IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

RISEDELAWARE INC., *et al.*, Plaintiffs, v. Secretary Claire Dematteis, in her official capacity as Secretary of the Delaware Department of Human Resources and Co-Chair of the State Employee Benefits Committee, *et al.*, Defendants.	C. A. No.: N22C-09-526-CLS

ANSWERING BRIEF OF THE DEFENDANTS IN OPPOSITION TO THE PLAINTIFFS' MOTION TO STAY

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STATEMENT OF FACTS

The State's Mandate to Control Healthcare Costs

Employers across the country have identified managing healthcare benefits costs as their top priority, and Delaware is no exception.[1] Rising healthcare costs due to inflation and provider consolation in recent years have only exacerbated the challenge.

The cost of the current healthcare plan for retired State employees is simply not sustainable long-term, and without implementing measures for cost-management, the continuing viability of these benefits are threatened. Rentz Aff. at ¶ 4.[2] For several years, the State Employee Benefits Committee ("SEBC") and the Retirement Benefit Study Committee ("RBSC") have worked to tackle this daunting issue. Rentz Aff. at ¶ 5. The transition to the Medicare Advantage plan marks the first substantive change in the benefits afforded to State benefit eligible Medicare pensioners since 2013. Rentz Aff. at ¶ 5.

Over the last fifteen years, the SEBC's efforts to manage the rising costs for the State Group Health Plan have been focused on the health plans offered to employees and non-Medicare (pre-65) pensioners. Rentz Aff. at ¶ 6. Health plans offered to that population have included prior authorization requirements since 2010.

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[1] A 2022 survey reflected that that "managing healthcare benefit costs" is top priority for 94% of employers. Willis Towers Watson (2002), *Emerging Trends Healthcare Survey, United States*.

[2] An affidavit of SEBC Director Faith Rentz is attached as Exhibit A.

Rentz Aff. at ¶ 6. To address the projected Fiscal Year 2023 deficit, the SEBC approved an 8.67% increase in State non-Medicare health plan premiums effective July 1, 2022—the first health plan rate increase since July 2016. Rentz Aff. at ¶ 6.

The goal of the SEBC and RSBC as they continued to review healthcare costs for the Medicare population is to identify options ensuring retired State employees retain access to high quality and affordable health care, while also making progress toward reducing the State's $10 billion unfunded liability for retiree healthcare.[3] Rentz Aff. at ¶ 7. By migrating to Medicare Advantage, the unfunded Other Post-Employment Benefits Liability ("OPEB") liability is expected to only grow to $19.8 billion, a nearly 55% decline in the estimated growth rate of the unfunded liability. Rentz Aff. at ¶ 9. Combined with a sustained effort to carveout 1% of the prior year's budget each year to the OPEB Trust (as was included in the Fiscal Year 2023 budget), the unfunded OPEB liability could shrink to an estimated $3.1 billion by the Year 2050. Rentz Aff. at ¶ 9.

By partnering with Highmark Blue Cross Blue Shield ("BCBS") Delaware and its Medicare Advantage Plan, the State ensured pensioners will continue to have access to an affordable plan that is not available in the individual healthcare market.

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[3] The last analysis reviewed by the RBSC in March 2022 showed that absent any changes to retiree benefit funding or the underlying retiree benefits, the unfunded OPEB liability would be expected to grow to $31.3 billion by the Year 2050. Rentz Aff. at ¶ 7.

At its February 28, 2022 SEBC meeting, the SEBC approved a State Medicare Advantage plan effective January 1, 2023 that replaces the current Highmark BCBS Special Medicfill Medicare Supplement plan. Compl., ¶44; Rentz Aff. at ¶ 10. The SEBC worked with Highmark Delaware to customize the new plan (Highmark BCBS Delaware's Freedom Blue PPO Medicare Advantage Plan or "HMAP") to mirror the design of the current Special Medicfill Supplement plan and include the same Medicare Part D prescription plan available today. Rentz Aff. at ¶ 10. The new plan focuses on preventive care and care management program engagement with members and their providers, delivering a coordinated approach to care and resulting in lower monthly premiums and higher quality outcomes for Medicare-eligible members. Rentz Aff. at ¶ 13.

Pensioners and dependents who enroll in the State Medicare Advantage plan will continue to be enrolled in Medicare and will continue to pay Part B premiums, while HMAP assumes responsibility to provide all Medicare Part A and Part B benefits covered by original Medicare. Rentz Aff. at ¶ 14. The plan will continue to be an employer- sponsored plan administered by Highmark Blue Cross Blue Shield of Delaware. Rentz Aff. at ¶ 14.

Just as it has for many years, Highmark's Plan for Medicare-eligible retirees includes the following:

- $0 co-pay for visits with your doctor;

- $0 deductible for medical services;
- $0 cost for skilled nursing facilities;
- $0 cost for lab and imaging; and
- full and immediate coverage for pensioners with pre-existing conditions.

Rentz Aff. Coverage remains extremely affordable: State pensioners who retired prior to July 1, 2012 and earned 100% of state share coverage will continue to pay $0 monthly premium and pensioners who retired after that date with 20 years of service will have a premium of $10.80 per month. Rentz Aff. at ¶ 15. For state pensioners who retired after June 30, 2012 with less than 20 years of service, and are responsible for some or all of the cost of their Medicare coverage, their monthly premium is reduced by more than half of the current amount, to $216.18 per month. Rentz Aff. at ¶ 16.

The SEBC worked with Highmark Delaware to customize the new HMAP to mirror the design of the current Special Medicfill Supplement plan and include the same Medicare Part D prescription plan available today. Rentz Aff. at ¶ 38. In addition, the HMAP includes terms negotiated by and unique to Delaware, including: (1) a four-month suspension of pre-authorization requirements (until May 1, 2023), (2) a dedicated concierge team with dedicated toll-free line to provide direct support to the State's pensioners for the duration of the agreement and (3) monthly reporting on pre-authorization denials and appeals, including total number

of prior authorizations submitted, and the percentage approved and denied in total and for defined categories. Rentz Aff. at ¶ 11.

Plaintiffs have focused on the pre-authorization requirements of the HMAP as the area of greatest concern, labeling it a "particularly harmful" process. Opening Br., 7. These pre-authorization requirements in the HMAP ***are identical to those that active State employees and pre-65 retirees have had as part of their insurance coverage through Highmark since 2010***. Rentz Aff. at ¶ 17. More than 33,000 active employees and pre-65 retirees are currently enrolled in Highmark plans with the exact same pre-authorization requirements. Rentz Aff. at ¶ 17. Just as the healthcare for active State employees has evolved over time due to the soaring costs of healthcare and the State's budgetary restrictions—it is reasonable to expect that healthcare for State pensioners would do the same.

The list of services requiring pre-authorization and the process providers must follow are the exact same for State Group Health Plan active employees, non-Medicare (pre-65) pensioners, and pensioners enrolled in the HMAP.[4] Rentz Aff. at ¶ 18. Historically, Highmark Delaware has approved 92% of Medicare Advantage Prior Authorization requests at the time of the initial submission from the provider. Rentz Aff. at ¶ 21. Additionally, regular reporting to the SEBC on pre-authorization

[4] Expedited, non-emergency prior authorization in Highmark's BCBS Medicare Advantage Plan are approved within an average of a day and a half, with standard, non-emergency authorizations typically approved within four days. Emergency and urgent care services do not require pre-authorization. Rentz. Aff. at ¶ 21.

statistics will enable it to respond promptly to any systemic concerns. Rentz Aff. at ¶ 21.

The Open Public Process

From beginning to end, the SEBC's decision to choose the Medicare Advantage Plan administered by Highmark was a transparent process, conducted in its ordinary course of business and compliant with its obligations under Delaware's Freedom of Information Act.[5] The agenda is posted no later than seven days prior to the meeting. Rentz Aff. at ¶ 3. Minutes are posted once they are final and approved by the SEBC, which usually occurs the following meeting. Rentz Aff. at ¶ 3.

The SEBC made the decision to split the awards for the commercial population (active and non-Medicare retirees) and Medicare-eligible pensioner population, voting on the commercial portion of the award at the meeting on December 13, 2021 and the Medicare portion on February 28, 2022.[6] Review of this Medical TPA Services RFP was identified as a topic in the agenda and in the minutes of the SEBC meetings beginning on May 10, 2021.[7] The agenda for

[5] Minutes and agendas for the SEBC meetings are posted on the State's Public Meeting Calendar: https://dhr.delaware.gov/benefits/sebc/sebc-materials.shtml and the SEBC's webpage: https://dhr.delaware.gov/benefits/sebc/sebc-materials.shtml.

[6] https://publicmeetings.delaware.gov/#/meeting/66743; https://publicmeetings.delaware.gov/#/meeting/69779

[7] https://dhr.delaware.gov/benefits/sebc/documents/2021/0510agenda.pdf?ver=0510

subsequent meetings continue to reflect the topic of "Medical Third-Party Administration (TPA) Services Request for Proposal Overview."[8]

The Agenda for the SEBC Meeting on February 28, 2022 included a specific item for award recommendations for the Medicare Plan portion of the RFP, effective January 1, 2023.[9] The minutes for that same meeting, posted publicly on March 14, 2022, reflect a motion to "accept the Subcommittees' recommendation for moving to a Group Medicare Advantage Plan (medical only), effective 1/1/2023, administered by Highmark and to continue offering drug coverage through CVS EGWP."[10] The Agenda for the April 25, 2022 meeting specifically references "Medicare Advantage with and without Prescription Plan Options."[11]

Following the award of the Medicare Advantage Contract to Highmark, the parties continued to negotiate the final terms of its customized plan, including all the specialized features discussed above. Rentz Aff. at ¶ 11. The final contract was executed on September 28, 2022 and posted publicly on the SEBC's website the following day.[12]

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[8]https://publicmeetings.delaware.gov/#/meeting/66741;https://dhr.delaware.gov/benefits/sebc/documents/2021/1213-agenda.pdf.
[9]https://dhr.delaware.gov/benefits/sebc/documents/2022/0228-agenda.pdf.
[10]https://dhr.delaware.gov/benefits/sebc/documents/2022/0228-minutes.pdf
[11]https://dhr.delaware.gov/benefits/sebc/documents/2022/0425-agenda.pdf?ver=0418.
[12] https://dhr.delaware.gov/benefits/medicare/documents/ma-delaware-contract.pdf.

Communication with Pensioners Regarding the Change

Written communications and information sessions with the more than 30,000 State benefit eligible pensioners were designed to ensure that the recipients were made aware of the new plan, had the opportunity to ask questions, and learn more about how the plan works, sufficiently in advance of Delaware Medicare Open Enrollment period. Rentz Aff. at ¶ 24. The communications began on June 1, 2022 with an introductory mailing about the transition to a Medicare Advantage Plan. Rentz Aff. at ¶ 26. The timing of the mailing was deliberately done following the end of the State's regular annual Open Enrollment period (May 2-18) to avoid any confusion. Rentz Aff. at ¶ 26. Because pensioners are eligible for the same vision and dental plans provided to the rest of the State's employees, they received Open Enrollment information for those during the regular Open Enrollment Period. Rentz Aff. at ¶ 26. The mailers sent to pensioners for the Regular Open Enrollment period were tailored based on their eligibility. Rentz Aff. at ¶ 26.

The June 1 mailing was the first of several mailings and information sessions conducted in advance of the fall Medicare Open Enrollment mailing. Rentz Aff. at ¶ 28. These communications began three months earlier than any communications or mailings have historically been sent to the State of Delaware Medicare population regarding their January 1 plan year for enrollment in the State Medicare health and

prescription coverage. Rentz Aff. at ¶ 29. The extensive communications with Medicare-eligible pensioners are detailed in Director Rentz's affidavit.

The Legislative Process

The move to HMAP was rolled out during the 2022 legislative session. Specifically, it was approved by the SEBC in February 2022, endorsed by the RBSC in March 2022, and included in briefings to the General Assembly's Joint Finance Committee during mark-up of the Governor's Recommended Budget. Rentz Aff. at ¶ 31.

The SBO communicated with the Delaware General Assembly Senate and House of Representatives Communications Directors on June 1, 2022, detailing the transition to Medicare Advantage. Rentz Aff. at ¶ 32. The communication included a copy of the June 1, 2022 Medicare Advantage introductory letter mailed to all State benefit eligible pensioners from the SBO and Office of Pensions. Rentz Aff. at ¶ 32. The same information was also sent to all members of the House Representatives.

State employees, pre-65 pensioners and Medicare pensioner health plan premium rates for Fiscal Year 2023 have been set and became effective as of July 1, 2022 for the employee and pre-65 pensioner populations. Rentz Aff. at ¶ 33. Delaying implementation of the Medicare Advantage plan would result in the Group Health Insurance Plan incurring approximately $66 million in unfunded Medicare pensioner medical plan expenditures during calendar year 2023. Rentz Aff. at ¶ 8.

The move to HMAP was included in the Fiscal Year 2023 Budget, introduced on June 7, 2022, passed by the General Assembly, and signed into law on June 28, 2022. The change was codified in the budget epilogue language contained in Senate Bill 250, Section 116.[13] The law amends 29 *Del. C.* §§ 5252(d)(4) and (d)(5) by striking references to "Medicare Supplement" plan and replacing with "Medicare Advantage." *Id.*

Timelines for Implementation in January 2023

The extremely tight timeline for required actions by SEBC, SBO, the Pension Office, Highmark and CVS to implement the HMAP for January 1, 2023 are driven by federal regulation and leave virtually no wiggle room. The necessary steps are already underway and are built around federal regulation which requires that the plan commences on January 1, 2023. These efforts began immediately following the HMAP contract award and are detailed in Director Rentz's affidavit. Rentz Aff. at ¶ ¶ 40-49 (which focus on remaining steps and timeline).

The contract for the Highmark BCBS Special Medicfill Medicare Supplement plan ends on December 31, 2022, and that plan no longer exists for State of Delaware pensioners after that date. Rentz Aff. at ¶ 23. The annual open enrollment period for the State Medicare population is currently underway (started October 3, 2022) and ends on October 24, 2022. Rentz Aff. at ¶ 40.

[13] legis.delaware.gov/BillDetail/119629

On the evening of November 4, the Pension system will run an automated process to generate an enrollment file containing the January 1, 2023 Medicare health plan year elections (enrolled or opt-out/waiving coverage) for the over 33,000 State benefit eligible Medicare pensioners and dependents. Rentz Aff. at ¶ 42. The enrollment file will be transmitted via SFTP the evening of Friday, November 4, 2022 to Highmark BCBS Delaware. Separately, the same processes must occur for benefit eligible Medicare retirees and dependents participating in the State Group Health plan and formerly employed by the University of Delaware and several municipalities. Rentz Aff. at ¶ 43.

Upon receipt of the SFTP files from the State, Highmark will load the enrollment information into the Highmark system and begin to send enrollment transactions to CMS on November 5, 2022. Rentz Aff. at ¶ 44. On November 15, 2022, Highmark will sent approved CMS enrollment data to CVS SilverScript.

ARGUMENT

As Plaintiffs succinctly note, "[t]he ultimate issue in this case is whether. . . the SEBC violated its obligations under Delaware's Administrative Procedure Act."[14] Simply stated, it did not. Plaintiffs desperately attempt to contort the SEBC's decision to select a new insurance carrier for pensioners under 29 *Del. C.* §§ 5210(3) & 9602(b)(2) into a "regulation" in a failed attempt to argue the SEBC violated the APA and implore this Court to stay implementation of an administrative agency decision that Plaintiffs are not happy with. The SEBC selection of a new insurance carrier under Sections 5210(3) and 9602(b)(2) was not the passage of a regulation. Plaintiffs' arguments fail as a matter of law. They have no likelihood of success on the merits.

While Plaintiffs resoundingly contend they are entitled to a stay under Section 10144 of the Delaware Administrative Procedures Act ("APA"), they devote the vast majority of their Opening Brief to criticizing the Medicare Advantage plan. The underlying quality and nature of the plan is not relevant to Plaintiffs' claim. Plaintiffs have cited to rumors and internet surveys to sully the HMAP, inflame this Court, and garner sympathy in ways that do nothing to support their legal argument. Plaintiffs both misstate the standard for a stay, and more crucially, wholly ignore

[14] Opening Br., 17.

prevailing legal authority in Delaware undercutting their entire argument. The Motion for a Stay must be denied.

I. PLAINTIFFS MISSTATE THE APPLICABLE LEGAL STANDARD.

Under the Delaware APA, 29 *Del. C.* § 10101 *et seq*, stays of any administrative decisions may be granted "only if [the Court] finds. . .that the issues and facts presented for review are substantial and the stay is required to prevent irreparable harm." 29 *Del. C.* § 10144. Despite Plaintiffs' contention, a stay may not be granted absent a reasonable probability of success on the merits and in order to so demonstrate this, "a party must do more than simply outline the issues before the Court on appeal." *Del. Inst. of Health Scis., Inc. v. State Bd. of Nursing*, 2011 WL 5042382, at *2 (Del. Super. Oct. 21, 2011); *Dept. of Trans. v. Keeler,* 2010 WL 334920, at *1 (Del. Super. Jan. 28, 2010); *In re the License of Ford*, 1990 WL 81889 (Del. Super. May 30, 1990).

Despite the clear holdings from this Court, Plaintiffs assert that "this Court has repeatedly construed"[15] the standard for a stay to require something "far less demanding than [demonstrating] likelihood of success on the merits."[16] In support of this novel argument, Plaintiffs cite only two utility regulation cases.[17] In the first, this Court did not analyze the parties' likelihood of success, but Plaintiffs ignore

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[15] Opening Br., 18.
[16] *Id.*
[17] The Opening Brief simultaneously relies on, and rejects, Court of Chancery decisions. *Compare* Opening Br., n.8 *with* Opening Br., 16-17.

why. While this Court declined to address whether the plaintiffs demonstrated a likelihood of success, it went on to explain, in language Plaintiffs omit from their Opening Brief:

> [t]his is not to say that weighing the probability of success would not be appropriate in other circumstances, but the issues in this ***utility regulation case*** are complex and at this early stage where I am considering the issues on an expedited basis with nothing but affidavits before me, I am unable to make an intelligent determination on this score.

Delmarva Power & Light Co. v. Pub. Serv. Comm'n, 1997 WL 855702, at *3 (Del. Super. Dec. 22, 1997) (emphasis added). This statement certainly does not support Plaintiffs' conclusion that this Court has "repeatedly" chosen not to evaluate the parties' likelihood of success under 29 *Del. C.* § 10144. In the only other Delaware Superior Court case relied on by Plaintiffs, this Court stated, "I do not believe that it is appropriate for me to attempt to measure the probability of success . . .[as] the legal principles and standards to be applied [in utility regulation] are somewhat arcane and not generally familiar to the average judge without considerable study." *Bell-Atl. Del., Inc. v. Pub. Serv. Comm'n*, 1996 WL 659487 at *2 (Del. Super. Aug. 9, 1996).

These two utility regulation cases from 25 years ago are completely irrelevant to the Court's current analysis under 29 *Del. C.* § 10144. In this decade, this Court has repeatedly held plaintiffs to a likelihood of success on the merits standard when analyzing motions to stay. *See Dept. of Trans. v. Keeley,* 2018 WL 4352855, at *3-

4 (Del. Super. Jan. 28, 2018) (denying a stay where the plaintiff failed to offer evidence or argue that it would "prevail on the merits."); *Hannan v. Del. Bd. of Med. Licensure and Discipline*, 2018 WL 1037463, at *3 (Del. Super. Feb. 23, 2018) (stating the APA "prohibits this court from issuing a stay unless it finds, among other things, that the appellant has a substantial chance of success on the merits"); *Denham v. Del. Bd. of Mental Health*, 2017 WL 1505225, at *1 (Del. Super. Apr. 20, 2017) (denying a stay because appellant did not provide the Court with sufficient information to evaluate her likelihood of success on the merits). Plaintiffs' desire to avoid the likelihood of success on the merits standard is understandable. They have completely failed to state a claim upon which relief may be granted. Unfortunately for Plaintiffs here, the standard they must meet in order to stay implementation of the SEBC's decision, which they cannot meet, is both (1) a likelihood of success on the merits, and (2) that irreparable harm will result if a stay is not granted. They fail on both counts.

II. PLAINTIFFS HAVE NO LIKELIHOOD OF SUCCESS ON THE MERITS.

A. The SEBC Did Not Promulgate a Regulation When It Selected a New Health Insurance Carrier.

Plaintiffs' central, indeed their only, claim is that the SEBC violated the APA in selecting a new health insurance carrier for pensioners without following the APA

requirements for adoption of a regulation.[18] Plaintiffs note that 29 *Del. C.* § 9602(b)(4), "imbues" the SEBC with the "authority to adopt rules and regulations for the general administration of the employee benefit coverages."[19] Relying solely on this statutory language, Plaintiffs contend that the SEBC was required to follow the APA's regulation process when it made the decision to change carriers for retirees. Throughout the entirety of their argument, Plaintiffs refuse to acknowledge the SEBC's other statutory powers, separate and distinct from its power to promulgate regulations: the ***"[s]election of all carriers or third-party administrators necessary to provide coverages to State employees***" (29 *Del. C.* § 9602(b)(2)) and the ***"[s]election of the carriers or third-party administrators deemed to offer the best plan to satisfy the interest of the State and its employees and pensioners . . . .***" (29 *Del. C.* § 5210(3)) (emphases added). Although 29 *Del. C.* §§ 5210 & 9602(b) both list regulation promulgation as one of the SEBC's duties, powers, or functions, each section lists additional powers, and under the plain language of these provisions, the SEBC has at least six discrete duties, none of which are subordinate to or subsumed by the other.[20]

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[18] Complaint, ¶¶72-100 encompassing Counts I and II.

[19] Complaint, ¶76.

[20] Notably, Section 5203(c)(3) states "[i]f a comparable Medicare reimbursement rate is not available, a plan shall reimburse for services at the rates generally available under Medicare for services . . . ***which may be further delineated by regulation***." (emphasis added). As the Supreme Court has noted, "when provisions are expressly included in one statute but omitted from another, we must conclude that the General Assembly intended to make those omissions." *Leatherbury v. Greenspun*, 939 A.2d 1284, 1291 (Del. 2007).

It is well-settled under Delaware law that, "if the statutory language at issue is 'unambiguous, then there is no room for judicial interpretation and the plain meaning of the statutory language controls.'" *Jimmy's Grille of Dewey Beach v. Town of Dewey Beach*, 2013 WL 6667377 (Del. Super. Dec. 17, 2013) (citing *CML V, LLC v. Bax*, 28 A.3d 1037, 1041 (Del. 2011)); *see also Dewey Beach Enterprises, Inc. v. Bd of Adjustment of the Town of Dewey Beach*, 1 A.3d 305 (Del. 2010). Statutory language is ambiguous only if it is susceptible to two reasonable interpretations. *Dewey Beach Enterprises*, at 307. Here, Plaintiffs skip right over the SEBC's clear and distinct statutory powers to select carriers for state benefit holders (Section 9602(b)(2)), contract on an insured or self-insured basis (Section 9602(b)(3)), control and manage all employee benefit coverages (Section 9602(b)(1)), and select carriers for pensioners (Section 5210(3)) to argue that every decision the SEBC ever has or will make is done so under its statutory power to pass regulations. Not only does Plaintiffs' argument ignore the clear language of the SEBC's numerous statutory duties, it also completely ignores controlling Delaware case law. *See, e.g., Turnbull v. Fink*, 668 A.2d 1370, 1377 (1995) (holding that where two statutes arguably conflict, "the specific statute must prevail over the general").

The Delaware Supreme Court has soundly rejected "the premise that all of what an agency does must culminate in a regulation or a case decision [subject to

the APA]." *Free-Flow Packaging Int'l, Inc. v. Sec'y of Dep't of Nat. Res. & Env't Control of State*, 861 A.2d 1233, 1236 (Del. 2004) (holding that DNREC's adoption of a base fee categorization was not a regulation subject to the requirements of the APA and was instead an exercise of DNREC's other statutory power). When an agency "implements a specific and detailed statutory directive, it may operate outside the scope of the APA." *T.R.H. v. Div. of Family Serv.*, 2006 WL 4546613, *2 (Del. 2006). In other words, when the SEBC exercised its authority under 29 *Del. C.* §§ 5210(3) and 9602(b)(2) to select a health insurance carrier for pensioners, it was not required to promulgate regulations and therefore did not violate the APA.

Instead of acknowledging the long-standing precedent of *Free-Flow Packaging Int'l, Inc.*, Plaintiffs cite to inapposite cases in support of their argument that the SEBC's exercise of its authority under Sections 5210(3) or 9602(b)(2) was actually the passage of a regulation under Section 5210(4) or 9602(b)(4). In *Baker v. Delaware Dep't of Nat. Res. & Env't Control*,[21] this Court found certain DNREC regulations invalid because they required compliance with technical standards that were not adopted in compliance with the APA. 2015 WL 5971784, at *15 (Del. Super. Oct. 7, 2015), *aff'd* 137 A.3d 122 (Del. 2016). Plaintiffs fail to note here that the *Baker* Court simultaneously reiterated that an agency need not comply with the

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[21] Opening Br., 22.

APA when acting within the confines of a specific, detailed statutory directive, but in *Baker*, unlike here, no such directive existed. 2015 WL 5971784, at *13.

In *Delaware State Sportsmen's Ass'n v. Garvin*,[22] this Court found that DNREC could not rely on a hunting guide that was not promulgated in compliance with the APA to dictate the types of guns hunters could use. The Court noted that DNREC was solely passing a regulation, "[u]nlike in *Free-Flow*, where there was a specific statutory directive . . . ." 2020 WL 6813997, at *10 (Del. Super. Nov. 18, 2020). In *Garvin*, the Court found that a statute outlining DNREC's responsibility to protect all forms of wildlife did not empower it to pass a regulation outlawing certain guns for hunting. Here, the SEBC's statutory directive is to select "carriers or third-party administrators necessary to provide coverages to State employees."[23]

B. Plaintiffs Have No Right of Appeal.

Because the SEBC's exercise of its authority under Section 9602(b)(2) and Section 5210(3) in no way implicated its authority to pass regulations under Section 9602(b)(4) or 5210(4), the APA, specifically the stay provision at 29 *Del. C.* § 10144 simply does not apply to this action. More fatal to Plaintiffs' Complaint is the fact that because Plaintiffs have failed to establish that the APA applies to the SEBC's decision, Plaintiffs have no right to appeal that decision.

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[22] Opening Br., 24.
[23] 29 *Del. C.* § 9602(b).

The purpose of the APA is to "standardize the procedures and methods whereby certain state agencies exercise their statutory powers and to specify the manner and extent to which action by such agencies may be subject to public comment and judicial review." 29 *Del. C.* § 10101. Certainly, when an agency adopts a regulation, it must comply with the APA's procedures for adopting a regulation; and when an agency decides whether a named party is violating a law or regulation, it must comply with the APA's procedures for case decisions. But that is not what happened here. As the *Free-Flow* Court noted, "[w]hen an agency carries out other functions, as when it implements a specific and detailed statutory directive, it may operate outside the scope of the APA." *Free-Flow Packaging Int'l, Inc.*, 861 A.2d 1233, 1236–37. There is no right to appeal unless such a right has been granted by statute, and the legislature may grant or withhold such a right at its discretion. *Del. Alcoholic Beverage Control v. Appeals Comm'n Del. Alcoholic Beverage Control, and Lex–Pac, Inc. d/b/a Hak's Sports Bar & Restaurant,* 116 A.3d 1221 at 1227 (Del. 2015). Delaware's APA only grants judicial review of case decisions and agency regulations. *Free-Flow Int'l, Inc.*, 861 A.2d 1233 at 1236. Delaware Courts have held that that in Delaware, there is no "general right of judicial review enabling private parties to challenge governmental conduct whenever a plaintiff can demonstrate noncompliance with the law" unless there is clear statutory text creating that right. *Korn v. Wagner*, 2012 WL 5355662, *3 (Del. Super. Sept.

28, 2012) (citing to *O'Neill v. Town of Middletown*, 2006 WL 205071, at *21 (Del. Ch. Jan. 18, 2006). In *Korn*, this Court held that a statute "wholly concerned with duties of the auditor [which] does not directly or by implication create an enforceable right . . . is without a controversy and cannot stand under the Declaratory Judgment Act." *Id.* As the SEBC's selection of a new insurance carrier was clearly not the passage of a regulation, Section 10141 of the APA provides Plaintiffs no entry into this Court.

C. Plaintiffs' Vague Allegations of Violations of the Freedom of Information Act Cannot Save Their Complaint.

Count II of Plaintiffs' Complaint suggests that the SEBC violated the APA *by virtue* of violating the Freedom of Information Act ("FOIA").[24] The Complaint points to the public policy of FOIA and repeatedly claims that the SEBC failed to provide adequate notice of its meetings under 29 *Del. C.* § 10004.[25] In their Motion to Stay, Plaintiffs' only mention of FOIA is the bold conclusory statement, without legal citation, that Delaware's FOIA is "incorporated by reference into the APA through 29 *Del. C.* § 10141(e)."[26]

Presumably Plaintiffs make only vague accusatory statements about FOIA violations because the Delaware FOIA provides for specific judicial relief, but Plaintiffs are out of time and in the wrong court to avail themselves of it. 29 *Del. C.*

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[24] Complaint, ¶¶98-99
[25] Complaint, ¶¶95-98
[26] Opening Br., 21.

§ 10005(a) provides that any challenge of an agency action under FOIA must occur "within 60 days of the citizen's learning of such action but in ***no event later than 6 months after the date of the action***," and, "[a]ny action taken at a meeting in violation of [FOIA] may be voidable ***by the Court of Chancery***." (emphases added). Plaintiffs allege the SEBC decision to switch to Medicare Advantage occurred, at the latest, on February 28, 2022.[27] By Plaintiffs' own admission, their opportunity to seek relief for any alleged FOIA violation lapsed six months later, on August 28, 2022, and even if timely brought, belonged in the Court of Chancery. Plaintiffs' references to FOIA appear to be nothing more than an attempt to inflame this Court while side-stepping the mandated jurisdiction and time limitations of Delaware's FOIA, and as such, they fail.

D. Plaintiffs Are Not Entitled to Declaratory Relief.

Plaintiffs appear to have fully abandoned this argument in the Opening Brief, but Count III of their Complaint seeks a declaratory judgement that Secretary DeMatteis failed to fulfill her duty to communicate changes in coverage to state employees as required by 29 *Del. C.* § 9604(8) and that all Defendants violated Sections 10115-10118 of the APA.[28] As has been established, Plaintiffs' claims that the Defendants violated the APA are without merit. As for the claim pertaining to Secretary DeMatteis, it is well settled in Delaware that a declaratory judgement is

[27] Complaint, ¶44; Opening Br., 5.
[28] Complaint, ¶104-105.

only appropriate in the face of an "actual controversy," and the purpose of a declaratory judgement is not for the Court to offer legal advice or advisory opinions. *Marshall v. Hill*, 93 A.2d 524, 525 (Del. Super. 1952). Rather, the "Court must balance its interest in conserving resources and avoiding hypothetical questions against the declarant's interest in resolving the immediate question and avoiding any further hardship which would be caused by delay." *Burris v. Cross*, 583 A.2d 1364, 1372 (Del. Super. 1990). Here it is unclear how Plaintiffs' claim does more than seek the answer to a hypothetical question—did Secretary DeMatteis fully comply with 29 *Del. C.* § 9604(8)?—as Plaintiffs in no way articulate the consequence of this alleged failure, or the redress this Court can provide. If Secretary DeMatteis failed to adequately communicate the change to state employees, how will this Court declaring so cure any hardship? In fact, what effect would such a declaration have at all? In short, far from a likelihood of success, it remains wholly unclear from Plaintiffs' complaint what actual redressable controversy is alleged in Count III.[29]

III. PLAINTIFFS HAVE NOT DEMONSTRATED IRREPERABLE HARM WILL RESULT IF A STAY IS NOT GRANTED.

A. A violation of the APA's Regulatory Drafting Scheme Is Not *Per Se* Irreparable Harm.

[29] Failure to include an issue in an opening brief deprives the opposing party of the opportunity to address the issue. *Stone Creek Custom Kitchens & Design v. Vincent*, 2016 WL 3960273, *6 (Del. Super. Jul. 20, 2016) (discussing Delaware Supreme Court cases that hold anything not raised in the Opening Brief is waived).

Plaintiff's first irreparable harm argument alleges that Plaintiffs have sustained *per se* irreparable harm simply by virtue of "the violation of their procedural rights under the APA."[30] Claiming that this is a "well-established"[31] principle, Plaintiffs point to *Blue Cross & Blue Shield v. Elliott*, 1977 WL 23810, (Del. Ch. Apr. 13, 1977), a 1977 Court of Chancery case which did not involve a violation of the APA. In *Blue Cross*, the Court of Chancery granted a stay after finding discriminatory treatment of subscribers and an ambiguous order, not simply an alleged procedural deficiency, as Plaintiffs allege here. *Blue Cross & Blue Shield*, 1977 WL 23810, *1. In further support of this so-called well-established "Delaware principle," Plaintiffs cited to federal districts cases in the Western District of Louisiana, the Northern District of Texas, and the District of Alaska.[32] Plaintiffs have looked throughout the country because no court in this circuit supports their claim that a procedural violation of the APA is *per se* irreparable harm. In fact, only two Delaware Superior Court cases in the last 25 years have even involved requests for stays based on the regulation prong of the APA. In both cases (neither of which are cited by Plaintiffs), stays were denied. *Stevenson v. Dep't of Nat. Res. & Env't Control*, 2016 WL 1613281 at *9 (Del. Super. Apr. 5, 2016) *aff'd* 2016 WL 2620501 (Del. Apr. 16, 2016) (denying Plaintiffs' stay based on their failure to establish that

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[30] Opening Br., 26.
[31] *Id.*
[32] Opening Br., 27.

they will sustain even financial harm should enforcement of the regulation not be stayed); *E. Shore Env't. v. Del. Solid Waste Authority*, 2001 WL 913994 at *1 (Del. Super. Jul. 9, 2001) (finding Plaintiffs' claim that they will sustain irreparable injury should a DSWA regulation be enforced "unpersuasive"). Simply, there is no well-established principle in Delaware that procedural APA violations are *per se* irreparable harm, and no recent Court has even found the possibility of irreparable harm in cases contesting the validity of a regulation.

B. Undesirable Consequences Are Not Irreparable Harm.

Plaintiffs next claim that forcing them to make consequential healthcare decisions and the anxiety resulting therefrom amounts to "irreparable harm."[33] Here Plaintiff's cite to decisions from a New York trial court, the D.C. Circuit, the 1st Circuit, the Minnesota District, and the Northern District of California. Plaintiffs again do not cite to any Delaware cases because to do so, they would have to acknowledge that Delaware Courts do not recognize "undesirable consequences" as irreparable harm. *See Del. Inst. of Health Scis., Inc.,* 2011 WL 5042382 at *2 (holding the closure of a nursing school and related harm to its reputation and current students is not irreparable). Plaintiffs would have this Court believe that requiring Plaintiffs to make the types of anxiety-inducing decision faced by millions regularly

[33] Opening Br., 28.

is irreparable harm. Plaintiffs seek extraordinary relief but have only presented evidence of potential undesirable consequences.

C. Speculative Harm Is Not Irreparable Harm.

Plaintiffs have focused on their criticism of the HMAP but do not acknowledge that retirees are simply being asked to use the same coverage available to current state employees. Virtually all of their claims involve hypothetical situations. Plaintiffs claim the "risk"[34] that something will happen, and the "possibility" of providers not accepting HMAP[35] is irreparable harm. They allege without citation that Medicare is accepted by all doctors but HMAP will not be accepted by "a large number of healthcare providers,"[36] and they will be "prohibited from receiving various tests and treatments."[37] Although these grandiose statements presented without citation may sound scary, the Plaintiffs have not provided the Court any evidence that they are true. These allegations ignore a well-established principle in Delaware that "speculative harm" cannot form the basis of irreparable harm. *Spanabel v. Del. Thoroughbred Racing Comm'n.*, 2021 WL 3829203, * 2 (Del. Super. Aug. 26, 2021) (denying a stay because "Appellant presented no evidence that the alleged harms she claims she will suffer, will actually occur" and

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[34] Opening Br., 25.
[35] Opening Br., 26.
[36] Opening Br., 29-30.
[37] Opening Br., 29.

the alleged harm is speculative.); *Keeley*, 2018 WL 4352855 at *4 (noting that the "possibility" of a DelDOT employee not returning back pay should she lose on appeal "amounts to mere speculation" and is therefore insufficient for a stay); *Patel v. Milfor, Inc.*, 2018 WL 1009168, *2 (Del. Super. Feb. 21, 2018) (granting a stay because Appellant presented sufficient evidence of real, not speculative, harm.); and *Keeler*, 2010 WL 334920 at *2 (finding possibility of negative consequences speculative and insufficient for a stay). Here, Plaintiffs have relied upon stories from other jurisdictions and unverifiable surveys to attempt to establish they will suffer irreparable harm.[38] All Plaintiffs have presented at this stage is speculative and therefor inadequate to meet the high standard for a stay under 29 *Del. C.* § 10144.

D. Financial Hardship Is Not Irreparable Harm.

The final basis for Plaintiffs' alleged irreparable harm appears to be financial hardship. Plaintiffs once again point to cases throughout the country, while ignoring Delaware cases involving challenges or appeals under the APA.[39] This Court has been clear that financial burdens are not the type of "irreparable harm" contemplated by the APA. *DaimlerChrysler Corp. v. Del. Dept. of Ins.*, 938 A.2d 623, 625 (Del. 2007) (holding that "even evidence of insolvency does not necessarily equate to irreparable harm"). Indeed, even the loss of one's ability to work in their trained profession forever cannot form the basis of irreparable harm. *See Spanabel,* 2021

[38] Opening Br., 10, 12.
[39] Opening Br., 31-32.

WL 3829203, at *2 (the loss of a racing license is not irreparable harm); *Johns v. Council of Ass'n of Prof'l Eng'nrs*, 2004 WL 1790119 (Del. Super. Jul. 27, 2004) (permanent license revocation is not irreparable harm); *Cobb v. Del. Thoroughbred Racing Comm.*, 2021 WL 3660813, at *2 (Del. Super. Aug. 17, 2021) (same). Delaware Courts have consistently held that financial hardship, even rising to the level of insolvency, does not equate to irreparable harm. *SC&A Construction, Inc. v. Potter*, 2017 WL 3047061, *3 (Del. Super. Jul. 18, 2017) ("A payment of money is not irreparable harm, even if it will present a financial hardship."); *BAC Home Loans Servicing, L.P. v. Brooks,* 2012 WL 1408596 *3 (Del. Super. Mar. 8, 2012) (finding that the prospect of losing one's home is not irreparable harm). Plaintiffs note that financial hardship can be deemed irreparable if a damages remedy is not available;[40] however, that principle does not trump the fact that the alleged harm must be more than speculative.

E. Plaintiffs Cannot Seek Relief for Harm They Brought on Themselves.

Plaintiffs' overall grievance is that they were not allowed input into Defendants' decision to switch carriers because of the alleged "clandestine" nature of the decision-making process.[41] But the Complaint itself belies this contention, repeatedly referencing the ways in which Plaintiffs were publicly notified or made

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[40] Opening Br., 31 (citing to *Stritzinger v. Barba*, 2018 WL 4189535, at *2 (Del. Ch. August 31, 2018).
[41] Opening Br., 17; Complaint, ¶5

aware of the SEBC's actions leading up to this decision. Plaintiffs admit: the State's public description of the new plan is found on a public website;[42] Defendants have issued communications about the new Medicare Advantage Plan;[43] Defendants have repeatedly highlighted that "most non-contracted providers agree to accept the Highmark BCBS Freedom Blue Medicare Advantage PPO plan";[44] meetings of the SEBC were conducted in open public session and minutes were made publicly available;[45] the agenda for April 25, 2022 SEBC meeting ***clearly identified*** "Medicare Advantage" as an item;[46] the RBSC formed by the Governor in 2019 and again in 2021 was to study "options for reducing Delaware's unfunded liability for retiree healthcare benefits, citing to two public-facing websites;[47] the RBSC provided a written report in November 1, 2021 laying out a plan to change pensioners' benefits;[48] a newspaper article from August 28, 2022 in which the State "publicly stated that Medicare Advantage is needed to address the State's unfunded liability";[49] and admitting a "directive" issued by the SEBC to change to HMAP is "memorialized in various statements published online by the SEBC."[50]

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[42] Complaint, ¶19.
[43] Complaint ¶¶32, 37.
[44] Complaint ¶35.
[45] Complaint ¶¶ 4, 49.
[46] Complaint ¶50.
[47] Complaint ¶52.
[48] Complaint ¶53.
[49] Complaint ¶58.
[50] Complaint ¶60.

In addition to what is set forth in the Plaintiffs' Complaint, there is a wealth of information about the change to HMAP in the public sphere. For example, John Kowalko, Director of RiseDelaware Inc., wrote an opinion piece on this issue that was published in the New Journal on August 12, 2022—over a month before this lawsuit was filed. The SEBC held a public meeting via Webex on May 10, 2021, and the agenda, which was posted on the State public meeting calendar included the following: Medical Third-Party Administration (TPA) Services Request for Proposal Overview.[51] The Committee's October 11, 2021 agenda included "Other Post Employment Benefits (OPEB) Liability" and was posted on the public meeting calendar.[52] The publicly posted December 13, 2021 agenda included: "Health Third Party Administration RFP Contract Award Recommendation."[53] The Committee's allegedly clandestine decision on February 28, 2022 was under this agenda item:

> 2021 Health Third Party Administrative Services RFP Award Recommendations
> a. Active/non-Medicare Care Management Programs
> b. Aetna HMO Model
> c. Medicare Plan Effective January 1, 2023[54]

Looking just to the Plaintiffs' Complaint alone, it is clear that there was nothing clandestine or quiet about the SEBC's decision, and looking to the publicly available

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[51] https://publicmeetings.delaware.gov/#/?week=2021-05-10.
[52] https://publicmeetings.delaware.gov/#/?week=2021-10-11.
[53] https://publicmeetings.delaware.gov/#/?week=2021-12-12.
[54] https://publicmeetings.delaware.gov/#/?week=2022-02-27

information, it is clear that even if Plaintiffs had filed suit under FOIA, it would have failed.

Although these facts establish that there was nothing quiet about the SEBC's decision, what is most important for the purposes of Plaintiffs' Motion to Stay is that they completely undercut Plaintiffs' claims that they will suffer imminent irreparable harm if the SEBC's decision is not stayed. If there was a true risk of irreparable harm, why did Plaintiffs wait until the eve of open enrollment to file their lawsuit? RISEDELAWARE's own Director publicly voiced his disdain for the plan in the State's largest newspaper *six weeks* before filing this lawsuit. Plaintiffs' Complaint states "the agenda for the April 25, 2022 SEBC meeting finally made reference to Medicare Advantage with the item, "Medicare Advantage with and without Prescription Coverage Plan Options." Apparently this was the language Plaintiffs needed to hear, and they heard it in April. This Court has held, when reviewing requests for a stay under 29 *Del. C.* § 10144, Plaintiffs cannot be rewarded for dragging their feet. *See Munir v. Del. Examining Bd. of Physical Therapy*, 1999 WL 458800, * 1 (Del. Super. May 25, 1999) (noting that "to the extent the Appellant has had approximately six months to prepare for the predicament in which he now finds himself, he is to a degree, a victim of his own undoing"); *Miles, Inc. v. Cookson Am., Inc.*, 1995 WL 214400, at *2 (Del. Mar. 31, 1995) (holding "the petitioner failed to demonstrate 'irreparable injury' on the basis that his failure to take contingency

measures suggested that any ensuing injury was 'of his own creation.'"); *BAC Home Loans Servicing, L.P.,* 2012 WL 1408596 at *3 (holding a mother of three losing her home would not be irreparable harm because she suffered "no legal injury"; delayed defending the action; and forewent reasonable opportunities to prevent her own harm).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Plaintiffs' request for a stay be denied.

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DATED: October 11, 2022

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

RISEDELAWARE INC., *et al.*, Plaintiffs,	
v.	C. A. No.: N22C-09-526-CLS
Secretary Claire Dematteis, in her official capacity as Secretary of the Delaware Department of Human Resources and Co-Chair of the State Employee Benefits Committee, *et al.*, Defendants.	

DEFENDANTS' CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This document complies with the typeface requirement of Superior Court Rule 107(b) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2016.

2. This document complies with the type-volume limitation of Superior Court Rule 107(h)(i) because it contains 7,780 words, which were counted by Microsoft Word 2016.

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DATED: October 11, 202

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

RISEDELAWARE INC., *et al.*, Plaintiffs, v. Secretary Claire Dematteis, in her official capacity as Secretary of the Delaware Department of Human Resources and Co-Chair of the State Employee Benefits Committee, *et al.*, Defendants.	C. A. No.: N22C-09-526-CLS

DEFENDANTS' CERTIFICATE OF SERVICE

The undersigned hereby certifies that she caused copies of the Defendants' Answering Brief in Opposition to the Motion to Stay to be served as follows on the following counsel on October 11, 2022.

BY FILE & SERVE AND ELECTRONIC MAIL:

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DATED: October 11, 202

Exhibit A

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

RISEDELAWARE INC., *et al.*, Plaintiffs, v. Secretary Claire Dematteis, in her official capacity as Secretary of the Delaware Department of Human Resources and Co-Chair of the State Employee Benefits Committee, *et al.*, Defendants.	C. A. No.: N22C-09-526-CLS

AFFIDAVIT OF FAITH L. RENTZ

STATE OF DELAWARE)
KENT COUNTY)

I, Faith L. Rentz, hereby depose and state as follows:

1. I am the Director of the State of Delaware Statewide Benefits Office ("SBO").

2. In this capacity, I coordinate the procurement and implementation of benefits and benefit programs for state employees, retirees, and their families on behalf of the State Employee Benefits Committee ("SEBC") which is authorized by Chapter 96 of Title 29 of the Delaware Code to select health-care insurance,

disability coverage, life insurance and other benefits for those individuals entitled to State benefits.

3. The SEBC meets monthly. Meeting minutes and agendas for these meetings are posted publicly on the State of Delaware's Public Meeting Calendar at https://dhr.delaware.gov/benefits/sebc/sebc-materials.shtml and the SEBC's webpage at https://dhr.delaware.gov/benefits/sebc/sebc-materials.shtml. The agenda is posted no later than seven days prior to the meeting, often sooner. Minutes are posted once they are final and approved by the SEBC, usually at the following meeting.

4. The cost of the current healthcare plan for retired State employees is simply not sustainable for the long-term, and without implementing measures for cost-management, the continuing viability of these very important benefits are threatened.

5. For several years, the SEBC and the Retirement Benefit Study Committee ("RBSC") have worked to tackle this daunting issue. The transition to the Medicare Advantage plan marks the first substantive change in the benefits afforded to State benefit eligible Medicare pensioners since 2013.

6. Over the last fifteen years, the SEBC's efforts to manage the rising costs for the State Group Health Plan have been focused on the health plans offered to

employees and non-Medicare (pre-65) pensioners. Health plans offered to that population have included prior authorization requirements since 2010. In addition, to address the projected Fiscal Year 2023 deficit, the SEBC approved an 8.67% increase in State non-Medicare health plan premiums effective July 1, 2022—the first health plan rate increase since July 2016.

7. The goal of the SEBC and RSBC as they continued to review healthcare costs for the Medicare population is to identify options that ensure retired State employees retain access to high quality and affordable health care, while also making progress toward reducing the State's $10 billion unfunded liability for retiree healthcare. The last analysis reviewed by the RBSC in March 2022 showed that absent any changes to retiree benefit funding or the underlying retiree benefits, the unfunded Other Post-Employment Benefits Liability ("OPEB") liability would be expected to grow to $31.3 billion by the Year 2050.

8. Delaying implementation of the Medicare Advantage plan would result in the Group Health Insurance Plan incurring approximately $66 million in unfunded Medicare pensioner medical plan expenditures during calendar year 2023.

9. By migrating to Medicare Advantage, the unfunded OPEB liability would be expected to only grow to $19.8 billion, a nearly 55% decline in the estimated growth rate of the unfunded liability. Combined with a sustained effort to

carveout 1% of the prior year's budget each year to the OPEB Trust Fund (as was included in the Fiscal Year 2023 budget), the unfunded OPEB liability could shrink to an estimated $3.1 billion by the year 2050.

10. At its February 28, 2022 SEBC meeting, the SEBC approved a State Medicare Advantage plan effective January 1, 2023 that replaces the current Highmark Blue Cross Blue Shield ("BCBS") Special Medicfill Medicare Supplement plan. The SEBC worked with Highmark Delaware to customize the new plan (Highmark BCBS Delaware's Freedom Blue PPO Medicare Advantage Plan or "HMAP") to mirror the design of the current Special Medicfill Supplement plan and include the same Medicare Part D prescription plan available today.

11. The HMAP includes terms negotiated by and unique to the State of Delaware, including: a four-month suspension of pre-authorization requirements (until May 1, 2023); a dedicated concierge team with dedicated toll-free line to provide direct support to the State's pensioners for the duration of the agreement; and (3) monthly reporting on pre-authorization denials and appeals, including total number of prior authorizations submitted, and the percentage approved and denied in total and for defined categories.

12. The final contract was executed on September 28, 2022 and posted publicly on the SEBC's website the following day.

13. The new plan focuses on preventive care and care management program engagement with members and their providers, delivering a coordinated approach to care and resulting in lower monthly premiums and higher quality outcomes for Medicare-eligible members.

14. Pensioners and dependents who enroll in the HMAP will continue to be enrolled in Medicare and will continue to pay Part B premiums, however the HMAP assumes responsibility to provide all Medicare Part A and Part B benefits covered by original Medicare. The plan will continue to be an employer-sponsored plan administered by Highmark Blue Cross Blue Shield of Delaware.

15. As it has for many years, Highmark's Plan for Medicare-eligible retirees includes the following:

$0 co-pay for visits with your doctor;
$0 deductible for medical services;
$0 cost for skilled nursing facilities;
$0 cost for lab and imaging;
and full and immediate coverage for pensioners with pre-existing conditions.

16. Premiums remain extremely affordable: State pensioners who retired on or prior to July 1, 2012 and earned 100% of state share coverage will continue to pay $0 monthly premium and pensioners who retired after that date with 20 years of service will have a premium of $10.80 per month. For state pensioners who retired with less than 20 years of service and are responsible for some or all of the cost of

their Medicare coverage, their monthly premium is reduced by more than half of the current amount, to $216.18 per month.

17. Pre-authorization requirements in the HMAP are identical to those that active State employees have had as part of their insurance coverage through Highmark since 2010. More than 33,000 active employees and pre-65 retirees are currently enrolled in Highmark plans with the exact same pre-authorization requirements.

18. Highmark health plans offered to employees and non-Medicare (pre-65) pensioners have included prior authorization requirements since 2010.

19. The list of services requiring pre-authorization and the process providers must follow are the same for Highmark State Group Health Plan active employees, non-Medicare (pre-65) pensioners, and pensioners enrolled in the HMAP.

20. Highmark's Medicare Advantage plan approves expedited, non-emergency prior authorization are within an average of a day and a half, and standard, non-emergency authorizations within four days. Emergency and urgent care services do not require pre-authorization.

21. Historically, Highmark Delaware has approved 92% of Medicare Advantage Prior Authorization requests at the time of the initial submission from the

provider. Additionally, the regular reporting to the SEBC on pre-authorization statistics will enable it to respond promptly to any systemic concerns.

22. Approval or a prior authorization is required from Highmark BCBS Delaware before certain types of services that are not an emergency such as home health care, home infusion therapy, organ transplants, some inpatient hospital care services, high cost or specialized durable medical equipment, non-emergent and air ambulance transportation, outpatient drug and alcohol treatment programs/services, certain high risk Part B drugs, physical/occupational/speech therapy, select outpatient hospital/ambulatory surgeries, outpatient procedures that may be deemed possibly cosmetic, experimental, or investigational, mental health care, skilled nursing facility care, chiropractic care, respiratory therapy, select outpatient diagnostic tests/labs, and some high cost radiology services (for example, CT, MRI, MRA and PET scans).

23. The current contract for Medicare with Medicfill Supplement, administered by Highmark, ends by its terms with no more renewal options, on December 31, 2022. In early 2021, the SEBC began preparation for the rebidding of the State's healthcare for both active employees and retirees, and advertised a Request for Proposals ("RFP") for these services on April 26, 2021, entitled "Medical Third-Party Administration ("TPA") Services" and posted on the Bid

Solicitation Directory maintained by the State's Government Support Services at https://mmp.delaware.gov/Bids.

24. Since the February 28, 2022 contract award, SBO, the State Office of Pensions and Highmark BCBS Delaware have distributed numerous communications and held dozens of information sessions to stakeholders and most importantly, State of Delaware benefit eligible Medicare pensioners. The information and information sessions were designed to ensure that benefit eligible Medicare pensioners were made aware of the HMAP plan, had the opportunity to ask questions, and learn more about how the plan works, sufficiently in advance of Delaware Medicare Open Enrollment period held each October.

25. The communications to plan members and member impact associated with the Medicare Advantage implementation and Open Enrollment are summarized in the following chart. Each of these mailings were sent to thousands of State pensioners and required significant planning and coordination with a contracted State print vendor. Mailings of this size require a minimum of four weeks to complete, starting with drafting the content and ending with the physical mailing.

Communication Outreach	Description	Number of Mailings
June 1, 2022 Introductory Mailing	Notification and introductory mailing to State of Delaware benefit eligible Medicare pensioners about the transition to a Medicare Advantage Plan beginning January 1, 2023.	25,348
June 22, 2022	Notification to State of Delaware benefit eligible Medicare pensioners waiving State Medicare coverage or enrolled in the Special Medicfill without Medicare Part D SilverScript coverage. This population is required to take action to enroll in the Medicare Advantage plan for January 1, 2023 and a specific overview of the plan and a rate sheet were included.	5,700
July 15, 2022	Initial mailing with plan information from Highmark BCBS Delaware to State of Delaware benefit eligible Medicare pensioners about the transition to a Medicare Advantage Plan beginning January 1, 2023. The mailing included the dates, times and locations for the 18 Medicare Advantage Information Sessions held throughout the State of Delaware during August 2022.	27,797

Communication Outreach	Description	Number of Mailings
August 29, 2022	Letters mailed to State Medicare pensioners covering a spouse currently in the Special Medicfill plan as tertiary (the spouse has other Medicare coverage that is secondary to Medicare) advising of changes to the State Spousal Coordination of Benefits Policy (SCOB) effective January 1, 2023 to coincide with the Medicare Advantage Plan effective date. The communication requested completion of the SCOB form to determine primacy eligibility effective January 1, 2023.	236
Ongoing in September	Letters mailed to State Medicare Pensioners covering a spouse currently in the Special Medicfill plan following their submission of a SCOB form advising the pensioner of the spouse's eligibility for coverage in the State Medicare Advantage Plan effective January 1, 2023.	79 through October 6, 2022
September 15, 2022	State of Delaware Medicare Open Enrollment mailing to State of Delaware benefit eligible Medicare pensioners with important information regarding the State's annual Medicare Open Enrollment	19,978 members currently enrolled in the Special Medicfill Plan

Communication Outreach	Description	Number of Mailings
	period and required actions depending upon the Pensioner's current enrollment in the State Medicare Medicfill Supplement Plan. The mailing included an 8-page Frequently Asked Questions document, the Medicare Advantage Plan rates and the dates, times and locations for the State in person Open Enrollment Sessions held throughout the State during Open Enrollment.	with prescription. 523 members currently enrolled in the Special Medicfill Plan without prescription. 5,225 members not currently enrolled in the Special Medicfill Plan. (Total mailed is 25,726.)
9/26/2022	Medical Benefits Chart and Pre-Open Enrollment Booklet from Highmark BCBS Delaware to State of Delaware benefit eligible Medicare pensioners and dependents about the transition to a Medicare Advantage Plan beginning January 1, 2023.	34,027

26. The introductory communication regarding the HMAP was sent on June 1, 2022, and was deliberately mailed immediately following the end of the State

of Delaware's regular annual Open Enrollment period (May 2, 2022 – May 18, 2022) to avoid confusion. Because pensioners are eligible for the same vision and dental plans provided to the rest of the State's employees, they receive Open Enrollment information for those programs as well. The mailers sent to pensioners for the Regular Open Enrollment period are tailored based on their eligibility.

27. Separately, State of Delaware benefit eligible Medicare pensioners have a Fall Open Enrollment period that is specific to their enrollment in the State Medicare health and prescription coverage, available on a January 1 through December 31 plan year to coincide with the Medicare plan year. SBO took efforts to separate the two mailings out of concern that an earlier mailing would have created confusion among the pensioners because they may not make changes until the Fall Open enrollment period.

28. The June 1 mailing was the first of several mailings and information sessions conducted in advance of the fall Medicare Open Enrollment mailing. The mailings and information sessions were all conducted in advance of the Fall Open Enrollment season to give benefit eligible Medicare pensioners advance notification of the change to the Highmark BCBS Delaware Freedom Blue Medicare Advantage PPO Plan beginning January 1, 2023.

29. These communications were mailed three months earlier than any communications or mailings have historically been sent to the State of Delaware Medicare population regarding their January 1 plan year for enrollment in the State Medicare health and prescription coverage.

30. Separate from the communications and information sessions provided directly to State benefit eligible Medicare pensioners, the SBO provided updates and conducted additional discussions with the SEBC at each public monthly meeting since the SEBC's contract award to Highmark BCBS Delaware on February 28, 2022. The details of those discussions are available on the SEBC's website at https://dhr.delaware.gov/benefits/sebc/sebc-materials.shtml.

31. The move to HMAP was rolled out during the 2022 legislative session. It was approved by the SEBC in February of 2022, endorsed by the RSBC in March of 2022, and included in briefings to the General Assembly's Joint Finance Committee during mark-up of the Governor's recommended budget.

32. The SBO also sent an email to the Delaware General Assembly Senate and House of Representatives Communications Directors on June 1, 2022 which detailed the transition to Medicare Advantage. The email included the information sent to the SEBC, SEBC Subcommittees and the Retirement Benefits Study Committee on the same date and attached a copy of the June 1, 2022 Medicare

Advantage introductory letter mailed to all State benefit eligible Medicare pensioners from the SBO and Office of Pensions. On June 4, 2022, the same information was forwarded to the House Representatives.

33. State employees, pre-65 pensioners and Medicare pensioner health plan premium rates for FY23 have been set and became effective as of July 1, 2022 for the employee and pre-65 pensioner populations. The rates were established and approved by the SEBC on March 14, 2022. The necessary increase in the State share to fund in the Fiscal Year 2023 rates was included in the FY23 operating budget.

34. Also, to coincide with the initial June 1, 2022 mailing and information dissemination to the SEBC, SEBC Subcommittees, Retirement Benefits Study Committee and the members of the Delaware General Assembly, the SBO and Office of Pensions worked together to create a Highmark Delaware Medicare Advantage website. This website was available and could be accessed through the Office of Pensions website which was included in the June 1, 2022 introductory communication. The websites have been included in all subsequent mailings and communications as a source for State benefit eligible Medicare retirees to visit for access to the most updated information, frequently asked questions ("FAQs"), information session materials, Open Enrollment materials, plan documents and the State and Highmark BCBS Delaware Medicare Advantage contract.

35. In addition to the communications and information developed and distributed by the SBO, Office of Pensions and Highmark BCBS Delaware, a detailed implementation of the Medicare Advantage plan has been underway since the SEBC's vote and contract award on February 28, 2022. This includes: Weekly meetings (Tuesdays at 1pm) between the SBO and Office of Pensions to discuss the administrative, operational and system modifications necessary to transition to the State of Delaware Highmark BCBS Freedom Blue Medicare Advantage plan effective January 1, 2023. This includes in depth review of the processes and system requirements related to pensioner benefit enrollments, benefit deductions, benefit payments and billing and customer services.

36. Regular meetings between the SBO and Office of Pensions to review and propose modifications to the State of Delaware Spousal Coordination of Benefits Policy and the State Group Health Plan Eligibility and Enrollment Rules to ensure administration of the Medicare Advantage plan in accordance with the intent of the SEBC and as required by the Centers for Medicare and Medicaid ("CMS") for Medicare Advantage plans and the Highmark BCBS Delaware plan requirements.

37. Weekly meetings between the SBO, Office of Pensions and Highmark BCBS Delaware (Thursdays at 12noon and 3pm) specific to the implementation of

the Medicare Advantage plan are also taking place. These meetings are led by Highmark BCBS Delaware project managers with the 12 noon weekly meeting focusing on the development and dissemination Highmark communications and plan documents and the 3pm weekly meeting focused on the operational and implementation activities required to ensure that the plan can be administered accordance with the intent of the SEBC and as required by CMS for Medicare Advantage plans and the Highmark BCBS Delaware plan requirements. Both meeting times have also been used to conduct trainings and exchange information with the customer service teams from the SBO, Office of Pensions and Highmark BCBS Delaware supporting the State Medicare pensioners.

38. Regular meetings between the SBO, Office of Pensions and Highmark BCBS Delaware and CVS SilverScript are occurring. CVS SilverScript administers the State Medicare Part D Prescription benefits for State Medicare pensioners. These meetings are conducted with participation from the SilverScript State Account Team and technical staff responsible for maintaining and processing the enrollment and claims files sent between Highmark BCBS Delaware and CVS SilverScript as required for administration of the Part D prescription benefits provided to State Medicare pensioners.

39. The transition from the State of Delaware Highmark BCBS Delaware Special Medicfill Medicare Supplement plan effective until December 31, 2022, to the State of Delaware Highmark BCBS Freedom Blue PPO Medicare Advantage plan effective January 1, 2023 required significant coordination and understanding of the exchange of data via secure file transfer protocol ("SFTP") between the State, Highmark BCBS Delaware, CVS SilverScript and CMS.

40. Careful planning and coordination have been critical to ensure that benefit eligible Medicare pensioners and dependents are properly disenrolled from the Medicfill plan and enrolled in the Medicare Advantage plan, and that both CVS SilverScript and Highmark BCBS Delaware are meeting all plan and regulatory requirements related to each vendor's administration of Medicare Advantage plan and the Medicare Part D prescription plan.

41. The State of Delaware's coordination of the two benefits (Medicare Advantage medical only and Medicare Part D prescription coverage administered by CVS SilverScript) is unique in that many fully insured Medicare Advantage plans offer prescription coverage as part of the Medicare Advantage plan. The SEBC chose to continue the self-insured custom Medicare Part D prescription coverage available currently to State Medicare pensioners who have elected to enroll in the State of Delaware Highmark BCBS Delaware Special Medicfill Medicare

Supplement plan with prescription coverage. Today, State Medicare pensioners have the option to enroll in the Special Medicfill plan with or without prescription coverage. Both options have been available to give benefit eligible pensioners and dependents the option and flexibility to enroll in other Medicare supplement and/or prescription coverage that can be coordinated with the State Medicare coverage and is permissible by CMS coordination of benefits rules.

42. With the transition to the HMAP on January 1, 2023, the SEBC acted at the April 25, 2022 SEBC meeting to bundle the Medicare Advantage medical plan and the Medicare Part D prescription coverage to create one single plan option, including both Medicare Advantage medical plan and with custom Medicare Part D prescription coverage plan beginning January 1, 2023. This was done to comply with the CMS requirement that only allows a Medicare beneficiary enrollment in one qualified Medicare Advantage and corresponding Part D prescription drug plan.

43. Enrollment in another plan will terminate coverage with the State of Delaware Highmark BCBS Delaware Freedom Blue PPO Medicare Advantage plan and integrated SilverScript prescription drug coverage. Communications to State Medicare pensioners have included strong cautions regarding this CMS coordination of benefits requirement and the importance of the pensioner and dependents who

may be enrolled in other coverage to contact the Office of Pensions during the fall Medicare Open Enrollment (October 3 – October 24, 2022) to discuss options.

44. The Office of Pensions must update in the Pension payroll and benefits system, the enrollment decisions of all State benefit-eligible Medicare pensioners and dependents made during open enrollment. State Medicare pensioners and dependents who are currently enrolled in the Special Medicfill with prescription plan (approximately 27,500 individuals) and who do not intend to opt-out of the Medicare Advantage plan will be automatically enrolled upon the end of open enrollment. State Medicare pensioners and dependents who are currently enrolled in the Special Medicfill without prescription coverage (approximately 689 individuals) or who are not enrolled (approximately 5,089 individuals) for the current plan year (January 1 through December 31, 2022), have been advised in their open enrollment materials that the completion and submission of an enrollment form to the Office of Pensions is required no later than October 24, 2022. The enrollment forms must be manually entered into the Office of Pension payroll and benefits system by Office of Pensions staff no later than 4:30 on Friday, November 4.

45. The evening of Friday, November 4, 2022, the Pensions system will run an automated process to generate an enrollment file containing the January 1, 2023 Medicare health plan year elections (enrolled or opt-out/waiving coverage) for the

over 33,000 State benefit eligible Medicare pensioners and dependents. The enrollment file will be transmitted via SFTP the evening of Friday, November 4, 2022 to Highmark BCBS Delaware.

46. Separately, the same workflows and process will occur for the benefit eligible Medicare retirees and dependents participating in the State Group Health plan and formerly employed by the University of Delaware and several municipalities. University of Delaware and the municipalities' management and enrollment in the State health plans are conducted through a separate system that is maintained by the SBO with assistance from the Office of Management and Budget technical staff. The enrollment in the current plans and benefit eligible Medicare pensioners who are waiving coverage noted above includes retirees and dependents from the University of Delaware and the municipalities.

47. Upon receipt of the SFTP files from the State, Highmark BCBS Delaware will load the enrollment information into the Highmark system and begin to send enrollment transactions to CMS on Saturday, November 5, 2022. CMS requires Highmark BCBS Delaware as the Medicare Advantage organization to submit the information necessary for CMS to add the Medicare beneficiary/State Medicare pensioner or dependent to its records as an enrollee of the Medicare Advantage organization within seven calendar days of receipt of the completed

enrollment request. The receipt of the State's enrollment files via SFTP suffices as the receipt of the completed enrollment request.

48. It is expected that CMS will make available to Highmark BCBS Delaware, acceptance or rejection of the enrollments during the second half of November via the CMS Enrollment Acceptance transaction ("DTRR"). CMS requires Highmark BCBS Delaware to provide enrollment confirmation letters within 7 calendar days of the availability of the DTRR. Highmark's business practice is to also issue ID cards within 7 calendar days of the DTRR. Highmark BCBS Delaware and the State have a contractual performance guarantee regarding initial ID card distribution and requiring ID cards to be distributed at least 20 days in advance of the Medicare Advantage plan effective date.

49. Beginning November 15, 2022, Highmark BCBS Delaware will send via SFTP to CVS SilverScript, Medicare Advantage enrollments effective January 1, 2023 and as approved by CMS via the DTRR. In order to ensure both Highmark BCBS Delaware and CVS SilverScript are in full compliance with CMS enrollment requirements, the two vendors have established a new process and file whereby Highmark will reconcile daily, any enrollments sent to CVS against CMS approvals reported on the DTRR to account for rejected enrollments. Highmark will attempt to resubmit rejections back to CMS for approval. Rejections that cannot be resolved

will be communicated to CVS via an additional rejection sync file that will be sent via SFTP. This process will enable CVS to take the appropriate action to remove rejected State Medicare pensioners and dependents from the Medicare Part D prescription drug enrollment process.

50. To minimize the risk of State Medicare pensioners and dependents inadvertently opting-out or being terminated from coverage in the combined Medicare Advantage with custom Medicare Part D prescription coverage for January 1, 2023, the SBO, Office of Pensions, Highmark BCBS Delaware and CVS SilverScript have established numerous processes and discrepancy reporting to monitor enrollments, disenrollments and terminations in both the Medicare Advantage plan and the Medicare Part D prescription coverage.

51. These new processes will be implemented to coincide with the enrollment transmissions occurring between the State, Highmark BCBS Delaware, CVS SilverScript and CMS for both the initial plan effective date as well as for State pensioners and dependents reaching Medicare eligibility due to age or disability during the plan year. The processes will include telephonic outreach and mailings to State Medicare pensioners and dependents to verify disenrollments and terminations, both for the January 1, 2023 effective date and ongoing once the plan year begins. Every effort is being made to ensure that State benefit eligible Medicare

pensioners and dependents are enrolled or not enrolled in the Medicare Advantage plan as intended.

52. The State Medicare Open Enrollment period started on October 3, 2022 after months of planning and preparation that included the dissemination of information through numerous communications and events. Significant revisions have been made to policies and procedures to ensure proper and effective administration and customer service support to our State Medicare pensioner population.

53. The SEBC has chosen to offer an annual Medicare Open Enrollment period so that State benefit eligible Medicare pensioners and dependents are afforded the same opportunities to make informed decisions about their enrollments in the plans offered to them through the State of Delaware, as employees and non-Medicare (pre-65) pensioners.

54. The SEBC's decision to transition the Medicare pensioners to a custom employer sponsored Medicare Advantage plan was done in order to continue to give Medicare pensioners access to superior Medicare health and prescription benefits that few employers can match. As stated repeatedly in the communications and information about the new plan, the plan is exclusively available only to State of

Delaware benefit eligible Medicare pensioners and provides the same coverage as the current Special Medicfill plan.

55. The move to the Medicare Advantage plan provides a meaningful long term financial benefit to the State of Delaware and ensures long term sustainability of employee and retiree health benefits to the more than 130,000 benefit eligible employees, retirees and dependents receiving health benefits through the State Group Health Plan.

56. The transition to the Medicare Advantage plan marks the first substantive change in the benefits afforded to State benefit eligible Medicare pensioners since the SEBC's decision to move to a Medicare Part D prescription drug benefit beginning January 1, 2013. Over the last 15 years, the SEBC's efforts to manage healthcare trend and rising costs for the State Group Health Plan has been primarily focused on implementing tighter controls and utilization management of health plans offered to employees and non-Medicare (pre-65) pensioners.

57. To give pensioners and providers time to adjust to the preauthorization requirements under the new plan, the State has negotiated with Highmark BCBS Delaware to postpone implementation of prior authorization for outpatient services until May 1, 2023.

58. Any delay in the transition would create significant confusion for pensioners. There is no ability at this stage of the implementation and given that the State is in the middle of the Medicare Open Enrollment period, to unwind and restart the operational and administrative tasks necessary to meet the regulatory deadlines for a January 1, 2023 start date.

59. I am over the age of 18 years and am competent to testify.

I declare under penalty of perjury under the laws of Delaware that the foregoing is true and correct.

EXECUTED this 11th day of October 2022.

Faith L. Rentz

SWORN TO AND ASCRIBED before me this 11 day of October, 2022.

Notary Public

My commission expires: Upon Office

LINDA G. WHITE
Notary Public, State of Delaware
My Commission Expires Upon Office