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October 7, 2005

VIA E-MAIL AND US MAIL

Alessandro A. Iuppa, Superintendent
Attn: Vanessa J. Leon, Docket No. INS-05-700
Bureau of Insurance
Maine Department of Professional and Financial Regulation
34 State House Station
Augusta, ME 04333-0034


**RE: In Re: Review of Aggregate Measurable Cost Savings Determined by
Dirigo Health for the First Assessment Year
Docket No. INS-05-700**

Dear Superintendent Iuppa:

Enclosed for filing in the above-referenced matter please find the original and one (1) copy of the Maine Association of Health Plans' Memorandum of Law, as requested by Deputy Superintendent Cioppa during the October 5 prehearing conference in this Docket.

Thank you for your attention to this matter.

Sincerely,



D. Michael Frink

DMF/acd
Enclosure

Cc: John Kelly (via mail and email)
Thomas C. Sturtevant, Jr., Esq. (via mail and email)
William H. Laubenstein, III, Esq.
Christopher T. Roach, Esq.
Rufus E. Brown, Esq.
Bruce Gerrity, Esq.
William H. Stiles, Esq.

STATE OF MAINE

DEPARTMENT OF PROFESSIONAL & FINANCIAL REGULATION

BUREAU OF INSURANCE

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

FILING COVER SHEET

TO: Superintendent, Bureau of Insurance
Attn: Vanessa J. Leon

DATE FILED: October 7, 2005

PARTY: Maine Association of Health Plans

DOCUMENT: Memorandum of Law on Standard of Review

DOCUMENT TYPE: Memorandum

CONFIDENTIALITY: None.



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STATE OF MAINE

DEPARTMENT OF PROFESSIONAL & FINANCIAL REGULATION

BUREAU OF INSURANCE

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

In line with the Deputy Superintendent's direction at the prehearing conference held in this Docket on October 5, 2005, the Maine Association of Health Plans ("MEAHP" or the "Association") submits this Memorandum of Law regarding the standard of review to be employed by the Superintendent in this case and related issues.

**THE BUREAU SHOULD NOT ACCORD ANY DEFERENCE TO THE
DETERMINATIONS MADE BY DIRIGO HEALTH AGENCY IN DETERMINING
AGGREGATE MEASURABLE SAVINGS**

In the course of the October 5 prehearing conference in this Docket, Deputy Superintendent Cioppa advised that the Bureau of Insurance (the "Bureau") intended to treat the filing made by Dirigo Health Agency ("DHA") just as it would a typical insurance rate filing submitted by an insurer.

MEAHP fully endorses this approach.

The Legislature established the outlines of the proceeding now before the Bureau in 2005 Public Laws c. 400, Section B-2(2)(A). This Section requires DHA to file its determination, together with its "supporting information," with the Bureau. Subsection B-2(2)(B) then states that, following a hearing held in accordance with the Maine Administrative Procedures Act (the "Maine APA"), the Superintendent of Insurance (the "Superintendent") shall approve, in whole or in part, or disapprove DHA's "filing" based on his "determination" of whether DHA's proposed savings are "reasonably supported by the evidence in the record."

DHA's suggestion, made during the October 5 prehearing conference, that by "the record" the Legislature meant the "record" (such as it is) of the activities that took place before the DHA Board prior to this filing makes no sense. In the above-quoted law, the Legislature directed that the hearing before the Bureau be held in accordance with the Maine APA. The Maine APA specifically requires the agency holding the hearing to "make a record" consisting of the pleadings, evidence, proposed decision, etc., in the case before it. 5 M.R.S.A §9059(1). No one should doubt that the record which the Maine APA requires the Bureau to make of this Docket is the "record" mentioned by the Legislature in Subsection B-2(2)(B). Had the

Legislature intended the Superintendent to restrict his review to the “record” made by DHA, rather than the record now being compiled in this Docket, it would certainly have said so.

In fact, up to the point of the October 5 prehearing conference DHA’s conduct has been fully consistent with this view. For example, DHA’s September 19 cover letter transmitting its initial filing (the “Initial Filing”) states (at 4) that the DHA Board deliberated and reached its decision with respect to a savings calculation on September 14. However, DHA includes in its Initial Filing both the September 14 Draft Final Report of its consultant, the Mercer Group, *and* the Mercer Group’s Final Report. The Final Report, which is dated September 19 – the date of the Initial Filing – contains numerous appendices and other material not included in the Draft Report. Had DHA truly believed that the “record” referred to in Subsection B-2(2)(B) was the “record” of the activities occurring before the DHA Board, it would only have submitted the Draft Report, since the Final Report was not available at the time that the DHA Board finalized its savings calculation (and therefore could not have been part of any “record” before the DHA).

As this demonstrates, DHA wants to have it both ways. It interprets the reference to the “record” in Subsection B-2(2)(B) as the “record” before the DHA Board, and then rests on this premise its argument that the Bureau must accord some degree of deference to the DHA Board’s determination. In apparent recognition, however, that it cannot sustain this position, DHA simultaneously proffers for inclusion in the record in this Docket (and in support of its position) a significant document, the Final Mercer Report with numerous appendices, which was not before the DHA Board when it voted on September 14, 2005.

As counsel to DHA conceded at the October 5 prehearing conference, and as betokened by its submission of material not available to the DHA Board in its Initial Filing, DHA must “prove” the reasonableness of its savings. This it apparently plans to do by submitting prefiled testimony and other evidence (such as the evidentiary material in Mercer’s Final Report), just as any party seeking to sustain its burden of proof in a *de novo* hearing would do.

MEAHP would point out that the upcoming hearing before the Bureau will be the first time that DHA’s savings calculation will be tested before a neutral forum through the Maine APA procedures required by the Legislature under Subsection B-2(2)(B): discovery, cross-examination of DHA witnesses and the opportunity for presentation of formal testimony in opposition. In MEAHP’s view, it would be anomalous to suggest that the Legislature would require the Bureau to carry out the rigorous procedures of a *de novo* hearing under the Maine APA, but then give deference to DHA’s savings calculations.

MEAHP submits that Deputy Superintendent Cioppa’s determination that the Bureau will treat DHA’s filing just as it would an insurance rate filing is sound, and should control the allocation of burden of proof and the standard of review to be employed by the Bureau. In insurance rate filings before the Bureau, the filing party “bears the burden of proving by a preponderance of the evidence that its proposed rates are not inadequate, excessive, or unfairly discriminatory.” (*See, e.g., Anthem Blue Cross and Blue Shield 2005 Individual Rate Filing for HealthChoice, HealthChoice Standard and Basic Products*, Bureau of Insurance Docket No. INS-04-610, Decision and Order dated December 16, 2004, at 3. It is safe to assume that the Legislature intended that DHA’s savings calculation be subjected a degree of scrutiny no less

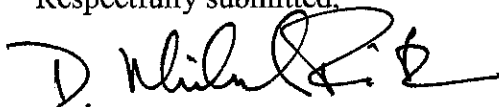
than that customarily employed by the Bureau in reviewing any other filing that could result in a change in rates charged to Maine consumers.

MEAHP therefore respectfully requests that the Superintendent determine:

- (a) that he will not accord any measure of deference to the savings calculation made by DHA;
- (b) that DHA shall have the burden of proof as to the reasonableness of its savings calculation; and
- (c) that DHA must prove the reasonableness of its savings calculation by a preponderance of the evidence.

Dated at Portland, Maine, this 7th day of October, 2005.

Respectfully submitted,



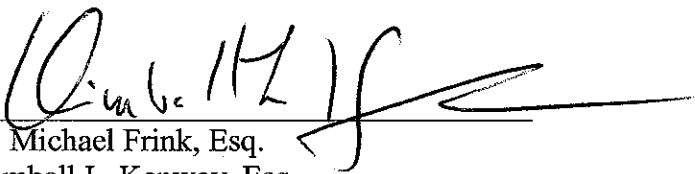
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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2005, by 3:00 p.m., I served via electronic mail a copy of the above filing on:

Alessandro A. Iuppa, Superintendent
Attn: Vanessa J. Leon, Docket No. INS-05-700
Bureau of Insurance
Maine Department of Professional and Financial Regulation
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Augusta, ME 04333-0034

Dirigo Health Agency
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