

Christopher T. Roach

One Monument Square
Portland, ME 04101

207-791-1373 voice
207-791-1350 fax
croach@pierceatwood.com
pierceatwood.com

October 7, 2005

VIA HAND DELIVERY

Alessandro A. Iuppa, Superintendent
Attn: Vanessa J. Leon
Docket No. INS-05-700
Maine Bureau of Insurance
34 State House Station
Gardiner, Maine 04333-0034

In Re: Review of Aggregate Measurable Cost Savings Determined By Dirigo Health
For the First Assessment Year

Dear Superintendent Iuppa:

Enclosed for filing please find two hard copies of the following:

SUBMITTED BY: Christopher T. Roach
DATE: October 7, 2005
DOCUMENT TITLE: Memorandum of Law on Standard of Review
DOCUMENT TYPE: Memorandum of Law
CONFIDENTIAL: **No**

Thank you for your assistance in this matter.

Very truly yours,



Christopher T. Roach

cc: John Kelly
Thomas C. Sturtevant, Jr.

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

IN RE:)	
)	
REVIEW OF AGGREGATE)	
MEASURABLE COST SAVINGS)	MEMORANDUM OF LAW
DETERMINED BY DIRIGO HEALTH)	ON STANDARD OF REVIEW
FOR THE FIRST ASSESSMENT YEAR)	
)	
Docket No. INS-05-700)	
)	

Pursuant to the deadline designated by the Deputy Superintendent on October 5, 2005, Anthem Health Plans of Maine, Inc. d/b/a/ Anthem Blue Cross and Blue Shield (“Anthem BCBS”), by and through its attorney, hereby expands upon its position in its Response to Motion to Dismiss, dated September 30, 2005, that the hearing before the Superintendent is *de novo*, with no deference to the Board’s recommendation. Anthem BCBS respectfully requests that the Superintendent rule explicitly on the standards that he will apply in this proceeding so that all parties are clear on how the evidence presented will be reviewed. Anthem BCBS has no doubt that the Superintendent will conduct a fair hearing guided by his interpretation of the statutory parameters for the hearing. It is important for the parties, however, including Anthem BCBS, to understand clearly and unambiguously the extent to which the Superintendent interprets the Dirigo Act as requiring any deference in his review of the evidence to be presented at the hearing in this matter.

I. The Plain Language of Section 6913 Makes Clear that the Superintendent's Review is *De Novo*, with No Deference to the Board.

We start with the relevant text:

A. No later than the effective date of this Act, the board shall file with the Superintendent of Insurance its determination as to the aggregate measurable cost savings in this State, including any reduction or avoidance of bad debt and charity care cost to health care providers 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 as well as the supporting information for that determination. The filing constitutes a public record; and

B. Following a public hearing held in accordance with the Maine Administrative Procedure Act and no later than 6 weeks following the receipt of the board's determination, the superintendent shall issue an order approving, in whole or in part, or disapproving the filing made under paragraph B. The board is designated a party to the hearing. The superintendent shall approve the filing upon a determination that the aggregate measurable cost savings filed by the board are reasonably supported by the evidence in the record.

24-A M.R.S.A. § 6913, as enacted by P.L. 2005, ch. 400, §B-2 (2) (B).

Under this language, the Board is directed to make a calculation, which it “files” *as a party*, in an adjudicatory hearing before the Superintendent, who is directed to approve or disapprove the Board’s “filing.” To determine whether to accept or reject in whole or in part the Board’s proposal, the Superintendent holds a hearing governed by the Maine Administrative Procedure Act.

The process set forth in Section 6913 thus makes the Board a participant in an adjudicatory proceeding before the Superintendent, and not an adjudicator itself. The Board’s determination is identified as a “filing,” to be “approved” by the Superintendent, and the Board is a “party,” not an adjudicator. The Legislature provided that the Superintendent will hold a proceeding similar to rate cases, in which one party (here the Board) files a proposal, upon which others may be heard. It is then up to the Superintendent, within his discretion, to make the first truly adjudicated determination, based on the proposing party’s filing.

Not only is the language used in Section 6913 telling and clear, but equally determinative on this issue is what the statute does *not* say. Nowhere does Section 6913 used the term “appeal” or otherwise identify the Board’s determination as an adjudicated decision to be “affirmed,” “amended” or “reversed.” Contrast statutory schemes that do have intra-agency appeals, *e.g.*, the Department of Environmental Protection, 38 M.R.S.A. 341-D(4) (using this terminology).

Indeed, in an appellate situation, the adjudicating agency is typically not a proper “party” at all, just as a litigant would not name the trial court justice in an appeal to the Law Court. *See Bureau of Taxation v. Town of Washburn*, 490 A.2d 1182, 1184 (Me. 1985).¹

Further, Section 6913 describes the nature of the Superintendent’s review as including a “a public hearing held in accordance with the Maine Administrative Procedure Act.” The APA discusses public hearings in adjudicatory proceedings in 5 M.R.S.A §§ 9052 *et seq.* Section 9056(2) gives every party the right to submit evidence in such a hearing. An evidentiary hearing is not ordinarily considered an appeal, and nothing in the APA suggests that such a hearing means anything but an initial, non-deferential review of a party application. When evidence is submitted and reviewed, the proceeding is deemed *de novo*. *See Stewart v. Town of Sedgewick*, 2000 ME 157, 757 A.2d 773.

Moreover, the Superintendent has the authority to approve “in whole, or in part” the Dirigo Board’s filing. If it were not otherwise so, the reference to approval “in part” makes clear that the Superintendent is not simply bound to give a “thumbs up or thumbs down” to the Dirigo Board filing, but rather is vested with the discretion to approve some parts and, presumably, deny

¹ The Superintendent and other agencies are named as parties in administrative appeals because of their enforcement, not adjudicatory functions. *See Washburn, supra*, 490 A.2d at 1194. *See also, e.g. Adler v. Town of Cumberland*, 623 A.2d 180,180 n. 1 (Me.1993) (board not proper party to appeal); *State v. Maine Labor Relations Board*, 413 A.2d 510, 512 (Me. 1980) (state board proper party in appeal because of its prosecutorial responsibilities); *Department of Mental Health and Corrections v. Chase*, 428 A.2d 410, 412 (Me. 1981) (state board not proper party to suit seeking review of its own decision).

others while indicating different parameters under which the Superintendent would approve the filing.

In sum, one need go no further than the plain text of the statute, which makes clear that the Superintendent's review of the Board's filing is *de novo*, with no deference to that particular party's position.

II. Rules of Statutory Construction Underscore that the Superintendent's Review is *De Novo*, With No Deference to the Board.

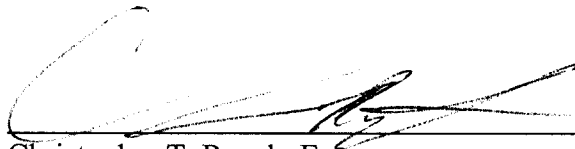
While one need not and should not go beyond the statute's text because it is not ambiguous, if it somehow were unclear, aids to construction only confirm what the text says: the Superintendent's review is *de novo*, with no deference. The legislative history of P.L. 2005 is silent on this issue. The next step, therefore, is to look to rules of statutory construction. A fundamental rule of construction is to avoid unconstitutional interpretations. *State v. Copley*, 544 A.2d 302, 304 (Me.1988) ("this Court is bound to avoid an unconstitutional interpretation of a statute if a reasonable interpretation of the statute would satisfy constitutional requirements") (quoting *Bossie v. State*, 488 A.2d 477, 479 (Me.1985)). Administrative due process principles are flexible, but require, at a minimum, a fair opportunity to be heard before an unbiased tribunal. Additionally, the Law Court has made clear that when a statutory scheme is silent as to whether a board is acting *de novo* or in an appellate capacity, the presumption is that the hearing is *de novo*. See *Logan v. City of Biddeford*, 2001 ME 84, P7, 772 A.2d 183, n.1.

Given what is at stake in this proceeding – a determination that could impact Maine residents by tens of millions of dollars – all involved, including the Board itself,² have a vested interest in ensuring a fair and unbiased adjudicatory hearing that provides all litigants with the right to be heard and present evidence equally and without deference to one. Neither the plain language, nor constitutional requirements of fundamental fairness, would support that view.

CONCLUSION

For all these reasons, Anthem BCBS requests that the Superintendent issue an order confirming that his review here is *de novo*, with no deference to the Board's determination as set forth in its filing.

DATED: October 7, 2005



Christopher T. Roach, Esq.

PIERCE ATWOOD
One Monument Square
Portland, ME 04101
(207) 791-1100
Attorney for Applicant
Anthem Health Plans of Maine, Inc.

² Indeed the Board, perhaps more than any other party to this proceeding, has an interest not only in ensuring a fair and unbiased adjudicatory process, but in reducing to the extent possible the potential for delay resulting from challenges to the procedural processes that lead ultimately to a final determination of the aggregate measurable savings and savings offset payment.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 7, 2005, a copy Anthem BCBS Memorandum of Law on Standard of Review was served via electronic and US mail on each of the persons listed below:

Thomas C. Sturtevant, Jr.
Assistant Attorney General
Department of the Attorney General
6 State House Station
Augusta, Maine 04333-0006

Compass Health Analytics, Inc.
Attn: John Kelly
465 Congress Street, 7th Floor
Portland, Maine 04101

Roy T. Pierce, Esquire
PretiFlaherty
One City Center
P. O. Box 9546
Portland, ME 04112-9546

William H. Laubenstein, III, Esquire
Office of The Attorney General
6 State House Station
Augusta, Maine 04333-0006

William H. Stiles, Esquire
Verill Dana, LLP
One Portland Square
Portland, ME 04101

Rufus E. Brown, Esquire
Brown & Burke
85 Exchange Street, Suite 201
P.O. Box 7530
Portland, ME 04112

D. Michael Frink, Esquire
Curtis, Thaxter, Stevens, Broder
& Micoleau, LLC
One Canal Plaza
P.O. Box 7320
Portland, ME 04112-7320

DATED: October 7, 2005



Christopher T. Roach, Esq.

PIERCE ATWOOD
One Monument Square
Portland, ME 04101
(207) 791-1100
Attorney for Anthem Health Plans of Maine, Inc.