

STATE OF MAINE

DIRIGO HEALTH AGENCY

RE: DETERMINATION OF)
SAVINGS OFFSET PAYMENT)
FOR THE FIRST ASSESSMENT)
YEAR (2006)) DECISION ON
REQUEST FOR
STAY

By letter dated December 19, 2005, the Maine Association of Health Plans (“MAHP”) requested that the Board of Directors of the Dirigo Health Agency (the “Board”) stay implementation of its determination of the savings offset payment pending the outcome of MAHP’s appeal of that determination. The MAHP filed its appeal in Cumberland County Superior Court on December 19, 2005. By letter dated January 4, 2006, the Maine State Chamber of Commerce (the “Chamber”) joined in the request of the MAHP for a stay. The Chamber filed its appeal in Kennebec County Superior Court on December 22, 2005. The Maine Automobile Dealers Association Insurance Trust and the Bankers Health Trust (the “Trusts”) joined in the request for stay by letter dated January 5, 2006. The Trusts filed their appeal in Kennebec County Superior Court on December 21, 2005

The request for stay by MAHP, the Chamber and the Trusts (the “Petitioners”) was made in accordance with 5 M. R. S. A. § 11004 that authorizes an agency, in its discretion, to issue a stay “upon a showing of irreparable injury to the petitioner, a strong likelihood of success on the merits, and no substantial harm to adverse parties or the general public.”

The Board determined, in accordance with 24-A M. R. S. A. § 6913, that the savings offset amount for the first assessment year (2006) was \$43.7 million. This is the

amount the Board determined is necessary to provide subsidies to eligible individuals and employees under 24-A M. R. S. A. § 6912 and to support the Maine Quality Forum. 24-A M. R. S. A. § 6913 (2) (D). This determination followed a decision by the Superintendent of Insurance that the \$43.7 million of aggregate measurable cost savings determined by the Board was reasonably supported by the evidence in the record. The Superintendent rendered his decision after two days of hearings conducted pursuant to the Maine Administrative Procedures Act, 5 M. R. S. A. § 9051, et seq. Many of the arguments the Petitioners raise in support of their respective appeals and in support of their request for a stay were made in the proceedings conducted by the Superintendent.

Prior to making its determination of the savings offset payment, the Board reviewed materials prepared by the staff of the Dirigo Health Agency (the “Agency”) setting forth the financial position of the Agency, the projected enrollment in DirigoChoice and the projected need for subsidies. In addition, the Board provided an opportunity for all interested persons to submit written comments regarding the amount of the savings offset payment and to make oral presentations to the Board.

Injunctive relief, in the form of a stay, is “an extraordinary remedy only to be granted with utmost caution when justice urgently demands it and the remedies at law fail to meet the requirements of the case.” *Lisbon School Comm. v. Lisbon Educ. Assoc.*, 438 A.2d 239, 246 (Me. 1981) (internal quotations omitted); *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (a preliminary injunction “is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.”) (emphasis in original).

It is against this background that the Board has considered the request for stay made by the Petitioners.

1. Irreparable injury to petitioner.

The Petitioners assert that they and their members will suffer financial harm if a stay is not granted. This harm will be in the nature of higher premiums for health insurance and certain administrative expenses incurred in establishing systems for calculating, billing and collecting the savings offset payment. The MAHP alleges that the administrative expenses are, in part, the result of the compressed time established for the determination of the savings offset payment. The courts generally do not recognize financial or economic harm as constituting irreparable injury. See, *Clemente v. Pearle Vision, Inc.*, 762 F. Supp. 1518, 1519 (D. Me. 1991) (allegations of economic harm insufficient to establish irreparable harm for purposes of temporary restraining order); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bishop*, 839 F. Supp. 68, 70 (D. Me.1993) (economic harm alone itself not sufficient to constitute irreparable injury). With regard to an increase in premiums, the Superintendent recently found that savings from the operation of Dirigo Health have been incorporated into premiums and that Anthem Blue Cross and Blue Shield, a member of MAHP, could include any savings offset payments in the premiums. See, In Re: Anthem Blue Cross and Blue Shield 2006 Individual Rate Filing for HealthChoice and HealthChoice Standard and Basic Products, Docket No. INS-05-820, Decision and Order, December 19, 2005.¹ It is also noted that the provision for assessment of the savings offset payment was contained in the P. L. 2003, ch. 469 and therefore the MAHP and its members had adequate notice of any related need to plan to

¹ The Board notes that, to the extent Anthem reduced premiums as a result of savings from the operation of Dirigo Health, including any savings offset payment in the premium should result in no increase in the amount of the current premium that can be attributed to the Dirigo Health Program.

implement any changes to its calculation, billing and collection processes. Accordingly, the Board finds that the Petitioners have failed to meet their burden of showing irreparable injury.

2. Likelihood of success on the merits.

The Petitioners have made a broad based attack on the Dirigo Act and the process that resulted in the determination of the savings offset payment. This attack fails to recognize that the savings offset payment determination for the first assessment year was made in accordance with a legislative directive that did not take into account the unavailability of data due to the short period of time in which Dirigo Health had been operating. Thus, it was not possible for the Agency to collect and analyze data on experience with the recovery of the savings offset payment as envisioned in 24-A M. R. S. A. §6913 (7) and (8). Similarly, the amount of paid claims for 2006 obviously is not available and the Agency clearly stated that it will make appropriate adjustments for any assessment in excess of paid claims for 2006 in the next savings offset payment assessment. In addition, contrary to the assertions made by the MAHP and the Chamber, the Agency did report available information to the Legislature as required by 24-A M. R. S. A. § 6913 (8) (A).

Although the Agency has not completed the rule making process for adoption of a definition of paid claims, the proposed rule incorporates the definition as developed by the Working Group established by the Legislature in P. L. 2005, ch. 400 and it is this definition that was used by the Board in making its determination of the savings offset payment. The allegations of Petitioners that the determination of aggregate measurable cost savings and the savings offset payment included items not attributable to the

operation of Dirigo and not intended by the Legislature to be included in that determination are a challenge to the Board's interpretation of the Dirigo Act. The Board, however, is charged with the administration of the Dirigo Act and its interpretation of the Act is entitled to deference and will be upheld unless the statute compels a contrary result. *Murphy v. Board of Environmental Protection*, 615 A. 2d 255, 259 (Me. 1992), and cases cited therein. In this case, the Dirigo Act does not compel a conclusion, for example, that CMAD is not appropriately included in aggregate measurable cost saving and contributions for the MaineCare expansion are not appropriately included in the savings offset payment.

The Petitioners present arguments but cite no authority, to support their claims of other "legal flaws" in the Board's determination. In fact, there is no statutory support for their claim that savings must be realized by payors before an assessment can be made; there is no factual basis for the claim that the Agency is seeking funding for more than 12 months; and the Superintendent has found that there have been savings from limits on CMAD that are attributable to the operations of Dirigo Health.

The Dirigo Act does not require the Board to hold an adjudicatory hearing with regard to the determination of the savings offset payment. 24-A M. R. S. A. § 6913 (2) (A). The Board provided interested persons a full opportunity to present written comments and make oral presentations prior to making its determination. This satisfies the minimal requirements of due process that adhere to the administrative process. See *In re Maine Clean Fuels, Inc.*, 310 A. 2d 736, 746 (Me. 1973).

To succeed on their claim that the Dirigo Act is unconstitutional Petitioners bear the heavy burden of overcoming the presumption of constitutionality of legislative

enactments. *Fredette v. Secretary of State*, 1997 ME 105, ¶6, 693 A. 2d 1146, 1148.

Absent a “clear showing by strong and convincing reasons that it conflicts with the Constitution,” a statute will not be invalidated. *Id.*, citing *State v. McGillicuddy*, 646 A. 2d 354, 355 (Me. 1994) (internal quotations omitted). Petitioners have not made such a showing with regard to the Dirigo Act.

For all of the above reasons, the Board finds that the Petitioners have not met their burden of showing a strong likelihood of success on the merits.

3. Substantial adverse harm to the adverse parties or the general public

Two of the essential purposes of the Dirigo Act were to provide health insurance to uninsured and underinsured citizens in Maine and to control the growth of health care costs in Maine. The DirigoChoice Health Insurance Plan serves these two purposes by making subsidies available to eligible individuals and employees and thereby reducing bad debt and charity care costs. The funds necessary to provide these subsidies comes from the savings offset payment. 24-A M. R. S. A. § 6913 (1) (A) and (2) (D). The Agency presentation at the Board meetings that as of April 1, 2006 it would be unable to continue the subsidy programs without the savings offset payment was not rebutted by Petitioners or any other participant. In addition, the full \$43.7 million was necessary if the Agency is to make available DirigoChoice to the 3,000 persons on the waiting list for coverage. The granting of the stay therefore would substantially harm the Agency and the general public.

For all of the foregoing reasons, the Board denies the request of the Petitioners for a stay of the Board’s determination of the amount of the savings offset payment made on

November 22, 2005 and its calculation of the savings offset payments as a percentage of paid claims made on December 7, 2005.

Dated: January 10, 006

DIRIGO BOARD OF DIRECTORS



Robert McAfee, M.D.
Chair, Dirigo Board of Directors