THE STATE OF NEW HAMPSHIRE
INSURANCE DEPARTMENT

In re Petition of McCarthy

INS 13-038-AP

PETITIONER MARGARET MCCARTHY'S REQUEST FOR FINDINGS AND RULINGS

Margaret McCarthy asks that the Court find and rule as follows following the Hearing set for May 14, 2014 in this matter:

1. RULING: Once the threshold of standing is met, a party may argue broader issues of public policy. See *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972) ("Taken together, *Sanders* and *Scripps-Howard* thus established a dual proposition: the fact of economic injury is what gives a person standing to seek review under the statute, but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate."). Having shown that she has standing, Ms. McCarthy's burden of proof is to show that Anthem's Pathway Network (or "narrow network") has not met the network adequacy standards of the ACA or N.H. Admin. R. Ins. 2701, *et seq*. ("Ins. ___").

2. RULING: The Patient Protection and Affordable Care Act (the "ACA") requires that plans presented for purchase on the New Hampshire Health Insurance Marketplace (the "Exchange") must include "a network that is sufficient in number and types of providers, including providers that specialize in mental health and substance abuse services, to assure that all services will be accessible without unreasonable delay." 45 C.F.R. §156.230(a)(2).

3. RULING: The New Hampshire Insurance Department (the "Department") was vested with the authority to determine whether plans submitted for sale on the Exchange contained adequate networks of providers. RSA 420-N:8, I.

4. FACT: The Department applied its existing regulation for ensuring the adequacy of managed care networks, Ins. 2701, to evaluate the adequacy of provider networks for plans available on the Exchange and under the ACA.

5. RULING: The goals of the ACA differ from those of managed care statutes and regulations.

6. RULING: Among the many goals of the ACA are:

a. Expanding insurance coverage into populations that had previously been uninsured by requiring the purchase of health insurance, prohibiting the exclusion of coverage based on preexisting conditions, and providing means-tested subsidies for consumers to purchase insurance.

b. Making preventive care more accessible by requiring certain essential preventive health care services to be paid for without copays or deductibles.

See, generally, ACA, Section I ("Table of Contents").

7. RULING: A managed care statute, such as RSA 420-J and its regulatory framework, Ins. 2700, was not intended specifically to insure as many Americans as possible, and was not crafted specifically to maximize insurance coverage in the population or to ensure free access to preventive care services. *Compare*, generally, ACA, Section I and Ins. 2700, RSA 420-J:1.

8. RULING: Although network adequacy provisions in the State's managed care statute, *see* RSA 420-J:7 and the language of the ACA addressing network adequacy are similar, *see* 45 C.F.R. §156.230(a)(2), what constitutes "services [that] will be accessible without unreasonable delay" under the ACA should be a more exacting analysis, with a higher standard of access and network adequacy required than would be required under a pre-ACA managed care regime.

9. FACT: The Department relied upon Ins. 2701 as its baseline for evaluating the adequacy of Anthem Blue Cross Blue Shield's ("Anthem's") provider network for Anthem's Exchange-available plans.

10. RULING: In assessing the network adequacy of Anthem's narrow network plans under Ins. 2701 *et seq.*, a number of metrics applied, including:

11. RULING: The requirement that waiting times for patients on the network not exceed standards determined by the National Council on Quality Assurance. Ins. 2701.07(a).

a. FACT: Anthem failed to submit any data concerning waiting times for patient access to providers for primary care and various specialties.

12. RULING: The requirement that Anthem's geographic analysis include maps showing the residential location of covered persons in New Hampshire *as well as* providers. Ins. 2701.09(g)(3)(b).

a. FACT: Anthem failed to submit data concerning the location of its insured population—neither its presently insured population, nor any analysis of where its insured population would likely be located.

13. RULING: The requirement that Anthem submit a consumer survey demonstrating that the network was offering a level of service that meets members' needs for primary care availability. Ins. 2701.06(b)(2).

a. FACT: Anthem failed to submit consumer survey data demonstrating that its network was offering, or would offer, a level of service that meets its members' needs for primary care.

14. RULING: The requirement that Anthem submit a comprehensive network adequacy report that assembled and documented the necessary data. Ins. 2701.09(d).

a. FACT: Anthem's network adequacy submission was a mix of hundreds of separate documents with no summaries, no references to data, nor any other means of evaluating whether its conclusions were supported by evidence.

15. RULING: Ins. 2701 requires Anthem to post its network adequacy report on its website. Ins. 2701.09(c) ("The health carrier shall make the network adequacy reports available on its business premises and accessible on their carrier's website. The carrier shall provide them to any interested party upon request."). The two separate sentences in Ins. 2701.09(c) reflect two separate obligations: first, to post the network adequacy report on the website; second, to provide the network adequacy report to any interested party upon request.

a. FACT: Anthem's network adequacy report is not posted on its website. Anthem requires a user to log on, submit name, address information, and wait for a mailed copy of the network adequacy report.

16. RULING: Ins. 2701.04(c) unequivocally requires the submission of all this material and fulfillment of these requirements for a plan to be deemed network adequate.

17. FACT: Because of the foregoing deficiencies, the Anthem narrow network is inadequate as a matter of law.

18. RULING: In addition, Ins. 2701.06(b)(1) requires that Anthem ensure that at least two primary care providers who are accepting new patients ("open panel" providers) be within 15 miles or 40 minutes of 90% of the enrolled population. Ins. 2701.06(b)(1).

19. FACT: While Anthem's GeoAccess data for primary care physicians states that 90% of the patient population in the service area, *i.e.*, New Hampshire, meet the geographic access requirements of Ins. 2701.06(b)(1), there is no data in Anthem's GeoAccess submissions that shows what percentage of the population in *Strafford County* has access to a primary care provider as required.

20. FACT: The towns of Milton, Middleton, Strafford, New Durham and Farmington comprise approximately 20,000, or 16%, of Strafford County's ca. 124,000 residents.

21. FACT: The towns of Milton, Middleton, Strafford, Rochester, New Durham and Farmington have family incomes substantially lower, on average, and education rates substantially higher, on average, than the towns of Dover, Durham, Lee, Bennington, Madbury, Rollinsford and Somersworth.

22. FACT: Lower income and education rates correlate closely with a lack of health insurance.

23. FACT: Of the Strafford County primary care providers on Anthem's provider list, the vast majority, more than 80%, are in Dover, Durham or Lee, the southernmost towns in Strafford County.

24. FACT: The closest open panel providers, those accepting new patients, to the towns of Milton, Middleton, Strafford, New Durham and Farmington appear to be:[1]

a. Terry Bennett MD, South Main St. Rochester, N.H.

b. Goodwin Family Health (three providers), 311 Route 108, Somersworth, N.H.

c. Barrington Health Center (one provider), 8 Century Pines, Barrington, N.H.

25. FACT: Even assuming Dr. Bennett is still accepting patients, that is only one physician for the five towns in the northernmost part of Strafford County. Both Salmon Falls Family Health and Goodwin Family Health in Somersworth are approximately 20 miles from Milton, 22 miles from New Durham, 14 miles from Farmington, 20 miles from Strafford, and 23 miles from Middleton. Barrington Family Health is at least 14.6 miles from Strafford, 14 miles from Farmington, and greater distances to Milton, New Durham, and Middleton.

26. RULING: Thus, only 84% of the Strafford County population is realistically within 15 miles of two open panel primary care providers. [2]

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[1] A number of providers are double-listed on the comprehensive provider listing submitted by Anthem as part of its application for approval. Of these, the data shows that they are both accepting and not accepting new patients. Ex.: Bress, J., MD, 60 Rochester Hill Road, Rochester, N.H. (indicating both Y and N under column "accepting patients"). Exhibit 7. At a minimum, this is confusing. Lilac City Pediatrics, also cited as a primary care provider in the Department's Exhibit H, doe s not serve adults.

[2] The argument that some of the population of these towns may live within 15 miles of two open panel primary care providers is not tenable, as Anthem did not submit any data concerning the location of its insured population for the consideration of the Department.

27. RULING: This access percentage does not meet even the threshold required by Ins. 2701.06(b)(1). Therefore, it does not appear that the northern towns of Strafford County are able to access basic primary health care without unreasonable delay.

28. RULING: The addition of Frisbie Memorial Hospital and its affiliated providers, including Farmington Family Health, would bring primary care services at least seven miles closer to these communities and address the geographic deficiencies of the Anthem narrow network in Strafford County.

29. FACT: Margaret McCarthy is currently insured under Anthem's broad network plan.

30. FACT: Ms. McCarthy's medical provider is a member of Frisbie Memorial Hospital's physician network.

31. FACT: Under the broad network plan, Ms. McCarthy cannot receive a subsidy, a sum she calculated, using Healthcare.gov, would amount to a savings of approximately $3,000 per year for her given her income level.

32. FACT: If Ms. McCarthy signed up for insurance on Anthem's narrow network through the Exchange, she would have to leave her provider, with whom she has a long-established relationship, due to the fact that Frisbie-affiliated physicians are not part of Anthem's narrow network.

33. FACT: Assurant offers a health insurance product that includes access to Frisbie Memorial Hospital; however, the Assurant plan is not available through the Exchange.

34. RULING: To comply with Ins. 2701.06(b)(1)'s geographic distance requirements for access to open panel primary care providers, Anthem must take

measures to ensure that 90% of its narrow network members residing in Milton, Middleton, New Durham, Strafford, Farmington and Rochester are within 15 miles of at least two open panel providers, including if necessary the addition of Frisbie Memorial Hospital and its affiliated providers Strafford County.

35. RULING: To comply with the requirements of Ins. 2701, Anthem must submit the following information for the Department's—and the public's—consideration in evaluating the adequacy of the so-called narrow network:

a. A consumer survey demonstrating that the network is offering or would offer a level of service that meets members' needs for primary care availability. Ins. 2701.06(b)(2).

b. GeoAccess surveys that include maps showing the residential location of covered persons in New Hampshire *as well as* providers. Ins. 2701.09(g)(3)(b).

c. A survey of primary care and specialty waiting times to demonstrate compliance with NCQA standards for waiting times. Ins. 2701.07(a).

d. A comprehensive network adequacy report, posted to the Anthem's website, that assembles and documents the necessary data to prove network adequacy. Ins. 2701.09(d).

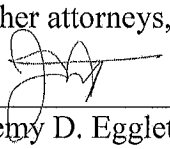
See Ins. 2701.04(c) (requiring that all standards be met to ensure network adequacy).

Respectfully submitted,

Margaret McCarthy

By her attorneys,

June 4, 2014

By: 

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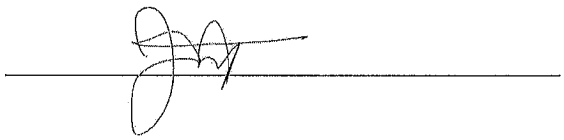
Certification

I, Jeremy D. Eggleton, certify that on this the 4th day of June, 2014, I caused a copy of the foregoing Request for Findings and Rulings to be served via electronic mail and US mail upon Richard McCaffrey, Esq., New Hampshire Department of Insurance, and Michael Durham, Esq., counsel for Anthem Blue Cross Blue Shield.



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