Medicaid patients, communities burdened by a disproportionate share of toxic exposure, and dental staff who must regularly expose themselves to mercury, we strongly urge you to follow the lead of Hartford and correct the policy embodied in Regs. Conn. State Agencies §17b-262-865(4) and the March 2015 DSS Bulletin. Please consider this letter to be a petition for rulemaking under C.G.S.A. § 4-174.

We request that you initiate the process of rescinding Regs. Conn. State Agencies §17b-262-865(4) or respond to this letter within 30 days of receipt. If you have any questions or would like to arrange a meeting, please do not hesitate to contact Sharon Lewis, the Executive Director of CCEJ, at 860-548-1133 ext. 02 or sharonelewis2001@icloud.com.

Sincerely,

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On behalf of:

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