

STATE OF MAINE
DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION
BUREAU OF INSURANCE

IN RE: REVIEW OF AGGREGATE)
MEASURABLE COST SAVINGS) DECISION AND ORDER
DETERMINED BY DIRIGO) ON REMAND
HEALTH FOR THE FOURTH)
ASSESSMENT YEAR)
)
)
Docket No. INS-08-900)

For the reasons set forth below, Superintendent of Insurance Mila Kofman hereby approves the determination by the Board of Directors (the "Board") of the Dirigo Health Agency ("DHA") calculating aggregate measurable cost savings ("AMCS") for the fourth assessment year in the amount of \$78.9 million.

I. BACKGROUND AND PROCEDURAL HISTORY

This is the fourth and final adjudicatory proceeding conducted under former 24-A M.R.S.A. § 6913,¹ which has required the Board, subject to review by the Superintendent, to determine:

the aggregate measurable cost savings, including any reduction or avoidance of bad debt and charity care costs to health care providers in this State as a result of the operation of Dirigo Health and any increased MaineCare enrollment due to an expansion in MaineCare eligibility occurring after June 30, 2004.

A Decision and Order approving the Board's original determination in part was issued on September 30, 2008, but was vacated on appeal by the Superior Court on August 31, 2009.² On October 2, 2009, pursuant to the Superior Court's order, the matter was remanded to the Board for further proceedings. Following a public hearing held on December 16, 2009, the Board voted 6-1 to adopt DHA's recommended determination of AMCS.³ On January 14, 2010, the Dirigo Board filed the determination of AMCS for approval with the Superintendent, together with supporting documentation.

Pursuant to former 24-A M.R.S.A. § 6913(1)(C) and the Procedural Order issued on January 27, 2010, a public adjudicatory hearing was held on February 12, 2010, subject to the Maine Administrative Procedure Act, 5 M.R.S.A. chapter 375, subchapter 4; 24-A M.R.S.A.

¹ Although Section 6913 was repealed as of October 1, 2009, it continues to apply to matters related to the calculation of savings offset payments based on claims paid before that date. P.L. 2009, ch. 359, §§ 2 & 7.

² *Maine Automobile Dealers Association Insurance Trust, et al. v. Superintendent of Insurance and Dirigo Health Agency*, KEN-AP-08-71, -08-72, -08-73, & -08-74 (Me. Super. Ct., Ken. Cty., Aug. 31, 2009) (Jabar, J.).

³ Board members Jonathan S.R. Beal, Mary E. McAleney, Edward David, M.D., Sara Gagne Holmes, and Mary Anne Turowski, and Robert McAfee, M.D. (Chair) voted in favor. Board member Joseph Bruno opposed. Non-voting *ex officio* members Anne Head, Commissioner of Professional and Financial Regulation, Ellen Schreier representing the Department of Administrative and Financial Services, and David Lemoine, State Treasurer, also participated in the hearing and deliberations. Non-voting *ex officio* member Trish Riley, Director of the Governor's Office of Health Policy & Finance, did not participate in the Board's deliberations.

§§ 229 to 236; and Bureau of Insurance Rule 350. The evidentiary record was left open at the close of the hearing, and closed by order issued that afternoon.

DHA, through its Board, is the moving party in this proceeding. By order issued August 18, 2008, the following additional parties were granted permission to intervene: the Maine Automobile Dealers Association Insurance Trust (the "Trust"), the Maine State Chamber of Commerce (the "Chamber"), the Maine Association of Health Plans ("MEAHP"), Anthem Health Plans of Maine, Inc. ("Anthem"), and Consumers for Affordable Health Care ("CAHC"). There were no subsequent withdrawals or additional requests to intervene.

II. ANALYSIS

On remand, DHA conducted a *de novo* redetermination of AMCS. Adopting DHA's analysis, the Board found savings in two categories: hospital cost savings of \$67.3 million and bad debt and charity care savings of \$11.6 million. Finding no reasonable basis upon which to make an adjustment for overlap between the two categories, the Board found the aggregate savings to be \$78.9 million.

Unlike prior AMCS determinations, this one was uncontested. No intervenor exercised its right to submit evidence or to cross-examine DHA's witness at the Board hearing. In the proceeding before the Superintendent, all parties were given the opportunity to file briefs, make statements, and ask questions. No party filed a brief, and only DHA spoke at the hearing. After DHA's presentation, the Superintendent offered an additional opportunity for questions or comments, which the three intervenors present declined.⁴

Notwithstanding the lack of any disputed issues, I am required to conduct a hearing and to determine whether or not "the aggregate measurable cost savings filed by the board are reasonably supported by the evidence in the record." Former 24-A M.R.S.A. § 6913(1)(C). My staff and my expert consultant carefully reviewed the DHA report to verify that the data and methodology supported the report's conclusions.

The Superior Court has ruled that in conducting this review, I am to act in a quasi-appellate capacity. Thus, the question before me is not whether the Board's determination is correct, but only whether it is reasonable, based on the evidence presented to the Board. On this record, I cannot say that the Board acted unreasonably. It would not be appropriate to consider alternative premises, data, or methodologies, because none were offered by any party.

The Board's decision expressly recognized that in the proceeding below, "The burden rests with DHA to demonstrate that its determination of AMCS is reasonable." The Board's non-unanimous decision indicates that members took this burden of proof seriously. At the hearing before the Superintendent, my consultant questioned DHA's representative about the approach taken in the latest determination of AMCS. DHA recognized the need for a determination "that can withstand the scrutiny of independent evaluators" (*Tr. 7*),⁵ and acknowledged that "each year we've been aware that the data has been an issue. And

⁴ The Trust, MEAHP, and Anthem attended the hearing. The Chamber and CAHC did not attend.

⁵ "Tr." stands for the transcript of the Superintendent's February 12 hearing.

particularly after the first round of proceedings on Year Four, one of the directions we gave to the consultants was that you really have to clean up the data and clearly identify the data sources and make clear exactly what you're doing with the data this year. I think they certainly made a much greater effort than they had ever done before, and I think they focused a lot of time on the data." (Tr. 11) DHA engaged a second consultant to review the work of the primary consultant, and praised "the rigor that Dr. Atherly brought" to the process. (Tr. 10) My consultant agreed that Dr. Atherly's work and DHA's documentation were very helpful. (Tr. 11)

I therefore conclude that the Board's determination was reasonably supported by the evidence in the record.

III. ORDER AND NOTICE OF APPEAL RIGHTS

By reason of the foregoing, the Superintendent ORDERS that the Dirigo Board's determination of aggregate measurable cost savings in the amount of \$78.9 million is APPROVED.

This Decision and Order on Remand is final agency action of the Superintendent of Insurance within the meaning of the Maine Administrative Procedure Act. Any party may appeal this Decision and Order on Remand to the Superior Court as provided by 24-A M.R.S.A. § 236, 5 M.R.S.A. § 11001, *et seq.*, and M.R. Civ. P. 80C. Any such party must initiate an appeal within thirty days after receiving this notice. Any aggrieved non-party whose interests are substantially and directly affected by this Decision and Order on Remand may initiate an appeal within forty days after the issuance of this decision. There is no automatic stay pending appeal; application for stay may be made as provided in 5 M.R.S.A. § 11004.

PER ORDER OF



February 19, 2010

MILA KOFMAN, Superintendent