STATE OF MAINE
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT
CIVIL ACTION
Doc. No. BCD-AP-18-02

MAINE EQUAL JUSTICE PARTNERS, CONSUMERS FOR AFFORDABLE HEALTH CARE, et al.

Petitioners

v.

RICKER HAMILTON, COMMISSIONER MAINE DEPARTMENT OF HEALTH AND HUMAN SERVICES

Respondent

ORDER ON M.R. CIV. P. 80C APPEAL OF AGENCY ACTION

I. Background

On November 7, 2017, the people of Maine enacted "An Act to Enhance Access to Affordable Health" ("2017 I.B. 2") by citizens' initiative. It was codified at 22 M.R.S. § 3174-G(1)(H). 2017 I.B. 2 adds the following language to Section 3174-G:

> **1. Delivery of services.** The department shall provide for the delivery of federally approved Medicaid services to the following persons:
> …
> G. No later than 180 days after the effective date of this paragraph, a person under 65 years of age who is not otherwise eligible for assistance under this chapter and who qualifies for medical assistance pursuant to 42 United States Code, Section 1396a(a)(10)(A)(i)(VIII) when the person's income is at or below 133% plus 5% of the nonfarm income official poverty line for the applicable family size. The department shall provide such a person, at a minimum, the same scope of medical assistance as is provided to a person described in paragraph E.
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> Cost sharing, including copayments, for coverage established under this paragraph may not exceed the maximum allowable amounts authorized under section 3173-C, subsection 7. No later than 90 days after the effective date of this paragraph, the department shall submit a state plan amendment to the United

> States Department of Health and Human Services, Centers for Medicare and Medicaid Services ensuring MaineCare eligibility for people under 65 years of age who qualify for medical assistance pursuant to 42 United States Code, Section 1396a(a)(10)(A)(i)(VIII).
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> The department shall adopt rules, including emergency rules pursuant to Title 5, section 8054 if necessary, to implement this paragraph in a timely manner to ensure that the persons described in this paragraph are enrolled for and eligible to receive services no later than 180 days after the effective date of this paragraph. Rules adopted pursuant to this paragraph are routine technical rules as defined by Title 5, chapter 375, subchapter 2-A.

22 M.R.S. § 3174-G(1)(H), 2017 I.B. 2. By voting in favor of 2017 I.B. 2, the people of Maine voted to expand MaineCare coverage to low-income individuals under the age of 65 who qualify for assistance according to federal guidelines set out in 42 United States Code, Section 1396a(a)(10)(A)(i)(VIII). Expansion pursuant to 2017 I.B. 2 allows the State of Maine to take advantage of a provision of the Patient Protection and Affordable Care Act ("ACA") that extends Medicaid coverage to this group and offered complete federal cost coverage between 2013 and 2016, after which that federal contribution gradually decreases to a permanent 90% coverage in and after 2020.

2017 I.B. 2 requires the Commissioner to submit a state plan amendment ("SPA") to the United States Department of Health and Human Services, Centers for Medicare and Medicaid Services within 90 days of the effective date of 2017 I.B. 2; promulgate rules within 180 days of the effective date; and provide coverage to the above described group within 180 days of the effective date. Ninety days have passed since 2017 I.B. 2 was enacted and the Commissioner has not filed a SPA. Petitioners seek an order of the Court requiring the Commissioner to file a SPA immediately and adopt rules and provide coverage within the statutory deadline of 180 days from the effective date of 2017 I.B. 2.

II. Standard of Review

When reviewing the determination of a government agency, the Court looks to issues of statutory construction de novo. *Munjoy Sporting & Ath. Club v. Dow*, 2000 ME 141, ¶ 7, 755 A.2d 531. If the agency's decision was committed to the reasonable discretion of the agency, the party appealing has the burden of demonstrating that the agency abused its discretion in reaching the decision. *See Sager v. Town of Bowdoinham*, 2004 ME 40, ¶ 11, 845 A.2d 567. "An abuse of discretion may be found where an appellant demonstrates that the decision maker exceeded the bounds of the reasonable choices available to it, considering the facts and circumstances of the particular case and the governing law." *Id.* Ultimately, the petitioner must prove that "no competent evidence" supports the agency's decision. *Seider v. Bd. of Examiners of Psychologists,* 2000 ME 206, ¶ 9, 762 A.2d 551 (citing *Bischoff v. Bd. of Trustees*, 661 A.2d 167, 170 (Me. 1995)). The mere fact that there is "[i]nconsistent evidence will not render an agency decision unsupported." *Id.*

Review of an agency's interpretation of statute is performed in the following manner:

> First, the court decides de novo whether the statute is ambiguous or unambiguous.
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> Second, if the statute is unambiguous, the statute is construed directly, without deference to the agency's interpretation on the question of law. An agency cannot, by regulation, create an ambiguity in interpretation of a statute that does not otherwise exist.
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> Third, if the statute is viewed as ambiguous, the agency's interpretation, although not conclusive, is reviewed with great deference and will be upheld unless contrary to the plain meaning of the statute.

Alexander, *Maine Appellate Practice* § 8(b)(3) (4th ed. 2013); citations omitted, *citing City of Bangor v. Penobscot County*, 2005 ME 35, ¶ 9, 868 A.2d 177; *Whitney v. Wal-Mart Stores, Inc.*, 2006 ME 37, ¶¶ 22-23, 895 A.2d 309; *Dep't of Corrections v. Pub. Utils. Comm'n*, 2009 ME 40,

¶ 8, 968 A.2d 1047; *S.D. Warren Co. v. Bd. Of Environmental Prot.*, 2005 ME 27, ¶¶ 4-5, 868 A.2d 210, *aff'd*, 547 U.S. 370; *Kane v. Comm'r of Dep't of Health and Human Servs.*, 2008 ME 185, ¶ 12, 960 A.2d 1196. "Only if the statute is ambiguous will we look to extrinsic indicia of legislative intent such as relevant legislative history." *Sabina v. JPMorgan Chase Bank, N.A.*, 2016 ME 141, ¶ 6; *quoting Strout v. Cent. Me. Med. Ctr.*, 2014 ME 77, ¶ 10, 94 A.3d 786.

III. Discussion

A. Record

Petitioners attached an affidavit of State Representative Andrew Gattine to their reply brief and used language suggesting a motion for the Court to take additional evidence. The Commissioner objects to the taking of additional evidence and to consideration of the Rep. Gattine affidavit "to the extent that Rep. Gattine's affidavit is offered in some capacity as a purported expert on the appropriations process or DHHS funding." The Commissioner does not object to Court consideration of the exhibits attached to the affidavit, but does not concede that the documents are relevant or accurate. At hearing, the Court offered the Commissioner the opportunity to submit additional documents to the record but the Commissioner declined the invitation.

In analyzing legislative intent, the Court will not consider Rep. Gattine's affidavit submitted by the Petitioners or any other material submitted by the parties created after the passage of 2017 I.B. 2. "[P]ost-enactment comments are not legally cognizable legislative history." *Seven Islands Land Co. v. Maine Land Use Regulation Com.*, 450 A.2d 475, 481 n. 9 (Me. 1982). Additionally, the Court denies any motion Petitioners may have made for the taking of additional evidence in their Reply Brief because any evidence presented would likely be post-

enactment comments. In terms of deciphering the Commissioner's reasons for not taking action on 2017 I.B. 2, the Court will consider all documentation presented without objection.

B. Ripeness

i. Questions before the Court

The Commissioner argues that because 180 days have not passed since the effective date of 2017 I.B. 2, the question of whether or not the Commissioner is required to promulgate rules or provide coverage is not yet ripe. 2017 I.B. 2 will have been effective for 180 days on July 2, 2018.[1] "[A] case is ripe when there exists a genuine controversy between the parties that presents a concrete, certain, and immediate legal problem." *Johnson v. City of Augusta*, 2006 ME 92, ¶ 7, 902 A.2d 855. The Commissioner argues that because it has not yet failed to comply with 2017 I.B. 2's language concerning what must occur 180 days after its effective date, there is no genuine controversy and the issue is not ripe for appeal. The Court finds that only the questions concerning the filing of the SPA are ripe, not those pertaining to rulemaking or coverage because the deadlines for those actions are still on the horizon.

ii. Effective Date

The Commissioner disputes the effective date of 2017 I.B. 2, arguing that the effective date is in fact February 17, 2018, not January 3, 2018 as stated by the Petitioners. According to the Maine Constitution:

> Any measure referred to the people and approved by a majority of the votes given thereon shall, unless a later date is specified in said measure, take effect and become a law in 30 days after the Governor has made public proclamation of the result of the vote on said measure, which the Governor shall do within 10 days after the vote thereon has been canvassed and determined; provided, however, that any such measure which entails expenditure in an amount in excess of available and unappropriated state funds shall remain inoperative until 45 days

[1] According to the Commissioner's argument, 2017 I.B. 2 will not have been effective for 180 days until August 16, 2018. See discussion below.

> after the next convening of the Legislature in regular session, unless the measure provides for raising new revenues adequate for its operation.

Maine Const. Art. IV, pt. 3, § 19.

The Petitioners calculated the effective date as "30 days after the Governor has made public proclamation of the result of the vote", finding it to be January 3, 2018. The Commissioner argues that, because the 2017 I.B. 2 requires expenditures for which there have not yet been appropriations, and because the legislation itself did not provide for raising new revenues adequate for its operation, 2017 I.B. 2 "remain[ed] inoperative until 45 days after the next convening of the Legislature in regular session," bringing the effective date to February 17, 2018.

As Petitioner points out in its Reply, the operative date of legislation is delayed where the law "entails expenditure in an amount in excess of available and unappropriated state funds." The constitutional language does not concern itself with whether the funds have been appropriated for the purpose found in the new law, but instead whether there are "available and unappropriated funds." *See Maine Senate v. Sec. of State et al*., 2018, ME 52, ¶ 30, __ A.3d __ (distinction between unappropriated and unavailable, appropriated funds). Petitioners further argue in their Reply Brief that there is reason to believe that there are available funds to cover the expenditures required by 2017 I.B. 2.[2]

Additionally, Petitioners argue that even were the Court to find that there were not unallocated, available funds to cover the expenditures required by 2017 I.B. 2, the effective date would still be January 3, 2018. What would have been delayed were there not unallocated,

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[2] The Office of Fiscal and Program Review's estimate of available funds attached to Petitioners' Reply Brief exceed the alleged estimated expenditures. The Commissioner argues that the numbers in the OFPR estimate are current, but that the Court should instead be looking at figures as of the effective date of the statute. The Court declines both parties' requests to consider funding in order to calculate the effective date of 2017 I.B. 2.

available funds would be the date the law became operative, not the effective date. *See Opinion of the Justices*, 460 A.2d 1341, 1349-50 (Me. 1982). Finally, again as noted by Petitioners in their Reply Brief, until the Commissioner's Opposition Brief, the Commissioner appeared to concede the effective date of January 3, 2018 as is evidenced by the written effective date on 2017 I.B. 2.

The Court agrees with the Petitioners' argument that the cited constitutional provision may cause a statute to remain "inoperative" when there are insufficient available and unappropriated funds, but the effective date would be unchanged.[3] The Court finds that regardless of the "operative" date of 2017 I.B. 2, the effective date of 2017 I.B. 2 was January 3, 2018. Additionally, more than 90 days have elapsed since *both* the effective date proposed by the Petitioners and that proposed by the Commissioner. Therefore, the Court need not delve into the exact figures of when and whether there were and are sufficient unallocated, available funds to cover the expenditures required by 2017 I.B. 2.

C. Separation of Powers

The Commissioner argues that the Court does not have jurisdiction over the current controversy because compliance with 2017 I.B. 2 is a question of funding which may only be determined by the Legislature. The Commissioner contends that were the Court to weigh in, the Court would violate the separation of powers established in the Maine State Constitution.[4]

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[3] What the Court finds most notable about the constitutional language providing for a later operative date for a measure referred to the people "which entails expenditure in an amount in excess of available and unappropriated state funds," is that the framers anticipated that there would be unfunded referenda and initiatives, and that not only would they not be funded, but that some of these unfunded referenda would require funding in excess of available state funds. In anticipation of such a situation, the framers expressed that they did not intend for the unfunded law to become unenforceable, but instead provided for the operation of the law to be delayed in order that the legislature have the time to carry out the will of the people.

[4] The Commissioner also objects to the Court's jurisdiction over the matter arguing that the current issue is a political question and therefore not appropriate for judicial review. As the Law Court has consistently held, "it is not our duty to judge the wisdom of legislative enactments." *Davies v. Bath*, 364 A.2d 1269, 1271 (Me. 1976). The Court is not entering the debate concerning whether or not MaineCare expansion is good policy. Following years of

According to the Maine Constitution, "[n]o person or persons, belonging to one [of the three branches of government], shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted." Me. Const. art. III, §§ 1-2. "Each of the three departments being independent, as a consequence, are severally supreme within their legitimate and appropriate sphere of action." *Ex parte Davis*, 41 Me. 38, 53 (Me. 1856.

As explained in Marshall Tinkle's *The Maine State Constitution*,

> Section 1 [of the Maine State Constitution] broadly distributes all governmental power into the legislative, executive, and judicial departments. These are distinct, co-equal branches of state government. In general, the first branch enacts laws, the second approves and executes them, and the third expounds and enforces them….
>
> The doctrine of separation of powers presupposes that a member of one branch of government may not undertake the duties properly belonging to another branch. Thus, this section prevents the judiciary from restricting or enlarging interpretation to laws in conflict with properly rendered judicial opinion, and the legislature from attempting to enact laws that the court declares unconstitutional."

Tinkle, *The Maine State Constitution* 70-71 (2d ed. 2013). As recently explained by the U.S. Supreme Court of the U.S. Constitution, "[t]o the Framers, the separation of powers and checks and balances were more than just theories. They were practical and real protections for individual liberty in the new Constitution." *Perez v. Mortg. Bankers Ass'n,* 575 U.S. __, 135 S. Ct. 1199, 1216 (2015). "The Framers were well aware of the natural desire of office holders as well as others to seek to expand the scope and authority of their particular office at the expense of others. They sought to provide against success in such efforts by erecting adequate checks and balances in the form of grants of authority to each branch of the government in order to counteract and prevent usurpation on the part of the others." *Furman v. Ga.*, 408 U.S.

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debate between the legislative and executive branches, any question concerning the wisdom of the current policy has been resolved, at least for the time being, by the people's initiative enacting 2017 I.B. 2.

238, 469-470 (1972). As in the U.S. Constitution, the checks and balances of the Maine Constitution maintain the separation of powers among the branches of government and the independent liberties of the governed.

To that end, the Court recognizes it does not have the authority to require the Legislature to appropriate funds, especially in a case such as this one where the act in question, namely the submission of the SPA, may be performed without appropriation. *Maine Senate,* 2018 ME 52, ¶ 30, __ A.3d __. However, it is the Court's role to interpret the law in the context of a controversy, such as is currently before it. As the Law Court recently wrote in *Maine Senate*, "our constitutional structure does not require that the Judicial Branch shrink from a confrontation with the other two coequal branches." *Id*. ¶ 29; citing *Raines v. Byrd*, 521 U.S. 811, 833 (1997) (Souter, J., concurring). In fact the vehicles by which the Petitioners have brought this action, Maine Rule of Civil Procedure 80C and the Maine Administrative Procedures Act, were created in anticipation of cases such as this one, in which a party seeks to challenge the actions of an administrative body for decisions "(1) In violation of constitutional or statutory provisions; (2) In excess of the statutory authority of the agency; (3) Made upon unlawful procedure; (4) Affected by bias or error of law; (5) Unsupported by substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion." 5 M.R.S. § 11007.

The Law Court did just that in *Manirakiza v. Dep't of Health and Human Services*. In *Manirakiza*, following a legislative amendment expanding food stamp benefits, the Department of Health and Human Services argued that the Court could not require its compliance with the amended statute because doing so would require appropriations, thereby violating the separation of powers. *Manirakiza v. HHS*, 2018 ME 10, 177 A.3d 1264. The Law Court found that engaging in statutory analysis could not violate the separation of powers and held that DHHS

was required to provide food stamp benefits to those newly eligible because of the amendment "in the same way that it must provide food assistance to those persons eligible under" the earlier enacted provisions. *Id.* ¶ 15. In this case, as in *Manirakiza*, it is the duty of the Court to interpret the legislative intent of L.D. 1039 and review the Commissioner's decisions, regardless of the status of appropriations.

D. Statutory Interpretation

Law created through the initiative process "is evaluated under the ordinary rules of statutory construction." *League of Women Voters v. Sec. of State*, 683 A.2d 769, 771 (Me. 1996). The general rules of statutory interpretation require the Court to interpret statutes by their plain language where the language is unambiguous. *Arsenault v. Sec. of State*, 2006 ME 111, ¶ 11, 905 A.2d 285; *Opinion of the Justices*, 460 A.2d 1341, 1345 (Me. 1982) ("Where the meaning of terms used in a statute is plain, we need look no further to conclude that the law means exactly what it says.") In this case, when read as a whole, the statute is clear and unambiguous. Coverage shall be extended "no later than 180 days after the effective date" of 2017 I.B. 2, the state plan amendment shall be submitted "no later than 90 days after the effective date," and the department shall adopt rules to implement the expansion within 180 days of the effective date. If there were any question as to the meaning of the word "shall," 1 M.R.S. § 71 defines shall, must, and may as indicating "a mandatory duty, action or requirement." 1 M.R.S. § 71.

Nevertheless, the Commissioner argues that the language setting out the timeline for the tasks to be accomplished – namely the SPA, rulemaking, and expansion of coverage – is directory rather than mandatory. The Commissioner cites to *Anderson v. Comm'r of Dep't of Human Services* in support of his argument. In *Anderson*, the Petitioner appealed the recovery of overpayment of Aid to Families with Dependent Children benefits, conceding the overpayment,

arguing that the Department violated federal and state regulations requiring that the agency take action to recover overpayment by the end of the quarter following the quarter in which the overpayment is first identified, and therefore the agency should be estopped from recovery. *Anderson v. Comm'r of Dep't of Human Services*, 489 A.2d 1094, 1096-97 (Me. 1985). Despite clear regulatory language concerning the time in which the agency was to take action to recover overpayment, the Law Court considered the Department's argument that the language of the regulations proscribing the time in which the Department had to act in order to recover overpayment of benefits was directory language, not mandatory. The Court cited to 1A Sutherland, *Statutes and Statutory Construction* § 25.03 at 298-99 (4th ed. C. Sands ed. 1972):

> Generally those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by the failure to obey no prejudice will occur to those whose rights are protected by the statute, are not commonly considered mandatory. Likewise, if the act is performed but not in the time or in the precise manner directed by the statute, the provision will not be considered mandatory if the purpose of the statute has been substantially complied with and no substantial rights have been jeopardized.

Anderson, 489 A.2d at 1098 (Me. 1985). In its analysis, the Law Court found that the general purpose of the regulations concerning the time in which the agency seeks to recover overpayment was to reduce federal spending. *Id*. at 1098. Additionally, the Law Court found that there was no negative effect on the plaintiff because the overpayment had ceased to accrue before the Department identified the error. *Id*. Because the Law Court found that the recovery timeline set out in the regulation spoke to the "orderly and prompt conduct of business" rather than "the essence of the thing to be done;" and "by the failure to obey no prejudice will occur to those whose rights are protected by statute," the Law Court found that the regulation timelines were directory rather than mandatory, requiring substantial compliance rather than strict compliance. *Id.* at 1099.

The Commissioner argues that the facts of the current matter track those of *Anderson*, and the Court should find that the language of 2017 I.B. 2 is directory instead of mandatory. Petitioners argue that *Anderson* predated 1 M.R.S. § 71, and was thus replaced by 1 M.R.S. § 71, which statutorily clarified that the word "shall" indicates that the thing to be done is mandatory.

The Court need not make a determination as to whether the language of 2017 I.B. 2 is mandatory or directory, because even if the language is directory as the Commissioner suggests, the Commissioner has not substantially complied with 2017 I.B. 2. A finding that statutory language is directory rather than mandatory does not permit non-compliance. Even where statutory language is directory, the agency must substantially comply. *Id*. at 1098. In this case, the Commissioner has taken no action at all to submit the SPA according to 2017 I.B. 2. He argues that his obligations do not begin until the appropriations are made. The Court disagrees. The Court is not persuaded that the executive branch is excused from clear statutory obligations by the legislature's failure to follow through with legislative obligations - as defined by the executive branch. The Commissioner has not cited to any authority suggesting that an agency can be considered to have substantially complied with a directory statute by taking no action at all. The Court concludes that the Commissioner's complete failure to act cannot be considered substantial compliance with 2017 I.B. 2.[5]

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[5] The Commissioner cites to three sections of Title 5 of the Maine Revised Statutes in support of its argument that "specifically restrict—under penalty of criminal prosecution—the authority of the Commissioner (and other state officials) to exceed the limits of appropriated funds." The Court finds that the cited statutes do not apply to the current controversy. Section 1543 states: "Money may not be drawn from the State Treasury except in accordance with appropriations duly authorized by law. Every disbursement from the State Treasury must be upon the authorization of the State Controller and the Treasurer of State…" 5 M.R.S. § 1543. Section 1543 does not apply because no money need be drawn from the State Treasury in order for the Commissioner to submit the SPA. Section 1582(1) states: "A state department may not establish a new program or expand an existing program beyond the scope of the program already established, recognized and approved by the Legislature until the program and the method of financing are submitted to the Department of Administrative and Financial Services, Bureau of the Budget for evaluation and recommendation to the Legislature and until the funds are made available for the program by the Legislature." 5 M.R.S. § 1582(1). This section is not applicable because 2017 I.B. 2 expands the MaineCare program through legislation, no expansion has been accomplished by a state department. Finally, 5 M.R.S. § 1583 states: "No agent or officer of the State or any department or agency thereof, whose duty it is to expend money

IV. Conclusion

The Court Orders the Commissioner to submit a state plan amendment to the United States Department of Health and Human Services, Centers for Medicare and Medicaid Services ensuring MaineCare eligibility for people under 65 years of age who qualify for medical assistance pursuant to 42 United States Code, Section 1396a(a)(10)(A)(i)(VIII) by June 11, 2018.

The Clerk is directed to incorporate this Order into the docket by reference pursuant to M.R. Civ. P. 79(a).

DATE: June 4, 2018

/ S

Michaela Murphy
Justice, Superior Court

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under an appropriation by the Legislature, shall contract any obligation on behalf of the State in excess of the appropriation. Whoever exceeds in his expenditure said appropriation shall not have any claim for reimbursement. Any person who knowingly violates this section shall be guilty of a Class E crime." 5 M.R.S. § 1583. Because this case addresses only the SPA, and because no money need be expended to submit the SPA, the Court finds that this section also does not apply. The Commissioner further argues that the SPA would act as a binding contract requiring the Commissioner to expend money that has not been appropriated, and thereby causing the Commissioner to act in violation of Section 1583. The Court is not persuaded by the Commissioner's argument as it seems clear from the record that federal law permits States to withdraw from Medicaid expansion, and the Legislature is always free to amend or repeal the statute before the Court.